



REPUBLIC OF KENYA

IN THE ENVIRONMENT AND LAND COURT AT NAKURU

CASE NO. 44 OF 2017

JOSEPH KARIKO.....PLAINTIFF

VERSUS

MANDEEP SINGH SAHOTA.....1ST DEFENDANT

THE CHIEF LAND REGISTRAR, NAKURU.....2ND DEFENDANT

THE ATTORNEY GENERAL.....3RD DEFENDANT

NATIONAL LAND COMMISSION.....4TH DEFENDANT

RULING

(An application for injunction to restrain 1st defendant from interfering with suit property; an application seeking striking out of suit against 1st defendant; both applications dismissed)

1. Proceedings herein were commenced on 10th February 2017 when the plaintiff filed the plaint dated the same date. In the plaint, the plaintiff accused the 1st defendant of trespassing on to the property known as Nakuru Municipality Block 23/740 (the suit property) which the plaintiff avers that he owns. The plaintiff thus sought judgment against the 1st defendant for among others an eviction order, damages and injunction.

2. Alongside the plaint, the plaintiff also filed Notice of Motion dated 10th February 2017 in which he sought the following orders:

1. Spent.

2. Spent.

3. The court be pleased to grant an injunction restraining the 1st defendant/respondent whether by himself, his agents and/or servants from trespassing on, wasting, constructing on, alienating or otherwise interfering or dealing with the plaintiff's property being Title Number Nakuru Municipality block 23/740 pending the hearing and determination of this suit.

4. The Officer Commanding Nakuru Central Police Station do enforce compliance of the orders above.

5. The costs of this application be provided for.

6. The honourable court be pleased to make such further or other orders as it may deem just and expedient in the circumstances of this case.

3. The application is supported by an affidavit sworn by the plaintiff wherein he deposes that he is the proprietor of the suit property having purchased it from one Kipoki Oreu Tasur on 16th September 2014. He annexed a copy of a Certificate of Official Search as at 29th May 2014 and Sale Agreement. He accuses the 1st defendant of invading the suit property sometime in January 2017, interfering with the perimeter fence and erecting structures on the land.

4. The 1st defendant responded to the application through replying affidavit sworn on 8th May 2017. He deposed among others that he is the registered proprietor of the suit property having purchased it from one Benjamin Cheboi and that the plaintiff has no interest in the property. He annexed a copy of Sale Agreement dated 3rd January 2017, Certificate of Lease dated 18th January 2017 and Certificate of Official Search

as at 31st January 2017. He thus urged the court to dismiss the application.

5. Additionally, the 1st defendant filed Notice of Motion dated 12th May 2017 in which he sought the following orders:

1. Spent.

2. That this honourable court be pleased to strike out the suit as against the 1st defendant/applicant for non-joinder of the party giving rise to the interest claimed by the plaintiff/respondent, failure to establish a cause of action as against the 1st defendant and for being an abuse of the court process.

3. That cost (sic) of this application be borne by the plaintiff/respondent.

6. The application is brought inter alia under Order 1 rule 10 of the Civil Procedure Rules and is supported by an affidavit sworn by the 1st defendant. In the affidavit he reiterated that he is the registered proprietor of the suit property and that the plaintiff has no legal interest in the property. He adds that this suit is an abuse of court process and should be dismissed for non-joinder.

7. I have perused the record carefully and I do not see any replying affidavit or grounds of opposition filed by or on behalf of the plaintiff in respect of the application dated 12th May 2017. I also note that the plaintiff does not make any reference to any such replying affidavit or grounds of opposition in his submissions.

8. By consent of parties and pursuant to orders of the court, both applications were heard together by way of written submissions. The 1st defendant filed submissions on 31st August 2017, the plaintiff filed submissions on 18th September 2017 and the 1st defendant filed further submissions on 6th October 2017. The 2nd, 3rd and 4th defendants indicated to the court through counsel representing them that they do not oppose both applications.

9. I have considered the applications, the affidavits, submissions and authorities cited. Notice of Motion dated 12th May 2017 seeks striking out of the suit against the 1st defendant. If it succeeds, the suit will be struck out with the result that there will be no need to consider Notice of Motion dated 10th February 2017 which seeks an injunction against the 1st defendant. I will therefore consider Notice of Motion dated 12th May 2017 first.

