



REPUBLIC OF KENYA

IN THE ENVIRONMENT AND LAND COURT AT NAKURU

CASE No. 355 OF 2017

BENSON KIBOCHI NG'ANG'A.....PLAINTIFF

VERSUS

CLEMENT V. GACHUHI KABAYA.....DEFENDANT

RULING

(An application for injunction to restrain the defendant from interfering with suit property; application allowed)

1. By Notice of Motion dated 21st September 2017, the plaintiff seeks the following orders:

1. Spent.

2. Spent.

3. That this honourable court be pleased to issue an order for temporary injunction to restrain the Defendant/Respondent by herself, agents, servants, sub-lessees, and/or anyone claiming through him from interfering with the plaintiff's ownership and peaceful use of land parcel number UNS. COMMERCIAL PLOTS NO. B 53 AND B 54 – GITHIORO TRADING CENTRE pending the hearing and determination of this suit.

4. That this honourable court be pleased to grant an order of eviction of the defendant/respondent from land parcel numbers UNS. COMMERCIAL PLOTS NO. B 53 AND B 54 – GITHIORO TRADING CENTRE pending the hearing and determination of this suit.

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

2. The application is brought under Order 40 Rule 1 of the Civil Procedure Rules among other provisions and is supported by an affidavit sworn by the plaintiff. He deposes that he is the owner of the parcels of land known as UNS. COMMERCIAL PLOTS NO. B 53 AND B 54 – GITHIORO TRADING CENTRE. He purchased UNS. COMMERCIAL PLOT NO. B 53 GITHIORO TRADING CENTRE in October 2012 from Zipporah Wanjiru Maina who had been allocated the plot by County Council of Nakuru. He also purchased UNS. COMMERCIAL PLOT NO.54 GITHIORO TRADING CENTRE on 16th December 2013 from Jackline Nduta Mwangi who had been allocated the plot by the County Council of Nakuru. He has been paying rates to the County Government of Nakuru. The defendant has moved into the land and started erecting a fence and a temporary housing structure. The plaintiff thus prays that an injunction be granted.

3. Though the defendant filed a Notice of Appointment of Advocate, the defendant did not file any response to the application. This is despite the fact that the defendant's advocate sought from the court and was granted time within which to file a response. Similarly, the defendant's advocate did not attend court at the inter parte hearing of the application despite the fact that the date was given in court in the presence of counsel representing both parties. As a result, the application proceeded unopposed. Counsel for the applicant therefore urged the court to allow the application.

4. I have considered the application. 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.

5. The evidence put on record by the plaintiff to the effect that he owns the two suit plots has not been challenged by the defendant. I have perused the annexures to the supporting affidavit and I note that the plaintiff has annexed allotment letters, sale agreements and copies of rates payment receipts. The plaintiff's allegations to the effect that the defendant has moved into the suit properties and embarked on construction have not been challenged.

6. In the circumstances, I am persuaded that the plaintiff has established a *prima facie* case with a probability of success. Damages would not compensate the plaintiff for loss of his land. He is entitled to a restraining order. I am not however persuaded that an eviction order should be granted at this stage as doing so would in effect conclude the case at this interlocutory stage.

7. In the end, I grant an injunction restraining the Defendant/Respondent by himself, agents, servants, and/or anyone claiming through him from interfering with the plaintiff's ownership and peaceful use of land parcel number UNS. COMMERCIAL PLOTS NO. B 53 AND B 54 – GITHIORO TRADING CENTRE pending the hearing and determination of this suit.

8. Costs to the plaintiff.

Dated, signed and delivered in open court at Nakuru this 15th day of December 2017.

D. O. OHUNGO

JUDGE

In the presence of:

No appearance for the plaintiff/applicant

Mr. Mbatia for the defendant /respondent

Court Assistant: Gichaba