



REPUBLIC OF KENYA

IN THE ENVIRONMENT AND LAND COURT

AT NAKURU

CASE NO. 173 OF 2017

JAMES TALLAM T/A MALOSOI

TRANSPORTERS SERV.....PLAINTIFF

VERSUS

DAVID GIKARIA.....1ST DEFENDANT

COUNTY GOVERNMENT OF NAKURU....2ND DEFENDANT

RULING

1. This ruling is in respect of plaintiff's Notice of Motion dated 20th April 2017. The application is brought under Order 40 rules 1, 2 and 3 of the Civil Procedure Rules, among others. The following orders are sought in the application:

1. Spent.

2. Spent.

3. That pending the hearing and final determination of this suit an interlocutory injunction be granted in favour of the plaintiff/applicant restraining the defendants by themselves, their agents and/or their servants from interfering, changing (sic), leasing out, moving into, construction thereon (sic), wasting, damaging or in any way interfering with the plot of land measuring approximately 0.11 acres within Nakuru Railway Station.

4. That the O.C.S Nakuru Railway Station to ensure compliance of the Orders.

5. That the cost of this application be provided for.

2. The application is supported by an affidavit sworn by the plaintiff. It is deposed in the affidavit that the plaintiff is the lessee from Kenya Railways Corporation, of land measuring approximately 0.11 acres within Nakuru Railway Station. He operates a parking bay business on the plot and has been paying licence fees and rates to the 2nd defendant. Early in the year 2017, the plaintiff was granted a change of use by Kenya Railways Corporation to build stalls for leasing out. The defendants have now started constructing stalls on the plot and have threatened to destroy or change the plaintiff's stalls which are already leased out. The plaintiff fears that if the defendants are allowed to continue with their activities, his business will be severely affected and he will suffer huge losses.

3. Despite being served with the application, the 1st defendant did not oppose the application. The suit against the 2nd defendant was withdrawn prior to the hearing of the application.

4. I have considered the application and submissions of counsel for the applicant. 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.

5. The 1st defendant herein has not challenged the evidence tendered by the applicant in any way. In the circumstances, I have no reason to

doubt that the applicant is a lessee of 0.11 acres within Nakuru Railway Station as pleaded and that the 1st defendant has started constructing stalls on the said land thus threatening the plaintiff's stalls and business. I therefore find that the plaintiff has established a prima facie case with a probability of success. I do not think that damages would adequately compensate him.

6. In view of the foregoing, I grant an injunction restraining the 1st defendant by himself, his agents and/or servants from constructing upon, wasting, damaging or in any other manner interfering with the parcel of land measuring approximately 0.11 acres leased to the plaintiff within Nakuru Railway Station pending hearing and determination of this suit. I award costs of the application to the plaintiff.

Dated, signed and delivered in open court at Nakuru this 17th day of May 2018.

D. O. OHUNGO

JUDGE

In the presence of:

No appearance for the plaintiff/applicant

No appearance for the defendants

Court Assistants: Gichaba & Lotkomoi