



**REPUBLIC OF KENYA**

**IN THE E.L.C COURT**

**AT MAKUENI**

**ELC NO. 292 OF 2017**

**FELIX MUTUA NZAMU (*Suing as the legal representative of the estate of***

**SAMUEL NZAMU MAINGI.....PLAINTIFF**

**VERSUS**

**MAKUENI COUNTY POLICE COMMANDER.....1<sup>ST</sup> DEFENDANT**

**THE INSPECTOR GENERAL OF POLICE.....2<sup>ND</sup> DEFENDANT**

**RULING**

1. There is before me a Notice of Motion Application expressed to be brought under Order 51 Rule 1, Order 40 Rules 1, 2 & 4 of the Civil Procedure Rules 2010, sections 3, 4(2), 5, 6, 7, 8, 9, 10, 11, 12 and 13 of the Land Acquisition Act Cap 295, Sections 1A, 1B and 3A of the Civil Procedure Act and all other enabling provisions of the law for orders.

**1) Spent.**

**2) Spent.**

**3) That this honourable court does issue temporary orders of injunction restraining the defendants by themselves, their agents, servants and /or representatives from fencing, alienating, sub dividing, selling construction or building any structures on the suit property pending the hearing of the main suit.**

**4) That costs of this application be provided for.**

2. The application is predicated on the grounds on its face and is supported by the affidavit of Shedrack, Mwau Nzamu, the second Plaintiff/Applicant, herein, sworn at Makindu on the 20<sup>th</sup> June, 2017.

3. The application is opposed by the Respondents vide the replying and further affidavits of Joseph Ole Napeiyan, the first Defendant/Respondent herein, both sworn at Nairobi on the 13<sup>th</sup> October, 2017 and 30<sup>th</sup> January, 2018 respectively.

4. On the 16<sup>th</sup> November, 2017 the court directed that the application be disposed off by way of written submissions. Consequently, the Plaintiffs/Applicants filed their submissions on the 20<sup>th</sup> February 2018, the same being dated the 23<sup>rd</sup> February, 2018. The Defendants/Respondents filed theirs on the 8<sup>th</sup> February 2018.

5. Both parties are agreed that in order for the grant of order of injunction to be granted, the Applicants must meet the principles set out in the famous case of ***GIELLA –VS- CASSMAN BROWN & CO. LTD [1973] EA 358***. The Applicants further rely on the case of ***AMERICAN CYNAMID CO VS ETHICON LTD [1975] ALL ER 504 at 510*** while the Respondents have cited the Court of Appeal decision in the case of ***KENYA COMMERCIAL FINANCE CO. LTD –VS- AFRAHA EDUCATION SOCIETY (2001) IEA 86***.

6. I need not repeat the three principles in the Giella’s case herein save to say that on the first principle of *prima facie*, the Applicants’ counsel submitted that in the supporting affidavit, the Applicants have annexed documents of ownership of the suit property as annexure “SMN-4” and added that the property belongs to the estate of Samuel Nzamu Maingi.

7. The counsel went on to submit that the authenticity of the allotment letter marked as “SMN-4” in the supporting affidavit was not

challenged by the Respondents and opined that the Applicants have a *prima facie* case with probability of success.

8. The counsel went on to submit that the fact that there is a development plan annexed as “**JON-8**” in the Respondents’ replying affidavit that in itself does not give proprietary rights. The counsel termed the allegations contained in the Respondents’ further affidavit that the applicants forged documents in support of this application as not true since the correspondence that the applicants produced were obtained from the Land’s Office in Makueni County.

9. On the other hand, the Respondents’ counsel in her submissions told the court that the authenticity of the documents that the applicants rely on is in doubt as can be seen from the Respondents’ further affidavit. The counsel opined that in light of this flow, the applicants have failed to demonstrate a *prima facie* case with probability of success. And having failed to prove the first ground as set out in Giella’s case, there was no need for the court to venture into the other two grounds.

10. The counsel referred the court to the case of **KENYA COMMERCIAL FINANCE CO. LTD VS AFRAHA EDUCATIONS SOCIETY [2001] I EA 86** where the court of Appeal held thus;

***“The sequence of steps to be followed in the enquiry into whether to grant an interlocutory injunction is.....sequential so that the second condition can only be addressed if the first is satisfied...”***

11. Having read the submissions filed as well as the application and the affidavit evidence placed before me, I would agree with the Respondents’ counsel that the Applicants have not demonstrated that they have a *prima facie* case with probability of success. The documents that the Applicants rely on to prove ownership of the suit property have been put into question by the Respondents deposition in paragraphs 5 and 6 of their further Affidavit. The dispositions remain unchallenged by the Applicants.

12. In the circumstances, therefore, I hold that having failed to satisfy the first principle in Giella’s case, I see no reason to address the second and the third conditions. The application must, therefore, fail. I therefore proceed to dismiss it with costs to the Respondents.

**Signed, Dated and Delivered at Makueni this 30<sup>th</sup> Day of May, 2018.**

**MBOGO C.G**

**JUDGE**

**IN THE PRESENCE OF:**

Ms Ngeleche for the Respondent

No Appearance for the Applicant

**MBOGO C.G , JUDGE**

**30/5/2018**