



REPUBLIC OF KENYA

IN THE ENVIRONMENT AND LAND COURT

AT MAKUENI

ELC CASE NO 145 OF 2017

FORMERLY NAIROBI ELC 1609 OF 2016

FORMERLY MACHAKOS ELC 235 OF 2016

NICHOLAS NGULA.....1ST PLAINTIFF

ABED MUSEMBI KITHOME.....2ND PLAINTIFF

REBECCA MUTEI NGILA.....3RD PLAINTIFF

VERSUS

PHILIP KALATU WAMBUA.....DEFENDANT

RULING

1. There is before me a notice of motion application expressed to be brought under Article 48 of the constitution, section 3 A of the Civil Procedure Act, order 40 rules 1 and 2 of the Civil Procedure Rules and all enabling provisions of the law for orders:-

1. Spent

2. Spent

3. That Honourable court be pleased to grant temporary injunction against the defendant/respondent, by himself, his servants, agents and/or employees from restraining, intimidating, threatening and/or harassing the plaintiffs/applicants from accessing their Plot No. 176 Masongaleni Settlement Scheme pending hearing and determination of the main suit.

4. That the costs of this application be met by the respondents.

The application is predicated on the grounds on its face and is supported by the affidavit of Nicholas Ngula, the first applicant herein sworn on behalf of his co-applicants on the 20th December, 2016 and filed in court on even date together with the application which is dated the 21st December, 2016.

2. The respondent has opposed the application vide his replying affidavit dated 11th October, 2017 and filed in court on the 18th October, 2017.

3. On the 2nd November, 2017 the court directed that the application be disposed off by way of written submissions. Consequently, the respondent filed his submissions on the 20th December, 2017. On the other hand, the applicants filed theirs on the 18th January, 2018.

4. I have read the submissions and I note that all the parties are agreed that the grant of the prayers sought by the applicants turns on the principles set out in *Giella Vs Cassman Brown & Company Ltd [1973]EA 358*. I need not repeat those principles herein as they are well known. I will however proceed to determine whether or not the prayers sought by the applicants should be granted.

5. On the principle of prima facie case with probability of success, the applicants' counsel submitted that there were sale agreements between the applicants and the respondent over plot number 176 Masongaleni. He added that the respondent acknowledges receipt of money

from the second applicant. The counsel further submitted that the respondent has not demonstrated that he is indeed the proprietor of the suit land. The respondent's counsel's submissions are that the applicants are not in possession of the suit land. The counsel added that the affidavit in support of the application is defective.

6. The first applicant has deposed in paragraph 3 of his affidavit that he and his co-applicants purchased the suit land from Philip Kalalu Wambua on diverse dates between 2000 and 2004. He goes on to depose that the Philip Kalalu Wambua had bought the suit land from the respondent. The agreements though marked as NN-1 were never annexed to the affidavit. This raises the issue of whether or not proprietorship changed hands between the respondent and Philip Kalalu Wambua because in my view, it would have been necessary to add a co-respondent going by the contents of paragraph 3 of the supporting affidavit. It presupposes that transfer is yet to take place. I, therefore, hold that the applicants have not established a prima facie case with probability of success.

7. Have the applicants shown that they will suffer irreparable damage if injunction is not granted? The applicants counsel submitted that the applicants have invested in their portions of land and that the respondent who is a retired teacher cannot get resources to compensate them. The respondent's counsel is silent on this issue. In my view the investments that the applicants have put in their respective portions of land are quantifiable and the applicants can be compensated by way of damages. There is nothing in the supporting affidavit by the first applicant to show the irreparable damage or injury that the applicants are likely to suffer. The applicants have not shown that the respondent, though retired teacher, is a man of straw. The application must also fail under this ground.

8. Regarding the principle of balance of convenience, the applicant's counsel submitted that it is only prudent that the interests of both parties to this suit are protected by restraining the respondent from interfering with the applicants' quiet possession. On the other hand, the respondent's counsel submitted that the balance of convenience tilts in favour of the respondent.

9. From the affidavit evidence it is clear that the applicants have not proved that the balance of convenience tilts in their favour and besides, they were under obligation to prove the three principles sequentially. They have failed to do so. In the circumstances, my finding is that the application lacks merit and I proceed to dismiss the same with costs to the respondent.

Signed, dated and delivered at **Makueni** this **21st** day of **February**, 2018

MBOGO C.G

JUDGE

In the presence of;

Mr. Kwemboi Court Assistant

Mr Langalanga holding brief for Mr. Kasyoka for the respondent

Mr. Tamata holding brief for Mr. Mulandi for the applicants

MBOGO C.G

JUDGE

21/2/2018