



**REPUBLIC OF KENYA**

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

**CASE No. 472 OF 2016**

**DIANA LEE LASOI (SUED AS ADMINISTRATOR OF THE ESTATE OF**

**SOLOMON KIPKORIR ARAP LASOI).....1<sup>ST</sup> PLAINTIFF**

**LEAH CHERONO SHABANGI.....2<sup>ND</sup> PLAINTIFF**

**VERSUS**

**JOHN KIPTOO CHERUIYOT .....1<sup>ST</sup> DEFENDANT**

**PETER K. CHERUIYOT .....2<sup>ND</sup> DEFENDANT**

**COLLINS K. CHEPKWONY .....3<sup>RD</sup> DEFENDANT**

**RULING**

1. Through Notice of Motion dated 3<sup>rd</sup> November 2016, the plaintiffs herein seek the following orders:

**1. Spent.**

**2. Spent.**

**3. There be a temporary injunction barring the defendants from advertising or selling the property known as land title number Nakuru/ Olenguruone/Cheptuech/269 pending the hearing of this suit.**

**4. There be a permanent injunction barring the defendants from advertising or selling the property known as land title number Nakuru/Olenguruone/Cheptuech/269.**

**5. The 2<sup>nd</sup> and 3<sup>rd</sup> defendants be ordered to release the original title that they are holding for the property known as land title number Nakuru/Olenguruone/ Cheptuech/269 to the plaintiffs.**

**6. The 1<sup>st</sup> defendant be ordered to render an account of all his dealings under the powers of attorney granted to him by the plaintiff and to release Certificate of Titles to L.R. No. Kajiado/Kitengela/ 4074, Kajiado/ Olooloitikoshi/ Kitengela/2555 and 2558 and Ngong/Ngong/14344 that he is holding in trust for the plaintiffs.**

**7. Costs incidental to and arising from this application be borne by the defendants.**

2. The application is supported by a supporting affidavit sworn by the 2<sup>nd</sup> plaintiff on 3<sup>rd</sup> November 2016 and a supplementary affidavit also sworn by the 2<sup>nd</sup> plaintiff on 26<sup>th</sup> May 2017. The 1<sup>st</sup> plaintiff is the administrator of the estate of Solomon Kipkorir Arap Lasoi (deceased) while the 2<sup>nd</sup> plaintiff holds a general power of attorney donated by the 1<sup>st</sup> plaintiff. Through a Limited Power of Attorney registered on 5<sup>th</sup> June 2012, the 1<sup>st</sup> plaintiff authorized the 1<sup>st</sup> defendant to handle the affairs of the deceased's estate while she was out of the county. Sometime in the year 2012, the 1<sup>st</sup> defendant contracted the 2<sup>nd</sup> and 3<sup>rd</sup> defendants to act as estate agents to source for buyers for land situated in Ngata area of North Njoro Town. The defendants agreed among themselves that the 1<sup>st</sup> defendant would pay the 2<sup>nd</sup> and 3<sup>rd</sup> defendants 10% of the purchase price as commission. When the 1<sup>st</sup> defendant failed to honour the agreement, the defendants entered into a new agreement dated 8<sup>th</sup> September 2015 pursuant to which the 1<sup>st</sup> defendant deposited the original title deed for parcel of land known as Nakuru/Olenguruone/Cheptuech/269 (the suit property), one of the properties forming part of the deceased's estate. The plaintiffs contend that the power of attorney did not empower the 1<sup>st</sup> defendant to deal with the suit property as he did. The 2<sup>nd</sup> plaintiff subsequently learnt

that the 2<sup>nd</sup> and 3<sup>rd</sup> defendants have been advertising the suit property for sale through their advocate. The 1<sup>st</sup> defendant is also said to be holding original title documents for the properties listed at prayer 6 of the Notice of Motion and has refused to render an account regarding his dealings with the said properties or to release the said title documents. The plaintiffs therefore seek the orders stated in the application.

