REPUBLIC OF KENYA

IN THE ENVIRONMENT AND LAND COURT

AT NAIROBI

ELC SUIT NO. 97 OF 2020

NDIRITU GIKARIA.....PLAINTIFF

-VERSUS-

MARGARET NJERI WANYOIKE.....1ST DEFENDANT

CHARLES MWANGI NGUMI.....2ND DEFENDANT

MICHAEL NGUGI KARANJA.....3RD DEFENDANT

FRANCIS KIRIMA N'IKINYUA(Sued as the Chairperson of Zimman

Settlement Scheme Society.....4TH DEFENDANT

RULING

What is before me is the plaintiff's Notice of Motion application dated 8th June, 2020 in which the plaintiff has sought an order that, pending the hearing and determination of this suit the defendants be restrained from trespassing, occupying, erecting structures on and/or interfering with the plaintiff's right over Plot No. 1379 and Plot No. 1380, Kasarani ("the suit properties"). The application was brought on the grounds set out on the face thereof and on the supporting affidavit sworn by the plaintiff on 8th June, 2020.

The plaintiff's case against the defendants is that, on 27th July, 2004, the plaintiff was allocated the suit properties by Zimman Settlement Scheme Society ("the society"). The suit properties are adjacent to each other. The plaintiff paid for the suit properties in instalments from 2004 when the same were allocated to him until 17th June, 2019 when he finished the payment of the full purchase price of Kshs. 2,000,000/=. The society had put up a building foundation on the suit properties that was sold to him together with the land. On 15th April, 2020 while on a visit to the suit properties, he found the 1st, 2nd and 3rd defendants undertaking construction thereon. As at the time the 1st to 3rd defendants entered the suit properties and purported to undertake construction thereon, the plaintiff had put up walls on the building foundation that had been constructed by the society and the construction of the building he intended to put up on the suit properties was at the roofing stage.

The 1st to 3rd defendants entered the suit properties without the plaintiff's consent and continued with construction of the building that the plaintiff was putting up on the suit properties by erecting a roof on the said building. The construction that the 1st to 3rd defendants were carrying out on the suit properties was unlawful and the same was interfering with the plaintiff's quiet possession of the suit properties. The 1st to 3rd defendants had also altered the design of the building that the plaintiff was putting up on the suit properties. The plaintiff was apprehensive that unless the 1st to 3rd defendants were stopped from continuing with construction on the suit properties, the plaintiff would be deprived of his right to the properties. The plaintiff annexed to his affidavit in support of the application among others; a copy of a membership certificate that was issued to him by the society on 27th July, 2004, a receipt for Kshs. 2,000,000/= dated 17th June, 2019 said to have been issued to him by the society for the purchase price of the suit properties and photographs showing the suit properties and the building in dispute.

The application was supported by the 4th defendant and opposed by the 1st to 3rd defendants. The 4th defendant claimed in his replying affidavit sworn on 27th August, 2020 that he was the chairman of the society. He stated that the plaintiff was the beneficial owner of the suit properties having purchased the same from the society at Kshs. 2,000,000/- that he paid in full. The 4th defendant averred that the suit properties were lawfully allocated to the plaintiff and that no fraud or collusion was involved. He stated that sometimes in February, 2020, the 1st to 3rd defendants invaded the society's properties and forcefully took possession of some of the parcels of land that had been allocated by the society to its members. He stated that the suit properties were some of the properties that were seized by the 1st to 3rd defendants.

The 1st to 3rd defendants opposed the plaintiff's application through a replying affidavit sworn by the 2nd defendant on 6th July, 2020. The 1st to 3rd defendants denied that the 4th defendant was the chairman of the society. The 1st to 3rd defendants averred that the 4th defendant was the chairman of the society until 10th October, 2019 when he was voted out at the society's Annual General Meeting held on the same date. The 1st to 3rd defendants averred that they were the current officials of the society. The 1st to 3rd defendants denied that the suit properties belonged to the plaintiff. The 1st to 3rd defendants averred that the suit properties were set aside for the construction of the society's office. The 1st to 3rd defendants averred that sale of land by the society had to be approved by the officials of the society at a meeting convened for that purpose. The 1st to 3rd defendants averred that there were no minutes of the meeting at which the sale of the suit properties to the plaintiff was approved. The 1st to 3rd defendants averred further that the plaintiff had not placed before the court the agreement of sale between him and society. The 1st to 3rd defendants averred that the membership certificate exhibited by the plaintiff in his affidavit in support of the application was fraudulent since the format in which it was drawn was not in use in 2004 when it was allegedly issued. The 1st to 3rd defendants averred further that the plaintiff had not placed evidence before the court on how he paid for the suit property and that the receipt for Kshs.2,000,000/= exhibited by the plaintiff in proof of the payment of the said amount was not an official receipt of the society. The 1st to 3rd defendants averred that the plaintiff had never been in possession of the suit properties and that the structures on the suit properties were put up by the society. The 1st to 3rd defendants averred that construction of the building on the suit properties that was the subject of the complaint by the plaintiff was completed in June, 2020. The 1st to 3rd defendants averred that the plaintiff's claim over the suit properties started when the 4th defendant was removed as the chairman of the society and that the plaintiff was likely to be working in cahoots with the 4th defendant to distract and confuse the new officials of the society following his removal from office.

