



**REPUBLIC OF KENYA**

**IN THE ENVIRONMENT AND LAND COURT OF KENYA**

**AT NAKURU**

**ELC NO. 131 OF 2017**

**JOHN MUNIU MWANGI.....PLAINTIFF**

**VERSUS**

**JOHN NJERU KAMWETI.....DEFENDANT**

**RULING**

***(Application for injunction; principles to be applied; applicant claiming that the suit land was sold to him by the respondent to compensate him for another land which the respondent lost in litigation; respondent refuting this and claiming that there was a new sale agreement for the suit land which was not performed by the applicant; contested facts which cannot be reconciled at this stage of the proceedings; application decided on a balance of convenience; on possession, balance of convenience tilts in favour of applicant and order of inhibition to preserve the title issued)***

1. This suit was commenced by way of a plaint which was filed on 23 March 2017. Together with the plaint, the plaintiff filed an application for injunction, seeking to restrain the defendant from the land parcel Elburgon/Kapsita/730, and it is that application which is the subject of this ruling. The application is opposed by the defendant who has filed a replying affidavit. The principles upon which an application of this nature are decided were spelt out in the case of *Giella vs Cassman Brown (1973) EA 358* and I stand guided by the same. It was held in the said case, that to succeed in an application for injunction, the applicant needs to demonstrate a prima facie case with a probability of success, and further show that he stands to suffer irreparable loss if the injunction is not granted. Where the court is in doubt, it will decide the application on a balance of convenience.

2. In order to assess whether or not an applicant has laid out a prima facie case, it is necessary to make a preliminary assessment of the case based on the material supplied by the parties. What then are the respective cases of the parties ?

3. The case of the plaintiff (applicant) is that he is the lawful owner of the land parcel Elburgon/Kapsita/730 (hereinafter referred to as "the suit land"). He has further averred that he is in possession of the said land and that he has been in quiet use of it until the defendant (respondent) started interfering with it by ploughing, cultivating and threatening his tenants. In the suit, the applicant has sought orders that the respondent be permanently restrained from the land.

4. In the supporting affidavit to the application, the applicant has explained how he acquired the suit land. He has averred that he purchased the land from the defendant on 15 November 2011. At that time, the respondent held a power of attorney donated by the then registered owner of the suit land, one Duncan Ileri Kaunyuu. Upon purchase, the applicant has averred that he took possession and he has been letting out the land to other persons. The respondent has however written to his tenant asking her to vacate the suit land. So as to safeguard his interest the applicant has lodged a caution on the property.

5. On his part the respondent, through his replying affidavit, has stated that he was allocated a land parcel Nakuru/Molo (Kapsita)/132 in the year 1998, after the person who had originally been allotted it, one Charles Karanja, failed to show up. He then decided to sell this land to the applicant through a sale agreement dated 16 June 1999 for the sum of Kshs. 200,000/=. It appears that the said Charles Karanja, successfully sued the respondent over the ownership of the land parcel No. 132, after which the respondent then agreed to sell to the applicant the suit property, which was then owned by the respondent's brother, so as to compensate him for the loss of the land parcel No. 132. He has stated that on 12 November 2005, they wrote a sale agreement in the offices of Mr. N.R Ngure advocate, and that upon execution of the agreement, the applicant claimed that he was going to fetch the purchase price of Kshs. 600,000/= (although the sale agreement annexed shows the sum of Kshs. 800,000/= as the purchase price) but he never showed up, and the advocate proceeded to cancel the agreement. He then decided to sell the land to one Stephen Obara on 1 March 2012, for a consideration of Kshs. 600,000/=. He has further deposed that he is ready and willing to refund the applicant the sum of Kshs.160,000/=. He has claimed that his signature, in the document annexed by the applicant as evidencing the sale of the suit land to the applicant, is forged.

6. The applicant filed a further affidavit vide which he deposed that the respondent is not being truthful. He has averred inter alia that the respondent agreed to transfer the suit land to him as compensation for the land parcel No. 132 which was lost to Mr. Charles Karanja after he

successfully sued for it. He has further asserted that he did take possession on 13 July 2006.

7. I invited both Mr. Ikua, learned counsel for the applicant, and Mr. Simiyu, learned counsel for the respondent to file written submissions, which they duly did, and I have taken note of these and considered them in arriving at my decision.

8. I have assessed the application and carefully perused the documents relied upon by both parties. The applicant has claimed that the respondent sold to him the suit land and has annexed what he termed to be an agreement dated 15 November 2005. I have looked at this document, which is actually not an agreement for sale, but a letter, purportedly written by the respondent, vide which he mentions that he sold the land parcel No. 132 to the applicant, but is ready to transfer the suit land (parcel No. 730), in the event that he loses the land (parcel No. 132) to Charles Karanja, following a dispute that the latter had lodged before the Land Disputes Tribunal. In the same document, there is also mention of refund of Kshs. 200,000/= in the event that he loses the case to Mr. Charles Karanja. I do note that the respondent has claimed that he never signed this document and that the signature therein is forged. I further observe that the respondent does not refute selling the land parcel No. 132 to the applicant and does not refute that he lost it after being sued by Mr. Karanja. He of course states that upon losing the case, he agreed to sell the suit land to the applicant for Kshs. 600,000/= through the agreement of 11 November 2005, that was cancelled, but did not agree to compensate the applicant with the land parcel No. 730 which is claimed in this case.

9. It is apparent that I am facing conflicting facts which I am unable to reconcile at this stage of proceedings and which facts can only come out clearly after a full hearing on merits. The position that I am in, is one of doubt, and I therefore opt to decide this application on a balance of convenience.

10. In my view, the balance of convenience tilts in favour of the applicant. I do believe that he has been in possession, for if he were not in possession, the respondent would not have written to the applicant's tenants, asking them to vacate the suit land. Thus in so far as possession of the land is concerned, I order that the same be with the applicant pending hearing and determination of the case. I also find it necessary to preserve the title to the suit land to prevent any further dealings and I therefore issue an order of inhibition, inhibiting the registration of any disposition in the register of the land parcel Nakuru/Kapsita/730 until this case is heard and finalized.

11. On costs, the same shall be in the cause.

12. It is so ordered.

**Dated, signed and delivered in open court at Nakuru this 19<sup>th</sup> day of April 2018.**

**JUSTICE MUNYAO SILA**

**ENVIRONMENT & LAND COURT AT NAKURU**

**In presence of: -**

Ms. Wanuma for the defendant/respondent

No appearance on the part of M/s Ikua Mwangi & Co. Advocates for the plaintiff/applicant.

Court Assistant: Nelima Janepher

**JUSTICE MUNYAO SILA**

**ENVIRONMENT & LAND COURT AT NAKURU**