REPUBLIC OF KENYA

IN THE ENVIRONMENT AND LAND COURT AT NAIROBI

MILIMANI LAW COURTS

ELC. CASE NO. 4 OF 2016

NGONG BUTCHERS CO-OPERATIVE SOCIETY LTD.....PLAINTIFF

VERSUS

PATRICK KABUE MUCHENE.....DEFENDANT

RULING

Coming up before me for determination are two applications. The first is the Plaintiff's Notice of Motion dated 7th January 2016 (hereinafter referred to as the "Plaintiff's Application"). The second is the Defendant's Notice of Motion dated 21st January 2016 (hereinafter referred to as the "Defendant's Application").

In the Plaintiff's Application, the Plaintiff seeks that a temporary injunction be issued restraining the Defendant himself, his servants and/or agents or otherwise howsoever from entering into or being, or trespassing or building or constructing or erecting any building or any other structure or in any way dealing with the premises known as Land Reference Number 23124/25 (hereinafter referred to as the "suit property") pending the hearing and determination of this case. In the Defendant's Application, the Defendant seeks that a temporary injunction be issued restraining the Plaintiff by itself, its servants and/or agents from entering into and/or being on the suit property pending the hearing and determination of this case.

The Plaintiff's Application is premised on the grounds appearing on its face together with the Supporting Affidavit of Moses Sironik Muraya, sworn on 7th January 2016, in which he averred that he is the Chairman of the Plaintiff and therefore duly authorized to swear this affidavit on their behalf. He averred that the suit property belongs to and has always been owned by the Plaintiff and that it is a subdivision of a larger parcel of land known as land reference number 23124. He annexed a copy of the title deed dated 3rd July 1998 for the suit property in the name of the Plaintiff. He went ahead to describe to the court the procedure of selling the subdivisions. The procedure according to him was that the committee of the Plaintiff would obtain approval to sell from the members of the society in the annual general meeting. The committee would thereafter obtain the consent of the then Ole Kejuado County Council for each specific plot being offered for sale to a specifically named purchaser. Only after the consent of the Ole Kejuado County Council had been obtained would the Plaintiff enter into a firm and well settled contract for sale of the plot. He averred that no sale agreement for the suit property has ever been entered into and further no consent for sale of the suit property has ever been obtained from the now-defunct Ole Kejuado County Council. It was his further averment that the current market value of each plot today is Kenya shillings 15 million. He further stated that on or about May 2015, the Defendant entered into the suit property and purported to erect, construct and put up some buildings and other structures thereon. He added that when confronted by the Plaintiff, the Defendant claimed that he had purchased the suit property from the previous community of the Plaintiff way back in 1997. He further averred that the Defendant availed certain documents in support of his ownership claim to the Plaintiff but did not produce any sale agreement over the suit property entered into with the Plaintiff. It was his averment that none of the documents produced by the Defendant in any way entitled him to the suit property. He asserted that the proper procedure for sale of the suit property had not been followed and therefore the Defendant had no valid claim to the suit property.

The Defendant's Application was premised on the grounds appearing on its face together with the Supporting Affidavit of the Defendant, Patrick Kabue Muchene, sworn on 21st of January 2016 as well as the Defendant's Replying Affidavit sworn on 21st of January 2016 in opposition to the Plaintiff's Application. In the said Replying Affidavit, the Defendant asserted that the Plaintiff's Application has no merit. He asserted that the Plaintiff received from him the purchase price of the suit property being Kenya shillings 350,000/- between October 1997 and September 1998 and that it was only in June 2015 that the Plaintiff decided to go back on the deal and purported to take the suit property from him while trying to get him to pay Kenya shillings 15 million which the Plaintiff claimed is now the current market value. It was his further averment that the title of the Plaintiff to the suit property has been extinguished under section 7 of the Limitation of Actions Act as this suit is brought 19 years after he took possession of the suit property. It was his further averment that the Plaintiff holds the suit property in trust for him under the doctrine of adverse possession. He further added that because the Plaintiff admitted that it has no claim against him for the suit property, it did not interfere with his quiet enjoyment thereof between October 1997 and 1 July 2015 when it obtained an injunction by deception of the court in the case filed by him in the magistrates court. He added that during that period of quiet possession, he had collected rent from tenants occupying a semi-permanent building and three kiosks on the suit property which he constructed in 1998. It was his averment that the Plaintiff is barred through the proprietary estoppel doctrine from repossessing the suit property from him after

refusing to complete the sale transaction way back in 1998. He added that the Plaintiff is guilty of latches in that since 25th of June 2014 when it was served by him with summons in Senior Principal Magistrates Court at Kajiado Civil Case No. 211 of 2014, the Plaintiff has known that he was constructing a permanent building on the suit property added that as the owner of the suit property, he has a right to develop it in accordance with the law and that is what he has done since 1997. On those grounds, he sought for the dismissal of the Plaintiff's Application and for the Defendant's Application to be allowed.

