



REPUBLIC OF KENYA

IN THE ENVIRONMENT AND LAND COURT

AT NAKURU

CASE No. 67 OF 2018

ENDAO COMPANY LIMITED.....PLAINTIFF

VERSUS

SHADRACK CHEROGONY.....1ST DEFENDANT

DICKSON KANGOGO YATICH.....2ND DEFENDANT

MAHESH RAMNIK..... 3RD DEFENDANT

LUKA K. CHEPKWONY.....4TH DEFENDANT

LAND REGISTRAR, NAKURU.....5TH DEFENDANT

THE HON. ATTORNEY GENERAL.....6TH DEFENDANT

RULING

1. This ruling is in respect of Notice of Motion dated 6th February 2018, an application through which the plaintiff seeks the following orders:

1. *Spent*

2. *Spent*

3. *THAT pending the hearing and determination of this suit, the Honourable Court be pleased to issue a temporary injunction restraining the Defendants herein whether by themselves, their agents and/or servants from in any manner whatsoever dealing with or disposing or in any other manner alienating all that parcel of land registered as L.R Nos. 473/10 and 9943.*

4. *THAT an Order of this Court do issue against the 5th defendant inhibiting the registration of any dealings whatsoever in respect of the parcel as (sic) LR Nos. 473/10 and 9943 until further orders of this Court.*

5. *THAT costs of this Application be in the cause.*

2. The application is supported by an affidavit sworn by John Wendot A. Kibowen, a director of the plaintiff company. He deposed that the plaintiff is a land buying company and the registered proprietor of the parcel of land known as L.R No. 473/10 and 9943 (hereinafter 'the suit property') and that the plaintiff learnt that the 1st, 2nd and 4th defendants were looking for buyers in respect of land whose title deeds were processed in favour of individuals who were not shareholders of the plaintiff. That no such dealings could have taken place in respect of the suit property without a resolution of the plaintiff passed at an annual general meeting and that no such meeting had taken place. He added that the 1st and 2nd defendants engaged in a fraudulent transaction with an intention of depriving the plaintiff's shareholders of the suit property.

3. The 1st and 2nd defendants responded to the application through a replying affidavit sworn by the 1st defendant. He deposed that the suit properties were bought by the plaintiff/applicant sometimes in the year 1973 for purposes of settling the members of the plaintiff/ applicant from Otano Estate Limited which was the original Grantee. Sometimes in 1994 in a members' general meeting members agreed and resolved to have the suit properties subdivided and shared among the members. The suit properties were consequently subdivided and all the members

were entitled to equal shares of the resultant subdivisions. About 84 members who were the beneficiaries of the subdivision of LR No. 473/10 came together and sold their shares, about 211 acres, of the suit property to one Patel Mansuk. About 332 members who did not get shares in LR NO. 473/10 were settled in the resultant subdivision from LR No. 9943 and hold title deeds to the shares to date. That sometimes in the year 2001, in a meeting of the members, it was resolved that some 25 twenty five acres that were left in the name of the company be sold to enable the company offset the debt owed to the Agricultural Finance Co-operation. Members through a resolution entered into an agreement of sale with the 3rd defendant to whom the company sold the 25 acres and he is the current owner of the said 25 acres. That the plaintiff/ applicant is no longer entitled to the suit property since subdivision and transfer of the suit property to the individual members and owners is complete.

4. The 3rd defendant stated in his replying affidavit that John Wendot A. Kibowen is not a director of the plaintiff. He added that on 18/09/2001 he entered into a sale agreement with the Plaintiff/Applicant for the sale of 25 acres portion of all that property known as L.R. Nos. 9943 and 473/10 situated in Bahati Area of Nakuru District for a consideration of KShs. 3,000,000. Upon execution of the aforesaid sale agreement, he was granted possession of the 25 acres portion of the suit property by the Plaintiff/Applicant and he has been living there peacefully, developing the same and enjoying quiet possession and occupation since 2001 to date.

