REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA AT NAIROBI

MILIMANI LAW COURTS

ENVIRONMENT AND LAND DIVISION

ELC. CASE NO. 825 OF 2013

TASSIA COFFE ESTATE LIMITED. ……...1ST PLAINTIFF

STANLEY MUNGA GITHUNGURI……2ND PLAINTIFF

VERSUS

MILELE VENTURES LIMITED……..….....DEFENDANT

RULING

Coming up before me for determination is the Notice of Motion dated 9th July 2013 in which the Plaintiff/Applicant seeks for orders of temporary injunction restraining the Defendant/Respondent from selling, transferring, disposing or in any other way offering for sale all that parcel of land known as L.R. No. 28318/8 (I.R. 123901 (hereinafter referred to as the "suit property") pending the hearing and determination of this Application and suit together with costs.

The Application is premised on the grounds appearing on the face of it together with the Supporting Affidavit of Stanley Munga Githunguri sworn on 9th July 2013 in which he averred that he is the Chairman of the 1st Plaintiff. He further averred that on 13th March 2009, the 1st Plaintiff entered into two Sale Agreements with the Defendant for the purchase of two parcels of land known as L.R. No. 4299 and L.R. No. 10916 measuring 280 acres and 510 acres respectively. He further stated that the Defendant/Respondent paid the purchase price for the aforesaid parcels of land and was left with a balance of Kshs. 21,450,000/- which the Defendant/Respondent was to pay within 90 days as per the sale agreement. He further averred that the Defendant/Respondent failed to pay the said balance of the purchase price within the stipulated period but offered to deposit the title deed for the suit property with the 1st Plaintiff as security until full payment of the balance of the purchase price. He further averred that since then, the Plaintiff has written to him many letters requesting for more time to pay but the Defendant/Respondent has never met his part of the bargain. He further averred that he is apprehensive that since the Defendant/Respondent has been unable to pay the balance of the purchase price, he may go on and sell the suit property to unsuspecting 3rd parties.

The Application is unopposed. Despite being served with this Application and being granted leave by the court to file its response, the Defendant/Respondent did not file any response to this Application.

In deciding whether to grant the interlocutory injunction, 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."

Have the Plaintiffs/Applicants 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."

Have the Plaintiffs/Applicants established a prima facie case? This heavily depends on whether the Plaintiffs/Applicants have been able to convince this court they have sufficient interest in the suit property that this court ought to protect through issuing an interlocutory injunction. It is admitted by the Plaintiffs that the suit property belongs to the Defendant. The Plaintiffs even produced a copy of the title deed of the suit property bearing the name of the Defendant/Respondent. However, it is the Plaintiffs contention that the Defendant/Respondent having deposited the title deed with them as security for the payment of the balance of the purchase price for the above stated parcels of land, they have sufficient interest in the suit property. The Plaintiffs further contend that the Defendant/Respondent should be stopped from selling the suit property to other persons while the balance of the purchase price of the said parcels of land remains unpaid. **Section 78(6)** of the **Land Act** provides as follows:

"An informal charge may be created where –

a. **–**
b. **The charger deposits any of the following –**
    i. **A certificate of title to the land;**
    ii. **A document of lease of land**
    iii. **Any other document which it is agreed evidences ownership of land or a right to interest in land."**

Further**, section 78(8)** of the **Land Act** provides as follows:

"An arrangement contemplated in subsection (6)(a) may be referred to as an "informal charge" and a deposit of documents contemplated in subsection (6)(b) shall be known and referred to as a "lien by deposit of documents."

Going by these provisions of the law, it would appear that the Defendant/Respondent having deposited his title deed for the suit property with the Plaintiffs/Applicants, it created an informal charge in favour of the Plaintiffs/Applicants over the suit property as security for the payment of the balance of the purchase price for those other parcels of land. The Plaintiffs/Applicants therefore became chargees of an informal charge over the suit property and enjoy a lien by deposit of documents. To that extent therefore, I find that the Plaintiffs/Applicants have established that they have a prima facie case with high chances of success at the main trial.

Does an award of damages suffice to the Plaintiffs/Applicants? Land is unique and no one parcel can be equated in value to another. The value of the suit property can be ascertained. However, it would not be right to say that the Plaintiffs can be compensated in damages. I hold the view that damages are not always a suitable remedy where the Plaintiffs have established a clear legal right or breach. See **JM**

GICHANGA versus CO-OPERATIVE BANK OF KENYA LTD (2005) eKLR.

Being not in doubt, I see no reason to determine in whose favour the balance of convenience tilts.

Arising from the foregoing, I hereby allow the Application with costs to the Plaintiffs.

SIGNED AND DELIVERED AT NAIROBI THIS 30TH DAY OF MAY 2014

MARY M. GITUMBI

JUDGE