



REPUBLIC OF KENYA

IN THE ENVIRONMENT AND LAND COURT AT NAKURU

CASE No. 126 OF 2012

SIMON TOWETT MARITIM.....PLAINTIFF

VERSUS

JOTHAM MUIRURI KIBARU.....DEFENDANT

CONSOLIDATED WITH

ELC 60/2013

JOTHAM MUIRURI KIBARU.....PLAINTIFF

VERSUS

KIPRONO BEIBEI NYANGUSI.....RESPONDENT

RULING

1. This ruling is in respect of Notice of Motion dated 14th February 2017, an application pursuant to which the following orders are sought:

1. Spent.

2. Spent.

3. That this honourable court be pleased to issue an order of injunction restraining the defendant from erecting structures, constructing on, building on, depositing constructing materials on/or in any manner whatsoever dealing in land parcel number Dundori/Mugwathi Block 2/20 pending hearing and determination of this suit.

4. That costs of this application be provided for and the same be borne by the defendant.

2. The application was filed in ELC 126 of 2012 and is supported by an affidavit sworn by Simon Towett Maritim (Simon), the plaintiff. It is deposed in the affidavit that sometime in the year 1997 Simon and the defendant (Jotham) entered into an agreement pursuant to which they exchanged parcels of land such that Simon gave Jotham Dundori/Mugwathi Block 2/20 in exchange for Kericho/Chesinende/55/97. Jotham took possession of the Dundori plot. However, Simon's occupation of the Kericho plot was later invalidated by the court and the plot invested to Jotham. Jotham however retained the Dundori plot and has since claimed entitlement to it through adverse possession. It is further deposed that Jotham has now mobilized construction material on the Dundori plot and is in the process of putting up permanent structures on it. Some photographs were annexed in support of this contention.

3. Jotham opposed the application through his replying affidavit filed on 20th March 2017. He deposed that he has lived on the Dundori plot for about 25 years and that he has been buying and storing building stones on the plot over the years. He also stated that in February 2017, he deposited two lorry loads of building stones on the plot for safety. He added that he does not intend to construct a permanent house in the suit land and that it is therefore not necessary for an injunction to be granted.

4. The application was argued by way of written submissions. The respondent's submissions were filed on 18th May 2017 while the applicant's submissions were filed much later on 31st January 2018. 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**. 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.

6. The respondent herein admits that he has recently deposited construction materials on the suit property. According to him, he last did so in February 2017, the same month that the present application was filed. It seems that his said action is what triggered the application. Though the respondent has tried to reassure the applicant that he does not intend to construct any permanent house on the suit property prior to the hearing and determination of this suit, his reassurance has not gone far enough. He has not stated categorically that he will not construct anything else.

7. Part of the evidence put before the court by the applicant include photographs which depict construction of a gate and what appears to be a perimeter wall. Though these do not run counter to the respondent's assurance that he will not construct a permanent house, they raise valid fears on the part of the applicant. These fears call for preservation the suit property. I am therefore persuaded that the applicant has established a *prima facie* case with a probability of success. I do not think that damages can adequately compensate the applicant.

8. I will therefore grant an injunction but on terms. I do so because I believe the litigants in this matter need to get to the root cause of the dispute. To achieve that end, the main suit needs to be heard and determined without any further delay. So as to encourage them to do so, I will limit the life span of the injunction.

9. In the end, I grant an injunction restraining the defendant (Jotham Muiruri Kinaru) from erecting structures, constructing on, depositing construction materials upon or in any other manner carrying out any developments on land parcel number Dundori/Mugwathi Block 2/20 for a period of 18 (eighteen) months from the date of delivery of this ruling. Costs of the application are awarded to the applicant.

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

D. O. OHUNGO

JUDGE

In the presence of:

Ms. Ogange holding brief for Mr. Akango for the plaintiff/applicant

Mrs. Morande holding brief for Ms. Mathenge for the defendant/respondent

Court Assistant: Gichaba