



**REPUBLIC OF KENYA**

**IN THE ENVIRONMENT AND LAND COURT AT NAKURU**

**CASE NO. 561 OF 2016**

**SAMUEL NJOROGE GACHACHA ..... 1<sup>ST</sup> PLAINTIFF**

**PAUL GACHACHA KAMAU ..... 2<sup>ND</sup> PLAINTIFF**

**VERSUS**

**JOHN MATEGA GACHACHA ..... 1<sup>ST</sup> DEFENDANT**

**CHIEF LAND REGISTRAR ..... 2<sup>ND</sup> DEFENDANT**

**RULING**

***(Applications for injunctions to restrain defendants from dealing with suit properties and for inhibitions in respect of suit properties; applications dismissed)***

1. By plaint filed on 15th December 2016, the plaintiffs seek judgment against the defendants for cancellation of the 1st defendant's title in respect of the parcel of land known as LR. No. 8022/56 Rongai and an order that title to the said property reverts back to Erastus Gachacha Mbanu, among other prayers. The plaintiffs also filed other similar and related suits being Nakuru ELC No. 557 to 560 of 2016 and Nakuru ELC No. 562 to 574 of 2016 against Land Registrars and other defendants. The plaintiffs also filed various applications for injunctions in each of the suits. Though not consolidated as yet, all the matters in the series have been dealt with together and proceedings have been generally recorded in ELC No. 561 of 2016.

2. In ELC No. 561 of 2016 the plaintiffs filed Notice of Motion dated 15<sup>th</sup> December 2016. The application is brought under Section 68 (1) of the Land Registration Act and Order 40 of the Civil Procedure Rules 2010, among other provisions. The orders sought in the application are:

**1. Spent.**

**2. Spent.**

**3. That this honourable court be pleased to issue an order of injunction restraining the 1<sup>st</sup> defendant jointly and severally herein either by himself, his servants, employees, agents and/or any other persons working under their instructions from selling, transferring, alienating, disposing, interfering and/or dealing with the suit property being title No. LR. No. 8022/56 Rongai pending the hearing and determination of this application and suit.**

**4. That this honourable court be pleased to issue an order of inhibition inhibiting any dealings in the suit property title No. LR. No. 8022/56 Rongai pending the hearing and determination of**

***application and suit.***

***5. That this honourable court be pleased to issue an order of mandatory injunction directing the 2<sup>nd</sup> Defendant to produce for the inspection of the court and the parties herein the original land register for the suit property together with the transfer forms, copies of identification cards, copies of PIN certificate and Land Control Board letters of consent to transfer used by the 1<sup>st</sup> defendant to acquire and transfer the suit property being title No. LR. No. 8022/56 Rongai to his own name pending the hearing and determination of application and suit.***

***6. That this honourable court be pleased to issue an order of mandatory injunction directing the 1<sup>st</sup> Defendant to produce for the inspection of the court and the parties herein the receipts, and/or documentary records evidencing payment of the deposit, purchase price, stamp duty and registration of the suit property being Title No. LR. No. 8022/56 Rongai to his name pending the hearing and determination of this application and suit.***

***7. That the costs of this application be provided for.***

3. The applications filed in the other matters and the suit properties in those matters are as follows:

i. Notice of Motion dated 15<sup>th</sup> December 2016 filed in ELC No. 557 of 2016 where an injunction is sought in respect of parcel of land known as Shawa/Gicheha Block 3/43 (Jirani Mwema)

ii. Notice of Motion dated 15<sup>th</sup> December 2016 filed in ELC No. 558 of 2016 where an injunction is sought in respect of parcels of land known as LR. No. 8022/36 Rongai and LR. No. 8504/18 generally known as Umoja Farm

iii. Notice of Motion dated 15<sup>th</sup> December 2016 filed in ELC No. 559 of 2016 where an injunction is sought in respect of parcel of land known as LR. No. 8022/55 Rongai

iv. Notice of Motion dated 15<sup>th</sup> December 2016 filed in ELC No. 560 of 2016 where an injunction is sought in respect of parcel of land known as Shawa/Gicheha Block 3/57 (Jirani Mwema)

