



**REPUBLIC OF KENYA**

**IN THE ENVIRONMENT AND LAND COURT AT KISII**

**ELC CIVIL SUIT NO. 447 OF 2014**

**JOSECK NYABWARI OSEKO.....PLAINTIFF**

**VERSUS**

**AGNES SONOI OCHAKO .....1<sup>ST</sup> DEFENDANT**

**DENNIS MOSE OCHAKO.....2<sup>ND</sup> DEFENDANT**

**RULING**

What I have before me is the plaintiff's Notice of Motion application dated 19<sup>th</sup> November 2014 in which the plaintiff is seeking the following orders:-

1. That a temporary injunction does issue restraining the defendants jointly and severally, their agents, servants, employees by whatever name called from encroaching upon or interfering with the plaintiff's possession or occupation of a portion measuring 150 by 50 feet ("the suit property") of all that parcel of land known as Bassi/ Bogetaorio II/4177("Plot No.4177") pending the hearing and determination of this suit.
2. That an order does issue directing the director of surveys to appoint and commission a government surveyor to point out and determine the boundary and extent of the suit property to be curved out of Plot No.4177.
3. That the officer commanding Kisii police station does supervise compliance with the orders of this court.

The application was supported by the affidavit sworn by the plaintiff on 19<sup>th</sup> November 2014. In his affidavit, the plaintiff stated that in the year 2010, he purchased from the defendants a portion of land measuring 150 by 50 square feet ("the suit property") which was to be excised from L.R No. Bassi/ Bogetaorio 11/3057("Plot No.3057") at a consideration of Ksh.1,500,000 which was payable in kind. The plaintiff stated that without his knowledge, the 1<sup>st</sup> defendant subdivided Plot No.3057 into two portions namely L.R No Bassi/ Bogetaorio 11/4177("Plot No.4177") and Bassi/ Bogetaorio 4178 ("Plot No.4178"). The plaintiff stated that the suit property is comprised in Plot No. 4177. The plaintiff stated that the defendants handed over to him possession of the suit property on the understanding that he would construct for them two permanent houses worth Ksh.1,500,000. He stated that the suit property was sold to him by the defendants with the structures which were standing thereon.

The plaintiff stated that after he had fulfilled his part of the bargain, the defendants in breach of the said agreement jointly and severally made attempts to evict him from the suit property in January, 2014. The plaintiff averred that in October, 2014, the defendants once again made attempt to enter the suit property for the purposes of demolishing the structures standing thereon. The Plaintiff stated further that the defendants' interference with his occupation of the suit property which has affected his activities thereon

is unjustified and that unless the defendants are restrained by this court from such interference, they are likely to continue with the same.

The application was opposed by the 1<sup>st</sup> defendant through a replying affidavit sworn on 17<sup>th</sup> February 2015. In her affidavit, the 1<sup>st</sup> defendant stated that on 15<sup>th</sup> January 2007, she issued a specific power of attorney to the plaintiff as her agent to enter into an agreement on her behalf with H. Young and Co. EA Ltd. for the lease of her land known as Bassi/Bogataorio II/3057 (“Plot No.3057”), for three years. H. Young and Co. EA Ltd. wanted the said parcel of land to set up a camp for its employees who were constructing Kisii-Kilgoris road. The 1<sup>st</sup> defendant stated that the said power of attorney was to expire on 15<sup>th</sup> January, 2010 after which the land that had been leased to H. Young and Co. EA Ltd. was to revert to her. The 1<sup>st</sup> defendant averred that on 19<sup>th</sup> August, 2010, she terminated the specific power of attorney that she had issued to the plaintiff consequent to which the land that had been leased to H. Young and Co. EA Ltd. reverted back to her. The 1<sup>st</sup> defendant averred that the said power of attorney was not an agreement for sale to the plaintiff of land measuring 150 feet by 50 feet as alleged by the plaintiff.

