REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA

AT NAIROBI (MILIMANI LAW COURTS)

ENVIRONMENTAL & LAND CASE 238 OF 2010

MARGARET WAIRIMU MUCHERU..1ST PLAINTIFF

FLORENCE NJERI MUCHERU...2ND PLAINTIFF

VERSUS

MANYATTA PARADISE LIMITED...1ST DEFENDANT

VERONICA NJERI KAMINJA..2ND DEFENDANT

RULING

1. The Plaintiffs are the registered proprietors of that parcel of land known as **LR No. Nairobi/Block 72/2934.** It borders the other parcel known as **LR No. Nairobi/Block 72/2425** owned by the 1st Defendant part of which is used by the 2nd defendant wherein she carries on the business of a posho mill. The Plaintiffs have now filed suit alleging that the 1st Defendant has encroached into their land by some 7.10 meters as per a survey undertaken by Geocom Africa Surveyors. The Plaintiffs have further a Chamber Summons under the then Order XXXIX Rules 1,2 and 3 of the Civil Procedure Rules and Section 3A of the Civil Procedure Act and all other enabling provisions of the law seeking orders.:-

1. **THAT this application be certified as urgent and the same be heard ex-parte in the first instance.**

2. **THAT an urgent temporary injunction order do issue restraining the 1st and 2nd Defendants by themselves and/or their employees agents, servants and/or any other person acting on their behalf from entering into and/or interfering in any manner whatsoever with the suit premises known as** Title No. Nairobi/Block 72/2934 **pending the hearing and determination of this application.**

3. **THAT an urgent mandatory injunction order do issue to compel and/or direct the 1st and 2nd Defendants by themselves and/or their employees, agents, servants and/or any other person acting on their behalf to forthwith cease their encroachment and/or entering into, taking possession and/or interfering in any manner whatsoever with the suit premises known as** Title No. Nairobi/Block 72/2934 **and to forthwith remove the part(sic) the 1st Defendant's building extending thereon pending the hearing and determination of this suit.**

4. **THAT the cost of this application be provided for;**

5. **THAT such other and/or other further relief as this Honourable Court may deem fit and just.**

2. The grounds in support of the application were given as that the plaintiffs are registered owners of the suit land and Geocom Africa Surveyors have confirmed that the 1st Defendant's buildings encroach into the plaintiffs' land. The Plaintiffs cannot develop their suit land due to such encroachment although they have the preliqusite approvals from the City Council of Nairobi, which have since expired as the encroachment hindered the Plaintiffs' intended development and that has caused them and continues to cause them loss and damage as building material prices keep escalating.

The first Plaintiff **Margaret Wairimu Mucheru** swore the Affidavit in support of the application restating the above and adding that upon the Plaintiffs noticing the encroachment complained of, they lodged a complaint with the City Council of Nairobi who upon satisfying themselves that indeed there was such encroachment issued an Enforcement Notice on 20/11/2007 to the 1st Defendant to remove the part of the building encroaching into the Plaintiffs' land. The 1st Defendant did not comply. Instead it filed suit and an application for injunction restraining removal such encroachment which application it withdrew on 3/3/2008 and has since taken no further action in its suit. The Plaintiffs prayed as earlier on stated.

3. The 1st Defendant upon entering appearance filed grounds of objection that the allocation of the suit land to the Plaintiffs was illegal as the same is public utility land and therefore not available for private development. The 1st Defendant described the Plaintiffs' land as an access area to the 1st Defendant's land and it is also used as a parking yard for tenants of adjacent buildings and the general public. The 1st Defendant further described the Plaintiffs as land grabbers having grabbed the suit land in 2004 and the suit land's allocation is cited in the **Ndungu Report** for revocation.

4. The 2nd Defendant opposed the application vide her Replying affidavit wherein she stated that she is the tenant of the 1st Defendant and the Plaintiffs are complete strangers to her. Describing herself as a bona fide tenant for value she added that she indeed received an Enforcement Notice but that the same was resisted by herself and the business community around the suit land. She concluded that as a rent-paying tenant she was not involved in any boundary dispute and her business should be left intact as acting otherwise would make her suffer irreparable loss, inconvenience and damages. She thought that the Plaintiffs have no cause of action against her.

In the Replying Affidavit of **Sylvia Wangari Mbau** described as a director of the 1st Defendant the deponent repeated the grounds of objection filed on behalf of the 1st Defendant adding that the suit land was initially preserved for public utility and any subsequent allocation must be a nullity. She prayed that the application be dismissed.

5. To deny that the suit land is public utility land the 1st Plaintiff swore a lengthy supplementary affidavit in which she deponed that the suit land was purchased by the Plaintiffs on 8/1/2004 from one Pauline Muringe at the agreed consideration of Kes. 2,000,000/=. The vendor was the leaseholder from the City Council of Nairobi since 2002 and she described herself and the 2nd Plaintiff as bona fide purchasers for value without notice. She added that it was the 1st Defendant's building which was not built in conformity with its deed plan and that the Plaintiff's land was included in the **Ndungu Report** through the machinations of the 1st Defendant to enable its grabbing from the Plaintiffs. The deponent swore further that the Plaintiffs' title was by law protected. They denied that the 1st Defendant has the locus to defeat their claim to the suit land. The 1st Plaintiff on her own behalf and that of the 2nd Plaintiff described the 2nd Defendant as a trespasser whose recourse is to the 1st Defendant for damages. The Plaintiffs then prayed as earlier.

6. Parties filed written submissions and placed reliance on authorities and merely emphasized those

submissions at a highlighting session before court.

