REPUBLIC OF KENYA

IN THE HIGH COURT

AT NAIROBI

MILIMANI LAW COURTS

Environmental & Land Case 705 of 2011

COL (Rtd) JAMES PETER GICHUHI (suing as appointed attorney for

VICTOR KAGWIMA GICHUHI)……....…....…..……....1ST PLAINTIFF

JANE MWIHAKI GICHUHI ……....……...…2ND PLAINTIFF

- VERSUS -

KAHAWA SUKARI LTD ……..……..... 1ST DEFENDANT

MEMBLEY HOUSING ……...…2ND DEFENDANT

WILLIAM NJAGI KARINGA ……....……....3RD DEFENDANT

JOSPHINE K. IGWETA ……4TH DEFENDANT

RULING

1. This is the plaintiffs' notice of motion dated 23rd November 2011. The plaintiffs pray for an interlocutory prohibitive injunction to restrain the defendants from selling or dealing in any manner with plots numbered 33 and 34 within LR No Logoi/46. The application is expressed to be brought under order 40 rules 1 and 2 of the Civil Procedure Rules 2010 as well as section 63 of the Civil Procedure Act. An affidavit sworn by Jane Gichuhi on 23rd November 2011 is annexed.

2. The plaintiffs' case is that they purchased the suit land from the 1st and 2nd defendants. Consideration passed. They took possession and erected a perimeter fence. On 20th August 2011, the 3rd and 4th defendants trespassed onto the property, demolished the fence and cleared the vegetation on the property. The 3rd and 4th defendants also erected a temporary structure on the land. The plaintiffs are thus apprehensive that the defendants may sell or alienate the land or deal with it to the prejudice of the

plaintiffs.

3.The motion is contested by the 3rd and 4th defendants. There is filed a replying affidavit of Josephine Igweta, the 4th defendant, sworn on 19th December 2011. The 3rd and 4th defendants claim to be the owners of the suit property having paid a total of Kshs 240,000 to Membley Housing Scheme. They were issued with an allotment certificate on 5th February 2007 and a certificate of possession on 27th April 2005. After that a surveyor identified the beacons and they took possession. The 3rd and 4th defendants admit they pulled down the plaintiffs' fence and have put up temporary structures. The 3rd and 4th defendants claim to be the first in time in purchase of the suit land. They pray that the motion be dismissed.

4.The 1st and 2nd defendants have replied by a brief affidavit sworn on 22nd February 2012 by Edward Kanjabi. He is a director of the 1st defendant. He avers that the 1st and 2nd defendants erred by allotting plots 33 and 34 to both the plaintiffs and the 3rd and 4th defendants. The 1st and 2nd defendants have thus offered to alternative properties of equal value to the protagonists to resolve the matter.

5. I have heard the rival arguments. I take the following view. When the plaintiff approaches the court for injunction, she must rise to the threshold for grant of interlocutory relief set clearly in *Giella Vs Cassman Brown and Company Limited* [1973] E.A 358. Those principles are first, that the applicant must show a *prima facie* case with a probability of success; secondly that she stands to suffer irreparable harm not compensable in damages; and thirdly, if in doubt, the court must assess the balance of convenience. Being a discretionary remedy, there is also ample authority that a party who has misconducted herself in a manner not acceptable to a court of equity, will be denied the remedy. See *Kenya Hotels Limited Vs Kenya Commercial Bank and another* [2004] 1 KLR.

6. Applying the law to the evidence at this stage, I find as follows. The legal status of the 2nd defendant is in doubt. The plaint at paragraph 5 pleads that it is "a scheme established by the 1st defendant for purposes of transacting land transactions". I express serious doubts about the capacity of the 2nd defendant to be sued in person. Nevertheless, it is not contested that the 2nd defendant received the purchase price for plots 33 and 34 from the plaintiffs and also from the 3rd and 4th defendants. It is pleaded at paragraph 9 of the plaint that the 1st or 2nd defendant entered into the agreement for sale of the suit land. At paragraph 8 of the plaint it is averred that the 1st and 2nd defendant are the registered owners of LR 10901/46 but no evidence of that ownership is presented in the affidavit of the plaintiffs in support of the motion. The anxiety over that matter is resolved partially by the admission by the 1st and 2nd defendants that they sold the suit properties to the disputants. As a result of the double allocation, it is incumbent upon the court to interrogate further the time lines an allotment of the suit land to determine priority of ownership. I do so with a bit of trepidation because at this interlocutory stage, the court is not fully seized of all the evidence.

