



REPUBLIC OF KENYA

IN THE ENVIRONMENT AND LAND COURT AT NAKURU

CASE NO. 394 OF 2017

JUDY WANGECHI NJENGA.....PLAINTIFF

VERSUS

MARY WANGARI MAENDE.....DEFENDANT

RULING

1. The plaintiff commenced proceedings in this matter on 13th October 2017 through plaint dated the same date. She seeks judgment against the defendant for a permanent injunction restraining the defendant from burying the remains of Stephen Otieno Maende (deceased) on the parcel of land known as Naivasha/Moi Ndabi/975 (the suit property) and an order evicting the defendant and her agents from the suit property. Alongside the plaint, the plaintiff filed Notice of Motion dated 13th October 2017 under Certificate of Urgency seeking the following orders:

1. Spent.

2. Spent.

3. Spent.

4. Spent.

5. That this honourable court be pleased to issue a temporary Order of injunction restraining the defendant by herself, her agents, their servants or her children from burying or even removing the body of Stephen Otieno or interring the deceased's body on the plaintiff/applicant's parcel of land known as Naivasha/Moi Ndabi/975 measuring 1.1 ha. pending the hearing and determination of this suit and the OCS Kongoni Police Station to ensure compliance.

6. That the honourable court be pleased to issue temporary orders of injunction restraining the defendant/respondent herein either by himself, his agents, servants or by any other person acting on his behest from interfering, entering, encroaching, harassing or in any other way preventing the plaintiff from using, ploughing, cultivating or utilize her land as required or doing such acts as would interfere with the plaintiff/applicant's use, occupation, possession or right of ownership to land parcel No. Naivasha/Moi-Ndabi/975 until the case herein is heard and determined or until the suit is heard and determined and the OCS Kongoni Police Station to ensure compliance of the order.

7. That costs of this application be borne by the respondent.

2. The application is supported by an affidavit sworn by the plaintiff. It is deposed in the affidavit that the plaintiff is the registered proprietor of the suit property. That sometime in February 2017, prior to his death, Stephen Otieno Maende (now deceased), entered the suit property and started claiming ownership. He later passed away and his family wanted to bury his remains on the suit property. Accordingly, the plaintiff filed the present suit as well as the Notice of Motion seeking orders to restrain the defendant from going ahead with the burial.

3. The defendant did not oppose the application. When the application came up for inter parte hearing on 16th November 2017, counsel for the applicant told the court that the burial of the deceased had been done somewhere else, away from the suit property. In view of that, prayer 5 of the Notice of Motion is clearly overtaken by events.

4. Regarding prayer 6 of the application, I note that it essentially seeks an interlocutory injunction. For an application for an interlocutory injunction to succeed, the applicant ought to satisfy the test in **Giella –vs- Cassman Brown & Co. Ltd [1973] E.A 358**. She must establish a *prima facie* case with a probability of success. Even if she establishes a *prima facie* case, an injunction would not to issue if damages can adequately compensate her. 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. If *prima facie* case is not established, then irreparable injury and balance of convenience need no consideration.

5. A perusal of the affidavit in support of the application shows that it deals exclusively with the threat of burial of the remains of the deceased on the suit property. The plaintiff does not accuse the defendant of anything else such as entering, ploughing, or interfering with the suit property. In such circumstances, I do not see how the plaintiff can have any *prima facie* case against the defendant. That being the case, Notice of Motion date 13th October 2017 is dismissed. Since there was real threat of burial when the application was filed, I do not condemn the applicant to any costs. No order on costs.

Dated, signed and delivered in open court at Nakuru this 22nd day of May 2018.

D. O. OHUNGO

JUDGE

In the presence of:

Mrs. Gathecha for the plaintiff/applicant

No appearance for the defendant/respondent

Court Assistants: Gichaba & Lotkomoi