7. The issues raised in this application are rather straightforward and I see them as being whether or not the Plaintiff has made out a case for the grant of orders of interlocutory and mandatory injunctions. The law on the grant of the former is now well settled in the case of **GIELLA –V- CASSMAN BROWN & CO LTD (1973) E.A. 358** wherein the following principles were set out as being those that a successful applicant must satisfy:-

(i) Show a prima facie case with a probability of success,

(ii) That he might otherwise suffer irreparable injury unless the injunction is granted,

(iii) **When the court is in doubt it will decide the application on the balance of convenience**.

A prima facie case has been defined as:-

"A case in 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." See **MRAO LIMITED –VS- FIRST AMERICAN BANK OF KENYA LIMITED & 2 OTHERS (2003) KLR 125**.

The law on the grant of mandatory injunctions will be found in many cases. Suffice to quote one**, KENYA AIRPORTS AUTHORITY –VS- PAUL NJOGU MUNGAI, JAMES KIMANI & NEW JAMBO TAXIS CAPP NO. NAI 29 of 1997. (12/97 UR)** wherein judges of Appeal stated;

"We would point out that the principles governing grant of mandatory as well as prohibitory (restrictive) orders pending hearing and determination of a suit in the High court are the self-same ones enunciated in the celebrated case of Giella- -vs- Cassman Brown & Co Ltd (1973) E.A. 358 save that a temporary mandatory injunction can only be granted in exceptional and in the clearest of cases. This test was laid down in the case of Kamau Mucuha vs The Ripples Limited Civil Application No. NAI 186 of 1992, unreported, by this court wherein it approved and applied the distinction between a prohibitory and a mandatory injunction drawn by Megary J. (as he then was) in the case of Shepherd Homes –vs- Sandham (1979) 3 W/R 348. Megary J there said,

"Whereas a prohibitory injunction merely requires abstention from acting, a mandatory injunction requires the taking of positive steps, and may (as in the present case) require the dismantling or destruction of something already effected or constructed.

This will result in a consequent waste of time, money and materials if it is ultimately established that the Defendant was entitled to retain the erection."

I have taken the deliberate move to extensively quote the above case to restate that caution is to be exercised in granting major orders at interlocutory stages of a case. Such a relief or order is to be given in exceptional and the clearest of cases. It is of course the law that a mandatory injunction can be granted at the interlocutory stage provided certain criteria is met. See **HALSBURY'S LAWS OF ENGLAND vol. 24 paragraph 948** where the following instructive passage is to be found;

"A mandatory injunction can be granted on an interlocutory application, as well as at the hearing, but, in the absence of special circumstances, it will not normally be granted. However, if the case is clear and one which the court thinks ought to be decided at once, or if the act done is a simple and summary one which can be easily remedied, or if the defendant attempts to steal a match on the Plaintiff, or such as where on receipt of notice that an injunction is about to be applied for, the Defendant hurries on the work in respect of which complaint is made so that when he receives notice of an interim injunction it is completed, a mandatory injunction will be granted on an interlocutory application."

8. Having set out the issues to be determined in this application and the principles to be adhered to in the process of such determination I now turn to such determination. It was not contested that the Plaintiffs and the 1st Defendant hold title to their respective parcels of land. It was further not disputed by those parties that indeed part of the 1st Defendant's building extends to the suit land which is registered in the Plaintiffs' names. What is contested is that the plaintiffs acquired the suit land irregularly and that the same has been recommended for return to public use as a parking lot. Various documents were shown to the court relative to the alleged grabbing of the suit land and the recommendation of the cancellation of title of the suit land to facilitate reversion to public use. That of course does not entitle the 1st Defendant to convert part of the suit land to its own private use. I am acutely alive to the sanctity of title provided for in Section 28 of the Registered Land Act Cap 300 Laws of Kenya as well as in Section 23(1) of the Registration of Titles Act cap 281 Laws of Kenya. However such absolute proprietorship and sanctity must be proceeded by regular and legal acquisition processes. Irregularity has been alleged. It can only be proved at hearing. Every literate and knowledgeable Kenyan ought to be aware of the widely publicized **Ndungu Report** on illegally acquired land. The Plaintiffs do admit that their parcel of land in dispute is included in that Report. They did not show this court what legal action they have taken to resolve that inclusion of the suit land in the Ndungu Report. And whereas the **Ndungu Report** is not a conclusive convicting authority, one who is adversely mentioned therein would, at the very least, be expected to contest the same.

I was presented with no material to show the existence of the ingredients preliquisite to the grant of orders for temporary and mandatory injunctions. No Prima facie case is made out and definitely no special circumstances were pointed out. If the stolen match is who between the Plaintiffs and the 1st Defendant should privately use what is described as public land, then that is no stolen match at all as none of the parties has a right to the land, until of course at a full hearing the issue is fully determined.

The Plaintiffs cannot be described as being vigilant and Equity does not aid the indolent. The 1st Defendant said they were first on the land and the encroached building existed before the Plaintiffs got to the land. The Plaintiffs got to the suit land sometime in year 2003 as per the Transfer. And even if they were to be believed that they noticed the encroachment during year 2005, they have shown no reason why they would wait until year 2010 to take action. The totality of the circumstances of this case do neither show a prima facie case nor the "clearest of cases" to warrant the grant of the orders sought. In the result the application under consideration is found to be unmeritorious and is dismissed. Costs will be in the cause.

It is so ordered.

DATED, SIGNED AND DELIVERED AT NAIROBI THIS **28TH** DAY OF **JUNE 2012**.

P.M. MWILU
JUDGE

In the presence of:-

…………………………………………………………..Advocate for Plaintiffs/Applicants

…………………………………………………………..Advocate for 1st Defendant

…………………………………………………………..Advocate for 2nd Defendant

…………………………………………………………..Court Clerk

P.M. MWILU
JUDGE