



REPUBLIC OF KENYA

IN THE ENVIRONMENT AND LAND COURT AT NAKURU

CASE No. 427 OF 2017

DOUGLAS KAMAU NGOTHO.....PLAINTIFF

VERSUS

KIMOIYO COMPANY LTD.....1ST DEFENDANT

LAND REGISTRAR.....2ND DEFENDANT

RULING

(An application for an order to restrain the defendants from issuing a Certificate of Lease and interfering with the suit properties; application allowed)

1. This ruling is in respect of Plaintiff's Notice of Motion dated 10th November 2017. The application is brought under Order 40 rule 2 of the Civil Procedure Rules and seeks the following orders:

a) Spent.

b) That an order that the 2nd defendant/respondent be restrained by an order of this court from issuing a Certificate of Lease to the 1st defendant/respondent in respect of Nakuru Municipality Block 12/128 as per Kenya Gazette Notice No. 9817 of 6th October 2017.

c) Spent.

d) That pending the hearing and determination of this suit, the defendant be stopped by way of an injunction from interfering, alienating, disposing on in any way interfering with the plaintiff's parcel of land known as Nakuru Municipality Block 12/290 and Nakuru Municipality Block 12/291 which arose from sub-division of Nakuru Municipality Block 12/128.

e) That the costs of the application be provided for.

2. The application is supported by an affidavit sworn by the plaintiff on 10th November 2017. He deposes that he is the registered proprietor of the parcels of land known as Nakuru Block 12/290 and Nakuru Municipality Block 12/291, the suit properties. That the suit properties arose out of sub-division of Nakuru Municipality Block 12/128. That he is the ratable owner of the suit properties and has been in peaceful possession for the last 22 years. That the defendants issued a notice through Gazette Notice No. 9817 appearing in the Kenya Gazette of 6th October 2017 alleging that Certificate of Lease in respect of Nakuru Municipality Block 12/128 had been lost and that the 2nd defendant intended to issue a new Certificate of Lease. He annexed a copy of Certificate of Lease in respect of each of the suit properties,

Certificates of Official Search, Registry Index Map for Nakuru Block 12, Rates Payment Receipts and Gazette Notice No. 9817.

3. When the application came up for inter parte hearing, the court was satisfied that the defendants had been served. There being no response to the application and there being no appearance by the defendants, the hearing of the application proceeded unopposed.

4. I have considered the application and the evidence tendered in support thereof. From the evidence, there is no doubt that the plaintiff is the registered proprietor of a lease in respect of the suit properties. The plaintiff maintains that the suit properties are subdivisions of Nakuru Block 12/128. He has annexed a copy of the Registry Index Map in respect of Nakuru Block 12. Though served, the defendants have not tendered any evidence to challenge the plaintiff's position.

5. The plaintiff seeks a restraining order pending the hearing and determination of this suit. In essence, the plaintiff seeks an interlocutory injunction. In an application for an interlocutory injunction, the applicant must satisfy the test in **Giella –vs- Cassman Brown & Co. Ltd [1973] E.A 358**. He 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 him. 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. On the basis of the evidence presented by the plaintiff, and which has not been challenged by the defendants, I am satisfied that the plaintiff has established a *prima facie* case with a probability of success. Unless an injunction is granted as sought, a new certificate of title is likely to be issued with the possibility that dispositions adverse to the plaintiff's interest may be made on Nakuru Municipality Block 12/128. In such an eventuality, the plaintiff will suffer irreparable damage. I am therefore satisfied that the plaintiff has established a case warranting granting of the orders sought.

7. In the end, I grant:

a) an order restraining the 2nd defendant/respondent from issuing a Certificate of Lease to the 1st defendant/respondent in respect of Nakuru Municipality Block 12/128 as per Kenya Gazette Notice No. 9817 of 6th October 2017.

b) an order restraining the defendants from alienating, disposing or in any way interfering with the plaintiff's parcels of land known as Nakuru Municipality Block 12/290 and Nakuru Municipality Block 12/291 pending the hearing and determination of this suit.

8. Costs to the plaintiff.

Dated, signed and delivered in open court at Nakuru this 19th day of December 2017.

D. O. OHUNGO

JUDGE

In the presence of:

Mr. Biko holding brief for Mr. Nyaribo for the plaintiff/applicant

No appearance for the defendants

Court Assistant: Gichaba