When the application came up on 17<sup>th</sup> February 2015 for hearing, the parties agreed to argue the same by way of written submissions which were duly filed. In his submissions dated 8<sup>th</sup> April 2015, the plaintiff argued that he had satisfied the principles for granting interlocutory injunction that were set out in the case of **Giella vs. Cassman Brown & Co. Ltd (1973) EA 358**. The plaintiff submitted that he had demonstrated that he purchased a portion of land measuring 150 by 50 feet from the defendants and that the defendants had put him in possession of the said parcel of land. He submitted that he had made substantial developments on the suit property with the knowledge of the defendants. The plaintiff argued that he had established a prima facie case against the defendant within the legal threshold set out in the case of **Mrao vs. First American Bank of Kenya Ltd & 2 others (2003) KLR 125**.

The plaintiff submitted further that he would suffer irreparable loss that cannot be compensated by way of damages since he was in possession of the suit property. The plaintiff submitted that he who comes to equity must come with clean hands. He accused the defendants of concealing material facts to the court in a bid to deny him the suit property.

In their submissions dated 20<sup>th</sup> April 2015, the defendants argued that the court cannot restrain by an injunction an event that has taken place. The defendants submitted that the law is clear that a contract for the disposition of an interest in land must be in writing. The defendants submitted that the plaintiff had not exhibited an agreement for sale of the suit property. The defendants submitted that they are in possession of the suit property, the same having reverted to them after the construction of Kisii-Kilgoris road which was being undertaken by H. Young Co. Ltd. was completed.

What I need to determine is whether the plaintiff has satisfied the conditions for grant of interlocutory injunction that were enunciated in the case of **Giella vs. Cassman Brown & Co. Ltd (supra)**. These conditions are that, the applicant for interlocutory injunction must show a prima facie case with probability of success and that he stands to suffer irreparable harm which cannot be compensated in damages unless the order is granted. If in doubt, the court would determine the application on a balance of convenience. The aforesaid conditions are sequential and must be applied as separate, distinct and logical hurdles which the applicant must surmount. See, **Nguruman Ltd vs. Jan Bonde Nielsen & 2 others Nairobi CA No. 77 of 2012** and **Kenya Commercial Finance Company Ltd vs. Afraha Education Society (2001)1 E.A. 86**.

The plaintiff in this case seeks to restrain the defendants from interfering with his possession or occupation of a property measuring 150 feet by 50 feet comprising said to be comprised in Plot No.4177. The plaintiff has contended that in the year 2010, he purchased the said property from the defendants at a consideration of Kshs 1,500,000/- which he paid in kind by constructing two permanent houses for the defendants worth the said amount. Although the plaintiff has contended both in the plaint and in the application before me that he entered into an agreement for sale with the defendants, the alleged agreement was not produced before the court. Section 3 of the Law of Contract Act, Chapter 23 Laws of Kenya provides that a contract for the disposition of an interest in land must be in writing, signed by the

parties to it and their signatures duly attested. Section 3(3) of the Law of Contract Act provides as follows:-

**" No suit shall be brought upon a contract for the disposition of an interest in land unless:-**

**a. the contract upon which the suit is founded:-**

- i. is in writing**
- ii. is signed by all the parties thereto; and**

**b. the signature of each party signing has been attested by a witness who is present when the contract was signed by such party".**

This section has been reproduced in section 38(1) of the Land Act, 2012. In the absence of an agreement which is in writing and in conformity with section 3(3) of the Law of Contract Act and section 38(1) of the Land Act aforesaid which are couched in mandatory terms, I am not satisfied that the plaintiff has a prima facie case with a probability of success against the defendants. Having failed to satisfy the first condition for the grant of an interlocutory injunction, it would be needless for me to consider whether the plaintiff would suffer irreparable damage or to assess the balance of convenience. I have noted that one of the prayers sought by the plaintiff was for an order to issue directing the director of surveys to appoint and commission a Government surveyor to point out and determine the boundary and extent of the suit property to be curved out of Plot No.4177. This order cannot be made at an interlocutory stage.

The upshot of the foregoing is that the plaintiff's application dated 19<sup>th</sup> November 2014 fails wholly and is accordingly dismissed with costs to the defendants.

**Signed at Nairobi this.....Day of .....2016**

**S. OKONG'O**

**JUDGE**

**Delivered, Dated and Signed at Kisii this 8<sup>th</sup> day of April 2016**

**J.M.MUTUNGI**

**JUDGE**

**In the presence of**

.....**for the Plaintiff**

.....**for the Defendants**