



REPUBLIC OF KENYA

IN THE ENVIRONMENT AND LAND COURT

AT NAKURU

CASE NO. 11B OF 2017

MAURA KATHLEEN BUTLER.....PLAINTIFF

VERSUS

CHUMO ARAP KOSKEI1ST DEFENDANT

BARSEBE ARAP SANG.....2ND DEFENDANT

CAHPKARIA LOSUTE.....3RD DEFENDANT

WILLIAM KIPRONO CHEPKWONY.....4TH DEFENDANT

MINYATTA SITOK.....5TH DEFENDANT

FRANCIS SUYA MINYATTA.....6TH DEFENDANT

RUTH JEPKEMOI SINGOE.....7TH DEFENDANT

ECHAKARI NAIBEL.....8TH DEFENDANT

KIPLANGAT KANGOGO.....9TH DEFENDANT

MARY CHEPKEMOI.....10TH DEFENDANT

LOUPE TE LOMULE.....11TH DEFENDANT

LOKITOI EKATO IKATO.....12TH DEFENDANT

EZEKIEL EDOME.....13TH DEFENDANT

EKIDOR ELEMEN.....14TH DEFENDANT

ESTHER CHEBORE CHUMO.....15TH DEFENDANT

ESTHER AKIRUI OMONDI.....16TH DEFENDANT

LOKITELA AKOL.....17TH DEFENDANT

AKUI CHEPUKOU IKORI.....18TH DEFENDANT

JOHN LOBEYOK EKIDOR.....19TH DEFENDANT

TOMITIK TONGU LONGORE (PETER).....20TH DEFENDANT

MODO LOKWAWI.....21ST DEFENDANT

NAWIYAKWAN LOMAE.....22ND DEFENDANT

ABOO EBADAL ABOK.....23RD DEFENDANT

RULING

1. This ruling is in respect of plaintiff's Notice of Motion dated 13th December 2016 pursuant to which the plaintiff seeks the following orders:

a. Spent.

b. Spent.

c. Spent.

d. This honourable court be pleased to issue a temporary order of injunction restraining the defendants by themselves, their agents, children or relatives or constructing of any building on the suit property namely LR/487/28/3, LR/487/28/2 and LR/487/28/1 till this suit is heard and decided.

e. The costs of the application be provided for.

2. The application is supported by an affidavit sworn by the plaintiff. It is deposed in the affidavit that the applicant is the registered owner of land parcel known as LR. No. 487/170 and that pursuant to a decree issued in Nakuru HCCC No. 426/1991 the applicant gave 49 acres out of the said plot to the defendants who are her ex-workers. That some of the workers moved to the allocated 49 acres while the defendants herein have refused to move. The plaintiff wishes to have the defendants move to their portions of land in accordance with the decree in Nakuru HCCC No. 426/1991. The plaintiff also wishes to have the defendants restrained from further staying on the land or cultivating it.

3. The defendants opposed the application through a replying affidavit sworn by Ezekiel Edome, the 13th defendant. He deposed that he is a beneficial owner of a portion of the suit property which was allocated to him by the plaintiff's late husband in the year 1979. He further deposed that neither he nor the other defendants were parties to any previous case as was alleged by the plaintiff.

4. The application was argued by way of written submissions. In the submissions filed on behalf of the applicant, it was argued that the defendants are strangers in the suit land and should be restrained from further construction on the property. Accordingly, it was submitted that a prima facie case had been established and the orders sought should be granted.

5. For the defendants, it was submitted that the application seeks the same prayers as those sought in the main suit and that if the prayers are granted the substitution of the suit will have been spent thus leaving nothing for determination. Additionally, it was submitted that the test for granting a mandatory injunction had not been satisfied.

6. I have carefully considered the application, the affidavits and the submissions. 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 be issued 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.

7. Though on the face of the application the applicant seeks a restraining injunction, the applicant has severally referred to the decree in Nakuru HCCC no. 426/1991 and stated that the defendants ought to be restrained from further staying on the suit property. A reading of paragraphs 9 and 10 of the supporting affidavit puts this in perspective. It is therefore not surprising that the defendants in their submissions dealt at length with reasons why a mandatory injunction ought not be granted.

8. I have perused the decree issued in Nakuru HCCC No. 426/1991. From the onset, it is clear that the defendants herein are not listed as parties to the said case. It is therefore not possible for me to conclude that the said decree conferred any benefit on the defendants as is argued by the plaintiff. In any case, it would have been better to enforce the decree in the suit where it was issued and not through another suit as I think the plaintiff is attempting to.

9. Though the plaintiff herein is claiming exclusive rights to the suit property, she admits that the defendants have had some interest in the suit property. According to her, they were allocated 49 acres and therefore they no longer have any claim over the property. The defendants on the other hand argue that they were not party to the case wherein the 49 acres were awarded and that they did not therefore benefit from the award. There is no dispute that the 49 acres were awarded to ex-workers and that the defendants are also the plaintiff's ex-workers. It is for that reason that they claim a beneficial interest in the suit property which interest they allege arose from an allocation by the plaintiff's deceased husband. To get to the core of the matter and to unravel the relationship between the defendants and the suit property and between the defendants and the decree in Nakuru HCCC No. 426/1991, it will be necessary to take viva voce evidence. That must await trial of the

main suit. For now, I am not persuaded that the plaintiff has established a prima facie case with a probability of success. That being the case, Notice of Motion dated 13th December 2016 must fail. It is dismissed with costs to the defendants. Parties are urged to urgently prepare the main suit for hearing and determination.

Dated, signed and delivered in open court at Nakuru this 15th day of May 2018.

D. O. OHUNGO

JUDGE

In the presence of:

Ms. Moenga holding brief for Mr. Maina for the plaintiffs/applicants

Ezekiel Edome (13th defendant) present in person for self and for the other defendants

Court Assistant: Gichaba