REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA AT NAIROBI

MILIMANI LAW COURTS

ENVIRONMENT AND LAND COURT

ELC. CASE NO. 1368 OF 2013

DANIEL MULWA KAVITHI……..…..…….....……...… PLAINTIFF

VERSUS

THE HON. ATTORNEY GENERAL…….....…..……1ST DEFENDANT

THE DISTRICT LAND ADJUDICATION AND

SETTLEMENT OFFICER MACHAKOS …….....……2ND DEFENDANT

THE DISTRICT SURVEYOR, MACHAKOS……....……3RD DEFENDANT

THE DISTRICT LAND REGISTRAR, MACHAKOS ….....…..4TH DEFENDANT

NZOMO MUSAU…….…..5TH DEFENDANT

WILLY NZOMO…….……6TH DEFENDANT

MUTUKU NZOMO……7TH DEFENDANT

RULING

Coming up before me for determination is the Notice of Motion dated 11th November 2013 in which the Plaintiff/Applicant seeks for an order prohibiting the Defendants from interfering with, shifting, altering or in any manner changing the common boundary between land parcels number Machakos/Mua Hills Settlement Scheme/800 and Machakos/Mua Hills Settlement Scheme/121 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, Daniel Mulwa Kavithi, sworn on 11th November 2013 in which he averred that sometimes on 2nd February 1966, he bought a parcel of land known as Machakos/Mua Hills Settlemnt Scheme/800 (hereinafter referred to as the "suit property") from the Settlement Fund Trustees for the sum of Kshs. 10,855/- which amount he paid in full. He attached a copy of the Offer Letter issued by the Commissioner of Lands dated 2nd February 1966 which offer was duly accepted by the Plaintiff on the same date. He also annexed a Charge also dated 2nd February 1966 issued by the Settlement Fund

Trustees. He averred further that the suit property had a permanent house in which he and his family moved into. It is not clear from these documents what the size of the suit property was. He averred further that on or about 2nd November 1966, he purchased an adjacent parcel of land comprising of an orchard from one John Musau Nzeki (now deceased), the father of the 5th and 6th Defendants and grandfather to the 7th Defendant at an agreed purchase price of Kshs. 800/-. He confirmed that he paid this sum in full. He averred that the agreement was reduced into writing and was duly executed by the deceased. He produced a copy of the sale agreement dating back to 1966. This sale agreement did not mention the size of the land being sold. He then averred that he subsequently bought yet another portion of land from the deceased which is adjacent to the orchard at a price of Kshs. 350/- which he avers he paid in full. He averred that the same sale agreement is proof of this transaction. He then mentioned that the total acreage for the abovementioned parcels of land comprising of the parcel of land bought from the Settlement Fund Trustees and the two portions bought from the deceased is approximately 6.2 acres. He further averred that there exists a clearly marked fence on the ground which has never been disputed either by the deceased or by the 5th, 6th and 7th Defendants. He further averred that he has been in occupation of the said land comprising 6.2 acres since 1966 and that over the years he undertook numerous developments thereon and that his three sons are settled on the said land. He then averred that on 22nd May 2006, the Settlement Fund Trustees executed the Transfer of Land in his favour clearing the way for him to secure a title deed but that upon presenting the same for registration at the Lands Office, he learnt with shock that the transfer could not be registered because the suit property does not exist in the survey records at the Lands Office. He blamed this development on the Defendants. He further produced a document entitled "Certificate of Identity" dated 12th February 2007 issued to him by the District Land Registry Machakos confirming that he is the owner of the suit property. He further referred to a letter dated 29th August 2012 from the District Land Settlement Officer, Yatta Machakos stating that the suit property was erroneously included in the acreage for parcel no. 121 and that the only option available was for the two parcels of the land to be re-surveyed with a view to raising the mutation to facilitate registration of the suit property. He disclosed further that the District Surveyor re-surveyed the two parcels but that the 5th, 6th and 7th Defendants refused to register the mutation forms thereby blocking him from obtaining his title. He further averred that the District Surveyor subsequently declared that his land comprises of ¾ acres as opposed to 6.2 acres. He averred that if not stopped, the Defendants would deny him his 6 acres of land.

The Application is contested. The 7th Defendant/Respondent, Isaac Mutuku Nzomo, filed his Replying Affidavit sworn on 15th January 2014 in which he averred that he does not dispute that the Plaintiff/Applicant bought land from the Settlement Fund Trustees but that the Plaintiff failed to disclose the size of land he bought. He conceded that the permanent house in which the Plaintiff dwells is not on their parcel of land known as Machakos/Mua Hills Settlement Scheme/121. Further, he denied that any transaction took place between the Plaintiff and his deceased grandfather John Musau Nzeki. He averred that the only parcel of land that belongs to the Plaintiff is the suit property which measures 1 ½ acres. He added that the Plaintiff only extended his boundaries to occupy their land on 8th April 2013. He further averred that the Certificate of Identity produced by the Plaintiff only referred to the suit property but not to the other portion being claimed by the Plaintiff on their parcel of land Machakos/Mua Hills Settlement Scheme/121.