v. Notice of Motion dated 15<sup>th</sup> December 2016 filed in ELC No. 562 of 2016 where an injunction is sought in respect of parcel of land known as Shawa/Gicheha Block 3/59 (Jirani Mwema)

vi. Notice of Motion dated 15<sup>th</sup> December 2016 filed in ELC No. 563 of 2016 where an injunction is sought in respect of parcel of land known as Shawa/Gicheha Block 3/46 (Jirani Mwema) and Shawa/Gicheha Block 3/47 (Jirani Mwema)

vii. Notice of Motion dated 15<sup>th</sup> December 2016 filed in ELC No. 564 of 2016 where an injunction is sought in respect of parcel of land known as Shawa/Gicheha Block 3/49 (Jirani Mwema)

viii. Notice of Motion dated 15<sup>th</sup> December 2016 filed in ELC No. 565 of 2016 where an injunction is sought in respect of parcel of land known as Shawa/Gicheha Block 3/51 (Jirani Mwema)

ix. Notice of Motion dated 15<sup>th</sup> December 2016 filed in ELC No. 566 of 2016 where an injunction is sought in respect of parcel of land known as Shawa/Gicheha Block 3/67 (Jirani Mwema)

x. Notice of Motion dated 15<sup>th</sup> December 2016 filed in ELC No. 567 of 2016 where an injunction is sought in respect of parcel of land known as Shawa/Gicheha Block 3/52 (Jirani Mwema)

xi. Notice of Motion dated 15<sup>th</sup> December 2016 filed in ELC No. 568 of 2016 where an injunction is sought in respect of parcel of land known as Shawa/Gicheha Block 3/50 (Jirani Mwema)

- xii. Notice of Motion dated 15<sup>th</sup> December 2016 filed in ELC No. 569 of 2016 where an injunction is sought in respect of parcel of land known as Shawa/Gicheha Block 3/54 (Jirani Mwema)
- xiii. Notice of Motion dated 15<sup>th</sup> December 2016 filed in ELC No. 570 of 2016 where an injunction is sought in respect of parcel of land known as Shawa/Gicheha Block 3/45 (Jirani Mwema)
- xiv. Notice of Motion dated 15<sup>th</sup> December 2016 filed in ELC No. 571 of 2016 where an injunction is sought in respect of parcel of land known as Shawa/Gicheha Block 3/53 (Jirani Mwema)
- xv. Notice of Motion dated 15<sup>th</sup> December 2016 filed in ELC No. 572 of 2016 where an injunction is sought in respect of parcel of land known as Shawa/Gicheha Block 3/44 (Jirani Mwema)
- xvi. Notice of Motion dated 15<sup>th</sup> December 2016 filed in ELC No. 573 of 2016 where an injunction is sought in respect of parcel of land known as Shawa/Gicheha Block 3/48 (Jirani Mwema)
- xvii. Notice of Motion dated 15<sup>th</sup> December 2016 filed in ELC No. 574 of 2016 where an injunction is sought in respect of parcel of land known as Shawa/Gicheha Block 3/55 (Jirani Mwema)

4. The applications are generally similar in nature in so far as they seek injunctions to restrain the registered proprietors of the suit properties in the respective suits from selling, transferring, alienating, disposing, interfering and/or dealing with the suit properties pending the hearing and determination of the suits; inhibitions inhibiting any dealings in the suit properties pending the hearing and determination of the suits; mandatory injunctions directing the land registrars to produce for the inspection of the court and the parties the original land register for the suit properties together with the transfer forms, copies of identification cards, copies of PIN certificate and Land Control Board letters of consent to transfer used by the registered proprietors to acquire and transfer the suit properties; and mandatory injunctions directing the registered proprietors to produce for the inspection of the court and the parties the receipts, and/or documentary records evidencing payment of the deposit, purchase price, stamp duty and registration of the suit properties to their names.

