



REPUBLIC OF KENYA

IN THE ENVIRONMENT AND LAND COURT AT NAKURU

CASE No. 138 OF 2016

FRANCIS KIMANI KIBOGO.....PLAINTIFF

VERSUS

MARY WANJIRU NJOROGE.....1ST DEFENDANT

HENRY JOHN NDUNGU KINYARA alias

KARANJA KINYARA.....2ND DEFENDANT

RULING

1. By Notice of Motion dated 19th April 2016 the plaintiff sought the following orders:

a) Spent.

b) Spent.

c) That the honourable court be pleased to issue temporary orders of injunction restraining the defendant/respondents herein either by themselves, their servants, agents and/or by any other persons acting on their behalf from entering, alienating, interfering, meddling, encroaching, working, or doing such acts as would interfere with the plaintiff/applicant's use, occupation, possession or right of ownership to land parcel No. 1317 Makongo in Mitimangi Location of Nakuru County until the case herein is heard and determined or until further orders of this court.

d) That the orders herein be served to OCS Gilgil Police Station to ensure compliance.

e) That costs of this application be provided for.

2. The application is supported by an affidavit sworn by the plaintiff. He deposed that he has been a member of the Gilgil Matigari Company Ltd since 1973. As a member of the said company, he was allocated plot No. 1317 Makongo in Mitimangi Location, Elementaita area of Nakuru County (the suit property) and took possession of it in 1973. Owing to the clashes of the year 2008, he left the land but on return in the year 2014, he found that the defendants had invaded it.

3. Despite being served, the defendants did not respond to the application or attend court at its hearing. The applicant filed written submissions on 11th October 2017.

4. I have considered the application, the affidavit 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 be issued 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. There being no opposition to the application and in view of what is deposed in the supporting affidavit, I am satisfied that the applicant has established a *prima facie* case. I do not think damages would be an adequate remedy. I note that in a demand letter dated 18th February 2015, the applicants' advocates stated that the defendants were in possession and demanded that they vacate.

6. Since what is sought is a restraining order and not an eviction, and since an eviction should ordinarily only be ordered upon hearing of the

suit, I will avoid making any orders that can amount to an eviction at this stage.

7. In the end, I order that:

a) An injunction is hereby granted restraining the defendants by themselves, their servants, agents or any person acting on their behalf from alienating, selling, transferring, disposing, subdividing or constructing upon land parcel number 1317 Makongo in Mitimingi Location of Nakuru County pending hearing and determination of this case.

b) Costs of the application are awarded to the plaintiff.

Dated, signed and delivered in open court at Nakuru this 7th day of December 2018.

D. O. OHUNGO

JUDGE

In the presence of:

Mr Ondieki holding brief for Mr Gichuki for plaintiff/applicant.

No appearance for defendants/respondents.

Court Assistants: Gichaba & Lotkomoi