REPUBLIC OF KENYA

IN THE ENVIRONMENT AND LAND COURT

AT KISUMU

ELC CIVIL CASE NO. 33 OF 2020

IN THE MATTER OF LIMITATION OF ACTIONS ACT

AND

IN THE MATTER OF LAND PARCEL PLOT NO.44 AHERO TOWN AND

IN THE MATTER OF APPLICATION BY LEUTINA ATIENO ABOK

LEUTINA ATIENO ABOK.....APPLICANT

VERSUS

MARGARET WERE ANDEGA.....1ST RESPONDENT

JOHN ANDEGA.....2ND RESPONDENT

KILLION ANDEGA.....3RD RESPONDENT

RULING

This ruling is in respect of an application dated 20th June 2020 by the plaintiff/applicant seeking for the following orders:

a) Spent.

b) THAT an interim order of injunction do issue restraining the defendants either by themselves, their servants and or agents or anyone whomsoever claiming title, deriving authority or acting on their behalf from entering, remaining in, occupying/continuing to occupy, cultivating, constructing on, alienating selling or doing any act on land parcel known as Plot No AHERO/44 Ahero Town pending the hearing and determination of this application.

c) THAT an interim order of injunction do issue restraining the defendants either by themselves, their servants and or agents or anyone whomsoever claiming title, deriving authority or acting on their behalf from entering, remaining in, occupying/continuing to occupy, cultivating, constructing on, alienating selling or doing any act on land parcel known as Plot No AHERO/44 Ahero Town pending the full hearing and determination of this suit.

d) THAT costs of this Application be provided for.

Counsel agreed to canvas the application vide written submissions which were duly filed. The matter came up for mention on 30th August 2020 where the court ordered that status quo be maintained pending the delivery of this ruling.

APPLICANT'S SUBMISSIONS

Counsel gave a brief background to case and stated that Plot No I-R AHERO/44 was allocated to the applicant's late husband and his two brothers Joseph Oloo Milaw and George Andega Milaw. The brothers built a 3 shopping unit on the plot between 1965-1968 and each brother allocated one shopping unit. Joseph oloo Milaw later sold his unit to Jacob Abok(deceased) and relocated to Nyalenda-Kisumu.

That the plot was initially allocated to Samson Sure and Shem Dienya but they took too long to develop it and the same was reallocated to

the Applicant's late husband and his two brothers by the Ahero County Council. When Samson and Shem complained they were allocated new plots being Ahero No 96 A and 91B. Though Plot No 44 was reallocated to the applicant's late husband and her brothers the lease is still in the name of Samson Sure and Shem Dienya.

Counsel further stated that in the year 1982 Samson Sure's son Tuju gave the lease to Jacob Abok and George Andega at the shopping units and commenced the process of registering the same but Jacob died in 1995 and Joseph in 2000 before the same was done. In 2005 George Andega(deceased) requested Tuju to write him a letter to enable him change the names but the changes did not go through.

Mr. Mwamu submitted that the applicant's late husband and family have been collecting rent from one shop since 1968 until 2020 when they demolished the same. That George Andega(deceased) did not interfere with the applicant collecting rent until his death in 2018. That the Applicant only started having problems when his sons/respondents demolished the building in 2020 and commenced putting up a building on the suit parcel.

Counsel submitted on the principles of grant of temporary injunctions and relied on the case of the case of **Giella v Cassman Brown & Co Ltd (1973) EA 358.** The issues for determination when an applicant is praying for a temporary injunction are as laid down in the case **Giella v Cassman Brown & Co Ltd (1973) EA 358,** where it was stated that:

> *"An applicant has to demonstrate firstly, that he has a prima facie case with probability of success. Secondly, an applicant has to show that he will suffer irreparable loss or damage if the interlocutory injunction is not granted, that is that an award of damages WI/ not adequately compensate the damage. Thirdly, if the court is in doubt on the above 2 requirements, then fit WI/ decide the application on the balance of convenience…*

Counsel submitted that it follows that in reaching on a conclusion whether or not the has a prima facie case, the court has to determine whether the plaintiff has any legal right as against the defendant and also whether that right has been infringed.

Mr Mawmu further submitted that from the brief history of the case it is evident that Plot No LPs AHERO/44 was allocated to the applicant's late husband and his two brothers Joseph Oloo Milaw and George Andega Milaw and that the applicant has been collecting rent since then until 2020 when the respondents demolished the units and started constructing a new building on the suit plot.

