



REPUBLIC OF KENYA

IN THE ENVIRONMENT AND LAND COURT AT NAKURU

CASE No. 135 OF 2017

FAME WAMBUI MBUGUA.....PLAINTIFF

VERSUS

FRANCIS MACHARIA.....DEFENDANT

RULING

(An application for injunction to restrain the defendant from interfering with the suit property; no prima facie case established; application allowed)

1. This ruling is in respect of plaintiff's Notice of Motion dated 24th March 2017. The application is brought inter alia under Order 40 rules 1, 2, 3, 4 and 5 of the Civil Procedure Rules, 2010 and seeks the following orders:

1. Spent.

2. Spent.

3. That pending the hearing and determination of this main suit this honourable court be pleased to restrain the defendant/respondent by himself, his agents, servants, employees, and/or others howsoever from interfering with the plaintiff's/applicant's quiet possession, occupation, use, work and/or in any other manner or way whatsoever, and or howsoever land known as Commercial Plot No. 45, Githioro Trading Centre.

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

2. The application is supported by an affidavit sworn by the plaintiff on 24th March 2017 wherein she deposes that she bought Commercial Plot No. 45 Githioro Trading Centre, the suit property from Miriam Gathoni Kimani in 27th December 2012. Miriam had been allotted the plot by the County Government of Nakuru. Upon buying the suit property, the plaintiff obtained transfer of the property from Miriam to herself and the transfer was acknowledged by the County Government which accordingly issued to the plaintiff an allotment letter dated 20th March 2013. The plaintiff further deposed that she has been paying rates to the County Government until this year. She accuses the defendant of coming onto the land in September 2015 and starting to claim it. She further deposes that the defendant has started digging a pit latrine on the property. She annexed copies of transfer dated 27th December 2012, letter of allotment dated 20th March 2013 and several rates payment receipts the latest of which is dated 20th February 2017.

3. When the application came up for inter parte hearing, the court was satisfied that the defendant had been served. There being neither response from the defendant nor appearance by the defendant, the

application proceeded unopposed. Counsel for the plaintiff urged the court to allow the application.

4. I have considered the application and the affidavit in support. 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.

5. In the present case, the evidence put before the court by the applicant has not been challenged. On the basis of the said evidence, I am satisfied that the applicant was allocated the suit property and that she has been paying rates in respect thereof. I am also satisfied that the defendant has laid claim on the property and has started digging a latrine thereon. In view of the foregoing, the applicant has established a prima facie case with a probability of success. I do not think that damages will adequately compensate the applicant.

6. In the end, I grant an injunction restraining the defendant, his agents, servants and/or employees from interfering in any manner with the plaintiff's quiet possession, occupation or use of land known as Commercial Plot No. 45, Githioro Trading Centre pending the hearing and determination of this suit.

7. The plaintiff shall have costs of the application.

Dated, signed and delivered in open court at Nakuru this 8th day of December 2017.

D. O. OHUNGO

JUDGE

In the presence of:

Ms. Atsieno holding brief for Mr. Onyancha for the plaintiff/applicant

No appearance for the defendant/respondent

Court Assistant: Gichaba