REPUBLIC OF KENYA

IN THE ENVIRONMENTAL AND LAND COURT

AT MOMBASA

ELC NO 207 OF 2020

RACHEL MWANGOMBE.....PLAINTIFF/APPLICANT

VERSUS

COUNTY GOVERNMENT OF TAITA TAVETA...1ST DEFENDANT/RESPONDENT

KENYA REVENUE AUTHORITY.....2ND DEFENDANT/RESPONDENT

THE REGISTRAR OF LAND, TAITA TAVETA COUNTY

AND THE CHIEF LAND REGISTRAR.....3RD DEFENDANT/RESPONDENT

RULING

1. The application for determination is the plaintiff's Notice of Motion dated 9th November 2020 brought under Section 1A, 1B and 3A of the Civil Procedure Act and Order 40 Rule 1, Order 51 Rule 1 and 2 of the Civil Procedure Rules and seeks the following orders:-

a) Spent

b) That this honourable court be pleased to find that the 2nd defendant is a trespasser on the property known as Plot 5147.

c) That this honourable court be pleased to order the 2nd defendant/respondent do immediately vacate the suit premises, Plot No 5147 in Taveta Town and remove all structures thereon.

d) That pending hearing and final determination of this application, this honourable court be pleased to issue a temporary injunction restraining the defendants by themselves, servants, legal representatives, agents or howsoever from trespassing, encroaching, constructing, further constructing or in any other manner interfering with or wasting the plaintiff/applicant's property being Plot No 5147 situate in Taveta.

e) That pending the hearing and determination of this suit the honourable court be pleased to issue a temporary injunction restraining the 1st and 3rd defendant, their servants and or agents from transferring, registering or in any other way alienating the plaintiff/plaintiffs' property being plot No 5747 pending hearing and final determination of this suit.

f) That a declaration that the plaintiff/applicant is the legal and rightful owner and entitled to all the property rights over plot No 5147 situate in Taveta.

g) That the OCS Taveta Police Station and the in charge Taveta Town Adminstration Police Camp to ensure compliance with the orders above.

h) That the cost of this application be provided for.

2. The application is grounded on the facts inter alia that the plaintiff on 6th June 2008 applied for and was allotted Plot No 5147 situated in Taveta on 18th May 2009 by the Town Council of Taveta, after paying the requisite Kshs 108,000/=. That the 1st defendant has failed to issue the plaintiff with the title to the suit property despite the plaintiff's persistent demands. That on or about 5th November 2020, the 1st and 3rd defendants identified the suit premises to the plaintiff's counsel and further alluded that the suit premises has been grabbed by the 2nd defendant who was in the process off fencing of a large parcel of land which is inclusive of the suit property. The plaintiff further stated that

the actions of the 1st and 2nd defendant have prevented her from developing the suit property.

3. The affidavit in support of the application was sworn by Rachel Mwangombe, she annexed and marked RM-1 her application to the Town Council of Taveta dated 6th June 2008 for allocation of the suit property, and was issued with a receipt upon payment of Kshs 2,000 for the plot allocation which she annexed and marked as RM-4. Ms. Mwangombe pleaded that the on 18th May 2009, Town Council of Taveta issued her with a Letter of allotment which she annexed as RM-3, and that she later made a payment Kshs 108,000/= as the annual rent for year 2009 and annexed the receipt marked RM-2.

4. Ms. Mwangombe pleaded that 1st defendant has failed to issue her with a title to the suit property despite her efforts which have been met by misinformation and procrastination. She further stated that on or about 5th November 2020, her advocate on record, was pointed out the suit property by the 1st defendant, who stated that the 2nd defendant had grabbed the plot and was in the process of constructing a wall that would encompass her plot. Ms. Mwangombe also stated that the 2nd defendant has denied her access to the plot and despite being served with notice to vacate, the 2nd defendant has been adamant. She prayed to court to allow the application in order to prevent the 2nd defendant from wasting the suit premises.

