



REPUBLIC OF KENYA

IN THE ENVIRONMENT AND LAND COURT AT NAKURU

CASE No. 544 OF 2016

ELISHA CHEBII CHESINYAPLAINTIFF

VERSUS

DOMIZIANO KABURU NJERUDEFENDANT

Consolidated with

ELC CASE No. 21 OF 2017

DOMIZIANO KABURU NJERU PLAINTIFF

VERSUS

ELISHA CHEBII CHESINYA DEFENDANT

RULING

(Applications for injunction; each party seeking to restrain the other from interfering with the suit property; none of the parties established a prima facie case; applications dismissed; status quo maintained so as to preserve the suit property)

1. On 8th December 2016 Elisha Chebii Chesinya, hereinafter ‘Chesinya’, filed ELC case No. 544 2016 (Nakuru) against Domiziano Kaburu Njeru, hereinafter ‘Njeru’. The genesis of the dispute is that Chesinya and Njeru entered into a sale agreement on 1st April 2013 pursuant to which it was agreed that Njeru sells to Chesinya 15 acres out of parcel of land known as plot No. 33 Olongai Scheme at a consideration of KShs. 27,000,000. Chesinya contends that he paid the purchase price fully while Njeru maintains that Chesinya only paid a total of KShs. 11,000,000/=. Together with the plaint, Chesinya filed Notice of Motion dated 5th December 2016 in which he sought an injunction to restrain Njeru by himself, his servants or agents from cultivating, ploughing or in any way interfering with the 15 acres forming part of plot No. 33 Olongai scheme pending hearing and determination of ELC No. 544 of 2016. The application was supported by an affidavit sworn by Chesinya in which he reiterated that he purchased the 15 acres from Njeru and that he paid the purchase price. He accused Njeru of trespassing into the portion some time in November 2016 and cutting down trees, pulling down fences and ploughing it in readiness for planting.

2. Njeru responded to Notice of Motion dated 5th December 2016 through a replying affidavit sworn on 7th March 2017 wherein he deposed that he sold the 15 acres to Chesinya at a consideration of KShs. 27, 000,000. He further deposed that Chesinya paid KShs. 11,000,000 but was unable to pay the balance. He accused Chesinya of trying to sell the land to third parties without his consent.

3. Njeru also filed a new suit, being ELC No. 21 of 2017 against Chesinya on 30th January 2017. He averred in the plaint that he sold the 15 acres to Chesinya at a consideration of KShs. 27,000,000 out of which Chesinya paid only KShs. 11,000,000/=. Simultaneously with the plaint, Njeru also filed Notice of Motion dated 19th December 2016 in which he sought an injunction to restrain Chesinya, his agents or servants from remaining on, cultivating, or in any way interfering with the 15 acres until the suit is heard and decided. The application is supported by an affidavit sworn by Njeru on 19th December 2016 in which he deposed that he sold the 15 acres to Chesinya on 1st April 2013 at a consideration of KShs. 27,000,000 out of which Chesinya had paid KShs. 11,000,000 but was unable to pay the balance. He further deposed that the parties did not apply for consent of the Land Control Board within the stipulated period and therefore the agreement was nullified.

4. Pursuant to orders made on 21st March 2017, the two suits were consolidated and the two applications were ordered to be heard together by way of written submissions. In that regard, Njeru filed his submissions on 26th September 2017. Chesinya did not file any submissions.

5. I have considered the applications, the affidavits and the submissions. The parties herein seek an injunction against each other in respect of the same suit property. 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.

6. As to what constitutes a *prima facie* in civil cases, I can do no better than to reproduce what the Court of Appeal stated in **Nguruman Limited v Jan Bonde Nielsen** (supra):

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.

7. There is no dispute that the parties entered into a sale agreement on 1st April 2013 pursuant to which Njeru sold 15 acres to Chesinya at an agreed purchase price of KShs. 27,000,000. Completion was 90 (ninety) days from the date of the agreement. Njeru maintains that Chesinya only paid KShs. 11,000,000 while Chesinya insists that he fully paid the purchase price. Chesinya has not tendered any evidence showing how and when the full purchase price was paid. On the other hand, though Njeru has alleged that consent of the land control board was not sought, I note that under clause 3.3 of the sale agreement, it was his duty to apply for the consent and to deliver it to the advocates handling the transaction. Therefore, failure to apply for the consent presupposes a failure on his part to comply with the sale agreement. Njeru seems to be of the view that the suit property has not passed to Chesinya due to the latter’s alleged

nonpayment. Chesinya believes that he has acquired the suit property and is therefore free to exercise the rights of a proprietor. Unfortunately, the affidavit evidence put before the court by the parties is rather scanty.

8. Since a prima facie case is more than an arguable case, the parties needed to tender more evidence beyond merely raising issues. Upon weighing the parties' respective cases, I am not satisfied that any of them has established a prima facie case with a probability of success. That being the case, I do not need to consider the other limbs of the Giella test. Notice of Motion dated 5th December 2016 and Notice of Motion dated 19th December 2016 are dismissed.

9. The foregoing notwithstanding, it is necessary to preserve the suit property pending determination of the consolidated suits. Consequently, I order that the status quo in respect of the 15 acres of plot No. 33 Olongai scheme shall be maintained pending hearing and determination of the consolidated suits. No party shall subdivide, sell, transfer, lease or make any disposition in respect of the property until the suit shall have been heard and determined.

10. Costs in the cause.

Dated, signed and delivered in open court at Nakuru this 5th day of December 2017.

D. O. OHUNGO

JUDGE

In the presence of:

No appearance for the plaintiff ELC No. 544/2016 and for defendant in ELC 21 of 2017

Mr. Maina holding brief for Mr. Ngure for the defendant in ELC No. 544/2016 and for plaintiff ELC 21 of 2017

Court Assistant: Gichaba