



REPUBLIC OF KENYA

IN THE ENVIRONMENT AND LAND COURT AT NAKURU

CASE NO. 43 OF 2017

JAMES KOECH TANGWAR.....PLAINTIFF

VERSUS

PAUL KIPKOECH LANGAT.....DEFENDANT

RULING

1. This ruling is in respect of plaintiff's Notice of Motion dated 9th February 2017. It is an application brought under Order 40 rule 1 of the Civil Procedure Rules, 2010. The plaintiff seeks the following Orders:

1. Spent.

2. Spent.

3. That pending the hearing and final determination of this suit, this honourable court be pleased to grant an interim injunctive order, directing upon the defendant by himself, his servants, agents and/or any other person acting under the defendant's authority; restraining them from trespassing on and/or further trespassing on; occupying, cultivating, plaintiff crops and/or in any other manner whatsoever interfering with the plaintiff's rights of absolute ownership of the plaintiff's parcel by measurement, three (3) acres excised from parcel of land known as Nakuru/Sururu/1599.

4. That costs 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 on 15th September 2004, the plaintiff purchased four (4) acres of land from Charles Konana Saiyalel which land was excised from parcel number Nakuru/Sururu/1599. He later leased to the defendant three (3) acres of that land for a period of 5 years from the year 2006. Upon expiry of the lease in the year 2010, the defendant refused to vacate. The defendant also demolished the plaintiff's semi-permanent house.

3. The defendant opposed the application through a replying affidavit filed on 5th May 2017. It is deposed in the affidavit that on 30th November 2010, the defendant entered into an agreement with the plaintiff pursuant to which the plaintiff sold to the defendant the three (3) acres at a consideration of KShs 270, 000. The defendant added that there was a semi-permanent house on the land which he purchased alongside the plot and that the parties both signed a sale agreement but the defendant misplaced his copy.

4. The application was argued by way of written submissions. The defendant's submissions were filed on 30th October 2017 while the plaintiff's submissions were filed on 23rd November 2017. I have 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**. He must establish a *prima facie* case with a probability of success. Even if he establishes a *prima facie* case, 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. If *prima facie* case is not established, then irreparable injury and balance of convenience need no consideration.

5. From the material placed before the court, there is no dispute that the plaintiff and the defendant had a transaction of some sort in respect of the suit property. While the plaintiff insists that the transaction was one in the nature of a lease, the defendant's case is that the plaintiff out rightly sold the suit property to him. It is not easy to reconcile these two positions purely on affidavit evidence. I think it will be necessary to await oral evidence at the trial of the suit so as to get to the core of the matter. On the basis of the material placed before the court by the applicant, I am unable to discern a *prima facie* case.

6. Further, a reading of the plaint herein shows that the plaintiff seeks judgment against the defendant for a declaration that the plaintiff is

the owner of the suit property and a permanent injunction restraining the defendant from ever trespassing on the suit property. In view of the said prayers in the plaint, granting the orders sought in the application would be tantamount to prematurely determining the dispute between the parties. A just approach in the matter is to have the suit heard and determined on the merits.

7. For the foregoing reasons, Notice of Motion dated 9th February 2017 is dismissed with costs to the defendant.

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 for defendant/respondent.

No appearance for plaintiff/applicant.

Court Assistant: Gichaba