5. The 2nd defendant opposed the application through its replying affidavit dated 15th January 2021 sworn by Joseph Kariuki. He stated that the 2nd defendant does not own nor lay claim to plot No 5147. He also denied being privy to the allotment of the Plot to the plaintiff. Mr. Kariuki annexed a letter dated 10th June 2008 from the Town Council of Taveta and marked 'JK-1A', which shows the 1st defendant was allocated Plot No. 5865/650, which is within the Council's New Taveta Town L.R NO. 5865/2. He further annexed an acknowledgement from Taveta Town Council confirming receipt of Kshs 1,250,000/= and marked 'JK-1B'. He also annexed and marked 'JK-1D' the 2nd defendant's Certificate of Lease dated 14th June 2017 for New Taveta Town/5324.

6. Mr. Kariuki denied that the 2nd respondent is a trespasser to Plot No. 5147 but then again affirmed being in possession and occupation of New Taveta Town/5324. He also denied the allegations that the 2nd defendant had grabbed the plaintiff's plot and referred the court to the documents annexed which prove that the 2nd defendant acquired New/Taveta Town 5324 legally. The deponent also stated that the plaintiff has not demonstrated why she did not identify the said property 11 years after she obtained the letter of allotment. He concluded by asking court to dismiss the application with costs for being an abuse of the court process.

7. The application was canvassed by way of written submissions which were duly filed by the parties to the suit. I have considered the pleadings herein as well as the rival submissions. The issue for determination is whether the plaintiff's application has met the threshold for grant of an order of temporary injunction.

8. The threshold required for an order of temporary injunction is now settled. The Court of Appeal in **Barclays Bank of Kenya Ltd v Banking, Insurance & Finance Union (Kenya) [2019 eKLR** discussed the law on injunction at length and had this to say:-

> **"The locus classicus Giella vs Cassman Brown & Company Ltd (1973) EA 358 which was restated by this Court in Nguruman Limited vs Jan Bonde Nielsen & 2 Others [2014] eKLR as follows:**
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> **"In an interlocutory injunction application, the plaintiff has to satisfy the triple requirements to;**
>
> **(a) establish his case only at a prima facie level,**
>
> **(b) demonstrate irreparable injury if a temporary injunction is not granted, and**
>
> **(c) allay any doubts as to (b) by showing that the balance of convenience is in his favour.**
>
> **These are the three pillars on which rests the foundation of any order of injunction, interlocutory or permanent. It is established that all the above three conditions and stages are to be applied as separate, distinct and logical hurdles which the plaintiff is expected to surmount sequentially. See Kenya Commercial Finance Co. Ltd vs Afraha Education Society [2001] Vol. 1 EA 86. If the plaintiff establishes a prima facie case that alone is not sufficient basis to grant an interlocutory injunction, the court must further be satisfied that the injury the respondent will suffer, in the event the injunction is not granted, will be irreparable. In other words, if damages recoverable in law is an adequate remedy and the respondent is capable of paying, no interlocutory order of injunction should normally be granted, however strong the plaintiff's claim may appear at that stage. If prima facie case is not established, then irreparable injury and balance of convenience need no consideration. The existence of a prima facie case does not permit "leap-frogging" by the plaintiff to injunction directly without crossing the other hurdles in between."**
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> **What amounts to a prima facie case was explained in Mrao Ltd vs First American Bank of Kenya Ltd & 2 Others [2003] eKLR as follows:**
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> **"A prima facie case is more than an arguable case. It is not sufficient to raise issues. The evidence must show an infringement of a right, and the probability of success of the plaintiff's case upon trial. That is clearly a standard which is higher than an arguable case."**
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> **In the case of Habib Bank Ag Zurich vs Eugene Marion Yakub, C. A. No. 43 of 1982 (unreported), 'probability of success' was taken to mean that 'the court is only to gauge the strength of the Plaintiff's case and not to adjudge the main suit at the**

stage since proof is only required at the hearing stage'.