5. Additionally, the 3rd defendant filed a Notice of Preliminary objection dated 12th March 2018 raising the point that the verifying affidavit sworn by John Wendot A. Kibowen is incompetent, fatally defective and inadmissible for want of authority of the plaintiff/applicant and violates the mandatory provisions of Order 4 rule 1 (4) of the Civil Procedure Rules, 2010.

6. The application was canvassed through written submissions. The 1st and 2nd defendants filed submissions on 18th October 2018, the applicant on 30th November 2018 and the 3rd defendant on 13th December 2018. The 4th defendant neither entered appearance nor responded to the application. On their part, the 5th and 6th defendants took the position that the application does not affect them. They therefore filed no response or submissions.

7. I have considered the application, the affidavits and the submissions. The applicant seeks an interlocutory injunction. It must therefore satisfy the test in **Giella –vs- Cassman Brown & Co. Ltd [1973] E.A 358**. This entails establishing a *prima facie* case with a probability of success. Even if a *prima facie* case is established, an injunction will not issue if damages can be an adequate compensation. Finally, if the court is in doubt as to the answers to the above two tests then the court will determine the matter on a balance of convenience. All these conditions and stages are to be applied as separate, distinct and logical hurdles which the applicant is expected to surmount sequentially. If *prima facie* case is not established, then irreparable injury and balance of convenience need no consideration. See **Nguruman Limited v Jan Bonde Nielsen & 2 Others [2014] eKLR**.

8. The plaintiff/applicant is a limited liability company or a corporation. **Order 4 rule 1 (2)** of the **Civil Procedure Rules** requires that every plaint be accompanied by a verifying affidavit. In the case of a corporation, **rule 1 (4)** thereof provides:

Where the plaintiff is a corporation, the verifying affidavit shall be sworn by an officer of the company duly authorized under the seal of the company to do so. [Emphasis supplied]

9. I have perused the verifying affidavit herein sworn by John Wendot A. Kibowen. Although he deposed that he is a director of the applicant, no authority of the applicant under seal is annexed. In fact, absolutely no authority is annexed. I further note that in the “Plaintiff’s List of Documents” is included a document stated to be “list of Directors”. Further perusal of the said document reveals that it is a CR12 dated 6th December 2004 which lists the directors of the applicant as at that date. John Wendot A. Kibowen is nowhere in that list. This suit thus offends **Order 4 rule 1 (4)** of the **Civil Procedure Rules**. Although a curable anomaly, this suit is invalid until the anomaly is corrected. A *prima facie* can only exist in the first place a valid suit exists. I am thus not persuaded that the applicant has a *prima facie* case. That alone is sufficient to dispose of the application.

10. Even assuming that the matter did not end there, the applicant itself maintains that the suit property was subdivided and titles issued in favour of individuals who were not shareholders of the applicant. Logically, L.R No. 473/10 and 9943 would have ceased to exist once it was subdivided and new titles issued. Although the applicant maintains that the subdivision and issuance of the new titles was a nullity, that is a matter for determination by the trial court. Needless to state, the applicant would have to involve the registered proprietors of the new parcels in any litigation seeking nullification of their titles. So far, those proprietors are not party to these proceedings. Owing to non-existence of L.R No. 473/10 and 9943 and owing to non-joinder of the registered proprietors of the new parcels, this case does not disclose any *prima facie* case. As was held in **Nguruman Limited v Jan Bonde Nielsen & 2 Others**, I need not consider the other limbs of the test in the **Giella** case.

11. In view of the foregoing discussion, Notice of Motion dated 6th February 2018 is dismissed with costs to the 1st, 2nd, 3rd, 5th and 6th defendants.

Dated, signed and delivered in open court at Nakuru this 28th day of November 2019.

D. O. OHUNGO

JUDGE

In the presence of:

No appearance for the plaintiff/applicant

No appearance for the 1st and 2nd defendants

No appearance for the 3rd defendant

No appearance for the 4th defendant

No appearance for the 5th and 6th defendants

Court Assistants: Beatrice & Lotkomoi