

REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA AT NAIROBI

MILIMANI LAW COURTS

ENVIRONMENT AND LAND COURT

ELC. NO. 1017 of 2014

LUCY NYAWIRA NJERI.....PLAINTIFF

VERSUS

MARY MUKIRI GILBERT.....DEFENDANT

RULING

Coming up before me for determination is the Notice of Motion dated 31st July 2014 in which the Plaintiff/Applicant seeks for orders of temporary injunction restraining the Defendant/Respondent from trespassing or continuing with any further developments on Plot No. 4 within Block 118/78 (hereinafter referred to as the “suit property”) pending the hearing and determination of this application and suit.

The Application is premised on the grounds appearing on the face of it together with the Supporting Affidavit of the Plaintiff/Applicant, Lucy Nyawira Njeri, sworn on 31st July 2014 in which she averred that she purchased the suit property in the year 2009 from one Beatrice Njoroge for a sum of Kshs. 145,000/- vide a sale agreement dated 5th August 2009, a copy of which she annexed. She further averred that the said Beatrice Njoroge gave her a share transfer certificate and sale agreement from the previous owner, a survey map and share payment receipts for the suit property, copies of which she annexed. She further stated that she was later issued with a Plot Ownership Certificate, a copy of which she annexed. She stated further that she proceeded to take possession of the suit property but lacked the finances to develop it. She then stated that in October 2013 she received information that the Defendant/Respondent had started constructing on the suit property upon which she visited the same and confirmed this to be the position. She averred further that both she and the Defendant/Respondent appeared before a dispute resolution committee where it was agreed that the Defendant/Respondent do pay her Kshs. 400,000/- for the suit property and Kshs. 15,000/- being a refund of expenses incurred in fencing the suit property. A sale agreement dated 12th November 2013 duly signed by the Plaintiff and the Defendant to this effect was annexed. She further stated that the Defendant/Respondent only paid Kshs. 14,000/- being fencing expenses but failed to honour her part of the bargain to pay Kshs. 400,000/- for the suit property. She averred further that this notwithstanding, the Defendant/Respondent proceeded to develop the suit property.

The Application is not opposed. The Defendant/Respondent did not file a response thereto despite being duly served. The Plaintiff/Applicant also filed her written submissions.

The issue which arises herein for my determination is whether the Plaintiff/Applicant is entitled to the temporary injunction that she prays for. In deciding whether to grant the temporary injunction sought after by the Plaintiff/Applicant, I wish to refer to and rely on the precedent set out in the case of **GIELLA versus CASSMAN BROWN (1973) EA 358** in which the conditions for the grant of an interlocutory injunction were settled as follows:

“The conditions for the grant of an interlocutory injunction are now, I think, well settled in East Africa. First, an applicant must show a prima facie case with a probability of success. Secondly, an interlocutory injunction will not be normally granted unless the applicant might

otherwise suffer irreparable injury which would not adequately be compensated by an award of damages. Thirdly, if the court is in doubt, it will decide an application on the balance of convenience.”

Has the Plaintiff/Applicant made out a prima facie case with a probability of success? In the case of **MRAO versus FIRST AMERICAN BANK OF KENYA LIMITED & 2 OTHERS (2003) KLR 125**, a prima facie case was described as follows:

“a prima facie case in a civil application includes but is not confined to a ‘genuine and arguable case’. It is a case 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 as to call for an explanation or rebuttal from the latter.”

Does the Plaintiff/Applicant have a genuine and arguable case? The Plaintiff/Applicant’s case is that she is the owner of the suit property, having purchased it from one Beatrice Njoroge. A sale agreement dated 5th August 2009 evidencing this transaction was produced. Further, the Plaintiff/Applicant has demonstrated that she entered into a sale agreement with the Defendant/Respondent in which she sold the suit property to the Defendant/Respondent for a sum of Kshs. 400,000/- including a refund of Kshs. 15,000/- for fencing expenses. This sale agreement is dated 12th November 2013. From this sale agreement, it is clear that the Plaintiff/Applicant has allowed the Defendant/Respondent to own the suit property and to continue developing the same provided that the Defendant/Respondent pays her the agreed price of Kshs. 400,000/-. In the circumstances, it appears to me that the Plaintiff/Applicant’s request for a temporary injunction is misplaced as it will amount to the eviction of the Defendant/Respondent from the suit property. Further, it appears quite clearly that all the Plaintiff/Applicant is really interested in is to be paid the agreed price of Kshs. 400,000/-. In the circumstances, the Plaintiff/Applicant, though having demonstrated that she has a prima facie case with probability of success at the main trial, has failed to show that an award of damages would not suffice. To the contrary, the Plaintiff/Applicant has shown that she would be satisfied with an award of the agreed purchase price of the suit property. The balance of convenience tilts in favour of the Defendant/Respondent who is in occupation of the suit property.

In light of the foregoing, this Application is hereby dismissed. Costs shall be in the cause.

DELIVERED AND SIGNED AT NAIROBI THIS 29TH DAY OF JANUARY 2016.

MARY M. GITUMBI

JUDGE