



REPUBLIC OF KENYA
IN THE ENVIRONMENT AND LAND COURT

AT NAKURU

CASE No. 591 OF 2016

MARY NJERI KARIUKI.....PLAINTIFF

VERSUS

JOYCE CHERUTO.....1ST DEFENDANT

ANN RUTO.....2ND DEFENDANT

RULING

(An application seeking injunction to restrain the defendants from interfering with the suit property; no prima facie case established; application dismissed)

1. This ruling is in respect of Plaintiff's Notice of Motion dated 20th December 2016. The application is brought inter alia under Order 40 rules 1, 2 and 4 of the Civil Procedure Rules, 2010. The applicant seeks an injunction to restrain the defendants by themselves, their agents or servants from entering, cultivating, erecting structures, selling, transferring, alienating, disposing, tilling, leasing or in any way interfering with the parcel of land known as Nakuru Olongai plot No. 483 (the suit property) pending the hearing and determination of this suit.

2. The application is supported by an affidavit sworn by the plaintiff on 20th December 2016 wherein she deposes that she is the beneficiary or owner of the suit property and that her husband, one Josphat Kariuki Maguru (deceased) bought the suit property on 24th August 2006. She annexed a copy of a sale agreement. Her husband passed away on 19th June 2016. A copy of certificate of death was annexed. The applicant further deposed that despite the purchase of the suit property by the deceased, the defendants did not give the original title deed to the deceased and that the defendants wrote a letter in October 2015 claiming that the suit property was grabbed. The applicant therefore sought the injunctive relief.

3. The defendants responded to the application through a replying affidavit sworn by Margaret Cheruto Rutto and filed in court on 28th February 2017. Ms. Rutto deposed that she holds a power of attorney donated to her by the 1st defendant in respect of parcel of land known as Nakuru/Olongai Phase II/483. She further deposed that the 1st defendant is the registered proprietor of Nakuru/Olongai phase II/483 and that the 1st defendant and her children were living on the said land until the year 2003 when she relocated to Eldama Ravine due to illness. That owing to the 1st defendant's absence, some people trespassed onto the land having been misled by the plaintiff that her late husband owned the land. She denied that the 1st defendant sold the land to the plaintiff's late husband or to any person. Ms. Rutto annexed a copy of the

power of attorney, title deed for Nakuru/Olongai Phase II/483 and a Certificate of Official Search as at 13th July 2016.

4. The plaintiff filed a brief further affidavit sworn on 18th March 2017 wherein she only annexed a copy of letters of administration ad litem issued to her on 9th March 2017 and limited to “the purpose of filling suit’.

5. Parties agreed to dispose of the application by way of written submissions. The court accordingly issued orders for filing of submissions as well as the mode of exchange thereof. In that regard, the applicant filed her submissions on 22nd August 2017. The respondents did not file any submissions. I have considered the application, the affidavits and submissions. In an application for an interlocutory injunction, the applicant must establish a prima facie case with a probability of success. Even where a prima facie case is established, an injunction ought not to issue if damages can adequately compensate the applicant. Finally, if the court is in doubt as to the answers to the above two tests then the court should determine the matter on a balance of convenience. These principles were enunciated in the case of **Giella –vs- Cassman Brown & Co. Ltd [1973] E.A 358**. Recently in **Nguruman Limited v Jan Bonde Nielsen & 2 Others [2014] eKLR**, the Court of Appeal further elaborated the test by stating that 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 applicant claims to be the owner of the suit property on account of the same having been bought by her husband Josphat Kariuki Maguru (deceased) who passed away on 19th June 2016. The suit herein was filed on 20th December 2016. As at the date of filing the suit, the plaintiff did not claim to have any letter of administration in respect of the estate of the deceased. Indeed, the plaintiff subsequently filed a further affidavit sworn on 18th March 2017 to which she annexed Letters of Administration Ad Litem issued to her on 9th March 2017 and limited to the purpose of filing suit. In the circumstances, it is clear that this suit was filed without the plaintiff obtaining any grant. In such circumstances, the suit is founded on a very shaky foundation with the result that there cannot be a prima facie case with a probability of success.

7. Even if I had found that the suit was properly commenced, the applicant would still need to show that the parcel of land which she has referred to as Nakuru/Ololongai Plot No. 483 exists by exhibiting a copy of a certificate of title or some other formal document that describes the land in terms of its size, location and ownership. No such document has been exhibited. It is not possible to tell whether the interest in the land is freehold or leasehold.

8. I am aware that the 1st defendant’s position seems to be that the suit property is known as Nakuru/Olongai Phase II/483 and that the 1st defendant is the registered proprietor. The 1st defendant has annexed a copy of title deed and Certificate of Search as at 13th July 2016 in support of her contention. Both documents show that the 1st defendant is the registered owner of Nakuru/Olongai Phase II/483. Nevertheless, the burden of proof in terms of identifying the property in respect of which she has brought the suit rests entirely on the applicant. In my view, she has failed to discharge burden as far as the application before the court is concerned.

9. If we were to accept the 1st defendant’s assertion that the suit property is known as Nakuru/Olongai Phase II/483 and that the 1st defendant is the registered owner, the plaintiff would still not establish a prima facie case since as a registered proprietor, the 1st defendant would be entitled to the rights and privileges afforded by sections 24 to 26 of the Land Registration Act.

10. From the foregoing, I find and hold that the applicant has failed to establish a prima facie case. That being the case, I do not need to consider the other limbs of the test for determining an application for interlocutory injunction. Notice of Motion dated 20th December 2016 is dismissed with costs to the defendants.

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

No appearance for the defendants/respondents

Court Assistant: Gichaba