7.The plaintiffs say they purchased the suit properties for Kshs 200,000 as per annexure **"JMG 1".** That annexure has two sets of letters of offer for plot 33 and 34. They are not dated. The price was Kshs 100,000 per plot. Payments were made by various receipts exhibited as **"JMG 2"** between25th October 2006 to 9th March 2007. The documents marked **"JMG 3"** and **"JMG 4"** are misleading. The 1st is dated 25th October 2006 and is an allotment certificate for both plots. Yet it has payment particulars running to 9th March 2007. It could then not have been issued on 25th October 2006. The second document, is dated 20th January 2010 giving the plaintiffs possession of the two plots. At paragraph 8 of the affidavit of the 2nd plaintiff, the plaintiff confirms taking possession and spending Kshs 70,820 to erect a fence. The plaintiff does not say when they took possession. It is signed by E.R. Kanjabi, "a partner", of Kahawa Sukari Limited. She is the deponent to the replying affidavit conceding that there has been double allotment of the suit land. From the above evidence then, the plaintiffs did not complete payment of the purchase price until 9th March 2007 and did not get formal possession until 20th January 2010.

8. The 3rd and 4th defendants claim they bought the two plots on 19th September 2005 at Kshs 120,000 per plot for a total of Kshs 240,000. That is strange because the plaintiffs claim to have bought them in the year 2006 at a cheaper price of Kshs 100,000 per plot. The 3rd and 4th defendants have enclosed 5 receipts dated between 19th September 2005 and 10th August 2006 totalling Kshs 55,000 towards purchase of the plots. Those payments were made before the first payment by the plaintiffs on 25th October 2006. The balance of the purchase price was made between 27th January 2007 and 27th April 2009. By the time that balance was received, the plaintiffs had already completed payments way back on 9th March 2007. The 3rd and 4th defendants only received formal possession from the vendor on 27th April 2009. Although their allotment letter is dated 19th September 2005 it is misleading because it contains payment details running to 24th April 2009.

9. I have thus come to the following conclusion. Although the 3rd and 4th defendants were allocated the suit land earlier and started paying for it earlier on 19th September 2005, they did not complete payments until 27th April 2009. That is the date of full consideration I am then of the view that ownership of that plot could not then pass until 27th April 2009. The 3rd and 4th defendants were only granted formal possession by the vendor on 27th April 2009. But by that date, the plaintiffs had completed payments having paid the last installment on 9th March 2007. I thus hold that the plaintiffs, on the basis of evidence before me, acquired ownership before the 3rd and 4th defendants and were entitled to possession. I am not saying that the 3rd and 4th defendants are not entitled to the plot. The vendors, 1st and 2nd defendants, have conceded they did a double allotment. They are the real culprits to whom the 3rd and 4th defendants should look for remedies. What I am saying is that on the basis of the evidence at this stage, the plaintiff's claim of ownership ranks in priority.

10. True, the value of the properties can be ascertained. And there is a valid argument that damages would be available. But I hold that damages are not always a suitable remedy where the plaintiff has established a clear legal right or breach. See *JM Gichanga Vs Co-operative Bank of Kenya Ltd* [2005] e KLR, *Aikman Vs Muchoki* [1984] KLR 353.

11. But as I have expressed doubts on the strength of the plaintiff's *prima facie* case, I would turn to the balance of convenience. The plaintiffs aver they have spent Kshs 70,820 to put up a fence on the property. The 3rd and 4th defendants have pulled down part of that fence and erected a temporary structure or pit latrine. Quite clearly, the balance of convenience would tilt a little more in favour of the plaintiffs. In all this I am comforted a little by the offer from the 1st and 2nd defendants to compensate any of the protagmist with plots in the same place of equal value. So all is not lost.

12. For all the above reasons, I find that the plaintiff has met the threshold for grant of interlocutory relief. In the result, I order that an injunction do issue restraining the defendants whether by themselves, their employees, servants, agents or howsoever from entering, selling, leasing subdividing, charging or taking possession of plots numbered 33 and 34 within LR No 10901/46 or in any manner inconsistent with the right of ownership or possession of the plaintiffs.

It is so ordered.

DATED and **DELIVERED** at **NAIROBI** this 19th day of June 2012.

G.K. KIMONDO

JUDGE

Ruling read in open court in the presence of

No appearance for the Plaintiffs.

Mr. Mwaniki for the 1st & 2nd Defendants.

Mrs. Kalinga for the 3rd & 4th Defendants.