3. The 1<sup>st</sup> defendant has neither entered appearance nor filed any response to the application.

4. The 2<sup>nd</sup> and 3<sup>rd</sup> defendants opposed the application through a replying affidavit sworn by the 2<sup>nd</sup> defendant. It is deposed in the affidavit that the power of attorney donated by the 1<sup>st</sup> plaintiff to the 2<sup>nd</sup> plaintiff does not give the 2<sup>nd</sup> plaintiff any power to swear affidavits or to file the suit on behalf or to file the suit on behalf of the 1<sup>st</sup> plaintiff. It is further stated that the 1<sup>st</sup> plaintiff donated to the 1<sup>st</sup> defendant a specific power of attorney on 11<sup>th</sup> December 2004 which authorized him to dispose of the suit property.

5. The application was argued by way of written submissions. The applicants filed submissions on 11<sup>th</sup> December 2017 while the 2<sup>nd</sup> and 3<sup>rd</sup> defendants' submissions were filed on 19<sup>th</sup> February 2018. I have considered the application, the affidavits filed, the submissions as well as the authorities cited.

6. A perusal of the prayers in the application against those in the plaint shows that prayer 6 of the Notice of Motion is similar to prayer (c) in the plaint and prayer 5 of the Notice of Motion is similar to prayers (b) and (d) of the plaint. Granting those prayers at this stage would amount to prematurely determining the suit as regards those aspects of the case. Those two prayers are in the nature of a mandatory injunction. The Court of Appeal reiterated the principles applicable as follows in the case of **Lucy Wangui Gachara v Minudi Okemba Lore [2015] eKLR**:

*It has been stated time and again that although the court has jurisdiction to grant a mandatory injunction at the interlocutory stage, such injunction should not be granted, absent special circumstances or only in the clearest of cases. The circumspection with which the court approaches the matter is informed by the fact that the grant of a mandatory injunction amounts to determination of the issues in dispute in a summary manner. In addition, the parties are put in an awkward situation should the court, after hearing the suit, ultimately decide that there was no basis for the mandatory injunction at the interlocutory stage....*

*Among the special circumstances that may justify the grant of a mandatory injunction at interlocutory stage is where the injunction involves a simple act that could be easily reversed or remedied should the court find otherwise after trial; the defendant has accelerated the development that the plaintiff seeks to restrain, with the intention of defeating the plaintiff's claim or where the defendant is otherwise bent on stealing a match on the plaintiff.*

*On the other hand, the court will not grant a mandatory injunction if the damage feared by the plaintiff is trivial, or where the detriment that the mandatory injunction would inflict is disproportionate to the benefit it would confer. We would also add that, save in the clearest of cases, the right of the parties to a fair and proper hearing of their dispute, entailing calling and cross-examination of witnesses must not be sacrificed or substituted by a summary hearing.*

7. I see no special circumstances that would warrant depriving the parties the opportunity to have the dispute heard and determined on the basis of oral evidence before judgment is rendered. For the foregoing reasons, I am not persuaded that prayers 5 and 6 of the Notice of Motion are merited.

8. Prayer 4 of the Notice of Motion seeks a permanent injunction. A prayer for a permanent injunction has no place in an application seeking interlocutory relief. If I were to allow it, I would in effect grant final judgment in the nature of a permanent injunction. That can only be done upon hearing the case. The upshot is that prayers 4, 5 and 6 of the Notice of Motion are dismissed.

9. That leaves only prayer 3 pursuant to which an injunction is sought to restrain the defendants from advertising or selling the suit property pending hearing of the suit. In other words, the plaintiffs seek an interlocutory injunction. The principles governing such an application are well settled. 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 be issued 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.

10. There is no denial that the 2<sup>nd</sup> and 3<sup>rd</sup> defendants are intent on advertising and selling the suit property to recover amounts allegedly owed them by the 1<sup>st</sup> defendant pursuant to an agency agreement between the defendants. In the said agreement dated 8<sup>th</sup> September 2015, the 2<sup>nd</sup> and 3<sup>rd</sup> defendants are stated to have been the 1<sup>st</sup> defendant's agents for the sale of another parcel of land. It is further stated in the agreement that 1<sup>st</sup> defendant owes the 2<sup>nd</sup> and 3<sup>rd</sup> defendants a sum of Kshs.5, 825, 000/= being balance of the 2<sup>nd</sup> and 3<sup>rd</sup> defendants' agreed commission.

