



REPUBLIC OF KENYA

IN THE ENVIRONMENT AND LAND COURT

AT NAKURU

CASE No. 66 OF 2015

DANIEL KIPTUM KIPYEGON.....1ST PLAINTIFF

ROSEBELLA JEPKEMBOI KIPTUM.....2ND PLAINTIFF

VERSUS

MARY MUGO MATHAI (Sued as legal representative of the estate of

JACKSON MUGO MATHAI (DECEASED).....1ST DEFENDANT

JOHN MUGO MATHAI.....2ND DEFENDANT

MUIGAI COMMERCIAL AGENCIES.....3RD DEFENDANT

HARON CHEPLENGIN KIPLALON.....4TH DEFENDANT

RULING

1. This is a ruling in respect of plaintiff's Notice of Motion dated 18th December 2017, an application pursuant to which the following orders were sought:

1. Spent.

2. Spent.

3. That this honourable court be pleased to restrain the respondents either by themselves, servants, agents or any other person whatsoever from entering, cultivating, leasing or in any other way interfering with the peaceful enjoyment of and occupation of land parcel No. Kampi ya Moto Block 3/122 by the plaintiffs pending hearing and determination of the suit.

4. Spent.

5. That upon inter parties hearing an order of inhibition be and is hereby issued inhibiting the registration of any dealing with all that parcel of land known as LR No. Kampi ya Moto Block 3/122 pending hearing and determination of the suit.

6. That costs of this application be provided for.

2. The application was brought under Order 40 rule 1 of the Civil Procedure Rules and was supported by an affidavit sworn by the 1st plaintiff. It was deposed in the affidavit that the plaintiffs who are husband and wife bought a parcel of land known as Kampi Ya Moto Block 3/23. Simon Wachira had himself bought the suit property from Jackson Mugo Mathai (deceased) in respect of whose estate the 1st defendant was the administrator. Despite the foregoing, the 1st defendant sold the suit property to the 4th defendant sometime in the year 2014. As at the time the supporting affidavit was sworn, the 4th defendant was the registered proprietor of the suit property.

3. The deponent added that on 14th December 2017 workers deposited construction stones on the suit property and erected a barbed wire fence on part of it. The plaintiffs maintained that they have been in occupation of the suit property since the year 2002 and they believe that the 4th defendant intends to dislodge them from it.

4. The 1st, 2nd and 4th defendants opposed the application through a replying affidavit sworn by the 4th defendant on 16th January 2018. He deposed that he was the registered proprietor of the suit property, having purchased it in the year 2005 from Jackson Mugo Maathai (deceased) the previous registered owner. Upon purchasing it, he took possession in the year 2005 and remained in possession even as at the date of swearing the affidavit. He denied that the plaintiffs have been in possession.

5. The application was heard by way of written submissions. The applicants filed submissions on 2nd March 2018 while the 1st, 2nd and 4th defendants/respondents filed submissions on 25th June 2018.

6. The 3rd defendant did not file any replying affidavit. Counsel for the 3rd defendant told the court that the 3rd defendant left it to the court to determine the application.

7. I have considered the application, the affidavits filed and the submissions. 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.

8. The plaintiffs admit that the 4th defendant is the registered proprietor of the suit property. They however contend that they bought the suit property on 26th July 2002 from one Simon Wachira Mwangi who according to them had bought the suit property from Jackson Mugo Mathai (deceased). The sale was arranged by the 3rd defendant as an agent of the said Simon Wachira Mwangi. Whatever transpired in between, the outcome was that the plaintiffs did not become registered proprietors. The 4th defendant is the registered proprietor of the suit property.

9. Though the plaintiffs claim that Simon Wachira Mwangi had bought the suit property from Jackson Mugo Mathai (deceased), they have not exhibited any evidence of the transaction between Simon Wachira Mwangi and Jackson Mugo Mathai (deceased). All we have is a copy of a sale agreement dated 26th July 2002 between the plaintiffs and Simon Wachira Mwangi. Since there is also no evidence that Simon Wachira Mwangi was the proprietor of the suit property as at the time of the transaction between him and the plaintiffs, there is considerable doubt whether he could pass any valid title to the plaintiffs.

