



REPUBLIC OF KENYA

IN THE ENVIRONMENT AND LAND COURT AT NAKURU

CASE No. 170 OF 2017

PETER GACOKA, EPHANTUS THIONGO (Suing on behalf of

MUGUNDA UNITED SELF HELF GROUP).....1ST PLAINTIFF

PATRICK NJEHIA CHUCHU..... 2ND PLAINTIFF

SAMUEL NJOROGE NDWARI 3RD PLAINTIFF

EPHANTUS THIONGO GATUNDU 4TH PLAINTIFF

SAMUEL WAIGANJO NJOGU 5TH PLAINTIFF

ALEX KAMAU MWAURA 6TH PLAINTIFF

VERSUS

JOSEPH MURIITHI KIMONDO.....DEFENDANT

RULING

(Application for injunction to restrain the defendant from dealing with suit properties; plaintiffs have titles in respect of suit properties; defendant alleges that he owned original parcel before subdivision and that he never sold the property or authorized subdivision; no prima facie case established; nevertheless, inhibitions ordered so as to preserve suit properties)

1. This ruling is in respect of plaintiffs' Notice of Motion dated 19th April 2017. This application is brought among others under Order 40 rules 1, 2, 4 and 10 of the Civil Procedure Rules and seeks the following orders:

a) Spent.

b) Spent.

c) That pending the hearing and determination of this suit this honourable court be pleased to issue a temporary order of injunction restraining the defendants by himself, his agents and or servants from remaining onto (sic), erecting any structures or fencing, trespassing, selling, invading, disposing, transferring or in any manner of whatsoever the nature dealing with Kijabe/Kijabe Block 1/16775 (Maai Mahiu), Kijabe/Kijabe Block 1/16776 Maai Mahiu, Kijabe/Kijabe Block 1/16777 Maai Mahiu, Kijabe/Kijabe Block 1/16778 Maai Mahiu,

Kijabe/Kijabe Block 1/16779 Maai Mahiu, Kijabe/Kijabe Block 1/16780 Maai Mahiu, Kijabe/Kijabe Block 1/16781 Maai Mahiu, Kijabe/Kijabe Block 1/16782 Maai Mahiu, Kijabe/Kijabe Block 1/16783 Maai Mahiu, Kijabe/Kijabe Block 1/16784 Maai Mahiu, Kijabe/Kijabe Block 1/16785 Maai Mahiu, Kijabe/Kijabe Block 1/16786 Maai Mahiu, all arising from the subdivision of Kijabe/Kijabe Block 1/3273 Maai Mahiu the O.C.S Mai Mahiu Police station to ensure compliance of this orders.

d) That the costs of this application be borne by the defendants.

2. The application is supported by an affidavit sworn by Peter Gacoka. He deposes that he is the Chairman of Mugunda United Self-Help Group, a self-help group registered with the Ministry of Gender, Children and Social Development. He states that he and the other applicants are the registered owners of the parcels of land known as Kijabe/Kijabe Block 1/16775 to 16786. That pursuant to a sale agreement dated 18th August 2010, the self-help group purchased a parcel of land known as Kijabe/Kijabe Block 1/3273 from one Kago Nduati at a consideration of Kshs.850, 000 and thereafter subdivided it into 12 plots being Kijabe/Kijabe Block 1/16775 to 16786 which plots were allocated to the members of the self-help group. He added that the defendant started claiming the plots on 12th February 2017. He further accuses the defendant of deploying tractors to plough the plots, remove beacons and the live fences on the land sometime in late March 2017. He annexed copies of the sale agreement, title deeds and bankers' cheques among others.

3. The defendant opposed the application through replying affidavit sworn on 26th May 2017. He deposed that he is the registered proprietor of the parcel of land known as Kijabe/Kijabe Block 1/3273 his father having acquired it for him while he was a minor. When he attained age of majority, new title deed was issued to him on 8th January 1993. That he left for the United Kingdom in the year 2006 and when he came back in the year 2015 he was shocked to realize that his property had been subdivided into 11 plots being Kijabe/Kijabe Block 1/16775 to 16785 and transferred to the plaintiffs. That when he enquired from the Land Registrar's office in Nakuru he was informed that in the registry file in respect of his property, the green card was missing and instead there was a white card. He added that the plaintiffs entered his property without his consent and purported to create subdivisions. He thus urged the court to dismiss the application. The defendant also responded to the suit by lodging a counterclaim seeking a declaration that the subdivision of Kijabe/Kijabe Block 1/3273 into the eleven plots is unlawful and void.

4. The application was argued by way of written submissions. In that regard, the applications filed submissions on 3rd August 2017 while the respondents filed submissions on 15th September 2017. I have considered the application, the affidavits 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**. 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.

5. The plaintiffs herein have title deed in respect of the plots known as Kijabe/Kijabe Block 1/16775, Kijabe/Kijabe Block 1/16776, Kijabe/Kijabe Block 1/16777, Kijabe/Kijabe Block 1/16778, Kijabe/Kijabe Block 1/16779, Kijabe/Kijabe Block 1/16780, Kijabe/Kijabe Block 1/16781, Kijabe/Kijabe Block 1/16782, Kijabe/Kijabe Block 1/16783, Kijabe/Kijabe Block 1/16784, Kijabe/Kijabe Block 1/16785 and Kijabe/Kijabe Block 1/16786. These plots are subdivisions of the plot known as Kijabe/Kijabe Block 1/3273. The defendant does not deny that the plaintiffs have the titles. Instead, the defendant contends that the subdivisions and the titles were created and acquired unlawfully.

6. I have looked at the documents put before the court by the plaintiffs and the defendants. Whereas

Mugunda United Self Help Group became registered proprietor of Kijabe/Kijabe Block 1/3273 on 6th December 2010, the defendant herein became registered proprietor of the same property as a minor on 27th August 1985 and later another title deed was issued to him as an adult on 8th January 1993. It is thus not clear how the same property could have been registered in the name of Kago Nduati who sold it to the self-help group.

7. To succeed in the application for injunction, the applicants must establish a prima facie case. Though the applicants are currently registered proprietor of the properties, the defendant is contesting the said registration. In view of the evidence put before the court by the defendant to the effect that he owned the original plot long before the self-help group acquired it, the plaintiffs' title alone cannot be a guarantee of their ownership. The defendant may, if he persuades the trial court, succeed in nullifying them at the conclusion of the case. I am thus not satisfied that the applicants have established a prima facie case. Notice of Motion dated 19th April 2017 is thus dismissed.

8. The foregoing notwithstanding, I consider it necessary in the particular circumstances of this case to preserve the properties pending hearing and determination of the suit. I therefore order that inhibitions be registered against Kijabe/Kijabe Block 1/3273, Kijabe/Kijabe Block 1/16775, Kijabe/Kijabe Block 1/16776, Kijabe/Kijabe Block 1/16777, Kijabe/Kijabe Block 1/16778, Kijabe/Kijabe Block 1/16779, Kijabe/Kijabe Block 1/16780, Kijabe/Kijabe Block 1/16781, Kijabe/Kijabe Block 1/16782, Kijabe/Kijabe Block 1/16783, Kijabe/Kijabe Block 1/16784, Kijabe/Kijabe Block 1/16785 and Kijabe/Kijabe Block 1/16786 pending hearing and determination of this suit.

9. Costs in the cause.

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

D. O. OHUNGO

JUDGE

In the presence of:

Mr. Kambo holding brief for Mrs. Gathecha for the plaintiffs/applicants

No appearance for the defendant/respondent

Court Assistant: Gichaba