



REPUBLIC OF KENYA

IN THE ENVIRONMENT AND LAND COURT AT NAKURU

CASE No. 462 OF 2017

STANLEY KIPRUTO BOMET.....PLAINTIFF

VERSUS

PAMELA CHEPCHUMBA RECHENBACH.....1ST DEFENDANT

FRANCIS KITUYO.....2ND DEFENDANT

NAKURU LAND REGISTRAR.....3RD DEFENDANT

RULING

1. By Notice of Motion dated 14th December 2017, the plaintiff sought the following orders:

1. Spent.

2. Spent.

3. Spent.

4. That pending hearing and the determination of the suit herein, this honourable court be pleased to restrain the defendants, by themselves, their agents, servants, hooligans, hoodlums, hirelings and or proxies from, dealing and tampering with, alienating, cultivating, selling, disposing of or in any way interfering with land parcel No. Miti Mingi/Mbaruk Block 3/786 (Barut). The OCS/in-charge Nakuru Central Police Station to assist in the enforcement of this order.

5. Spent.

6. That an order of inhibition be and is hereby issued inhibiting the registration of any dealing with parcel of land known as Miti Mingi/Mbaruk Block 3/786 (Barut) pending hearing and determination of the suit.

7. That this honourable court be pleased to order the 3rd defendant to supply the plaintiff with a certified copy of green card for land parcel No. Miti Mingi/Mbaruk Block 3/786 (Barut).

8. That costs of this application be borne by the defendants.

2. The application is supported by an affidavit sworn by the plaintiff. He deposed that around the year 1998 he borrowed Kshs.200, 000 from the 1st defendant and deposited the title for the property known as Miti Mingi/Mbaruk Block 3/786 (Barut) (the suit property) with the 1st defendant as security but without formerly registering any charge against the title. He annexed a copy of a title deed and Certificate of Search showing that he was the registered owner of the suit property from 24th January 1992 and even as at 23rd January 2017.

3. The plaintiff further deposed that the 1st and 2nd defendants retained his aforesaid title and that the 1st defendant with the assistance of the 3rd defendant unlawfully and fraudulently transferred the suit property to the 1st defendant's name some time after 23rd January 2017 and backdated it to 14th December 2016. He annexed a copy of Certificate of Search as at 24th November 2017 which shows that the 1st defendant became registered proprietor of the suit property on 14th December 2016. He added that he did not sign any transfer in favour of the 1st defendant and that no consent of the Land Control Board or spousal consent was obtained.

4. The defendants were given several opportunities to file a replying affidavit but they did not do so. Ultimately, the court stated and ordered

in part as follows on 9th May 2018:

... All in all, I am not satisfied that valid reasons have been advanced to warrant an adjournment. Considering that the matter is today coming up for mention, I make the following orders:

1. The 1st and 2nd defendants to file and serve a replying affidavit within three (3) days from today.

2. The plaintiff to file and serve submissions within ten (10) days from today.

3. Defendants to file and serve submissions within twenty (20) days from today.

4. In default of 1st and 2nd defendants filing replying affidavit within the period provided under (1) above, the application shall be deemed unopposed by the 1st and 2nd defendants. ...

5. I have perused the record herein and I have not seen any replying affidavit filed by the 1st and 2nd defendants by 12th May 2018 which was the deadline.

6. Court orders are not made in vain. Parties and their advocates are under a grave obligation to comply with directions and the court's orders. That obligation is grave in situations where the court is dealing with proceedings brought under certificate of urgency.

7. This court dealt with a similar situation in Nakuru ELC Case No. 399 of 2013 Lally Farm Ltd –vs- Attorney General and 4 others reported as Lally Farm Limited -V- Attorney General & 4 others [2017] eKLR. The court stated in that case as follows:

8. The environment in which the business of the court is currently conducted is markedly different [from] that of yesteryears. The number of litigants approaching the courts for relief has grown tremendously. The courts have to be efficient in the use of time and other judicial resources. Amidst all this, the courts have given unto themselves a new challenge: slaying the dragon of case backlog. Parties must play their part in dealing with these challenges. Under sections 1A and 1B of the Civil Procedure Act both the court and litigants including their legal representatives have a duty to play their respective parts to assist the court to achieve its overriding objective which is the just, expeditious, proportionate and affordable resolution of disputes. This obligation extends to promptly complying with the directions and orders of the court, bearing in mind that court orders are not made in vain.

8. The application was argued by way of written submissions. I have considered the application, the affidavit and the submissions on record. 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 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.

9. From the material on record, I note that the plaintiff was registered proprietor of the suit property from 24th January 1992 and remained registered proprietor as at 29th June 2016. Pursuant to Certificate of Search dated 14th November 2017, the 1st defendant became registered proprietor on 14th December 2016. Yet for some strange reason, there is another Certificate of Search dated 23rd January 2017 which shows that the plaintiff was registered proprietor as at 23rd January 2017 and that a restriction was registered on 13th January 2017. It is not clear how the suit property changed ownership from the plaintiff to the 1st defendant on 14th December 2016 and yet the records as at 23rd January 2017 showed that the plaintiff was still the registered owner.

10. The defendants have not availed themselves the opportunity to controvert the plaintiff's case by filing a replying affidavit in compliance with the orders and directions of the court. I am therefore satisfied that the plaintiff has established a *prima facie* case. He has made a compelling case for preservation of the suit property. I do not think that damages would be an adequate remedy in the circumstances.

11. I note that the plaintiff averred at paragraph 8 of the plaint that the 2nd defendant is in occupation of the suit property. I will therefore avoid making any orders that may result in an eviction at this interlocutory stage. Regarding prayer 7 of the notice of motion, I note that it deals with issues of discovery. Since there is a separate procedure covering that aspect and since it has not been shown that that procedure has failed, I will not grant the order.

12. In the end, I make the following orders:

a) That pending hearing and the determination of this suit, the defendants, their agents and/or servants are restrained from alienating, selling or disposing of land parcel No. Miti Mingi/Mbaruk Block 3/786 (Barut).

b) That an order of inhibition is hereby issued inhibiting the registration of any dealing in respect of parcel of land known as Miti Mingi/Mbaruk Block 3/786 (Barut) pending hearing and determination of this suit.

c) Cost of the application shall be borne by the defendants.

13. It is so ordered.

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

D. O. OHUNGO

JUDGE

In the presence of:

Mr Nanda for the plaintiff/applicant

Ms Wangare holding brief for Mr Karanja for the defendants/respondents

Court Assistants: Gichaba & Lotkomoi