



REPUBLIC OF KENYA
IN THE ENVIRONMENT AND LAND COURT

AT NYERI

ELC NO. 99 OF 2017

TITUS KAGUNU MUNDIA.....PLAINTIFF/APPLICANT

-VERSUS-

JOSEPH MUTHEE MUNDIA.....1ST DEFENDANT/RESPONDENT

ANGELICA WANJIRU.....2ND DEFENDANT/RESPONDENT

RULING

1. Vide a notice of motion dated **20th June, 2017** and filed on an even date, the plaintiff/applicant herein seeks that:

(1) This application be certified as urgent and be heard in the first instance exparte pending the service of the application.

(2) The Honourable Court do issue a prohibitory/inhibitory order against Plot No. 12 and 13 Kamuyu Village within Nyeri town.

(3) The defendant/respondent and/or their agents, employees, surveyors and their assigns be inhibited/restrained from carrying on with any action which may be detrimental to the outcome of the suit.

(4) The OCS Nyeri Police Station do facilitate the adherence of the orders issued.

(5) Costs of this application be provided for.

2. The application is premised on the grounds on the face of the application and is supported by the applicants supporting affidavit sworn on **19th June, 2017**. In that affidavit, the applicant depones that he is a beneficiary of Plots No. 12 and 13 Kamuyu village which were initially owned by his father; that the aforesaid plots have been irregularly obtained by the respondents and registered in their names as allottees in place of his father. He urges the court to grant him an order inhibiting the respondents from taking any action with the suit property until the suit is heard and determined.

3. The application is not opposed.

4. Vide an affidavit of service sworn on **2nd November, 2016** by **Simon Ndirangu Ndumia**, a licensed process server, he depones that the respondents were personally served in their homes on **27th July, 2017**

and 23rd October, 2017 respectively and that both accepted service but declined to sign for the pleadings.

5. The application herein being one for issuance of a temporary injunction; to succeed in his quest to restrain the respondents, the plaintiff must satisfy the conditions enunciated in the celebrated case of **Giella vs Cassman Brown** (1973) E.A. 358. The plaintiff must:-

(i) Demonstrate that he has a *prima facie* case with a probability of success;

(ii) Prove that damages are not adequate to compensate him for the loss that he may suffer if the prayer for temporary injunction is denied;

(iii) If the court is in doubt, it will determine the case on a balance of probabilities.

6. I have considered the application, the grounds on its face and the supporting affidavit. Although the application is unopposed, I note that despite the applicant having deponed that he has a beneficial interest over the property, he has failed to produce evidence capable of proving that fact.

7. By dint of the provisions of **Section 107** of the Evidence Act Cap 80, the applicant has the burden to prove his allegation. The above Section provides:

“Whoever desires any court to give judgment as to any legal right or liability dependent on the existence of facts which he asserts must prove that those facts exist.

When a person is bound to prove the existence of any fact it is said that the burden of proof lies on that person”

8. Without any evidence to prove the alleged beneficial interest, the applicant’s allegations remain merely as such. In view of the foregoing, I find the applicant has failed to establish a *prima facie* case with probability of success and I dismiss the application with no order to costs since the application was not defended.

Dated, signed and delivered in open court at Nyeri this 2nd day of November, 2017.

L N WAITHAKA

JUDGE

Coram:

Titus Kagunu Mundia - applicant

N/A for the respondent

Court assistant - Esther