In response thereto, the Plaintiff filed his Reply to Replying Affidavit sworn on 20th February 2014 in which he averred that the 7th Defendant was not born and his father the 5th Defendant was only a minor when he entered into the transactions mentioned above with his grandfather and that he therefore has no knowledge of the same and his averments are misleading. He further averred that his son Mumo Daniel constructed his home in 1986 on the portion he purchased from the deceased and that his other son Jonah Kavithi Daniel built his home within the orchard in 1988 and they have been in occupation since then. He added further that the extent of his land is clear on the ground and has existed as such since 1966 and that this should be maintained including all his developments thereon.

The 7th Defendant/Respondent filed a Further Replying Affidavit sworn on 8th July 2014 making similar averments as earlier mentioned.

The Plaintiffs and the 5th, 6th and 7th Defendants/Respondents filed their respective written submissions which have been read and taken into account in this ruling.

The issue emerging for my determination is whether to grant the Plaintiff/Applicant orders prohibiting the Defendants from interfering with the suit property as well as the two additional portions of land forming part of Machakos/Mua Hills Settlement Scheme/121 which the Plaintiff claims he bought from the late John Musau Nzeki. This in essence is a temporary injunction. 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."

The question whether the Plaintiff/Applicant has demonstrated a genuine and arguable case no doubt leads us to an assessment of the documents of ownership produced by him in this Application. In regard to the suit property, the Plaintiff relies on an the Offer Letter issued by the Commissioner of Lands dated 2nd February 1966 which offer he duly accepted on the same date. He also produced a Charge document dated the same date in which he charged the suit property for the purchase price of the suit property amounting to Kshs. 10,855/-. Further to this documentary evidence, the 5th, 6th and 7th Defendants have conceded that the suit property belongs to the Plaintiff. To that extent therefore, I have no difficulty in finding that the Plaintiff has shown that he has a genuine claim over the suit property. In addition to the suit property, the Plaintiff has laid claim to two additional portions of land excised out of the parcel of land known as Machakos/Mua Hills Settlement Scheme/121 belonging to the 5th, 6th and 7th Defendants/Respondents. In making that claim, the Plaintiff relies on a sale agreement between him and the late John Musau Nzeki dating back to 1966. A sale agreement is a contract. S**ection 4(1)** of the **Limitation of Actions Act Cap 22** provides as follows:

Actions of contract and tort and certain other actions

1. **The following actions may not be brought after the end of six years from the date on which the cause of action accrued-**
    a. **Actions founded on contract;**
    b. -

This legal provision is very clear and cannot be ignored. It is quite categorical that actions founded on contract must be brought to court before the end of 6 years from the date the cause of action arose. In this particular case, the cause of action arose in the year 1971 when the last installment was made. The period between that year to the year 2013 when the Plaintiff filed this suit is well over the 6 year limitation period prescribed by the law cited above. To that extent therefore, the Plaintiff cannot rely on that sale agreement to enforce any ownership rights over the two additional portions of land excised out of Machakos/Mua Hills Settlement Scheme/121. To that extent therefore, I find that the Plaintiff has established a prima facie case in respect of the suit property but has not established a prima facie case in respect of the two additional portions of land forming part of Machakos/Mua Hills Settlement

Scheme/121.

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. Does an award of damages suffice to the Plaintiff? Land is unique and no one parcel can be equated in value to another. Though the value of the suit property can be ascertained, it would not be right to say that the Plaintiff can be compensated in damages. I hold the view that damages are not always a suitable remedy where the Plaintiff has established a clear legal right or breach. See **JM GICHANGA versus CO-OPERATIVE BANK OF KENYA LTD (2005) eKLR**. To that extent, I find that damages would not be an adequate remedy to repay the Plaintiff for the infringement of his ownership rights over the suit property. I must re-emphasize that this position does not apply to the two additional parcels of land being claimed by the Plaintiff.

The third limb I must determine is in whose favour the balance of convenience tilts. It is an undisputed fact that the Plaintiff lives on the suit property. I am inclined to maintain that status quo. I therefore find that the balance of convenience tilts in favour of the Plaintiff.

Arising from all of the above reasons, I find that the Plaintiff has reached the threshold for grant of an interlocutory injunction limited only to the suit property. I therefore allow a temporary injunction to issue in respect to the suit property only and not to the parcel of land known as Machakos/Mua Hills Settlement Scheme/121. Costs shall be in the cause.

It is so ordered.

SIGNED AND DELIVERED IN NAIROBI THIS 13TH DAY OF MARCH 2015.

MARY M. GITUMBI

JUDGE