10. As a registered proprietor, the 4th 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.....

11. The plaintiffs levelled various accusations of fraud against the defendants. They seek cancellation of the 4th defendant's title among other prayers in the plaint. Needless to state, the alleged invalidity of the 4th defendant's title due to fraud is a matter that will need to be established at the trial of the suit. Until that materialises, the 4th defendant's rights as a registered proprietor are protected by law. 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. ...

12. To succeed in their quest to obtain cancellation of the 4th defendant's title, the plaintiffs will not only need to prove the alleged fraud, they must also show that the 4th defendant was party to such fraud. The 4th defendant on his part put before the court a copy of a sale agreement between himself and Jackson Mugo Mathai (deceased) dated 12th March 2005, a consent of the Land Control Board dated 9th March 2006 and a transfer dated 21st March 2006. It is important to note that the 1st defendant who is the administrator of the estate of Jackson Mugo Mathai (deceased) has alongside the 4th defendant disowned the plaintiffs' claim to the suit property.

13. The plaintiffs cited the decision of the Court of Appeal in the case of **Naftali Ruthi Kinyua v Patrick Thuita Gachure & another [2015] eKLR** and argued that the doctrine of *lis pendens* should be applied so as to preserve the suit property. I note however that the certificates of search in respect of the suit property placed before the court by the plaintiffs as well as the copy of the title deed annexed by the 4th defendant all show that the suit property was first registered on 5th May 2014 pursuant to the **Registered Land Act (Cap 300) (Repealed)** and the **Land Registration Act No. 3 of 2012**. The Court of Appeal stated as follows in the **Naftali Ruthi Kinyua** case (supra):

The necessity of the doctrine of lis pendens in the adjudication of land matters pending before the court cannot be gainsaid, particularly for its expediency, as well as the orderly and efficacious disposal of justice. Having said that, with the repeal of section 52 of the ITPA by the Land Registration Act (LRA) Number 3 of 2013, the question arises as to whether the doctrine remains applicable to the circumstances of the present case. We consider that its applicability must be considered in the light of Section 107 (1) of the LRA which provides the saving and transitional provisions of this Act, and which stipulates,

“Unless the contrary is specifically provided for in this Act, any right, interest, title, power, or obligation acquired, accrued, established, coming into force or exercisable before the commencement of this Act shall continue to be governed by the law applicable to it immediately prior to the commencement of this Act.”

The effect of this provision is to allow for the continued applicability of the rights and interests ensuing from legislation that governed titles of properties established prior to the repeal of such legislation. Given that the concerned property involved land eligible for registration under the Registration of Titles Act (now repealed), having regard to section 107 (1) of the LRA, it is evident the rights flowing from section 52 of the ITPA including those under doctrine of lis pendens would remain applicable to the circumstances of this case. [Emphasis supplied]

14. As observed above, the suit property was registered pursuant to the **Registered Land Act (Cap 300) (Repealed)** and the **Land Registration Act No. 3 of 2012**. I therefore agree with counsel for the 1st, 2nd and 4th defendants that in view of the provisions of **section 164 of Registered Land Act (Cap 300) (Repealed)** and **section 25(1) of the Land Registration Act No. 3 of 2012**, *lis pendens* is not applicable to the circumstances of this case.

15. In view of the foregoing, I am not persuaded that the plaintiffs have established a prima facie case. That being the case, I need not enquire into the other limbs of the test in the Giella case.

16. Notice of Motion dated 18th December 2017 is dismissed with costs to the 1st, 2nd and 4th defendants.

Dated, signed and delivered in open court at Nakuru this 19th day of October 2018.

D. O. OHUNGO

JUDGE

In the presence of:

Mr Langat holding brief for Mr Morintat for the plaintiffs/applicants

Mr Biko holding brief for Ms Gatu Magana for the 1st, 2nd and 4th defendants/respondents

No appearance for 3rd defendant/respondent

Court Assistants: Gichaba & Lotkomoi