



REPUBLIC OF KENYA

IN THE ENVIRONMENT AND LAND COURT AT NAKURU

CASE No. 244 OF 2017

NAOMI WAIRIMU.....PLAINTIFF

VERSUS

BENJAMIN HIIYOHU N. MUIRURI.....DEFENDANT

RULING

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

1. By Notice of Motion dated 7th June 2017, the plaintiff sought the following orders:

1. Spent.

2. Spent.

3. Spent.

4. That pending the hearing and final determination of this suit, this honourable court be pleased to issue temporarily injunctions restraining defendants/respondents by themselves, servants, agents, employees and or any other individual entity acting or claiming authority from it from selling, transferring, leasing charging, encroaching, trespassing onto or otherwise or in any other manner whatsoever from interfering or dealing with all that land known as Kiambogo/Kiambogo 2/165 plot 66.

5. That costs of this application be provided for.

2. The application is brought under Order 40 Rule 1, 2, 4 and 10 of the Civil Procedure Rules, 2010 among others. It is supported by an affidavit sworn by the plaintiff on 7th June 2017. She deposes that being a paid up member of Nakuru Workers Housing Co-op Society Ltd, she balloted and was allocated plot No. 66 out a larger parcel known as Kiambogo/Kiambogo 2/165 which the said society had purchased. She was shown her plot and was promised to be issued with a title deed but that has not been done so far. She accuses the defendant of moving into the property, destroying the fence, digging trenches, depositing building materials sometime in October 2015 and resuming construction around April 2017. She now fears that the defendant will continue with construction or dispose of the property. She annexed a copy of a membership card, a payment receipt, map and photos said to show destroyed fences.

3. The defendant responded to the application through replying affidavit sworn on 24th July 2017. He

deposed that he is the registered owner of land parcel known as Kiambogo/Kiambogo Block 2/20953 (Mwariki) which he purchased from one Fredrick Isika Kalumbo on 29th September 2016. After purchasing the property, he fully developed it. He annexed a copy of a title deed in the name of the seller, sale agreement between himself and the seller, a title deed in his own name and a certificate of official search as at 27th September 2016 among others. He thus urged the court to dismiss the application.

4. The application was argued by way of written submissions. In that regard, the applicant filed her submissions on 12th October 2017. The respondent also filed his submissions on 12th October 2017. I have considered the application, the affidavit and the submissions. In an application for an interlocutory injunction the applicant must satisfy the test in **Giella –vs- Cassman Brown & Co. Ltd [1973] E.A 358**. She 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 her. 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 plaintiff's case is that she was allocated plot No. 66 by Nakuru Workers Housing Co-op Society Ltd and that title deeds have so far not been issued. I have looked at the membership card annexed by the plaintiff. The copy is faint and one cannot make much out of it. The writing which is said to show the plot number allocated appears to be in a markedly different handwriting and pen type from the one showing all the other details. I am also concerned that besides the payment receipt, the plaintiff has not exhibited any other records from Nakuru Workers Housing Co-op Society Ltd to support her contention that she was allocated the plot and that the said plot is the same one that the defendant is claiming.

6. On the other hand, the defendant has exhibited a copy of a title deed showing that he is the registered proprietor of the property known as Kiambogo/Kiambogo Block 2/20953 (Mwariki). Neither the plaintiff nor the defendant has shown any nexus between the suit property and Kiambogo/Kiambogo Block 2/20953 (Mwariki). Needless to state, burden of proof on the issue is upon the plaintiff/applicant.

7. To succeed in the application, the applicant must establish a *prima facie* case. Explaining the meaning of *prima facie* case, the Court of Appeal stated in **Nguruman Limited v Jan Bonde Nielsen & 2 Others [2014] eKLR** as follows:

Recently, this court in Mrao 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.

8. On the basis of the evidence put before the court, there is no connection established between the suit property and the defendant's property. The applicant's case is that the suit property still does not have any title deed. That position cannot be reconciled with the defendant's position that his property has a

title deed. A perusal of the plaint herein shows that there is no prayer for cancellation of any registration, let alone that of the defendant's property. In the circumstances, I am not persuaded that the plaintiff has established a prima facie case with a probability of success. That being the case, I do not need to enquire into the other limbs of the test in Giella.

9. In the end, Notice of Motion dated 7th June 2017 is dismissed with costs.

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. Wambeyi for the plaintiff/applicant

Mr. Kamau holding brief for Mr. Kibet for the defendant/respondent

Court Assistant: Gichaba