



REPUBLIC OF KENYA

IN THE ENVIRONMENT AND LAND COURT AT NAKURU

CASE No. 438 OF 2017

JOSEPH MITHIGA WAINAINA.....PLAINTIFF

VERSUS

GICHURU KAMOTHO.....1ST DEFENDANT

NAIVASHA DISTRICT LAND REGISTRAR.....2ND DEFENDANT

RULING

1. By Notice of Motion dated 20th November 2017, the plaintiff sought the following orders:

a) *Spent.*

b) *Spent.*

c) *That this honourable court be pleased to issue an order of temporary injunction restraining the 1st respondent either by himself, agents and/or servants howsoever from selling, transferring, alienating, dealing with or otherwise interfering with Land Parcel No. Naivasha/Municipality Block 4/41 formerly LR.1144/1/IX and specifically number 169 pending the hearing and determination of this suit.*

d) *Spent.*

e) *That this honourable court be pleased to issue an order of inhibition against Land Parcel No. Naivasha/Municipality Block 4/41 formerly LR.1144/1/IX and/or specifically plot number 169 pending the hearing and determination of this suit.*

f) *That the costs of this application be borne by the respondents.*

2. The application is supported by an affidavit sworn by the plaintiff. The defendants neither responded to the application nor attended its hearing.

3. The plaintiff deposed that on 15th August 2011, the 1st defendant who is his brother in-law sold to him a 50 by 100 to be excised from land parcel number Naivasha/Municipality Block 4/41 at a consideration of Kshs.2, 000, 000. The transaction was reduced to a sale agreement dated 15th August 2011. The plaintiff paid a total of Kshs.1, 874, 086. Plot No. Naivasha/Municipality Block 4/41 has since been subdivided and the property that the plaintiff bought is now known as Naivasha/Municipality Block 4/169. The 1st defendant has not transferred the property to the plaintiff as agreed.

4. I have considered the application. Once again we revisit the law relating to interlocutory injunctions. An applicant seeking such an order 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.

5. From the uncontroverted evidence placed before the court, I am satisfied that a sale agreement dated 15th August 2011 was executed between the plaintiff and the 1st defendant in the presence of an advocate. In the agreement, the plaintiff bought a plot measuring 50 by 100 feet to be excised from Naivasha/Municipality Block 4/41 and that the portion bought by the plaintiff is now known as Naivasha/Municipality Block 4/169. In the circumstances, I am persuaded that the plaintiff has established a *prima facie* case. Damages

will not be an adequate remedy.

6. Regarding the prayer for inhibition, the plaintiff has not availed evidence that the new parcel known as Naivasha/Municipality Block 4/169 has been registered. In the absence of registration, it would be futile to issue an order of inhibition.

7. In the end, I grant an injunction restraining the 1st defendant his agents and/or servants from selling, transferring or alienating land parcel number Naivasha/Municipality Block 4/169 pending hearing and determination of this suit. The 1st defendant shall bear costs of the application.

Dated, signed and delivered in open court at Nakuru this 11th day of December 2018.

D. O. OHUNGO

JUDGE

In the presence of:

Mr Bore holding brief for Mr Kipkoech for the plaintiff/applicant

Ms Amulabu holding brief for Mr Otieno for the 1st defendant/respondent

No appearance for the 2nd defendant/respondent

Court Assistants: Gichaba & Lotkomoi