10. As already pointed out, Notice of Motion dated 12th May 2017 seeks striking out of the suit against the 1st defendant. The grounds cited are that there is non-joinder of the party giving rise to the interest claimed by the plaintiff/respondent, failure to establish a cause of action as against the 1st defendant and that the suit is an abuse of the court's process.

11. The principles governing striking out of suits are well settled. Striking out is a draconian remedy that should only be resorted to in the clearest of cases. The often quoted wise counsel of Madan JA in **D.T. Dobie & Company (Kenya) Limited v Joseph Mbaria Muchina & another [1980] eKLR** remains valid:

A court of justice should aim at sustaining a suit rather than terminating it by summary dismissal. Normally a law suit is for pursuing it.

No suit ought to be summarily dismissed unless it appears so hopeless that it plainly and obviously discloses no reasonable cause of action, and is so weak as to be beyond redemption and incurable by amendment. If a suit shows a mere semblance of a cause of action, provided it can be injected with real life by amendment, it ought to be allowed to go forward for a court of justice ought not to act in darkness without the full facts of a case before it.

12. Generally, the court needs to exercise extreme caution before striking out a suit. Striking out should really be the last resort, to be deployed in the clearest of cases where a suit cannot be sustained by way of amendment or some other procedurally acceptable resuscitative measure.

13. In the present case the plaintiff has accused the 1st defendant of trespassing upon the suit property, among others. Though the plaintiff claims to own the suit property, he has not placed before the court any evidence of ownership. The 1st defendant has on the other hand, exhibited a Certificate of Lease as proof of his ownership. It is purely on account of ownership and the rights flowing from it that the parties are engaged in the dispute before the court.

14. Ownership is a question both of fact and law. Determination of the factual aspects of the question depends to a large extent on evidence. The final outcome will be determined by the evidence that will be adduced before the trial court. Such evidence may not necessarily be what is currently on record in the affidavits and witness statements. The plaintiff may very well in the future adjust the claim against the 1st defendant both in terms of amendment of pleadings and adducing more evidence. On the other hand, if the plaintiff fails to adduce sufficient evidence to support his case, the 1st defendant will still achieve his desired outcome: dismissal of the plaintiff's case. In the circumstances, I do not deem it fit to strike out the suit purely on the basis of the evidence of ownership. I therefore dismiss the application dated 12th May 2017.

15. Notice of Motion dated 10th February 2017 seeks an interlocutory injunction. 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.

16. The plaintiff asserts that he is the lawful proprietor of the suit property. From the documents exhibited by the plaintiff, it is evident that the suit property has a registered proprietor. The plaintiff does not claim to be the registered proprietor but alleges that he bought it from a registered proprietor. Though a copy of a Sale Agreement is annexed, there is no evidence of any transfer in favour of the plaintiff having been executed or even registered. On the other hand, the 1st defendant has exhibited a Certificate of Lease dated 18th January 2017 and Certificate of Official Search as at 31st January 2017, all showing that the 1st defendant is the registered proprietor of the suit property.

17. Pursuant to the provisions of Section 26 of Land Registration Act the Certificate of Lease is conclusive proof of the 1st defendant's ownership. I have perused the plaint herein and I see no allegation of fraud, misrepresentation, illegality, corruption or unprocedural acquisition. The 1st defendant is therefore entitled to all the interests and rights secured by Article 40 of the Constitution of Kenya and Sections 24 and 25 of the Land Registration Act. In such circumstances, the allegations that the 1st defendant has invaded the property and carried out construction thereon cannot avail the plaintiff any case against the 1st defendant.

18. In view of the foregoing, I find that the plaintiff has not established any *prima facie* case against the 1st defendant. In line with the procedure adopted by the Court of Appeal in the case of **Nguruman Limited v Jan Bonde Nielsen & 2 Others** (supra), I need not consider the other limbs of the test in *Giella*.

19. In the end, both Notice of Motion dated 10th February 2017 and Notice of Motion dated 12th May 2017 are dismissed. Each party to bear own costs.

Dated, signed and delivered in open court at Nakuru this 24th day of January 2018.

D. O. OHUNGO

JUDGE

In the presence of:

No appearance for the plaintiff

Ms. Kinuthia holding brief for Mr. Kibet for the 1st defendant

No appearance for the 2nd defendant

Court Assistant: Gichaba