



REPUBLIC OF KENYA

IN THE ENVIRONMENT AND LAND COURT AT NAKURU

CASE NO. 228 OF 2017

NJENENI ESTATES LIMITEDPLAINTIFF

VERSUS

MIONDWE COMPANY LIMITED1ST DEFENDANT

KIMKAN ENTERPRISES LIMITED2ND DEFENDANT

FRANCIS NGARUIYA NJAMA3RD DEFENDANT

GEORGE GITERE KAHURA4TH DEFENDANT

KENNETH KIMARI GITERE5TH DEFENDANT

VALLEY FRESH LIMITED6TH DEFENDANT

RULING

1. By amended plaint filed on 14th February 2018, the plaintiff averred that it is the registered owner of the parcels of land registered as numbers 8121, 8069 and 1176 situated in Bahati area within Nakuru County (the suit properties). The plaintiff further averred that the defendants are in illegal possession of the suit properties and further that the defendants had trespassed into the suit properties on several occasions and cleared coffee bushes. The plaintiff therefore sought judgment against the defendants for eviction, permanent injunction restraining the defendants from trespassing into or entering the suit properties, cutting the trees therein and general damages.

2. At the commencement of the case and prior to the amendment of the plaint, the plaintiff filed Notice of Motion dated 29th May 2017 seeking the following orders:

1. Spent.

2. Spent.

3. This honourable court be pleased to grant a temporary injunction restraining the defendants/respondents whether by themselves, their agents and/or servants from trespassing, entering or otherwise carrying on activities or in any way dealing with land parcels numbers 8121, 8069 and 1176 pending the hearing and determination of this suit.

4. That costs of this application be provided for.

3. This ruling is in respect of Notice of Motion dated 29th May 2017. It is generally understood that the application targets the defendants as listed in the amended plaint. The original plaint had only the 1st to 4th defendants. The amendment was triggered by an application by the 5th and 6th defendants seeking to be enjoined in the proceedings.

4. The application was supported by an affidavit sworn by Joyce Mbaire Ndoro, a director of the plaintiff. She reiterated that the plaintiff is the registered owner of the suit properties and that the defendants had on numerous occasions entered the properties and cut down trees as well as uprooted coffee. She annexed photographs said to show the defendants' activities.

5. The defendants opposed the application through various replying affidavits sworn by Kenneth Gitere Kahura, Lucas Waithaka Gitere, George Mungai Kahura, Obadiah Kimani Kanari and Kenneth Kimani Gitere. It was deposed by George Mungai Kahura on behalf of the 1st

defendant that sometime in 1997 the 1st defendant bought parcels of land known as LR. No. 24161/1, 24161/2 and 24161/3 measuring about 91 acres from the plaintiff. The parcels were excised from LR No. 8121 which was charged to Kenya Planters Cooperative Union (KPCU). The sale was with the consent of KPCU and the agreement was drawn by Kamere & Co. Advocates who were acting for the plaintiff and KPCU. The 1st defendant paid the full purchase price partly through the advocates and partly directly to KPCU. The 1st defendant took possession 20 years ago with the consent of the plaintiff and extensively developed the property. KPCU is on receivership and despite the 1st defendant being ready to complete the transaction, the plaintiff could not complete the transaction owing to a dispute with KPCU. He added that the 1st defendant is the legal and equitable owner of the portions it bought and that the 1st defendant has uprooted the coffee on the portions so as to replace them with better yielding varieties.

6. Obadiah Kimani Kanari took a similar position on behalf of the 2nd defendant and 6th defendant. He deposed that the 2nd defendant bought LR No. 24161/9, LR No. 24161/12 and several other plots measuring approximately 0.25 acres each and defined as plot numbers 381 to 412 all of which were excised from LR. No. 8121. He added that the 6th defendant similarly bought LR No. 11756 from the plaintiff and took possession in similar circumstances as stated by the 1st defendant.

7. Similarly, the 5th defendant deposed in his affidavit that he bought LR No. 24161/5 and LR No.24161/6 from the plaintiff. The plots were subdivisions of LR No. 8121. He also bought LR No. 24161/7 which was a subdivision of LR No. 8069. He added that despite being ready to complete the transaction, the plaintiff could not do so owing to a dispute that arose between it and KPCU and that the said dispute is the subject of Milimani HCCC No. 275 of 2016 (Njeneni Estates Ltd –vs- Kenya Planters Co-operative Union & Another) which is pending hearing and determination.

8. Though the plaintiff was granted leave to file a further affidavit, I have not seen any on record.

9. The application was heard by way of written submissions. The applicant filed submissions on 21st May 2018 wherein it was argued that the respondents had admitted uprooting coffee trees. It was further argued that the respondents did not tender any evidence of their alleged purchase of the suit properties and that the applicant as registered proprietor was entitled to the relief sought.

10. For the respondents, it was argued that the respondents had established that they had purchased the suit properties and had taken possession with the applicant's consent. It was further argued that the orders sought by the applicant are in effect mandatory injunctions aimed at upsetting the status quo summarily.

11. I have considered the application, the affidavits 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 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.

12. The respondents herein have stated that they bought the suit properties and that they have been in possession with the plaintiff's knowledge and consent for periods of up to 20 years. In their replying affidavits, they gave elaborate explanations as to how they acquired the properties. The applicant has not rebutted the respondents' affidavits.

13. The mere fact that the applicant is a registered owner of the suit properties cannot be taken to mean that the respondents as purchasers who have been put into possession by the applicant have no rights. Indeed, pursuant to **Section 25 of the Land Registration Act**, the rights of a registered proprietor are subject to such rights, liabilities and interest that do not require noting on the register, including obligations of a proprietor as a trustee. The Section provides:

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.....

14. Section 28 of the Act provides:

28. Overriding interests

Unless the contrary is expressed in the register, all registered land shall be subject to the following overriding interests as may for the time being subsist and affect the same, without their being noted on the register—

(a) ...

(b) trusts including customary trusts;

15. The respondents have stated that they bought their respective parcels from the applicant and that they have been in long standing possession with the knowledge and consent of the applicant. The applicant has not challenged this. It follows therefore that the applicant as registered proprietor may not have exclusive rights to the suit properties in view of the respondents' uncontroverted claims.

16. In view of the foregoing, I am not persuaded that the applicant has a prima facie case. That being so, I do not need to enquire into the other limbs of the test of Giella case.

17. Notice of Motion dated 29th May 2017 is dismissed with costs to the defendants/respondents.

Dated, signed and delivered in open court at Nakuru this 6th day of November 2018.

D. O. OHUNGO

JUDGE

In the presence of:

Ms Matu for the plaintiff/applicant

Mr Nderitu for the 1st, 2nd, 4th, 5th and 6th defendants/respondents

Court Assistants: Gichaba & Lotkomoi