Both the Plaintiff and the Defendant seek for an order of temporary injunction in their favour. In deciding whether or not to grant the temporary injunction, 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 either the Plaintiff of Defendant 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."***

Which party has demonstrated that they have a 'genuine and arguable case' and therefore a prima facie case? Before I can go any further to set out my deductions herein, I must mention to the parties that my findings herein are not conclusive and must await the full trial of this suit. This position is supported by the decision in **Airland Tours & Travels Ltd versus National Industrial Credit Bank Milimani High Court Civil Case No. 1234 of 2002** where the court held as follows:

> ***"In an interlocutory application, the court is not required to make any conclusive or definitive findings of fact or law, most certainly not on the basis of contradictory affidavit evidence or disputed provisions of the law."***

With that background laid down, the Plaintiff/Applicant has asserted that it is the registered proprietor of the suit property. As proof of that assertion, the Plaintiff/Applicant annexed a copy of its title deed. The Defendant/Respondent on the other hand, has claimed that he is the beneficial owner of the suit property by virtue of an incomplete sale transaction with the Plaintiff conducted way back in the year 1997. The Defendant claims that he paid the Plaintiff Kshs. 350,000/- for the suit property and has been in occupation and enjoyment of the suit property since 1997. He informed the court that he constructed a semi-permanent building and 3 kiosks on the suit property when he purchased it from the Plaintiff in 1997 and has been collecting rent from the tenants that he let the structures to. The Defendant claims to have uninterrupted possession of the suit property from 1997 and disputed the Plaintiff's claim that he came possession in the May 2015. The Defendant claimed that in May 2015, he demolished the temporary structures on the suit property and commenced construction of a permanent building on the suit property and it is at this juncture that the Plaintiff sought to have him removed from the suit property. The Defendant claims to be the beneficial owner of the suit property under the doctrine of adverse possession, having been in quiet uninterrupted occupation of the suit property for over 19 years. At this interlocutory stage, the most I can state is that the Plaintiff has produced a copy of its title deed to the suit property. The Defendant has not produced any agreement for sale between him and the Plaintiff as evidence of his purchase of the suit property and neither has he produced any title document. The position of the holder of a title deed over a parcel of land is well stated in **Section 26(1)** of the **Land Registration Act** provides as follows:

> ***"The certificate of title issued by the Registrar upon registration, or to a purchaser of land upon a transfer … shall be taken by all courts as prima facie evidence that the person named as proprietor of the land is the absolute and indefeasible owner , … and the title of that proprietor shall not be subject to challenge, except-***
>
> ***(a) On the ground of fraud or misrepresentation to which the person is proved to be a party; or***
>
> ***(b) Where the certificate of title has been acquired illegally, unprocedurally or through a corrupt scheme."***

In this suit, the Plaintiff's title deed has not been challenged by the Defendant on any of the grounds enumerated in the legal provision cited above. With that position, I find that the Plaintiff has established that it has a prima facie case with a probability of success at the main trial while the Defendant has not.

Does an award of damages suffice to the Plaintiff/Applicant? My answer to that question is aptly captured in the case of **Niaz Mohamed Jan Mohamed versus The Commissioner of Lands (1996) eKLR** where it was stated as follows:

> ***"it is no answer to the prayer sought that the Applicant may be compensated in damages. No amount of money can compensate the infringement of such a right or atone for transgression against the law if this turn out to have been the case."***

Further, land is unique and no one parcel can be equated in value to another. Though the value of the suit property can be ascertained, it would not be right to say that the Plaintiff can be compensated in damages. I hold the view that damages are not always a suitable remedy where the Plaintiff has established a clear legal right or breach. See **JM GICHANGA versus CO-OPERATIVE BANK OF KENYA LTD (2005) eKLR**.

To that extent therefore, I find that damages would not suffice to atone for the breach of the Plaintiff's right over the suit property.

In whose favour does the balance of convenience tilt? In the case of **Nguruman Ltd versus Jan Bonde Nielsen (2014) eKLR**, the court had this to say:

> ***"It is where there is doubt as to the adequacy of the respective remedies in damages available to either party or both that the question of balance of convenience would arise. The inconvenience to the applicant if interlocutory injunction is refused would be balanced and compared with that of the respondent if it is granted."***

In this particular suit, the party in possession of the suit property is the Defendant and the court acknowledges that the Defendant has been in occupation thereof for many years. The Defendant has had tenants on the suit property occupying temporary structures constructed by the Defendant and it is only recently that the Defendant commenced construction of a permanent building. Photos of the current construction activities by the Defendant have been produced to the court. The inconvenience to the Plaintiff seems minimal. The Plaintiff has allowed the Defendant to remain in possession of the suit property for many years. However, the Defendant would be greatly inconvenienced should he be removed from continued possession until this suit is determined. That being my finding , I find that the balance of convenience lies in favour of the Defendant and not the Plaintiff. The Plaintiff has not satisfied the three grounds for grant of the temporary injunction. Neither has the Defendant.

Having failed to satisfy all the 3 conditions for the grant of a temporary injunction, both the Plaintiff's Application and the Defendant's Application are hereby dismissed. The parties shall maintain the status quo currently prevailing where neither party shall occupy the suit property until this suit is heard and determined. Each party shall bear his own costs.

It is so ordered.

SIGNED AND DATED AT NAIROBI BY LADY JUSTICE MARY M. GITUMBI THIS 24TH DAY OF APRIL 2018.

MARY M. GITUMBI

JUDGE

DELIVERED AT NAIROBI BY JUSTICE SAMSON O. OKONG'O THIS 3RD DAY OF MAY 2018.

SAMSON O. OKONG'O

PRESIDING JUDGE