



**REPUBLIC OF KENYA**

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

**CASE No. 220 OF 2017**

**VICTORIA WANGUI OGANGA OGADA.....PLAINTIFF**

**VERSUS**

**MWANGI KIHARA.....1<sup>ST</sup> DEFENDANT**

**THE LAND REGISTRAR NAKURU.....2<sup>ND</sup> DEFENDANT**

**THE HONOURABLE ATTORNEY GENERAL...3<sup>RD</sup> DEFENDANT**

**RULING**

1. This ruling is in respect of plaintiff's Notice of Motion dated 22<sup>nd</sup> May 2017, an application pursuant to which the following orders are sought:

**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 1<sup>st</sup> defendant herein whether by himself, his agents and/or servants from in any manner whatsoever dealing with or disposing or in any other manner alienating LR No. Nakuru Municipality Block 2/114.**

**4. That an order of this court do issue against the 2<sup>nd</sup> defendant inhibiting the registration of any dealings whatsoever in respect of LR No. Nakuru Municipality Block 2/114.**

**5. That costs of this application be in the cause.**

2. The application is supported by an affidavit sworn by the plaintiff. The plaintiff deposed that as registered owner of the parcel of land known as Nakuru Municipality Block 2/114 (the suit property), she executed a Sale Agreement with the 1<sup>st</sup> defendant on 19<sup>th</sup> January 2017 pursuant to which the suit property was sold to the 1<sup>st</sup> defendant at an agreed consideration of Kshs.8, 500, 000/=. The 1<sup>st</sup> defendant paid part of the purchase price leaving a sum of Kshs.1, 900, 000/= which was to be paid upon consent and clearance for transfer being obtained. The 1<sup>st</sup> defendant did not pay the amount despite demand to do so. Instead and in spite of the plaintiff having revoked the agreement, the 1<sup>st</sup> defendant transferred the property to himself on the basis of a previous agreement between him and the plaintiff. Though the plaintiff managed to get the 2<sup>nd</sup> defendant to register a restriction against the title, the 2<sup>nd</sup> defendant later lifted the restriction without giving any reasons.

3. The 1<sup>st</sup> defendant opposed the application through a replying affidavit sworn on 30<sup>th</sup> May 2017. He admitted that the sale agreement was indeed executed. He denied that the plaintiff had revoked the agreement. He contended that he had paid the plaintiff a total of Kshs.7, 895, 000 leaving a balance of Kshs.605, 000/= which he is ready and willing to pay. He added that the plaintiff surrendered all the transfer documents to him in good faith. He thus urged the court to dismiss the application.

4. The application was heard by way of written submissions. The applicant's submissions were filed on 13<sup>th</sup> December 2017 while the 1<sup>st</sup> defendant's submissions were filed on 26<sup>th</sup> February 2018. Counsel for the 2<sup>nd</sup> and 3<sup>rd</sup> defendants informed the court that the 2<sup>nd</sup> and 3<sup>rd</sup> defendants did not intend to oppose the application. I have considered the application, the affidavits filed and the written submissions.

5. For an application for an interlocutory injunction to succeed, the applicant must 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 parties entered into the sale agreement dated 19<sup>th</sup> January 2017 and that purchase price has so far not been paid in full. The 1<sup>st</sup> defendant concedes that he owes Kshs.605, 000/= out of the purchase price. Yet the 1<sup>st</sup> defendant has since become registered proprietor, this despite the fact that the plaintiff had lodged a restriction which was removed in circumstances that the 2<sup>nd</sup> defendant has yet to explain.

7. In view of the foregoing, I am persuaded that the applicant has made out a prima facie case. Nevertheless it is not lost on the court that the 1<sup>st</sup> defendant has paid a large portion of the purchase price. In the circumstances, it is important to carefully balance the need to preserve the suit property against the rights of the 1<sup>st</sup> defendant who has paid a lion's share of the purchase price.

8. Pursuant to paragraph 32 of **Gazette Notice No. 5178** titled "**Practice Directions on Proceedings in the Environment and Land Courts, and on Proceedings Relating to the Environment and the Use and Occupation of, and Title to Land and Proceedings in Other Courts**", this court has jurisdiction to order maintenance of status quo so as to preserve the suit property pending hearing and determination of the main suit. The said paragraph provides:

*During the inter-partes hearing of any interlocutory application, where appropriate, parties are encouraged to agree to maintain status quo. If they cannot agree, after considering the nature of the case or hearing both sides the Judge shall exercise discretion to order for status quo pending the hearing and determination of the suit bearing in mind the overriding interests of justice.*

9. So as to preserve the suit property and to maintain status quo pending hearing and determination of the suit, I order that an inhibition be registered in respect of Nakuru Municipality Block 2/114 pending hearing and determination of this suit. Costs in the cause.

**Dated, signed and delivered in open court at Nakuru this 22<sup>nd</sup> day of June 2018.**

**D. O. OHUNGO**

**JUDGE**

In the presence of:

Ms Wangari holding brief for Mr Otieno for the plaintiff/applicant

Ms Ogange holding brief for Ms Njeri Njagua for the defendants /respondents

Court Assistants: Gichaba & Lotkomoi