



REPUBLIC OF KENYA

IN THE ENVIRONMENT AND LAND COURT AT NAKURU

CASE No. 285 OF 2018

JOSPHAT KARANJA MWAURA.....PLAINTIFF

VERSUS

**CATHERINE WAITHERA MANDE sued as the legal representative
of the estate of DANIEL MANDE MUNYUA.....DEFENDANT**

RULING

1. By Notice of Motion dated 18th September 2018, the plaintiff sought the following orders:

1. Spent.

2. That pending the hearing and determination of the suit, the honourable court be pleased to grant an order of inhibition, inhibiting the transfer, sale, charge, encumbrances and/or any other dealings, whatsoever in respect of Dundori/Muguathi Block 2/195 registered to the deceased herein.

3. That the honourable court be pleased to stay proceedings in Nakuru Succession Cause No. 82 of 2001 in so far as the same pertains the parcel of land known as Dundori/Muguathi Block 2/195 pending the hearing and determination of this application and suit.

4. That this honourable court be pleased to make such other and/or further orders as may be just and expedient in the circumstances.

5. That costs of this application be in the cause.

2. The application was supported by an affidavit sworn by the plaintiff. He deposed that the parcel of land known as Dundori/Muguathi Block 2/195 (the suit property) was owned by Daniel Mande Munyua (deceased) and remains so registered in the name of the deceased. The defendant herein is a co-administrator of the estate of the deceased. The deceased sold the suit property to the plaintiff in but passed away before it could be transferred to the plaintiff. The defendant has now sought to have the grant which was issued in respect of the estate of the deceased in Nakuru High Court Succession Cause No. 82 of 2001 be rectified to include the suit property as a free property of the deceased. The defendant filed an application dated 23rd March 2017 seeking the rectification. The application is pending determination. The plaintiff fears that the defendant intends to deprive him of the suit property with a view to selling it to third parties.

3. The defendant did not enter appearance or file a response to the application despite being served. Counsel for the applicant therefore urged me to grant the orders sought.

4. 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 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.

5. Even though the application is unopposed, the applicant must still satisfy the test for granting an interlocutory injunction. He must establish a *prima facie* case. The plaintiff maintains that he bought the suit property from the deceased. There is active litigation in Nakuru High Court Succession Cause No. 82 of 2001 where an application is pending to determine if the suit property is part of the free estate of the deceased. The applicant is participating in the rectification proceedings as an objector. Even though the applicant contends that the issue of

who as between him and the defendant are entitled to the suit property was referred by the High Court to this court on 28th May 2018, no order or proceedings to that effect have been exhibited.

6. I am alive to the provisions of **Section 6** of the **Civil Procedure Act** provides as follows:

No court shall proceed with the trial of any suit or proceeding in which the matter in issue is also directly and substantially in issue in a previously instituted suit or proceeding between the same parties, or between parties under whom they or any of them claim, litigating under the same title, where such suit or proceeding is pending in the same or any other court having jurisdiction in Kenya to grant the relief claimed.

7. The question of whether the suit property is part of the free estate of the deceased is directly and substantially in issue in the High Court in a previously instituted suit. The finding of the said court will affect the applicant's claim either way. In the circumstances, I cannot grant the injunctive orders sought. For the same reason, I cannot grant prayer 3 of the application. In any case, I have no jurisdiction to stay proceedings pending before a court of concurrent jurisdiction.

8. In the end, I am not satisfied that the applicant has established a prima facie case. That being the case, Notice of Motion dated 18th September 2018 is dismissed. Costs shall be in the cause.

Dated, signed and delivered in open court at Nakuru this 23rd day of November 2018.

D. O. OHUNGO

JUDGE

In the presence of:

Mr Githui holding brief for Ms Wairimu for the plaintiff/applicant

No appearance for the defendant/respondent

Court Assistants: Gichaba & Lotkomoi