The 1st to 3rd defendants filed a further affidavit sworn by the 2nd defendant on 5th October, 2020 in response to the affidavit by the 4th defendant. In the affidavit, the 1st to 3rd defendants denied the contents of the 4th defendant's affidavit. The 1st to 3rd defendants reiterated that they were the current officials of the society and that the term of the 4th defendant as chairman of the society ended on 10th October, 2019.

The plaintiff's application was heard by way of written submissions. The plaintiff filed his submissions dated 8th September, 2020 on the same date. The 1st to 3rd defendants filed their submissions dated 17th August, 2020 on 18th August, 2020. The 4th defendant did not file submissions.

I have considered the plaintiff's application together with the affidavits filed in support thereof. I have also considered the affidavits filed by the 1st to 3rd defendants in opposition to the application. Finally, I have considered the submissions by the advocates for the parties. The following is my view on the matter. The principles upon which this court exercises its discretion in applications for temporary injunction are now well settled. As was stated in Giella *v* Cassman Brown & Co. Ltd. [1973] E.A 358**,** an applicant for interlocutory injunction must show a prima facie case with a probability of success and such injunction will not normally be granted unless the applicant might otherwise suffer irreparable injury which would not be adequately compensated by an award of damages. It was held further that if the court is in doubt as to the foregoing, the application would be determined on a balance of convenience.

In Nguruman Limited *v* Jan Bonde Nielsen & 2 Others [2014] eKLR the court of Appeal adopted the definition of a prima facie case that was given in of Mrao Limited *v* First American Bank of Kenya Limited & 2 Others [2003] KLR 125 and went further to state as follows:

> **"The party on whom the burden of proving a prima facie case lies must show a clear and unmistakable right to be protected which is directly threatened by an act sought to be restrained, the invasion of the right has to be material and substantive and there must be an urgent necessity to prevent the irreparable damage that may result from the invasion. …All that the court is to see is that on the face of it the person applying for an injunction has a right which has been threatened with violation…The applicant need not establish title it is enough if he can show that he has a fair and bona fide question to raise as to the existence of the right which he alleges. The standard of proof of that prima facie case is on a balance or, as otherwise put on a preponderance of probabilities. This means no more than that the court takes the view that on the face of it, the applicant's case is more likely than not to ultimately succeed."**

I am not satisfied that the plaintiff has established a prima facie case with a probability of success. The plaintiff who claims to have paid for the suit properties in instalments over a period of over 15 years did not place any evidence before the court on how he made the payments. The receipt for Kshs. 2,000,000/= dated 17th June, 2019 that he placed before the court in proof of the said payments is contested. It is not clear how a single receipt could be issued on 17th June, 2019 for payments made instalments over a period of 15 years. The plaintiff did not also place before the court a copy of the agreement of sale that he entered into with the society. There is also no evidence that the structure on the suit properties was put up by the plaintiff or that the plaintiff had at any time been in possession of the suit properties. The fact that the society had put up a foundation for a building it wished to put up on the suit properties lends credence to the 1st to 3rd defendant's claim that the suit properties were reserved for the society's own use.

In view of my finding that the plaintiff has not established a prima facie case, it is not necessary for me to consider whether or not the plaintiff stands to suffer irreparable harm if the injunction sought is not granted.

Due to the foregoing, I find no merit in the plaintiff's application dated 8th June, 2020. However, in the interest of justice, I will make an order to preserve the suit properties pending the hearing of the suit. The following are my final orders in the matter;

1. The Notice of Motion dated 8th June, 2020 is dismissed.

2. Pending the hearing and determination of this suit or further orders by the court, the 1st to 3rd defendants and/or Zimman Settlement Scheme Society shall not sell, charge or enter into a lease exceeding 5 years in respect of Plot No. 1379 and Plot No.

1380 Kasarani being subdivisions of L.R No. Kasarani/Block 123/1-259.

3. The costs of the application shall be in the cause.

Dated and Delivered this 18th day of February, 2021

S. OKONG'O

JUDGE

Ruling delivered virtually through Microsoft Teams Video Conferencing Platform in the presence of:

Ms. Kariuki h/b for Ms. Mwangi for the Plaintiff

Ms. Ngesa for the 1st to 3rd Defendants

N/A for the 4th Defendant

Ms. C. Nyokabi-Court Assistant