



REPUBLIC OF KENYA  
IN THE ENVIRONMENT AND LAND COURT

AT NAKURU

CASE No. 27 B OF 2016

WINNIE WAMBUI KARIYU.....PLAINTIFF

VERSUS

KAGECHE BORO.....DEFENDANT

**RULING**

*(Application for injunction to restrain the defendant from interfering with  
the suit property; prima facie case established; application allowed)*

1. This ruling is in respect of plaintiff's Notice of Motion dated 4<sup>th</sup> February 2017. The application is brought under Order 40 rule 1 of the Civil Procedure Rules and seeks the following orders:

1. *Spent.*

2. *Spent.*

3. *That pending the inter partes hearing and determination of this suit, the defendant/respondent by himself, his agents, servants and/or employees or otherwise howsoever be restrained from trespassing, entering upon, encroaching, remaining, constructing, destroying, or in any other interfering with the plaintiff/applicant's lawful, quiet and peaceful enjoyment of L.R. No.398/19 (Original No. 398/10/4) and situate in South of Naivasha Township in the Naivasha District in Republic of Kenya.*

4. *That costs of this application be provided for and borne by the defendant/respondent.*

2. The application is supported by an affidavit sworn by the plaintiff on 4<sup>th</sup> February 2017 and a supplementary affidavit sworn on 31<sup>st</sup> May 2017, also by the plaintiff. The plaintiff deposed that she is the registered proprietor of land known as L.R. No. 398/19 (Original No. 398/10/4) (the suit property) situated South of Naivasha Township. She annexed a copy of an indenture of conveyance registered on 14<sup>th</sup> October 2015 and a copy of a certificate signed by the registrar, showing ownership as at 26<sup>th</sup> May 2016. The suit property was purchased pursuant to Agreement for Sale dated 28<sup>th</sup> April 2015. She further deposed that the defendant encroached on the suit property around December 2016 and destroyed her perimeter fence. She annexed copies of photographs to support the contention. She thus sought the orders in the application.

3. The defendant responded to the application through his replying affidavit sworn on 7<sup>th</sup> March 2017. He deposed that there is another suit being Nairobi ELC No. 255 of 2011 which was filed by the vendor against the defendant and wherein an order of status quo was issued on 4<sup>th</sup> February 2016. He further deposed that he has been in occupation of the suit property since 1981 under a lease until he bought the land. He annexed a copy of an agreement. He deposed that the plaintiff purchased or purported to purchase the land with full knowledge of his occupation and claim. In her supplementary affidavit, the plaintiff denied that the defendant had bought the suit property.

4. The application was argued by way of written submissions. The plaintiff/applicant filed her submissions on 14<sup>th</sup> August 2017 while the defendant/respondent filed his submissions on 5<sup>th</sup> September 2017. I have considered the application, the affidavits filed, the submissions and the authorities cited. In an application for an interlocutory injunction the applicant must satisfy the test in **Giella –vs- Cassman Brown & Co. Ltd [1973] E.A 358**. She 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 her. Finally, if the court is in doubt as to the answers of 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 evidence placed before the court, there is no doubt that the plaintiff is the registered proprietor of the suit property. The defendant does not specifically deny that the plaintiff is the registered owner but only seems to challenge the circumstances under which the plaintiff acquired the property. Under Section 24 of the Land Registration Act, the registration of the plaintiff as proprietor of the suit property vests in her absolute ownership thereof together with all the rights and privileges appurtenant thereto.

6. Under section 25 of the same Act, the rights of a proprietor shall be not defeated except as provided under the Act and shall be held by the proprietor free from all other interests and claims, save as provided under the section. I am alive to the fact that the defendant has argued that he purchased the suit property. He has annexed a copy of a sale agreement which on perusal I found not to be legible and I could not see the date when it was executed. Suffice it to say that the plaintiff's rights as a registered proprietor are acknowledged as well as protected by law. For the defendant's claim over the suit property to have any tangible impact over the plaintiff's rights, they must be established at the hearing of the main suit, with resultant cancellation of the registration of plaintiff's proprietorship.

7. The defendant also argued that the plaintiff bought the suit property knowing fully well that there was litigation in Nairobi ELC No. 255 of 2011 wherein an order of maintenance of status quo was issued on 4<sup>th</sup> February 2016. The defendant further cited the doctrine of *lis pendens* under section 52 of Indian Transfer of Property Act 1882 (repealed) and argued that the plaintiffs in ELC No. 255 of 2011 could not dispose of the suit property while the litigation was pending. I note that the sale agreement pursuant to which the plaintiff acquired the suit property was executed on 28<sup>th</sup> April 2015 and the conveyance in favour of the plaintiff was registered on 14<sup>th</sup> October 2015. Both these dates occur before the orders of 4<sup>th</sup> February 2016 were issued.

8. I have also perused the record herein and I have not seen any defence filed by the defendant in response to the suit herein. At this stage, I have not seen any challenge against the plaintiff's title. Even if there was, the plaintiff remains registered proprietor until the registration is cancelled by an order of the court. Similarly, applicability of the doctrine of *lis pendens* as well as its consequences upon the plaintiff's proprietorship of the suit property are all matters to be determined at the trial of the suit.

9. The plaintiff accused the defendant of encroaching on her property and destroying her fence sometime around December 2016. The defendant has not specifically denied this. The plaintiff fears that unless restrained, the defendant will continue the encroachment and destruction.

10. From the foregoing discussion, it is clear to me that the plaintiff has established a prima facie case with a probability of success. Damages cannot adequately compensate the plaintiff if the defendant were to continue with the destructive acts. In the circumstances, I grant an injunction restraining the defendant by himself, his agents, servants and/or employees or otherwise howsoever from trespassing upon, entering upon, encroaching, constructing upon, destroying, or in any other manner interfering with the plaintiff/applicant's quiet and peaceful enjoyment of L.R. No.398/19 (Original No. 398/10/4) situated South of Naivasha Township in the Republic of Kenya pending hearing and determination of this suit.

11. Costs of the application are awarded to the plaintiff.

**Dated, signed and delivered in open court at Nakuru this 23<sup>rd</sup> day of November 2017.**

**D. O. OHUNGO**

**JUDGE**

In the presence of:

Mr. Kisila for the plaintiff/applicant

Ms. Moenga holding brief for Mr. Waiganjo for the defendant/respondent

Court Assistant: Gichaba