5. The applications are supported by affidavits of Paul Gachacha Kamau (the 2<sup>nd</sup> plaintiff). The 2<sup>nd</sup> plaintiff deposed that the plaintiffs are the administrators of the estate of Erastus Gachacha Mbanu (deceased) having obtained Letters of Administration Ad Litem on 16<sup>th</sup> November 2016, limited for the purpose of filing suit. It was further deposed that the deceased was the registered owner of the suit properties and that the deceased passed away on 17<sup>th</sup> October 2013. The plaintiffs accuse the registered proprietors of having unlawfully acquired the suit properties with the assistance of the land registrars. Copies of the title deeds or title documents in respect of the suit properties were annexed. These show that the defendants, other than the land registrars, are the current registered proprietors of the suit properties.

6. It was further deposed that the deceased was suffering from dementia, impaired memory, confusion and paranoid psychosis from the year 2007 to his death and could not therefore make any conscious decision. A copy of a medical report dated 8<sup>th</sup> April 2009 was annexed. The 2<sup>nd</sup> plaintiff also deposed that it is impossible that the deceased would have transferred the suit properties to the current registered proprietors and thereby disinherit his lawful beneficiaries.

7. In various replying affidavits, the registered proprietors deposed that the suit properties were vested in their favour by the deceased during his lifetime or that the properties were validly acquired from the deceased during his lifetime and that the transfers in their favour were effected by the deceased to them or to those who subsequently transferred the properties to the current registered proprietors. They annexed copies of their title deeds as proof of ownership.

8. The 1<sup>st</sup> defendant in ELC No. 569 of 2016 and 1<sup>st</sup> and 2<sup>nd</sup> defendants in ELC No. 574 of 2016 responded to the applications and the suits by raising preliminary objections to the effect that the suits are

statute barred in view of the provisions of section 7 of Limitation of Actions Act. In support of the objection in ELC No. 569 of 2016, the 1<sup>st</sup> defendant therein referred to his own replying affidavit wherein he had deposed that he bought the suit property from one Waithunguri Njagu who was registered proprietor as from 27<sup>th</sup> January 1999. Similarly, in support of the objection in ELC No. 574 of 2016, the 1<sup>st</sup> and 2<sup>nd</sup> defendants therein referred to the replying affidavit of Samuel Maina wherein it is deposed that Waithunguri Njagu the father and husband respectively of the 1<sup>st</sup> and 2<sup>nd</sup> defendants became registered proprietor as from 27<sup>th</sup> January 1999. Accordingly, the said defendants in both cases argue that more than 12 years have elapsed since Waithunguri Njagu became registered proprietor and therefore no action can be brought to recover the suit properties.

9. The applications and preliminary objections were argued by way of written submissions. In that regard, the plaintiffs/applicants and the registered proprietors filed their submissions. The registrars neither filed any responses to the applications nor submissions. I have considered the objections, the applications, the affidavits, submissions and authorities cited.

10. I note that the preliminary objections are based on the contents of the replying affidavits filed by the said defendants in the said matters. A preliminary objection must be on a pure point of law. The point of law should be precisely, briefly and clearly defined in the notice of preliminary objection. The following ingredients must be present for a preliminary objection to succeed: It should raise a pure point of law; secondly, it is argued on the assumption that all the facts pleaded by the other side are correct; and finally, it cannot be raised if any fact has to be ascertained or if what is sought is the exercise of judicial discretion. The objections are founded on evidence contained in the replying affidavits. They can only be upheld if the evidence as presented by the defendants is accepted as proven. Consequently, I am not persuaded that the objections disclose any pure point of law. The preliminary objections are therefore dismissed.

11. 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 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.

12. The plaintiffs herein accuse the registered proprietors of unlawfully acquiring the suit properties. It is the plaintiffs' case that the defendants, other than the land registrars, are the current registered proprietors of the respective suit properties. The said defendants confirm as much.

