



**REPUBLIC OF KENYA**

**IN THE ENVIRONMENT AND LAND COURT AT NAKURU**

**CASE NO. 225 OF 2017**

JANE MWIHAKI.....1<sup>ST</sup> PLAINTIFF

GEORGE KIHIA MWANGI.....2<sup>ND</sup> PLAINTIFF

JOHN NDUNGU MWANGI.....3<sup>RD</sup> PLAINTIFF

JUDITH MWIHAKI.....4<sup>TH</sup> PLAINTIFF

**VERSUS**

**SAMUEL MWANGI NDUNGU.....DEFENDANT**

**RULING**

1. Through Notice of Motion dated 26<sup>th</sup> May 2017, the plaintiffs seek the following Orders:

**1. Spent.**

**2. Spent.**

**3. That pending the hearing and determination of this suit, the honourable court be pleased to issue a temporary injunction restraining the defendant herein either by himself, his agents and/or servants from evicting and/or in any manner interfering with the applicants (sic) quiet stay in plot No. 4 at Njoro Ndirangu/Kariombangi Estate.**

**4. That the OCS Njoro Police Station to enforce the terms of the above orders.**

**5. That costs of this application be provided for.**

2. The application is supported by an affidavit sworn by the 1<sup>st</sup> plaintiff. It is deposed in the affidavit that the plaintiffs' mother Mary Wanjiru Mwangi (deceased) was married to the defendant as a second wife and that the 1<sup>st</sup> plaintiff is the second born daughter of the defendant. That upon the demise of the deceased, the family agreed that the children of the deceased should reside on plot No. 4 Njoro Ndaragu/Kariobangi. An agreement dated 22<sup>nd</sup> January 2008 was executed to that effect. The 1<sup>st</sup> plaintiff left her matrimonial home to go and take care of her younger sister who needs specialized care. In April 2017 the defendant issued an eviction notice to the plaintiffs. The plaintiffs do not have anywhere else to go.

3. The defendant opposed the application through a replying affidavit filed on 19<sup>th</sup> June 2017. It is deposed in the affidavit that the defendant only cohabited with the deceased but did not marry her and that before the cohabitation, the deceased was married elsewhere and was blessed with the plaintiffs as children of the first marriage. That during the cohabitation, the plaintiffs were living with their father. They only came to the suit land to mourn their mother but refused to go back to their father's place after the burial. The defendant also stated that he is a stranger to the agreement dated 22<sup>nd</sup> January 2008. He admitted that he served the plaintiffs with a notice of eviction as he intended to sell the suit land.

4. Though the plaintiffs sought and obtained leave to file a supplementary affidavit to respond to the defendant's affidavit, none was filed. The application was then heard by way of written submissions. The plaintiffs' submissions were filed on 1<sup>st</sup> December 2017 while the defendant's submissions were filed on 11<sup>th</sup> December 2017. I have carefully considered the application, the affidavits and the submissions.

5. 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.

6. There is no dispute that the suit land belongs to the defendant. The plaintiffs' only reason for seeking to restrain the defendant from obtaining vacant possession is the allegation that they (the plaintiffs) are the defendant's children and that an agreement was signed on 22<sup>nd</sup> January 2008 to the effect that they can stay on the plot. The defendant has denied being the father of the plaintiffs or even executing the agreement. No documentary evidence such as birth certificates have been exhibited by the plaintiffs to support their case.

7. The plaintiffs somehow appear to have climbed down in their written submissions where in a departure from their supporting affidavit, they explain that only the 3<sup>rd</sup> and 4<sup>th</sup> plaintiffs are the children of the defendant. Considering that the plaintiffs were given a chance to file a supplementary affidavit to rebut the defendant's contention but they failed to do so, I have no choice but to conclude that they did not have any better evidence to offer. The burden of proof on this matter rests on them and they have not discharged it. That being the case, I am not persuaded that the plaintiffs have any *prima facie* case.

8. Notice of Motion dated 26<sup>th</sup> May 2017 is dismissed with costs to the defendant.

**Dated, signed and delivered in open court at Nakuru this 17<sup>th</sup> day of May 2018.**

**D. O. OHUNGO**

**JUDGE**

In the presence of:

Mr. Opar for defendant/respondent

No appearance for plaintiffs/applicants

Court Assistant: Gichaba