REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA

AT NAIROBI

ENVIRONMENTAL AND LAND DIVISION

ELC. CIVIL SUIT NO. 60 OF 2014

CAROLINE ODERO.....1ST PLAINTIFF

JOHN ABUKO.....2ND PLAINTIFF

Suing as Officials of ST. THADDEUS CHILD CARE SOCIETY

VERSUS

FREDRICK MWANGI CHEGE.....DEFENDANT

Sued as Chairman of RUAI EMBAKASI YOUTH UNITED DEVELOPMENT ASSOCIATION

RULING

Coming up before me for determination is the Notice of Motion dated 27th January 2014 in which the Plaintiffs/Applicants seek for orders of a temporary injunction restraining the Defendant from selling, transferring, constructing, demolishing or dealing in any other manner whatsoever with the parcel of land known as Plot No. 186 on LR. No. 12979/1 within Ruai Settlement (hereinafter referred to as the "suit property") pending the hearing and determination of this Application and suit. The Plaintiffs/Applicants also seek an eviction order against the Defendants and an order that the OCS Kayole Police Station do supervise the enforcement of the order. The Plaintiffs/Applicants also seek for costs of this Application.

The Application is premised upon the grounds appearing on the face of it together with the Supporting Affidavit of Caroline Odero sworn on 27th January 2014 in which she averred that she is one of the Directors of St Thaddeus Child Care Society (hereinafter referred to as the "society), which is the registered owner of the suit property. As proof of that averment, she attached a copy of the Letter of Allotment dated 21st November 2008 and a copy of the Lease from the City Council of Nairobi (as it then was) dated 8th April 2013. She further averred that the society has been paying its dues to the City Council of Nairobi. She then stated that on or about 15th January 2014, the Defendant/Respondent wrongfully entered and took possession of the suit property and have remained in possession and are subdividing it and selling it to unknown persons. She attached a copy of the ownership certificate issued by the Defendants. She further averred that the Defendant/Respondent has misused, damaged, destroyed and constructed structures on the suit property to the detriment of the Plaintiffs/Applicants. She confirmed

having made a report to the police on the said encroachment. She also stated that the Defendant/Respondent threatened to continue to remain in wrongful occupation of the suit property and to continue further subdividing and selling the same unless restrained by this court.

The Application is uncontested. Despite being duly served twice, the Defendant/Respondent did not file any response hereto.

In deciding whether to grant the temporary injunction sought after by the Plaintiffs/Applicants, 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."***

Looking at the facts of this case, the Plaintiffs have laid a claim of ownership upon the suit property and to prove that claim, they have produced to this court copies of their Letter of Allotment and Lease from the City Council of Nairobi as it then was. The Defendant has not disputed the Plaintiffs' ownership of the suit property. To that extent therefore, I find that the Plaintiff/Applicant has established 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/Applicants 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 in terms of prayer numbers 3, 5 and 7. Prayers no. 4 and 6 consist of prayers of eviction which are final in nature and cannot be issued at this interlocutory stage. The same are therefore disallowed. Costs are awarded to the Plaintiffs/Applicants.

SIGNED AND DELIVERED AT NAIROBI THIS 16TH DAY OF

MAY 2014.

MARY M. GITUMBI

JUDGE