



REPUBLIC OF KENYA

IN THE ENVIRONMENT AND LAND COURT AT NAKURU

CASE NO. 52 OF 2017

MARGARET CHEPKEMOI KIPKONESPLAINTIFF

VERSUS

JONATHAN PERE NGIRIA 1ST DEFENDANT

JOSEPH RUTO LESINGO2ND DEFENDANT

BENJAMIN MANGAWET KULUMAN3RD DEFENDANT

RULING

1. By Notice of Motion dated 14th February 2017, the plaintiff seeks the following orders:

1. Spent.

2. Spent.

3. That this honourable court be pleased to issue a temporary order of injunction to restrain the defendants applicants from entering, putting up structures, cultivating or in any other way whatsoever interfering with the plaintiffs quiet use and occupation of parcel No. Nakuru/Nessuit settlement scheme/745 pending final determination of the suit herein.

4. Costs of this application be awarded to the plaintiff/applicant.

2. The application is brought inter alia under the provisions of Order 40 rules 1 and 2 of the Civil Procedure Rules. It is supported by an affidavit sworn by the plaintiff/applicant. She deposed that she is the owner of a parcel of land known as Nakuru/Nessuit Settlement Scheme/745 (the suit property) and that she is in occupation thereof. She annexed a copy of an allotment card and a photograph. She accuses the defendants of commencing construction a nursery school on the suit property. According to her, the nursery school ought to have been constructed on plot No. 713 which was earmarked for that purpose. She further states that the 2nd defendant invaded the suit property on 7th January 2017. Accordingly, she seeks an injunction as prayed.

3. The defendants oppose the application through a replying affidavit sworn by the 1st defendant. He deposed that the plaintiff owns parcel of land known as Nakuru/Nessuit/787 and not the suit property herein. He added that the suit property belongs to Kapogiek Nursery School since the year 1996. He annexed a copy of a letter dated 20th February 2013 from District Land Adjudication and Settlement Officer Nakuru. He further stated that the plaintiff trespassed onto the suit land in the year 2016 and started constructing a small mud house on it. A report about this was made at Njoro Police Station.

4. In a further affidavit filed on 29th June 2017 the plaintiff reiterated that she owns the suit property and not plot No. 787.

5. The application was heard by way of written submissions. The plaintiff filed submissions on 5th March 2018 while the defendant filed submissions on 22nd May 2018. I have considered the application, the affidavits and the submissions.

6. 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 to 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.

7. The plaintiff's claim to the suit property is pegged on the allotment card which she annexed as MCK1a. A perusal of the card reveals that the plot allocated is plot No. 02134 and not plot 745 which is the suit property. No explanation has been offered as to be connection between plot 02134 and the suit property. I see no connection. I have also perused the map annexed as MCK b and I do not see any evidence that the plaintiff is the owner of the suit property.

8. Further, a perusal of the photograph annexed by the plaintiff as MCK 3 reveals a fairly recent structure. This has also created considerable doubt in my mind as to the plaintiff's claim to the suit property. All in all, I am not persuaded that the plaintiff has established a prima facie case. That being the case, Notice of Motion dated 14th February 2017 is dismissed with costs to the defendants.

9. It is so ordered.

Dated, signed and delivered in open court at Nakuru this 27th day of September 2018.

D. O. OHUNGO

JUDGE

In the presence of:

Mr Wachira holding brief for Mr Morintat for the plaintiff/applicant

Ms Gitau holding brief for Mrs Ndeda for the defendants/respondents

Court Assistant: Gichaba