



REPUBLIC OF KENYA

IN THE ENVIRONMENT AND LAND COURT

AT MOMBASA

ELC NO. 307 OF 2016

SAMUEL G. NJOROGI

(Suing as the legal representative

of the Estate of Late GEOFFREY

GIUKARU NJOROGI)(deceased).....PLAINTIFF

VERSUS

WANJE HOLDINGS LIMITED.....DEFENDANT

RULING

1. By a Notice of Motion dated 26th October 2016 and brought under sections 1A, 1B, 3, 3A and 63 (e) of the Civil Procedure Act and Order 40 Rules 1 (a), 3 (3) and (4) and Order 50 Rules (1) and (3) of the Civil Procedure Rules the plaintiff seeks a temporary order of injunction to be issued restraining the defendant from developing, demolishing, transferring, sub-dividing, alienating, charging and/or dealing in any way with parcel No.MN/VI/2360 pending hearing and determination of this application and pending hearing and determination of the suit.

2. The application is supported by affidavit of Samuel Njoroge, the plaintiff sworn on 26th October 2016 and the grounds set out in the Motion as follows:

- 1) The plaintiff/applicant is the legal representative to the estate of the late Geoffrey Gikaru Njoroge via succession cause no. 298 of 2015.
- 2) The defendant now claims ownership of parcel NO. MN/VI/2360 which they claim to have purchased through public auction.
- 3) That there is presently before court HCCC No.265 of 1996 Kenatco Transport Co. Ltd (under Receivership) –vs- Geoffrey Gikaru Njoroge which was consolidated with HCCC no.264 of 1996.
- 4) It is in the interest of justice that the orders sought herein do issue.

3. In his said affidavit the plaintiff deposes that the defendant claims to have acquired the suit property and is demolishing and about to commence construction works on the house situate on the suit property. The plaintiff further deposes that there is pending and awaiting determination of this court HCCC No.265 of 1996, Kenatco Co. Ltd (under receivership) -v- Geoffrey Gikaru Njoroge which is consolidated with HCCC No.264 and 265 of 1996 and the subject, matter in that suit is parcel NO/ MN/VI/2360, the suit property herein. According to the plaintiff, the defendant, who now claims ownership of the suit property was at the time of purchase, aware of the suit and the plaintiff's interest over it. The plaintiff deposes that there have never been any proceedings between them and the defendant over the suit property and that they were never aware that the suit property was up for sale by public auction. It is the plaintiff's contention that if the suit property was sold through a public auction, the same was never advertised as required, and that the defendant ought to have filed suit against them for vacant possession or seek to be enjoined to the pending cases. The plaintiff further contends that the suit property could not be disposed off during the pendency of an ongoing suit over the same subject matter and that the purchase and registration of the defendant as the owner was not proper as required by the law. The plaintiff deposes that if the orders sought are not issued, they would lose the suit property to the defendant without getting an opportunity to be heard. He states that it is only fair and just that the orders sought herein are granted.

4. The application is opposed by the defendant through a replying affidavit sworn by its operations manager Peter Waweru on 18th January 2017. Mr. Waweru deposes that the defendant purchased plot title numbers MN/VI/2362 and MN/VI/2360 from National Bank of Kenya Limited on 11th August 2014 at the purchase price of Kshs.35,000,000 which the defendant paid. That the plots were being offered for sale

because National Bank of Kenya Limited had a floating debenture with Kenatco (under receivership) for Kshs.20,000,000.00. It is deponed that when the defendant purchased the suit property they knew there were people occupying the plot illegally and therefore asked the bank which provided all the relevant documents to enable the defendant evict squatters from the plot. The defendant maintains that it acquired the suit property procedurally and was not involved in any fraud. A copy of the title deed is attached to the replying affidavit and it shows a caveat that was placed by the deceased on 2/9/1977 and removed on 8/9/1991 and a lease to one Julius Hamisi Kwajumbe between 1998 and 2004. Mr. Waweru further depones that at the time National Bank of Kenya Limited sold the suit property to the defendant, there was no court order, prohibition, caution or caveat against the title. It is the defendant's contention that the deceased has no legitimate claim against the defendant over the suit property and that even its claim against Kenatco has little chances of success and their remedy lies in damages. The defendant further contends that the plaintiff's claim is res judicata, the same having been heard and determined in ELC No.168 of 2015. The defendant urged the court to dismiss the application with costs.