11. The plaintiffs have argued that the 2<sup>nd</sup> and 3<sup>rd</sup> defendants are not entitled to sell the suit property to recover their commissions since they are not registered to practice as estate agents pursuant to the provisions of Section 7 of Estate Agents Act Chapter 533, Laws of Kenya. As such and in view of the provisions of Section 18 of the Act, allowing them to sell the suit property would amount to encouraging an illegality. Section 18 of the Act provides:

**18. Unregistered persons not to practice as estate agents**

**(1) After the expiration of six months from the commencement of this Act or such further period as the Minister may, by notice in the Gazette, allow either generally or in respect of any particular person or class of persons—**

**(a) no individual shall practise as an estate agent unless he is a registered estate agent;**

**(b) no partnership shall practise as estate agents unless all the partners whose activities include the doing of acts by way of such practice are registered estate agents;**

**(c) no body corporate shall practise as an estate agent unless all the directors thereof whose duties include the doing of acts by way of such practice are registered estate agents.**

**(2) Any person who contravenes subsection (1) shall be guilty of an offence and liable to a fine not exceeding twenty thousand shillings or to imprisonment for a term not exceeding two years or to both.**

12. The plaintiffs relied on a letter from Estate Agents Registration Board dated 11<sup>th</sup> May 2017 wherein it is stated that the 2<sup>nd</sup> and 3<sup>rd</sup> defendants are not registered to practice as estate agents. The 2<sup>nd</sup> and 3<sup>rd</sup> defendants have not offered any evidence to challenge the contents of the said letter. As such, the position stated in the letter must be accepted until the contrary is shown. Pursuant to the provisions of Section 18 of the Act, it would be illegal and a criminal offence for the 2<sup>nd</sup> and 3<sup>rd</sup> defendants to purport to practice as estate agents.

13. While dealing with a situation similar to that in which the 2<sup>nd</sup> and 3<sup>rd</sup> defendants find themselves, the Court of Appeal stated as follows in **Mapis Investment (K) Limited v Kenya Railways Corporation [2006] eKLR**:

*After careful consideration we have decided that it is clear from the evidence before the superior court and the provisions of section 18 of Cap 533 that, if the contract alleged by Mapis and Mr. Shompa to exist, did in fact exist, the conduct of Mr. Shompa and the appellant company was in breach of express provisions of the statute and illegal....*

*In the letter dated 20<sup>th</sup> November 2002 in which it was stated that the appellant and Mr. Shompa were not registered, was produced in evidence by Mr. Shompa, a director of the appellant without any denial of the non registration. This was in our view tantamount to an admission of the facts giving rise to the illegality. That being the case it was then a matter of law as to whether the non registration resulted in the illegality of the contract; it is clear that a contract to perform estate agency services can only be legal if entered into with a registered Estate Agent.*

14. There is a possibility that the agency agreement between the defendants may be found at the trial of the suit to be unenforceable due to illegality. I am thus satisfied that the plaintiffs have established a prima facie case with a probability of success. They would certainly suffer irreparable damage if the suit property were to be sold before the case is heard and determined.

15. I therefore grant an injunction restraining the defendants from advertising or selling the property known as Nakuru/Olenguruone/Cheptuech/269 pending hearing and determination of this suit. Costs of the application are awarded to the plaintiffs.

**Dated, signed and delivered in open court at Nakuru this 19<sup>th</sup> day of June 2018.**

**D. O. OHUNGO**

**JUDGE**

In the presence of:

Mr Chelule for the plaintiffs/applicants

No appearance for the 1<sup>st</sup> defendant/respondent

Mr Karanja for the 2<sup>nd</sup> and 3<sup>rd</sup> defendants/respondents

Court Assistants: Gichaba & Lotkomo