



REPUBLIC OF KENYA

IN THE ENVIRONMENT AND LAND COURT AT NAKURU

CASE NO. 47 OF 2017

ALICE CHEMUTAI KONINI.....PLAINTIFF

VERSUS

REGINA CHELANGAT KONINI.....DEFENDANT

RULING

(An application for injunction to restrain the defendant from interfering with the plaintiff's use of land parcel Nakuru/Nessuit/982; prima facie case established; application allowed)

1. This ruling is in respect of plaintiff's Notice of Motion dated 10th February 2017. The following orders are sought:

1. Spent.

2. Spent.

3. Spent.

4. THAT this honourable court be pleased to temporarily restrain the Defendant, her agents and servants by way of injunction from cultivating, ploughing, planting, fencing off, damaging crops, cutting trees, encroaching or interfering in any manner with the plaintiff's use of land parcel Nakuru/Nessuit/982 allocated vide Allocation Card S/No.04755 pending the hearing and determination of the suit herein.

5. That the costs of this application be provided for.

2. The application is brought under Order 40 rules 1 and 2 of the Civil Procedure Rules, 2010 among others and is supported by the affidavit of the plaintiff sworn on 10th February 2017 and further affidavit sworn on 17th May 2017. The plaintiff deposes that she is the owner of parcel of land known as Nakuru/Nessuit/982 measuring approximately 5 acres having been allocated to her through allocation Card S/No.04755. A copy of the allocation card is annexed. She was settled on the land by the District Surveyor on 3rd October 1996 and was in exclusive occupation and use of the land from that date to the year 2007 when her parents requested her to temporarily accommodate the defendant, who is her younger sister, on the land. That she complied and gave the defendant a quarter of an acre of the suit property to cultivate and temporarily reside on. That the defendant started laying claim on the other portion of the plaintiff's land sometime in the year 2015. Between 23rd December 2016 and 6th February 2017, the defendant interfered with the plaintiff's plot by pulling down the plaintiff's fence, cutting down trees, fencing off a portion of the land, destroying crops and ploughing the land in preparation for planting.

3. The defendant opposed the application through her replying affidavit sworn on 25th April 2017. While admitting that the plaintiff was allocated the land, the defendant deposes that the plaintiff holds the land in trust for her. She deposes that she has been in peaceful occupation from 1998 to February 2015 when the plaintiff sent his son to construct a house on the land. She further deposes that if the orders sought herein are granted, she will be deprived of the only home she has known for the last 19 years.

4. In the further affidavit, the plaintiff countered by denying the allegation of trust and stating that the allocation was made to her personally on the basis of a list of residents compiled by elders of the 18 clans of Ogiek Community residing in the area and that the defendant's name was not on the list.

5. The court ordered that the application be disposed of by way of written submissions. The plaintiff filed submissions on 27th September 2017. The defendant did not file any submissions. I have considered the application, the affidavits and submissions. In an application such as the one before the court 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 to 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.

6. The defendant herein admits that the plaintiff was allocated the suit property. She does not deny the allegations by the plaintiff that she has fenced off part of the property and cut down trees among others. The allegation that the property is held in trust for the defendant has not been supported by any evidence besides the defendant's allegation. In **Dorcas Indombi Wasike v Benson Wamalwa Khisa & another [2010] eKLR** the Court of Appeal stated:

The appellant's counsel, Mr Amolo, cited several authorities and a careful reading of all those authorities reveal one thing. Whether or not a trust exists is a matter of evidence. Those authorities, and in particular Mbothu & 8 Others vs Waitimu & 11 Others [1986] KLR 171, are clear that:-

“ The law never implies, the Court never presumes a trust, but in case of absolute necessity. The Courts will not imply a trust save in order to give effect to the intention of the parties. The intention of the parties to create a trust must be clearly determined before a trust will be implied.”

7. I am persuaded that the plaintiff has established a *prima facie* case with a probability of success. Damages will not adequately compensate her for the loss of the property and loss of opportunity to use and farm it.

8. I therefore make the following orders:

a) An injunction is hereby issued restraining the Defendant, her agents and servants from cultivating, ploughing, planting, fencing off, damaging crops, cutting trees, encroaching or interfering in any manner with the plaintiff's use of land parcel Nakuru/Nessuit/982 allocated vide Allocation Card S/No.04755 pending the hearing and determination of the suit herein.

b) The defendant to remain in temporary occupation and use of only the one quarter of an acre (0.25 acres) of Nakuru/Nessuit/982 that was allocated to her by the plaintiff, pending the hearing and determination of the suit herein.

c) Costs to the plaintiff.

9. It is so ordered.

Dated, signed and delivered in open court at Nakuru this 16th day of November 2017.

D. O. OHUNGO

JUDGE

In the presence of:

Mr. Mwalo holding brief for Mr. Ndubi for the plaintiff/applicant

No appearance for the defendant

Court Assistants: Gichaba and Lotkomoi