



REPUBLIC OF KENYA
IN THE ENVIRONMENT AND LAND COURT
MILIMANI LAW COURTS
ELC. CASE NO. 549 OF 2015

MARY GORETTY AKINYI ONYANGO..... PLAINTIFF

VERSUS

DOMINIC GATHECHA KINYANJUI.....1ST DEFENDANT

MARY NJERI GATHECHA.....2ND DEFENDANT

RULING

Coming up before me for determination is the Notice of Motion dated 17th June 2015 in which the Plaintiff/Applicant seeks for an order of temporary injunction restraining the Defendants/Respondents from encroaching in and interfering with the Plaintiff's parcel of land known as L.R. No. 31/20 situated in Lucky Summer, Ruaraka, Nairobi (hereinafter referred to as the "suit property") pending the hearing and determination of this suit.

The Application is premised on the grounds appearing on its face together with the Supporting Affidavit of the Plaintiff/Applicant, Mary Goretty Akinyi Onyango, sworn on 17th June 2015 in which she averred that she is the beneficial owner, licensee and or purchaser of the suit property. She then stated that she bought the suit property from the Defendants/Respondents in the year 2004. As proof of this assertion, she annexed a copy of an unsigned and undated conveyance. She further annexed a letter of consent and unsigned transfer of land. She further averred that the Defendants/Respondents have been harassing her so that she can vacate the suit property without justifiable cause. She added that she has been running a school on the suit property. She also disclosed that the Defendants/Respondents have destroyed her fence and all and created a road on the suit property. For those reasons, she sought for this court to allow her Application.

The Application is not contested.

The issue that I am called upon to determine is whether or not to issue an order of temporary injunction as sought by the Plaintiff/Applicant. In deciding whether or not to grant the temporary injunction, I wish to refer to and rely on the precedent set out in the case of **GIELLA versus CASSMAN BROWN (1973) EA 358** in which the conditions for the grant of an interlocutory injunction were settled as follows:

"The conditions for the grant of an interlocutory injunction are now, I think, well settled in East Africa. First, an applicant must show a prima facie case with a probability of success. Secondly, an interlocutory injunction will not be normally granted unless the applicant might otherwise suffer irreparable injury which would not adequately be compensated by an award of damages.

Thirdly, if the court is in doubt, it will decide an application on the balance of convenience.”

Has the Plaintiff/Applicant made out a prima facie case with a probability of success? In the case of **MRAO versus FIRST AMERICAN BANK OF KENYA LIMITED & 2 OTHERS (2003) KLR 125**, a prima facie case was described as follows:

“a prima facie case in a Civil Application includes but is not confined to a ‘genuine and arguable case’. It is a case which, on the material presented to the court, a tribunal properly directing itself will conclude that there exists a right which has apparently been infringed by the opposite party as to call for an explanation or rebuttal from the latter.”

Does the Plaintiff/Applicant have a ‘genuine and arguable case’ and therefore a prima facie case? Before I can go any further to set out my deductions herein, I must point out to the parties that my findings herein are not conclusive and must await the full trial of this suit. This position is supported by the decision in **Airland Tours & Travels Ltd versus National Industrial Credit Bank Milimani High Court Civil Case No. 1234 of 2002** where the court held as follows:

“In an interlocutory application, the court is not required to make any conclusive or definitive findings of fact or law, most certainly not on the basis of contradictory affidavit evidence or disputed provisions of the law.”

With that background laid down, I turn to assessing whether or not the Plaintiff/Applicant has met the three conditions for the grant of a temporary injunction. Firstly, I must assess whether the Plaintiff has established a prima facie case with a probability of success at the main trial. The Plaintiff/Applicant has sought to convince this court that she is the owner of the suit property. She contends that she is the purchaser of the suit property. In asserting this, the Plaintiff has produced an unsigned and undated conveyance document as well as an unsigned and undated transfer of land form. She also produced various photos of the suit property. None of these documents are proof of ownership of a parcel of land. The documents are not signed or dated. They cannot be relied upon to assert ownership rights over the suit property. Even though the Defendants/Respondents have not contested this Application, the onus is on the Plaintiff to prove that she does indeed have a “genuine and arguable” case and therefore a prima facie case with a probability of success at the main trial. For me, this threshold has not been met by the Plaintiff/Applicant.

Since the Plaintiff/Applicant has failed to prove the first ground in the grounds set down in the celebrated case of **Giella versus Cassman Brown**, this Honourable Court need not venture into the other grounds. This position was upheld in the Court of Appeal case of **Kenya Commercial Finance Co. Ltd versus Afraha Education Society (2001) 1 EA 86** as follows:

“The sequence of granting an interlocutory injunction is firstly that an applicant must show a prima facie case with a probability of success if this discretionary remedy will inure in his favour. Secondly, that such an injunction will not normally be granted unless the applicant might otherwise suffer irreparable injury: and thirdly where the court is in doubt it will decide the application on a balance of convenience. See Giella vs. Cassman Brown and Co. Ltd 1973 EA at page 360 Letter E. These conditions are sequential so that the second condition can only be addressed if the first one is satisfied and when the court is in doubt then the third condition can be addressed.”

Also, in the case of **Nguruman Ltd versus Jan Bonde Nielsen (2014) eKLR**, the Court of Appeal had this to say:

“If prima facie case is not established, then irreparable injury and balance of convenience need no consideration.”

In light of the foregoing, I hereby dismiss this Application. Costs shall be in the cause.

DELIVERED, DATED AND SIGNED AT NAIROBI THIS 5TH DAY OF MAY 2017.

MARY M. GITUMBI

JUDGE