13. To succeed in the application for interlocutory injunction, the applicants must establish a *prima facie* case. A *prima facie* case was defined in the case of the Court of Appeal stated in **Nguruman Limited v Jan Bonde Nielsen & 2 Others [2014] eKLR** as follows:

**Recently, this court in Mr Rao Ltd. V. First American Bank of Kenya Ltd & 2 others [2003] KLR 125 fashioned a definition for “*prima facie case*” in civil cases in the following words:**

**“In civil cases, a *prima facie* case is a case in which on the material presented to the court, a tribunal properly directing itself will conclude that there exists a right which has apparently been infringed by the opposite party to call for an explanation or rebuttal from the latter. A *prima facie* case is more than an arguable case. It is not sufficient to raise issues but the evidence must show an infringement of a right, and the probability of success of the applicant's case upon trial. That is clearly a standard, which is higher than an arguable case.”**

**We adopt that definition save to add the following conditions by way of explaining it. The**

**party on whom the burden of proving a *prima facie* case lies must show a clear and unmistakable right to be protected which is directly threatened by an act sought to be restrained, the invasion of the right has to be material and substantive and there must be an urgent necessity to prevent the irreparable damage that may result from the invasion**

14. By virtue of being registered proprietors of the respective suit properties the defendants are accorded the rights and privileges guaranteed by sections 24 and 25 of the Land Registration Act. I am alive to the fact that the plaintiffs have argued that the defendants obtained registration unlawfully and that the deceased was not in a capacity to transfer the suit properties. I note that at the time the deceased is said to have been incapacitated by dementia he swore a detailed replying affidavit in another case on 15<sup>th</sup> July 2008 which has been annexed by the plaintiffs. If he could swear an affidavit at that date, then it becomes difficult to accept the plaintiffs' case that the deceased was incapacitated by dementia.

15. Some of the allegations against the defendants are matters which if proven through the criminal law process would attract criminal sanctions. Considering that the actions complained of are said to have taken place several years ago, one would have expected that the plaintiffs would have lodged complaints followed by investigations. No such evidence has been put before the court.

16. The reality is that the suit properties are now registered in the names of the defendant proprietors. For the plaintiffs' claim over the suit properties to have any tangible impact over the defendants' rights, they must be established at the hearing of the main suit, with resultant cancellation of the registration of defendants' proprietorship. Whether or not the deceased was not in a position to convey the suit properties is a matter to be determined at the trial of the suit.

17. The plaintiffs have also sought mandatory injunctions. A reading of the prayers for mandatory injunctions reveals that the orders sought are in the nature of discovery. There are ample provisions in the rules governing discovery and which should be deployed at the appropriate stage. A litigant should not use a mandatory injunction against a fellow litigant to pursue discovery where there exist adequate procedures in the rules to achieve the same effect. In the circumstances, I am not persuaded that the plaintiffs have a *prima facie* case. The applications for restraining injunctions and mandatory injunctions must thus fail.

18. Additionally, the plaintiffs have sought inhibitions in respect of the suit properties. As already held, the plaintiffs have not established a *prima facie* case. The effect of an inhibition is to curtail the rights of a registered proprietor to deal with his property. I see no reason in the circumstances of these cases why I should fetter the registered proprietors through inhibitions. For that reason, the prayers for orders of inhibition fail.

19. In the end, all the Notices of Motion dated 15<sup>th</sup> December 2016 filed in ELC No. 557 of 2016 to ELC No. 574 of 2016 are dismissed with costs to the defendants. The orders made herein apply in ELC No. 557 of 2016 to ELC No. 574 of 2016.

**Dated, signed and delivered in open court at Nakuru this 13<sup>th</sup> day of December 2017.**

**D. O. OHUNGO**

**JUDGE**

In the presence of:

No appearance for the plaintiffs/applicants

Ms. Kinuthia for the 1<sup>st</sup> defendant/respondent in ELC No. 561/16, 557/16, 558/16, 559/16 and for the 1<sup>st</sup> and 2<sup>nd</sup> defendants/respondents in 566/16 and for the 1<sup>st</sup> to 4<sup>th</sup> defendants/respondents in 560/16 and 562/2016

Court Assistant: Gichaba