



REPUBLIC OF KENYA

IN THE ENVIRONMENT AND LAND COURT

AT NAKURU

CASE NO. 56 OF 2016

SAMUEL NGANGA PLAINTIFF

VERSUS

MARGARET KWAMBOKA THINGO.....1ST DEFENDANT

NAOMI WAMAITHA KAGIA.....2ND DEFENDANT

RULING

1. By Notice of Motion dated 2nd December 2016, the plaintiff sought the following orders:

1. Spent.

2. Spent.

3. That pending hearing and determination of this suit inter partes, this honourable court be pleased to issue a temporary injunction restraining the defendants/respondents either by themselves, agents, servants and/or employees from trespassing on, selling, disposing off, alienating or in any other way possible adversely dealing with the plaintiff's parcel of land exercised from Nakuru Municipality Block 22/176.

4. That costs of this application be borne by the respondents.

2. The application was supported by an affidavit sworn by the plaintiff. He deposed that on 15th September 1994 he bought a parcel of land measuring 50ft x 100ft from David Thingo Kagio, who is since deceased, at a consideration of Kshs.50, 000/=. The parcel was to be excised from Nakuru Municipality Block 22/177. He fenced off the parcel, constructed a site house and started cultivating on it. The vendor passed away in 1996 before the plaintiff could obtain title documents but the 2nd defendant who was the deceased's mother and the 1st defendant who was the deceased's widow assured the plaintiff that he would get his title documents once the estate of the deceased was distributed in a succession process. Despite all the assurances, the plaintiff is yet to obtain title documents. Worse still, the defendants' sons trespassed on the land on 8th March 2015 and destroyed the fence and crops. The plaintiff then became apprehensive that the defendants could sell the land to third parties.

3. The defendants opposed the application through a replying affidavit sworn by the 1st defendant. She deposed that the plaintiff is a stranger to them and denied that they have ever sold any land to him. She added that they are in possession of the land and wondered how the plaintiff could wait for 23 years before claiming his rights if he ever had any. She further deposed that the plaintiff had not exhibited any consent of the Land Control Board to back his allegations.

4. The application was argued by way of written submissions. The applicant filed his submissions on 5th June 2018 while the respondents filed their submissions on 12th June 2018. I have considered the application, the affidavits filed and the submissions.

5. 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.

6. The applicant contends that he bought the suit property from the deceased on 15th September 1994 and paid the full purchase price. He annexed a copy of a sale agreement to that effect. I note that he also annexed a copy of a demand letter dated 11th March 2015 written to the 1st defendant on his behalf by M/s Nyagaka S. M. & Co. Advocates. In the said letter, it is claimed that the plaintiff bought the property on 7th December 2011. The discrepancy in the date of the alleged sale is notable. I also find it strange that assuming that the sale was on 15th September 1994, the plaintiff did nothing to get a transfer in the period between the alleged agreement and when the vendor passed away about two years later. He has not availed even a single piece of evidence explaining any action taken jointly by him and the deceased prior to his death towards completion of the alleged transaction.

7. Further, I note that it is averred in the plaint and confirmed by Certificate of Official Search dated 21st August 2015 that the title in respect of Nakuru Municipality Block 22/177 was closed on 5th August 1999 when the said parcel was subdivided into new parcel numbers 1261 to 1369. The property is no longer in existence. Yet it is the same one that the plaintiff is seeking judgment and an injunction in respect of.

8. In view of the foregoing, I am not persuaded that the plaintiff has a prima facie case. That being so, Notice of Motion dated 2nd December 2016 is dismissed with costs to the defendants.

Dated, signed and delivered in open court at Nakuru this 8th day of November 2018.

D. O. OHUNGO

JUDGE

In the presence of:

Mr Biko holding brief for Ms Wanjiku Wamae for the plaintiff/applicant

Mr Towett for the defendants/respondents

Court Assistants: Gichaba & Lotkomoi