



REPUBLIC OF KENYA

IN THE ENVIRONMENT AND LAND COURT AT NAKURU

CASE No. 47 OF 2019

NDUNGU GATIGITHU.....1ST PLAINTIFF
NJANJA MBUTU.....2ND PLAINTIFF
KAGIMBI MUNGAI.....3RD PLAINTIFF
MUHIA WAIGANJO.....4TH PLAINTIFF
NJOGU GITAU.....5TH PLAINTIFF
NDUNGU GATHIGE.....6TH PLAINTIFF

VERSUS

KIAMBIRIRIA INVESTMENT COMPANY LIMITED.....DEFENDANT

RULING

1. The plaintiffs commenced this suit through plaint filed on 9th May 2019 at the High Court at Naivasha. The said court transferred the matter to this court that very day. Simultaneously with the plaint, the plaintiffs filed Notice of Motion dated 9th May 2019 which is the subject of this ruling.

2. The following orders are sought in the application:

1. *Spent*

2. *Spent*

3. *That pending the hearing and determination of this suit, the defendant, its agents, servants or any other person claiming under it be prohibited from collecting rental proceeds from the property known as from L.R 1144/21/XXIV.*

4. *That pending the hearing and determination of this suit, the rental proceeds from the suit property LR 1144/ 21/XXIV Naivasha Town be deposited in the account operated by the registered owners in Kenya Commercial Bank, Naivasha Branch, Account No. 1103XXXXXX.*

5. *That pending the hearing and determination of this suit, the defendant, its agents, servants or any other person claiming under it be prohibited from dealing with the suit property in a manner detrimental to the interests of the Plaintiffs.*

3. The application is supported by affidavits sworn by each of the plaintiffs. The defendant opposed the application through a replying affidavit sworn by Julius Nyaga Mwangi, its secretary. The plaintiffs also filed a further affidavit sworn by the 2nd plaintiff.

4. The application was canvassed through written submissions. Both sides filed and exchanged submissions. I have considered the application, the affidavits and the submissions.

5. The plaintiffs seek orders in the nature of interlocutory injunction. They 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 whether damages would be an adequate compensation 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 applicants are 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**.

6. From the material on record, it is apparent that on 15th July 1969, some 18 persons including the plaintiffs were registered as proprietors as tenants in common in equal shares of the parcel of land known as LR 1144/ 21/XXIV situated Naivasha Township and measuring 0.228 of an acre. They developed commercial premises on the suit property which they leased out to tenants. The original 18 registered proprietors plus two other persons registered a business name known as Kiambiriria Company on 17th November 1970. The defendant does not contest all this.

7. According to the plaintiffs, all rent collected from the premises prior to the year 2018 was banked into an account operated at Kenya Commercial Bank by the joint proprietors. They further allege that in the year 2010, some of the joint proprietors incorporated the defendant herein as a limited liability company and that from the year 2018, the directors of the defendant took over the running of the suit property and advised tenants to deposit rent into an account operated by the defendant at Co-operative Bank thus denying the registered proprietors rental income and rendering them destitute.

8. The defendant's position is that it was formed so as to hold the interest of the registered proprietors in the suit property. That although only 18 persons were registered as proprietors of the suit property, a total of 20 persons were owners and that explains why the 20 registered the business name on 17th November 1970. That in the year 2015, the defendant's shareholders passed a resolution to sell the suit property. That a dispute arose when the 3rd plaintiff demolished parts of the walls of the suit property with a view to renovating it so as to increase the space he occupies. As a result, criminal proceedings were commenced against the 3rd plaintiff. The 3rd plaintiff filed **ELC No. 262 of 2018 (Nakuru)** and **HCCC No. 15 of 2018 (Naivasha)**. The defendant further contends that the plaintiffs herein and the surviving members of the 20 original owners as well as members of the families of the deceased ones are shareholders of the defendant. The defendant does not also dispute that it opened the account at Co-operative Bank and that rent is being deposited into it. Its explanation is that one of the signatories of the account at Kenya Commercial Bank is no longer its officer and that it was therefore necessary to move company funds away from such an account.

9. It seems to me that the real dispute between the parties is a monetary one: control of the rental income. Although the defendant claims to own the suit property, there is no evidence to support that. On the contrary, the title document exhibited by the plaintiffs and which is not contested by the defendant, shows that the 18 persons who were registered as proprietors on 15th July 1969 remain registered proprietors. To the extent that the defendant seems to insist on controlling the suit property as well as its rental income, the plaintiffs have demonstrated a *prima facie* case. Nevertheless, despite the plaintiffs' fears, the defendant cannot legally sell the suit property since it's not the registered proprietor.

10. Nevertheless, a *prima facie* case is not all. Even if it is established, an injunction will not issue if damages can be an adequate compensation. As was stated in the **Nguruman Limited** case (supra):

... In other words, if damages recoverable in law is an adequate remedy and the respondent is capable of paying, no interlocutory order of injunction should normally be granted, however strong the applicant's claim may appear at that stage. ...

On the second factor, that the applicant must establish that he "might otherwise" suffer irreparable injury which cannot be adequately remedied by damages in the absence of an injunction, is a threshold requirement and the burden is on the applicant to demonstrate, prima facie, the nature and extent of the injury. Speculative injury will not do; there must be more than an unfounded fear or apprehension on the part of the applicant. The equitable remedy of temporary injunction is issued solely to prevent grave and irreparable injury; that is injury that is actual, substantial and demonstrable; injury that cannot "adequately" be compensated by an award of damages. An injury is irreparable where there is no standard by which their amount can be measured with reasonable accuracy or the injury or harm is such a nature that monetary compensation, of whatever amount, will never be adequate remedy.

11. As I have noted above, the dispute between the parties is largely about control of rental income. The rent is known and consequently, damages are easily ascertainable and would in the circumstances be an adequate compensation. It has not been shown that the defendant will be incapable of paying damages. The plaintiffs have therefore failed to satisfy the second limb of the test in **Giella** case (supra).

12. In view of the foregoing discussion, I find no merit in Notice of Motion dated 9th May 2019 and dismiss it with costs to the defendant.

Dated, signed and delivered in open court at Nakuru this 19th day of December 2019.

D. O. OHUNGO

JUDGE

In the presence of:

No appearance for the plaintiffs/applicants

Mr P.K. Njuguna for the defendant/respondent

Court Assistants: Beatrice & Lotkomoi