



REPUBLIC OF KENYA

IN THE ENVIRONMENT AND LAND COURT AT NAKURU

CASE No. 163 OF 2018

DAVID KIMANI NJAGI.....1ST PLAINTIFF

TABITHA NYAMBURA WAITHANJI.....2ND PLAINTIFF

VERSUS

GEORGE MWANGI KIBIRU.....1ST DEFENDANT

LAND REGISTRAR – NAKURU.....2ND DEFENDANT

RULING

1. By Notice of Motion dated 7th May 2018, the plaintiffs sought the following orders:

1. Spent.

2. Spent.

3. That pending the hearing and determination of this suit, this honourable court be pleased to issue an injunction restraining the defendants by himself, servant or agents or anyone acting under them from selling, alienating, charging, disposing off, transferring or any other way so interfering or any other interfere (sic) with Title No. Rwangondu Settlement Scheme 45 measuring approximately 3.7 hectares.

4. That pending the hearing and determination of this suit, this honourable court be pleased to issue a prohibition order stopping and dealing with the suit land herein namely: Rwangondu Settlement Scheme 45 measuring approximately 3.7 hectares.

5. That costs hereon be provided for.

2. The application is supported by an affidavit sworn by the plaintiffs jointly. They deposed that they bought the parcel of land known as Rwangondu Settlement Scheme 45 measuring approximately 3.7 hectares (the suit property) from one Joseph Rurigi in the year 1979 at a consideration of KShs 6,000 pursuant to a handwritten agreement dated 4th December 1979. That the 1st defendant's son visited the suit property and declared that it belongs to the 1st defendant. Upon conducting a search at the land registry, the plaintiffs confirmed that the 1st defendant became registered proprietor of the suit property on 20th January 2015. The plaintiffs contend that the registration in favour of the 1st defendant was irregular and fraudulent.

3. The 1st defendant responded to the application through his replying affidavit sworn on 21st May 2018. He deposed that he is indeed the registered proprietor of the suit property which according to him is title number Nakuru/Rwangondu/45. That he purchased the suit property in 1979 from Joseph Rurigi who had earlier on been allotted the property by Settlement Fund Trustees. He annexed a copy of the title deed as well as transfer form from Joseph Rurigi to himself. He added that he took possession in 1979 and remained in possession until May 2018 when the plaintiffs encroached on the land when he was away. He urged the court to order removal of bodies buried on the suit property.

4. The 2nd defendant did not respond to the application. The application was heard by way of written submissions. The applicants filed submissions on 11th June 2018 while the 1st defendant filed submissions on 2nd July 2018. I have considered the application, the affidavits and submissions.

5. An applicant who is seeking an interlocutory injunction 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. Both parties to this case claim that they bought the suit property from one Joseph Rurigi in 1979. There is no dispute that the 1st defendant has been registered proprietor of the suit property since 20th January 2015. The title number of the suit property according to a copy of title deed exhibited by the defendant is Nakuru/Rwangondu/45 while according to the plaintiffs pleadings as well as a copy of certificate of search as at 8th February 2018, is Rwangondu Settlement Scheme 45. The plaintiffs and the 1st defendant are however all in agreement that they are referring to one and the same property – the suit property.

7. I have compared the documentary evidence availed by the plaintiffs against that availed by the 1st defendant. I note that the 1st defendant has a clearer and more complete paper trail leading up to his title as opposed to the plaintiffs who are not registered proprietors. Despite the conflicting positions as regards who is in possession, I note that the 1st defendant acknowledges that there are graves on the suit property which he urges that be removed. It seems to me that the 1st defendant is indirectly admitting that the plaintiffs buried their kin on the suit property. That appears to confirm the plaintiffs' contention that they are in possession.

8. In my view, the best way forward is to preserve the suit property pending determination of the suit by maintaining the status quo on ownership without interfering with its day to day use and possession. Such an approach is in line with paragraph 32 of **Gazette Notice No. 5178** titled "**Practice Directions on Proceedings in the Environment and Land Courts, and on Proceedings Relating to the Environment and the Use and Occupation of, and Title to Land and Proceedings in Other Courts**" which encourages preservation of the suit property. It provides:

During the inter-partes hearing of any interlocutory application, where appropriate, parties are encouraged to agree to maintain status quo. If they cannot agree, after considering the nature of the case or hearing both sides the Judge shall exercise discretion to order for status quo pending the hearing and determination of the suit bearing in mind the overriding interests of justice.

9. In view of the foregoing, I order that:

a. That pending the hearing and determination of this suit, an inhibition be registered against title number Rwangondu Settlement Scheme 45 and/or title number Nakuru/Rwangondu/45.

b. That costs shall be in the cause.

Dated, signed and delivered in open court at Nakuru this 14th day of December 2018.

D. O. OHUNGO

JUDGE

In the presence of:

No appearance for the plaintiffs/applicants

Mr Ngware for 1st defendant/respondent

No appearance for the 2nd defendant/respondent

Court Assistants: Gichaba & Lotkomo