Next in sequence, even where a prima facie case is established, is the question of damages. In the Nguruman Limited case (supra), the principle was dealt with as follows:

"On the second factor, that the plaintiff must establish that he "might otherwise" suffer irreparable injury which cannot be adequately remedied by damages in the absence of an injunction, is a threshold requirement and the burden is on the plaintiff to demonstrate, prima face, the nature and extent of the injury. Speculative injury will not do; there must be more than an unfounded fear or apprehension on the part of the plaintiff. The equitable remedy of temporary injunction is issued solely to prevent grave and irreparable injury; that is injury that is actual, substantial and demonstrable; injury that cannot "adequately" be compensated by an award of damages. An injury is irreparable where there is no standard by which their amount can be measured with reasonable accuracy or the injury or harm is such a nature that monetary compensation, of whatever amount, will never be adequate remedy." [Emphasis added].

And finally, the balance of convenience which is applied to allay any doubts as to whether or not damages are an adequate remedy."

9. The plaintiff asserted ownership to Plot No 5147, which she averred that the 2nd defendant has trespassed on and is constructing a perimeter wall that denies her access to the suit property. The 2nd defendant on the other hand, claim to own and occupy a different parcel of land and produced a Certificate of Lease dated 14th June 2017 to Title No New Taveta/Town/5324.

10. The plaintiff's Plot No. 5147 appears quite different from the 2nd defendant's Plot No. New Taveta/Town/5324, and the plaintiff has failed to demonstrate to court the connection between the two plots. The plaintiff has the onus of substantiating to court, the 2nd defendant presence on her Plot, given that the 2nd defendant has categorically distanced itself from ownership and occupation of the suit property.

11. In the supporting affidavit, the plaintiff pleaded that the 1st defendant has failed to issue her with a certificate of lease despite her efforts. The plaintiff's claim that the 1st defendant misinformed her have not been substantiated by evidence and they remain as mere allegations.

12. Further to that, she stated that her plot was pointed out to her advocate on 2nd November 2020, 11 years after the plot was allocated to her. It seems to court that the plaintiff had not made any development to the plot since it was allocated to her in 2009. The plaintiff has not put forward evidence of loss that arises from the 2nd defendant's occupation of the suit property. A mere statement that the plaintiff stands to suffer irreparable injury that cannot be compensated by an award of damages does not suffice.

13. The Court of Appeal in **Charter House Investment Ltd v Simon K. Sang & 3 others [2010] eKLR stated the following:-**

"the trial court correctly applied the case of Giella vs Cassman Brown [1973] E. A. 358 when it declined to grant the injunction sought. Injunction is an equitable and discretionary remedy, given when the subject matter of the case before the court requires protection and maintenance of the status quo. The award of a temporary injunction by courts of equity has never been regarded as a matter of right, even where irreparable injury is likely to result to the plaintiff. It is a matter of sound judicial discretion, in the exercise of which the court balances the conveniences of the parties and possible injuries to them and to third parties. In the Giella case (supra) the predecessor of this Court laid down the principle that for one to succeed in such an application, one must demonstrate a prima facie case with reasonable prospect of success; that he stands to suffer irreparable damage which cannot be compensated for by an award of damages; and that the balance of convenience tilts in his favour."

14. From the material presented, the plaintiff has not demonstrated a prima facie case with a probability of success as there is no sufficient evidence to link the 2nd defendant to the suit property. Further to that, the plaintiff has not established the irreparable injury likely to suffer if the orders sought are not granted that cannot be compensated by an award of damages.

15. In conclusion therefore, I find no merit in the Notice of Motion dated 9th November 2020 and dismiss it with costs to the 2nd defendant.

DATED, SIGNED AND DELIVERED VIRTUALLY AT MOMBASA THIS 25TH DAY OF MAY, 2021

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C.K. YANO

JUDGE

IN THE PRESENCE OF:

Yumna Court Assistant

C.K. YANO

JUDGE