REPUBLIC OF KENYA

IN THE ENVIRONMENT AND LAND COURT AT NAKURU

CASE No. 198 OF 2016

STEPHEN MWANGI WAMBUGU.....1ST PLAINTIFF

ELIKANA MUITA WAMBUGU.....2ND PLAINTIFF

VERSUS

SUSAN O. JUMA T/A JUBILEE ACADEMY.....DEFENDANT

RULING

(An application for injunction to restrain the defendant from dealing with the suit property; prima facie case established; injunction granted)

1. By Notice of Motion dated 27th June 2017, the plaintiffs sought the following orders:

> ***1. Spent.***
>
> ***2. Spent.***
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> ***3. That this honourable court be pleased to issue an order of injunction restraining the defendant/respondent by herself, her agents, her servants, her workers and all persons acting under her instructions from depositing any building materials, on land parcel number Nakuru Municipality Block 29/50 (Ronda) and from constructing or erecting or building any structures, houses, classrooms or in any way dealing with, using or developing the plaintiff's parcel of land known as Nakuru Municipality Block 29/50 (Ronda) until this suit is heard and fully decided.***
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> ***4. That the respondent herein be ordered to meet the costs of this application.***

2. The application is supported by an affidavit sworn by the 2nd plaintiff. He deposes that the 1st plaintiff and him are the registered proprietors of the parcel of land known as Nakuru Municipality Block 29/50 (Ronda) (the suit Property). He adds that the defendant has deposited materials on the suit property and has commenced construction of permanent buildings on it. The plaintiffs thus pray for an injunction.

3. When the application first came up for inter parte hearing on 21st July 2017 the respondent sought for seven days within which to file and serve a replying affidavit. After hearing the applicants' counsel's submissions in opposition to the application, the court granted the respondent the requested period of 7 days within which to file and serve the replying affidavit. The court imposed a condition that in default of filing and serving the replying affidavit within the 7 days then the application would be considered unopposed. At the same time, the court also ordered that the applicants file and serve written submissions within 21 days from the said date and in default the interim orders to stand discharged. The respondent

was ordered to file and serve submissions within 35 days from the said date. The matter was then scheduled for mention on 11th October 2017 with a view to taking date of ruling.

4. Come 11th October 2017, counsel for the respondent told the court that they were served with applicants' submissions on 26th July 2017 and that the respondent's submissions were yet to be filed. He sought 7 days to file and serve his submissions. Counsel for the applicants opposed the application and drew the court's attention to the fact that the respondent's replying affidavit was filed and served out of the stipulated period and after the applicants had filed and served their submissions. Upon considering the application, the court declined to grant more time and consequently scheduled the matter for ruling.

5. A perusal of the record shows that the respondent's replying affidavit was filed on 27th July 2017. This was within the period which the court had allowed. The record also shows that the applicants' filed their submissions on 25th July 2017 though they had 21 days from 21st July 2017. It is not clear why the applicants filed and served their submissions so early without waiting to be served with the respondent's replying affidavit.

6. I have considered the application, the supporting and replying affidavits and the submissions on record. 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.

7. In the present case, the applicants have annexed a copy of the title deed for the suit property. It shows that the applicants became registered proprietors of the suit property on 21st October 2010. The encumbrances section of the title deed reveals no encumbrance at all. In the replying affidavit, the defendant deposes that she leased the suit property in 1988 from one Samuel Laboso who was the registered proprietor. She annexed a copy of a document headed "Landlord's Authority to Tenant to Occupy Premises". The date on the document is not clear but is definitely not the year 1988. It is not also clear on what basis the said Samuel Laboso would have leased the property to the defendant. He would only be in a position to lease it if he was the proprietor. No evidence of proprietorship by him is exhibited.

8. The defendant also acknowledged having received a demand from the applicants warning her that she was encroaching on the applicants' land. Additionally, she conceded that she carried out construction on the land though she states that the construction was in 2014 and not 2017 as alleged. Further, she conceded depositing construction material on the property for purposes of repair of the gate.

9. In view of the title deed exhibited by the applicants and which is not challenged by the respondent, the applicants have proven that they are registered proprietors of the suit property. As such, they are entitled to the rights under sections 24 to 26 of the Land Registration Act.

10. The applicants' proprietary rights cannot be overridden by the alleged lease which in any case is not proven. The document annexed by the respondent is not a lease agreement. Even it was, it is apparently signed by a purported landlord who has no demonstrated right to grant a lease in respect of the suit property. As regards the allegation that the respondent has carried out construction and also deposited construction material, all these have been admitted by the respondent.

11. For all the foregoing reasons, I am satisfied that the applicant has established a prima facie case with a probability of success. Damage will not be an adequate remedy.

12. I therefore make the following orders:

a) I grant an injunction restraining the defendant/respondent by herself, her agents, her servants, her workers and all persons acting under her instructions from depositing any building materials on land parcel number Nakuru Municipality Block 29/50 (Ronda) and from constructing or erecting or building any structures, houses, classrooms or in any way dealing with, using or developing the plaintiff's parcel of land known as Nakuru Municipality Block 29/50 (Ronda) until this suit is heard and determined.

b) Costs of the application are awarded to the plaintiff.

13. It is so ordered.

Dated, signed and delivered in open court at Nakuru this 13th day of December 2017.

D. O. OHUNGO

JUDGE

In the presence of:

Mr. Karanja for the plaintiffs/applicants

Mr. Mburu holding brief for Mr. Gekonga for the defendant/respondent

Court Assistant: Gichaba