



REPUBLIC OF KENYA

IN THE ENVIRONMENT AND LAND COURT

AT NAKURU

CASE No. 443 OF 2017

GEORGE GACHAGUA T/A BUILDVENTURE ENTERPRISES.....PLAINTIFF

VERSUS

MOHZUL COMMERCIAL AGENCIES.....DEFENDANT

RULING

1. This is a ruling on plaintiff's Notice of Motion dated 23rd November 2017, an application pursuant to which the following orders are sought:

a) Spent.

b) Spent.

c) Pending hearing and determination of this suit an order of injunction do issue restraining the defendant by itself, servants and/or agents from transferring, charging, selling or interfering with the plaintiff's possession and use of all that parcel of land known as Nakuru Municipality Block 17/831.

d) Costs of this application be provided for.

2. The application is supported by an affidavit sworn by the plaintiff. The plaintiff's case is that he bought the parcel of land known as Nakuru Municipality Block 17/831 (the suit property) on 5th May 2009 from one George Kimani Njoroge and immediately took possession of it. At the time of buying it, the property was known as Un-surveyed Residential plot No. Block 17 Nakuru Municipality. He added that the defendant persuaded the Land Registrar Nakuru to register the suit property in his name, alleging that it was Un-surveyed Residential Plot No. B. Despite the plaintiff's protests to the registrar, the defendant was registered as owner of the plot and a lease issued to him on 31st March 2014. On the night of 19th and 20th November 2017, goons descended on the property at night and started demolishing it.

3. The 1st defendant opposed the application through a replying affidavit sworn by Mohamed Ali Awedh. He stated that he is a director of the 1st defendant and that the 1st defendant is the registered owner of the suit property having been issued with a certificate of lease on 31st March 2014. He added that the 1st defendant was allocated the suit property on 1st July 1998 by the Commissioner of Land.

4. The application was heard by way of written submissions. The applicant filed submission on 11th June 2018 while the 1st defendant filed submissions on 2nd May 2018. I have carefully considered the application, the affidavits filed and the submissions.

5. The 2nd defendant did not participate on the hearing of the application.

6. The principles applicable when considering an application for an interlocutory injunction are that 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 1st defendant is the registered proprietor of the suit property. As such, it is entitled to all the benefits and privileges accorded to a

registered proprietor by law. The plaintiff has alleged that he registered a restriction against the suit property on 14th July 2014 and that the restriction was removed without notice on 7th July 2017. No evidence of such a registration was availed. Nothing would have been easier than presenting a copy of an application for registration, a payment receipt and a certificate of search showing a restriction in the encumbrances section.

8. All in all, I am not persuaded that the plaintiff has established any prima facie case. That being so, Notice of Motion dated 23rd November 2017 is dismissed with costs to the 1st defendant.

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

D. O. OHUNGO

JUDGE

In the presence of:

Mr Ikua for the plaintiff/applicant

Mr Ogolla for the 1st defendant/respondent

No appearance for the 2nd defendant/respondent

Court Assistants: Gichaba & Lotkomoi