5. In his submissions, counsel for the plaintiff reiterated the contents of the supporting affidavit and added that the plaintiff was not a party to ELC No.168 of 2015 and was in occupation of the suit property and was wrongly evicted by the defendant pursuant to the warrants in that case. On the issue of prima facie case, counsel referred to the Court of Appeal decision in *Nguruman Limited –v- Jan Bonde Nielsen & 2 others (2014) eKLR* in which the court stated that the applicant need not establish title and it is enough if he can show that he has a fair and bona fide question to raise as to the existence of the right which he alleges. Learned counsel submitted that the plaintiff has established a prima facie case as against the defendant. While relying in the cases of **DAVID JAMES MBOGO V- ALFRED ASIKOYO & 3 OTHERS (2013) eKLR** and the case of **WILLIAM KOROSS –V- HEZEKIAH KIPTOO KOMEN & 4 OTHERS (2016)EKLR**, counsel submitted that the plaintiff should have been made a party in ELC No.168 of 2015 before he was evicted. He further submitted that the doctrine of *lis pendens* is to preserve the suit property until the matter is determined and the same should not have been sold while ELC No.265 of 1996 was still pending. Counsel referred the court to the case of *Olympic Company Trading Ltd & another –v- Saidi Mohamed & 4 other (2014)eKLR*. The plaintiff's counsel submitted that the balance of convenience in this case tilts in favours of the applicant who has been in occupation since 1977. He further submitted that the matter is not res judicata because ELC No.168 of 2015 involved different parties from the ones in this case, and that although the subject matter is the same, the cause of action are different. He referred to the case of *Kenya Hotel Properties Limited –v- Willisden Investments Limited & 6 others (2013)eKLR*.

6. On his part, counsel for the respondent relied on the replying affidavit together with the annexures thereto. Counsel submitted that the fact that the caveat by the deceased was removed and the suit property was leased out by Kenatco Transport Company Limited to a different person was evidence that the applicant was not in possession as alleged by the applicant. He further submitted that no prima facie case has been established as applicant has never been registered as owner of the suit property at any one time. He submitted that the respondent in ELC No.168 of 2015 obtained warrants to give vacant possession against parties who were in the suit property and those persons were evicted. Thereafter, the plaintiff made an application in ELC No.168 of 2015 and made similar submissions as in this case, but their application was dismissed. It was submitted that the defendant, before purchasing the property, carried out due diligence and confirmed that the property was not encumbered. That there was no order by the applicant or Kenatco prohibiting the sale or transfer of the suit property. Counsel submitted that the subject matter is property that can be valued and in the event the applicant succeeds, he can be compensated by an award of damages. He submitted that the balance of convenience tilts in favour of the defendant who wishes to develop it. Counsel submitted that the applicant has not come to court with clean hands, having filed this case without disclosing that he was a party in ELC No.268 of 2015 and the subsequent appeal. He urged the court to dismiss the application with costs.

7. I have carefully considered the application herein. This being a **GIELLA –V- CASSMAN BROWN** application, the plaintiff must show that he has a prima facie case with probability of success; that he stands to suffer irreparable damage; and that, in the event of doubt, the balance of convenience lies with the plaintiff.

8. It is not disputed that the defendant is the registered proprietor of the suit property having purchased it from National Bank of Kenya Limited which had a floating debenture with Kenatco Transport Company Limited (under Receivership), the previous registered owner. The defendant herein filed ELC NO.168 of 2015 against National Bank of Kenya Limited seeking, inter alia an order for vacant possession which was granted vide a judgment entered on 2nd November, 2015 and it eventually took possession of the suit property.

9. One of the main grounds relied on by the plaintiff in support of his application is that there is presently pending before the court HCCC NO.265 of 1996 between Kenatco Transport Co. Ltd (under receivership) and Geoffrey Gikaru Njoroge (now deceased) which case was consolidated with HCCC NO.264 and HCCC 266 both of 1996. In paragraph 6 of the supporting affidavit, the plaintiff depones that there have never been any proceedings between them and the defendant over the suit property where the court declared the defendant the owners of the suit property.

10. In their replying affidavit, the defendant has attached among others, copies of judgment and ruling in ELC No.168 of 2015. It is clear from the ruling in ELC No.168 of 2015 that the applicant had made an application seeking various orders among them to be enjoined as parties to the suit, mandatory injunction reinstating them back to the suit property, stay of execution of the decree and warrants of eviction and setting aside the judgment in that case. It is also clear that after hearing the said application, the court declined to grant the applicant the orders sought and dismissed it.

11. An injunction is an equitable remedy and therefore it behoves an applicant to come to court with clean hands. He or she must make full disclosure of all material facts to enable the court make an informed decision. There is overwhelming and uncontroverted evidence showing that the issues raised in this application have been deliberated upon and determined in ELC NO.168 of 2015 contrary to the applicant's averment in the supporting affidavit. I am in agreement with the submission of the respondent that the applicant is guilty of non-disclosure.

12. The defendant has demonstrated that it acquired the suit property lawfully and has a genuine interest in it. Having considered the plaintiff's application with the affidavits in support and against as well as the submissions made, I am not satisfied on the material before me that the plaintiff has established a prima facie case against the defendant with a probability of success. On whether or not the applicant would suffer irreparable harm if the orders are not granted, I take the view that the loss that may result if the orders are not granted can be quantified in damages as the value of the property can be ascertained. As for the balance of convenience, I take the view that he same tilts in favour of the defendant who are the registered owners of the suit property.

13. The upshot of the foregoing is that the plaintiff's Notice of Motion dated 26th October 2016 lacks merit and the same is hereby dismissed with costs to the respondent.

Dated, signed and delivered at Mombasa this 15th day of JUNE 2017.

.....for the applicant

.....for the respondent

C. YANO

JUDGE