



REPUBLIC OF KENYA

IN THE ENVIRONMENT AND LAND COURT AT NAKURU

CASE No. 277 OF 2017

CHRISTOPHER KANDIE.....1ST PLAINTIFF

AMOS KANGOGO CHEBII.....2ND PLAINTIFF

CHARLES YEGO TOROITICH.....3RD PLAINTIFF

WILLY KURGAT.....4TH PLAINTIFF

VERSUS

ZEPHANIAH CHERUTICH CHEPTIRIM.....1ST DEFENDANT

BENARD KIBET CHERUTICH.....2ND DEFENDANT

LORGIS LOGISTICS LIMITED.....3RD DEFENDANT

RULING

(An application for injunction to restrain the defendants from alienating or transferring suit property; injunction granted)

1. This ruling is in respect of plaintiff's Notice of Motion dated 3rd July 2017. The application is brought under Order 40 rules 1, 2 and 4 of the Civil Procedure Rules and seeks the following orders:

1. Spent.

2. Spent.

3. Spent.

4. That a temporary injunction be and is hereby issued restraining the Defendants, their servants, agents, employees and/or those claiming through them from alienating, transferring, trespassing and/or dealing with that parcel of land known as Plot No. 293 being part of LR No. 6207/2 Nakuru pending the hearing and determination of this suit.

5. That the costs of this application be provided for.

2. The application is supported by an affidavit sworn by the 1st plaintiff. He deposes that the plaintiffs and the 1st defendants were businessmen operating butcheries within Kabarnet town. They opened a joint

account and a fixed deposit account at Transnational Bank where they deposited weekly contributions. By the year 2013, the funds in the fixed deposit account had accumulated to KShs. 900,000/= . Around July 2013, the plaintiffs and the 1st defendant learnt that parcel of land located in Kabarak was being sold by M/s Kiplenge & Kurgat Advocates on behalf of their client. The plaintiffs and the 1st defendant decided to obtain a loan of KShs. 840,000/= from the bank so as to purchase 0.75 acres of the plot since their fixed deposit had not yet matured. The bank agreed and issued them with a letter of offer dated 30th July 2013.

3. Upon the funds being availed by the bank, the plaintiffs and the 1st defendant decided that the purchase price be transferred to the property agents through the 1st defendant who was the interim chairman of the group. As a result of payment being routed through the 1st defendant, the allocation/beacon certificate for plot No. 293 which is the portion they purchased was issued in the name of the 1st defendant.

4. The 1st defendant took the plaintiffs to the plot in May 2014 and the plaintiffs took possession, fenced and started cultivating the land. When the plaintiffs asked the 1st defendant to surrender the original allocation/beacon certificate he claimed that he did not have it as he was only given a photocopy by the property agents. The plaintiffs subsequently discovered that the 1st defendant had sold the plot to the 2nd and 3rd defendants despite the fact that the 1st defendant had on 12th May 2014 sold his share of the plot to the 1st plaintiff. As such, the 1st defendant no longer had any interest in the plot and could not sell it to the 2nd and 3rd defendants. The plaintiffs annexed a copy of statement of account for the joint account, a copy of the letter of offer dated 30th July 2013, allocation/beacon certificate and sale agreement dated 12th May 2014. The plaintiffs thus pray that the application be allowed.

5. The 1st defendant opposed the application through his replying affidavit filed on 11th October 2017 in which he deposed that he was a member of the group referred to by the plaintiffs until February 2013 when he opted out and sought a refund of his share of contributions which totaled Kshs.460, 000/=. Since the contributions were tied up in the fixed deposit account, he advised the plaintiffs to take a loan equivalent to the savings to enable them buy the plot on offer by Kiplenge & Kurgat's client. He also sold another plot pursuant to sale agreement dated 19th September 2012 to enable him buy the plot.

6. He further deposed that upon receiving his share of contributions from the plaintiffs he paid Kshs.840, 000/= to the vendors and was allocated plot No. 293 measuring 0.75 acres. Subsequently on 28th April 2014, he was given an Allocation/Beacon Certificate in his name. He maintains that he was the absolute owner of the plot. Later on 30th November 2016, he met the 3rd defendant's directors and executed a sale agreement wherein he sold the property to the 3rd defendant. He urged the court to dismiss the application.

