



REPUBLIC OF KENYA

IN THE ENVIRONMENT AND LAND COURT OF KENYA AT EMBU

E.L.C. CASE NO. 121 OF 2017

ELIAS NDWIGA KARWINGO.....PLAINTIFF

VERSUS

KAMAU HOSEA NGANGA.....1ST DEFENDANT

IRENE WANGARI CHEGE.....2ND DEFENDANT

RULING

1. By a plaint dated 12th July 2017 and filed on 13th July 2017 the Plaintiff sought the following reliefs against the 1st and 2nd Defendants;
 - a. *A permanent injunction restraining the Defendants, their kin, agents, servants or any one claiming under them from trespassing, ingressing, cultivating, selling, building, disposing off or in any other manner interfering with Plaintiff's quite possession of one (1) acre out of land reference number Nthawa/Riandu/5552.*
 - b. *An order of specific performance directed to the Defendants to transfer one (1) acre out of land reference number Nthawa/Riandu/5552 he has been in possession to date.*
 - c. *Costs of this suit and any other relief that this honourable court may deem just and fair to order.*
2. The Plaintiff pleaded that vide a sale agreement dated 8th December 2015 he bought one (1) acre of land from the 1st Defendant which was to be excised from *Title No. Nthawa/Riandu/5552* (hereinafter described as the suit property). He further pleaded that he took possession thereof but thereafter the 1st Defendant refused or neglected to transfer the said portion to him.
3. It was further pleaded that in breach of the said agreement for sale, the 1st Defendant transferred the entire suit property to the 2nd Defendant who is the current registered proprietor thereof.
4. Contemporaneously with the filing of the suit, the Plaintiff filed a notice of motion dated 12th July 2017 brought under **sections 63 (e), 1A and 3A of the Civil Procedure Act, Order 40 Rules 2, 3 and 4 of the Civil Procedure Rules, section 13 of the Environment and Land Court Act 2011** and all enabling provisions of the law seeking the following orders;
 - a. *That this application be certified urgent and service be dispensed with in the 1st instance.*
 - b. *That pending the hearing and determination of this application, a temporary injunction do issue restraining the Defendants, their agents and or servants from trespassing, accessing or in any other way whatsoever interfering with the Plaintiff's user over one (1) acre out of land reference No. Nthawa/Riandu/5552.*
 - c. *That pending the hearing and determination of this suit, this honourable court be pleased to issue an injunction restraining the Defendants, their agents and or servants from trespassing, accessing or in any other way whatsoever interfering with the Plaintiff's user over one (1) acre out of land reference No. Nthawa/Riandu/5552.*
 - d. *That the Defendants be condemned to pay the costs of this application and of the suit generally.*
5. The said application was based upon the grounds set out on the face of the said motion and supported by a supporting affidavit sworn by the Plaintiff on 12th July 2017. The said affidavit exhibited a copy of the sale agreement between the Plaintiff and the 1st Defendant and a copy of a certificate of official search for the suit property.

6. The Plaintiff reiterated the averments of the plaint in the said application and asserted that he had been threatened with eviction by some unknown men who were also claiming to have purchased the suit property from the 1st Defendant. He, therefore, prayed for the interim orders specified in paragraph 4 hereof.

7. The 1st Defendant filed a replying affidavit sworn on 16th August 2017 in opposition to the said application. The 1st Defendant admitted having been the owner of the suit property at some point but contended that it was fraudulently transferred to the 2nd Defendant without his consent. According to his affidavit, the 2nd Defendant was supposed to acquire only 4 acres out of the suit property while he was to retain 16 acres. However, the surveyor who was entrusted with the assignment of sub-division and transfer swapped the acreage.

8. The 1st Defendant further stated that he had reported the alleged fraud to the Criminal Investigation Department (CID) vide OB No. 23 of 16th August 2016. He, therefore, contended that he was unable to legally transfer any part of the suit property to the Plaintiff since it was already registered in the name of the 2nd Defendant. He, therefore, asked the court to dismiss the Plaintiff's said application.

9. The 2nd Defendant filed a replying affidavit sworn on 15th December 2017. She conceded being the current registered proprietor of the suit property. She indicated her willingness to transfer one acre out of the suit property to the Plaintiff but could not do so due to a caution lodged by the 1st Defendant.

10. The main question for consideration is whether or not the Plaintiff has satisfied the requirements for the grant of an order of interlocutory injunction as set out in the case of **Giella Vs Cassman Brown & Co Ltd [1973] EA 358**. The first requirement is for the applicant to demonstrate a *prima facie* case with a probability of success at the trial.

The second is a demonstration that the applicant might otherwise suffer irreparable damage which cannot be adequately compensated by an award of damages. The third principle states that if the court is in doubt, it shall decide the application on a balance of convenience.

11. The court has considered the Plaintiff's application together with the supporting affidavit, the replying affidavits as well as the Plaintiff's written submissions. The Defendants' written submissions were not on record at the time of preparation of this ruling. The court has noted that the sale agreement dated 8th December 2015 was made between the Plaintiff and the 1st Defendant only. The 2nd Defendant was not a party thereto.

12. The copy of the certificate of search for the suit property indicates that the 2nd Defendant acquired the suit property on 26th August 2015 whereas a title deed was issued to her on 21st October 2015. It is thus clear that by the time the Plaintiff and the 1st Defendant made the sale agreement on 8th December 2015, the 2nd Defendant was already the registered proprietor of the suit property. So, that means the Plaintiff did not conduct a search of the land register to ascertain the ownership of the suit property before making the sale agreement. There is no indication on record that the 1st Defendant transferred the suit property to the 2nd Defendant after the execution of the sale agreement as contended by the Plaintiff. All the material evidence on record is to the contrary.

13. In the circumstances, the court is not satisfied that the Plaintiff has demonstrated a *prima facie* case with a probability of success against the Defendants or any of them. The 1st Defendant is no longer the registered owner of the suit property whereas the 2nd Defendant, who is the registered proprietor, was not privy to the sale agreement dated 8th December 2015.

14. The court is further of the opinion that since the Plaintiff has failed to satisfy the requirements of the first principle for the grant of an interlocutory injunction, it is not necessary to consider the other two principles set out in the case of **Giella Vs Cassman Brown & Co Ltd** (supra).

15. The upshot of the foregoing is that the court finds no merit in the Plaintiff's notice of motion dated 12th July 2018 and the same is hereby dismissed with costs to the Defendants.

16. It is so ordered.

RULING DATED, SIGNED and DELIVERED in open court at EMBU this 14th day of JUNE, 2018.

In the presence of the Plaintiff and in the absence of the Defendants.

Court clerk Mr Muinde.

Y.M. ANGIMA

JUDGE

14.06.18