



REPUBLIC OF KENYA

IN THE ENVIRONMENT AND LAND COURT AT NAKURU

CASE No. 446 OF 2017

FAUSTIN MWANGI.....PLAINTIFF

VERSUS

VIRGINIA WANJIRU MWANGI.....DEFENDANT

RULING

1. By Notice of Motion dated 29th November 2017, the plaintiff seeks the following orders:

1. Spent.

2. Spent.

3. That pending the hearing and determination of this suit an order of injunction be issued against the defendant either by herself, her agents, servants and or employees restraining them from digging trenches, carrying any development, undertaking any form of development, wasting, depositing construction materials, excavating, trespassing into or in any manner interfering with land parcel No. Gilgil/Township Block 3/615 (formerly known as Uns. Commercial Plot No. 90 Gilgil Town)

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

2. The application is brought inter alia under Order 40 rule 1 of the Civil Procedure Rules and is supported by an affidavit sworn by the plaintiff. He deposed that through letter of allotment dated 13th April 1992, he was offered a grant of Uns. Commercial Plot No. 90 Gilgil Town. He duly accepted the offer and paid the requisite stand premium of Kshs.13, 330.30 on 16th July 1992 through a banker's cheque. He annexed a copy of the letter of allotment and a copy of his letter forwarding the banker's cheque.

3. He added that he paid rates for the plot from the year 1992 to 2013 when he learnt that the records as regards the name of the rate payer had been changed to the name of the defendant. He also visited the plot and found that a fence and temporary structures had been erected on it. He further learnt that the plot number was changed to Gilgil Township Block 3/615. He thus registered a restriction against the title on 24th May 2016 and obtained a Certificate of Search which showed that a certificate of lease in respect of the plot was issued to the defendant on 28th March 2008. He therefore urged the court to grant injunction as sought.

4. The defendant opposed the application through a replying affidavit filed on 7th December 2017. She deposed that she is indeed the registered proprietor of a leasehold in respect of the suit property. She annexed a Certificate of Lease issued in her favour on 28th March 2008 for a term of 99 years from 1st July 1999. She added that she purchased the plot from Alex Onduko Thomas through sale agreement dated 17th January 2005. Alex Onduko Thomas had himself been allocated the land pursuant to an allotment letter dated 13th April 1996. Upon execution of the sale agreement, she took immediate vacant possession and has retained possession for over 12 years. Currently, she has a tenant on the plot whose lease will end in the year 2020. She therefore urged the court to dismiss the application.

5. The application was heard by way of written submissions. The defendant/respondent filed submissions on 29th January 2018 while the applicant filed submissions much later on 8th February 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 be issued 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. 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. There is no dispute that the defendant is the registered proprietor of the suit property pursuant to the Certificate of Lease issued to her. The plaintiff is seeking cancellation of the said certificate of lease on the grounds among others that it was obtained fraudulently.

9. As a registered proprietor, the defendant is entitled to the privileges accorded by **Sections 24 and 25** of the **Land Registration Act**. The sections provide as follows:

24. Interest conferred by registration Subject to this Act—

(a) the registration of a person as the proprietor of land shall vest in that person the absolute ownership of that land together with all rights and privileges belonging or appurtenant thereto; and

(b) the registration of a person as the proprietor of a lease shall vest in that person the leasehold interest described in the lease, together with all implied and expressed rights and privileges belonging or appurtenant thereto and subject to all implied or expressed agreements, liabilities or incidents of the lease.

25. Rights of a proprietor

(1) The rights of a proprietor, whether acquired on first registration or subsequently for valuable consideration or by an order of court, shall not be liable to be defeated except as provided in this Act, and shall be held by the proprietor, together with all privileges and appurtenances belonging thereto, free from all other interests and claims whatsoever.....

10. The alleged invalidity of the defendant’s title due to fraud is a matter that can only be established at the trial of the suit. Until then, the defendant’s rights as a registered proprietor must prevail. This is in line with **Section 26** of the **Land Registration Act** which provides:

26. Certificate of title to be held as conclusive evidence of proprietorship

(1) The certificate of title issued by the Registrar upon registration, or to a purchaser of land upon a transfer or transmission by the proprietor shall be taken by all courts as prima facie evidence that the person named as proprietor of the land is the absolute and indefeasible owner, subject to the encumbrances, easements, restrictions and conditions contained or endorsed in the certificate, and the title of that proprietor shall not be subject to challenge, except—

(a) on the ground of fraud or misrepresentation to which the person is proved to be a party; or

(b) where the certificate of title has been acquired illegally, unprocedurally or through a corrupt scheme. ...

11. To succeed, the plaintiff will not only need to prove the alleged fraud, he must also show that the defendant was party to such fraud. As matters stand presently and in view of the material placed before the court, I am not persuaded that the plaintiff has established a prima facie case. Until the plaintiff establishes his claim at the trial, the defendant’s rights as a proprietor ought not to be curtailed. That being the case, I need not enquire into the other limbs of the test in the Giella case.

12. In the end, Notice of Motion dated 29th November 2017 is dismissed with costs to the defendant.

Dated, signed and delivered in open court at Nakuru this 26th day of September 2018.

D. O. OHUNGO

JUDGE

In the presence of:

No appearance for the plaintiff/applicant

Ms Chelangat holding brief for Mr Matiri for the defendant/respondent

Court Assistant: Gichaba