



**REPUBLIC OF KENYA**

**IN THE ENVIRONMENT AND LAND COURT**

**AT NAKURU**

**ENVIRONMENT AND LAND CASE No. 301 OF 2015**

**SAMUEL MUNGAI KAMAU.....PLAINTIFF**

**VERSUS**

**ESTHER MUTHONI GITAHU.....DEFENDANT**

**RULING**

1. This ruling is in respect of Notice of Motion dated 2<sup>nd</sup> November 2017. The following orders are sought in the application:

***a) Spent.***

***b) That the defendant and/or her agents and/or servants and/or any 3<sup>rd</sup> parties be restrained by way of temporary injunction from building, constructing, alienating, selling, disposing and/or in any other matter dealing with either of the suit properties known as Plot Nos. 495 and 496 situated within Industrial Area in Naivasha town pending the hearing and determination of this suit.***

***c) That the defendant be cited for contempt of court orders issued on 10<sup>th</sup> March 2016.***

***d) That the costs of this application be borne by the defendant.***

2. The application is supported by an affidavit sworn by the plaintiff. It is deposed therein that the defendant has defied this court's orders of 10<sup>th</sup> March 2016 by continuing construction even after the order was made. The said order was to the effect that status quo be maintained until conclusion of the suit.

3. When the application came up for inter parte hearing on 14<sup>th</sup> February 2018, the defendant sought and was granted time to file a replying affidavit. Directions were also given regarding filing and exchange of written submissions. The defendant has not filed any replying affidavit. Counsel for the applicant has urged the court to grant the orders sought since the application is not opposed.

4. I have considered the application. It is not opposed and ordinarily the orders would issue. I note however that the defendant is said to have defied orders made on 10<sup>th</sup> March 2016. A perusal of the file shows that the orders were made by consent. Status quo was maintained until conclusion of the suit. The parties did not however define what the status was as at the date of the order of 10<sup>th</sup> March 2016. It would thus be difficult for me to ascertain whether there has been any breach of the order. I therefore dismiss prayer (c) of the application.

5. Regarding prayer (b) of the application, it is one seeking an interlocutory injunction. In such an application, the applicant must satisfy the test laid down 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 a *prima facie* case is established, an injunction will not to issue if damages can adequately compensate the applicant. Finally, if the court is in doubt as to the answers of the above two tests then the court will determine the matter on a balance of convenience. As was 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 and that if *prima facie* case is not established, then irreparable injury and balance of convenience need no consideration.

6. The defendant has not filed any replying affidavit. The plaintiff's case is unchallenged and I am therefore satisfied that a *prima facie* case has been established. In the circumstances, and so as to avoid a recurrence of complaints that the defendant is going ahead with construction, I think it is necessary to preserve the property which is the subject matter of the suit.

7. I therefore grant an injunction restraining the defendant, her agents or servants from building, constructing, alienating, selling, disposing or

in any other manner dealing with either of the suit properties known as Plot Nos. 495 and 496 situated within Industrial Area in Naivasha town pending the hearing and determination of this suit.

8. Costs of the application are awarded to the plaintiff.

**Dated, signed and delivered in open court at Nakuru this 21<sup>st</sup> day of June 2018.**

**D. O. OHUNGO**

**JUDGE**

In the presence of:

Ms Ngugi holding brief for Mr Nzavi for the plaintiff/applicant

Mr Ngotho holding brief for Mr Kago for the defendant/respondent

Court Assistants: Gichaba & Lotkomoi