



REPUBLIC OF KENYA

IN THE ENVIRONMENT AND LAND COURT AT NAKURU

ELC No. 181 OF 2018

ANTHONY MICHAEL SUGDEN.....PLAINTIFF

VERSUS

BENSON KANJA MBUGUA.....1ST DEFENDANT

JOSEPH MUTURA MBUGUA.....2ND DEFENDANT

RULING

1. This ruling is in respect of plaintiff's Notice of Motion dated 29th May 2018 pursuant to which the following orders are sought:

1. Spent.

2. Spent.

3. That pending hearing and determination of this application and the suit herein, a temporary injunction be issued against the defendants restraining them from constructing or developing, disposing, or alienating in any manner whatsoever whether by grant, subdivision, transfer, sale, charge, lease the property known as parcel No. Gilgil/Karuga Block 2/680 either by themselves, their agents, servants or any person acting at their behest and to further restrain the defendants'/respondents' from dealing in any way with the aforesaid suit parcel of land and from damaging, wasting, destroying or from any interference with it.

4. That a permanent injunction be issued against the defendants/respondents, their servants and/or agents restraining them from interfering, entering and/or dealing in any way whatsoever with the plaintiff's land parcel No. Gilgil/Karuga Block 2/680.

5. That the court do declare that the defendants/respondents are occupying the plaintiff's/applicant's land illegally and are therefore trespassers.

6. That an eviction order be issued against the defendants, their servants, employees and/or agents from the plaintiff's piece of land being land parcel No. Gilgil/Karuga Block 2/680.

7. That the OCS Gilgil Police Station to ensure compliance with the order.

8. That the costs of this application be provided for.

2. The application is supported by the affidavit sworn by the plaintiff. The plaintiff states that he is the registered proprietor of the parcel of land known as Gilgil/Karuga Block 2/680, the suit property. He annexed a copy of the title deed. He further states that the defendants encroached on the suit property sometime in May and June 2016, cut trees and erected houses. He annexed photographs in support of this contention. The defendants have failed to vacate despite being given time to do so.

3. Despite being served the defendants neither responded to the application nor attended court during its inter parte hearing. The application was thus unopposed.

4. I have considered the application, the supporting affidavit and submissions made by applicant's counsel. In an application for an interlocutory injunction, the applicant must 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 a *prima facie* case is established, 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 and that if *prima facie* case is not established, then irreparable injury and balance of convenience need no consideration.

5. From the material placed before the court, I am satisfied that the applicant has demonstrated that he is the registered proprietor of the suit property and that the defendants have encroached on it, cut trees thereon and constructed temporary houses. I am therefore satisfied that the applicant has a *prima facie* case with a probability of success. I do not think that damages would be an adequate remedy to him.

6. Pursuant to prayer 5 of the application the applicant seeks a declaration that the defendants are occupying the suit property illegally and that they are trespassers. At prayer 6 the applicant seeks an eviction order. Both of these are final orders which must await hearing and determination of the suit. They cannot be granted at an interlocutory stage.

7. In view of the foregoing, I make the following orders:

a) I grant a temporary injunction restraining the defendants, their agents, servants and/or any person acting at their behest from constructing, developing, disposing, alienating, damaging, wasting or in any manner whatsoever dealing with the property known as parcel No. Gilgil/Karunga Block 2/680 pending hearing and determination of this suit.

b) Costs of the application are awarded to the plaintiff.

8. It is so ordered.

Dated, signed and delivered in open court at Nakuru this 31st day of July 2018.

D. O. OHUNGO

JUDGE

In the presence of:

No appearance for the plaintiff/applicant

Mr Benson Kanja Mbugua the 1st defendant/respondent present in person

Mr Joseph Mutura Mbugua the 2nd defendant/respondent present in person

Court Assistants: Gichaba & Lotkomo