REPUBLIC OF KENYA

IN THE ENVIRONMENT AND LAND COURT AT NAKURU

ELC NO. 189 OF 2018

SAMUEL KIPKEMBOI CHESIREl.....PLAINTIFF

VERSUS

JOHN KIBET NGENO.....DEFENDANT

RULING

1. This is a ruling in respect of plaintiff's Notice of Motion dated 7th June 2018, an application pursuant to which the following orders are sought:

> **1. Spent.**
>
> **2. Spent.**
>
> **3. That pending inter partes hearing of this application a temporary injunction order be issued against the respondent, their servants, agents and/or any third parties acting under their direction from evicting, entering, sub-dividing advertising for sale, trespassing or dealing in any way interfering with the applicant's quiet possession over LR. No. Katigoi (Tall Trees) Plot No. 54 pending the hearing and determination of the main suit.**
>
> **4. That the Registrar of Lands be compelled to issue a title for all that parcel of land known as LR. No. Katigoi (Tall Trees) Plot No. 54 to the applicant.**
>
> **5. That the cost of this application be borne by the respondent.**

The application is supported by an affidavit sworn by the plaintiff. He states that he bought the parcel of land known as Katigoi (Tall Trees) Plot No. 54, the suit property, in 1996 from an entity known as "A.D.C Tall Trees" which he refers to as a company, at a consideration of Kshs.32, 500/=. He paid a deposit of Ksh.15, 000/= to the settlement officer and was advised to go to the office the next day to collect a receipt in respect of the said sum. Owing to ignorance, he neither collected the receipt nor a letter of allotment from the company. Subsequent attempts to obtain correspondence or receipts from the company in respect of the plot have been futile. He has however been in occupation of the suit property since 1996 and has developed it including by putting up a home on it.

3. The plaintiff further states that the defendant trespassed onto the property in April 2018 and claimed that he is the owner. The defendant has however not produced any document in support of his claim. In support of his claim, the plaintiff annexed a copy of a letter said to be from his area sub-chief as well as affidavits by persons who he said are his neighbours.

4. Though served with the application, the defendant neither filed a response nor attended court during its hearing. Consequently, counsel for the plaintiff urged the court to allow the application since it is unopposed.

5. I have considered the application, the supporting affidavit and submissions by counsel. From the onset, I note that prayer 4 of the application seeks an order compelling the registrar of lands to issue a title document in respect of the suit property to the plaintiff. This is the same prayer that is sought at prayer 2 of the plaint. The land registrar is not a party to this case. For that reason, orders cannot be issued against him without giving him an opportunity to be heard. In any case, the orders sought at prayer 4 of the Notice of Motion constitute final orders which would have to await hearing and determination of the main suit. Prayer 4 of the application is therefore dismissed.

6. Pursuant to prayer 3 of the Notice of Motion, the plaintiff seeks 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.

7. In the case of **Nguruman Limited v Jan Bonde Nielsen & 2 Others** (supra), the court defined prima facie case as follows:

> **Recently, this court in Mrao Ltd. V. First American Bank of Kenya Ltd & 2 others [2003] KLR 125 fashioned a definition for "prima facie case" in civil cases in the following words:**
>
> **"In civil cases, a prima facie case is a case in which on the material presented to the court, a tribunal properly directing itself will conclude that there exists a right which has apparently been infringed by the opposite party to call for an explanation or rebuttal from the latter. A prima facie case is more than an arguable case. It is not sufficient to raise issues but the evidence must show an infringement of a right, and the probability of success of the applicant's case upon trial. That is clearly a standard, which is higher than an arguable case."**
>
> **We adopt that definition save to add the following conditions by way of explaining it. The party on whom the burden of proving a prima facie case lies must show a clear and unmistakable right to be protected which is directly threatened by an act sought to be restrained, the invasion of the right has to be material and substantive and there must be an urgent necessity to prevent the irreparable damage that may result from the invasion. We reiterate that in considering whether or not a prima facie case has been established, the court does not hold a mini trial and must not examine the merits of the case closely. All that the court is to see is that on the face of it the person applying for an injunction has a right which has been or is threatened with violation. Positions of the parties are not to be proved in such a manner as to give a final decision in discharging a prima facie case. The applicant need not establish title it is enough if he can show that he has a fair and bona fide question to raise as to the existence of the right which he alleges. The standard of proof of that prima facie case is on a balance or, as otherwise put, on a preponderance of probabilities. This means no more than that the Court takes the view that on the face of it the applicant's case is more likely than not to ultimately succeed.**

8. The plaintiff's case is that he acquired the suit property from a company known as ADC Tall Trees. He paid slightly below half the purchase price. He however has no written evidence of the payment or even allocation of the plot to him by the said company. As matters stand, it is only the plaintiff's word and his witnesses that we have to go by. The law however requires much more regarding contracts for the disposition of an interest in law. **Section 3(3)** of the **Law of Contract Act** provides:

> **(3) No suit shall be brought upon a contract for the disposition of an interest in land unless— (a) the contract upon which the suit is founded—**
>
> **(i) is in writing;**
>
> **(ii) is signed by all the parties thereto; and**
>
> ***(b) the signature of each party signing has been attested by a witness who is present when the contract was signed by such party: ….***

9. The plaintiff has not placed before the court any written evidence of the contract pursuant to which he acquired the suit property from the company known as ADC Tall Trees. There is in fact no evidence of the existence of such a company. Even assuming that the company existed, there is no evidence that the company owned the suit property and that it had the capacity to pass good title in respect thereof to the plaintiff.

10. Though the application is unopposed, I am afraid that the plaintiff has not persuaded me that his case is more likely than not to ultimately succeed. He has not established a prima facie case. That being the case, I need not enquire into the other limbs of the test in **Giella**. The application is dismissed. No order on costs.

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

No appearance for the defendant/respondent

Court Assistants: Gichaba & Lotkomoi