7. The 2nd and 3rd defendants also opposed the application. They did so through a replying affidavit sworn by the 2nd defendant. He deposed that he is a director of the 3rd defendant. He added that the 3rd defendant bought the suit property from the 1st defendant by an agreement dated 30th November 2016.

8. The application was argued by way of written submissions. The plaintiffs'/applicants' submissions were filed on 30th October 2017 while the defendants' submissions were filed on 1st December 2017. I have considered the application, the affidavits filed and the submissions.

9. In an application for an interlocutory injunction, the applicant must satisfy the test in **Giella –vs- Cassman Brown & Co. Ltd [1973] E.A 358**. He must establish a *prima facie* case with a probability of success. Even if a *prima facie* case is established, an injunction would not to issue if damages can adequately compensate him. Finally, if the court is in doubt as to the answers of the above two tests then the court would determine the matter on a balance of convenience. As was recently held by the Court of Appeal in **Nguruman Limited v Jan Bonde Nielsen & 2 Others [2014] eKLR**, all the three **Giella** conditions and stages are to be applied as separate, distinct and logical hurdles which the applicant is

expected to surmount sequentially and that if *prima facie* case is not established, then irreparable injury and balance of convenience need no consideration.

10. As to what is meant by phrase *prima facie* case, we only need to turn to the words of Bosire JA in the Court of Appeal case of **Mrao Ltd v First American Bank of Kenya Ltd & 2 others [2003] eKLR:**

So what is a prima facie case? I would say that in civil cases it is a case in which on the material presented to the Court a tribunal properly directing itself will conclude that there exists a right which has apparently been infringed by the opposite party as to call for an explanation or rebuttal from the latter.

..... a prima facie case is more than an arguable case. It is not sufficient to raise issues. The evidence must show an infringement of a right, and the probability of success of the applicant's case upon trial. That is clearly a standard which is higher than an arguable case.

11. There is no dispute that the plaintiffs and the 1st defendant had a joint account and a fixed deposit account with Transnational Bank. I have perused the statement of account and the letter of offer dated 30th July 2013 and they bear the names of the plaintiffs and the 1st defendant. The letter of offer makes it clear that a loan of Kshs.840, 000/= was offered to the group and the purpose was indicated as purchase of a plot.

12. I also note that the plaintiffs' annexure CKK-4 is a bank transaction slip which shows that on 30th July 2013 at 13:02 hours, the 1st defendant transferred Kshs.840, 000/= to the account of Juma Kiplenge and Henry Kiptiony. I note further that the loan to the plaintiffs and the 1st defendant was disbursed by the bank on 30th July 2013.

13. The 1st defendant has explained that he solely paid the purchase price and that part of the purchase price came from proceeds of the sale agreement he annexed at ZC1. I have read the said agreement and I note that it is dated 19th September 2012, long before the transaction concerning purchase of plot number 293 was entered into.

14. From all the foregoing, it is clear to me that the plaintiffs and the 1st defendant obtained a loan from the bank to purchase a plot and that the loan was disbursed on 30th July 2013, the same day that the 1st defendant claims to have solely paid the purchase price. I am thus persuaded that the plaintiffs have established a *prima facie* case. The suit property needs to be preserved pending hearing and determination of this suit. If an injunction is not granted, the defendants may sale or transfer the suit property thus causing irreparable damage to the plaintiffs.

15. The 2nd and 3rd defendants having purchased the property from the 1st defendant, they have to contend with any doubts or questions raised as regards the 1st defendant's title as well as his capacity to pass valid title.

16. In the end, I grant an injunction restraining the defendants, their servants, agents, employees and/or those claiming through them from alienating, transferring, and/or making any disposition in respect of the parcel of land known as Plot No. 293 being part of LR No. 6207/2 Nakuru pending the hearing and determination of this suit. Costs to the plaintiffs.

17. It is so ordered.

Dated, signed and delivered in open court at Nakuru this 30th day of January 2018.

D. O. OHUNGO

JUDGE

In the presence of:

Mr. Kurui for the plaintiffs/applicants

Mr. Kibet for the defendants/respondents

Court Assistants: Gichaba and Lotkomoi