It was counsel's submission that the applicant therefore seeks the court's intervention by issuing interim orders to restrain the Defendant's from further interference pending the hearing and determination of the suit. That the applicant has lost her only source of income as she depended on the rent she collected from her shopping unit hence she will suffer irreparable harm

Counsel submitted that even if the loss can be compensated by damage the same cannot be a substitute for breach of law. That land is unique and no one parcel can be equated in value to another and that the value of the suit property can be ascertained and there is a valid argument that damages would be available, however, it would not be right to say that the Applicant can be compensated in damages.

Counsel relied on the case of **JM G/CHANGA versus CO-OPERATIVE BANK OF KENYA LTD (2005) e KLR** where it was held that damages are not always a suitable remedy where the Applicant has established a clear legal right or breach. Counsel also cited the case of **Waithaka —vs-Industrial and Commercial Development Corporation (2001) KLR 374 quoted in at page 381 that**

> *"as regards damages, must say that in my understanding of the law, it is not an inexonorable rule that where damages may be an appropriate remedy an interlocutory injunction should never issue. If that were the rules the law would unduly lean in favour of those rich enough to pay damages for all manner of trespasses.*
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> *That would not only be unjust but it would also be seen to be unjust Money is not everything at all times and in all circumstances and don 't you think you can violate another citizen 's rights only at the pain of damages."*

Counsel submitted that the grant of a temporary injunction does not extinguish the legal rights of the defendant/Respondent if any exists, it merely preserves the status quo of the subject matter of the application pending the hearing and determination of the suit. Counsel relied on the case of **Films Rover International 1986 3 ALL ER quoted in Olympics Sports House Limited Vs School Equipment Center Limited HCC No 190/2012 (2012) eKLR** where it was stated that

> *"A fundamental principles of . …...that the court should take whichever course appear to carry the lower risk of justice if it should turn out to have been wrong….*

Counsel therefore urged the court to find that the applicant has met the threshold for grant of temporary inunctions and the application should be allowed as prayed with costs.

RESPONDENT'S WRITTEN SUBMISSION

Counsel for the respondent relied on the replying affidavit and further affidavit filed by the respondent opposing the application. Counsel listed three issues for determination of the court, who is the owner of Plot No. AHERO/44?, whether the Respondents are trespassing on the Applicant's property and whether the Applicant is entitled to the prayers sought.

On the first issue on who is the owner of the suit plot counsel submitted that the Applicant alleges that the property was initially bought by her husband, Jacob Abok Milaw and his two brothers Joseph Oloo Milaw and George Andega Milau, and provided a receipt alleging that her husband bought construction material for the construction of a shopping unit on the said property, which receipts do not specify that the

construction materials were for the construction of a shopping unit on Plot no. AHERO/44. It was counsel's submission that the construction receipts are not proof of ownership of a leasehold.

Counsel further submitted that the Respondents have furnished tangible evidence showing that the deceased, George Andega Milau, made an application for allotment, and on 18th July 1967, a letter of allotment of Plot no. AHERO/44 was issued him and subsequently, a certificate of lease was erroneously issued to Samson Sure and Shem Dienya. That the said error was duly acknowledged by the Commissioner for Lands and while in the process of rectifying the same, the deceased passed on.

Counsel therefore submitted that based on the evidence tendered, George Andega Milau is the certified owner of plot no AHERO/44 hence the applicant does not have any proprietary rights on the suit land.

Mr Oyuko counsel for the respondent submitted that the respondent being the owner of the suit plot cannot legally be a trespasser on his own property. Further that the applicant has not established that she will suffer any irreparable dame if the orders of injunction are not issued. Counsel therefore urged the court to dismiss the applicant's application with costs to the defendants.

ANALYSIS AND DETERMINATION

The issues for determination in an application for injunction are well settled as per the Giella Casman Brown case. The court may also look at the circumstances surrounding the case together with the principles in the Giella Casman Brown case as was held in the case of JAN BOLDEN NIELSEN v HERMAN PHILLIIPUS STEYA ALSO KNOWN AS HERMANNUS PHILLIPUS STEYN & 2 OTHERS (2012) eKLR where Mabeya J remarked as follows:-

> *'I believe that in dealing with an application for an interlocutory injunction, the court is not necessarily bound to the three principles set out in the Giella Vs Cassman Brown case. The court may look at the circumstances of the case generally and the overriding objective of the law. In Suleiman vs Amboseli Resort Ltd (2004) e KLR 589 Ojwang Ag. J (as he then was) at page 607 delivered himself thus:-*
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> *'……..counsel for the defendant urged that the shape of the law governing the grant of injunctive relief was long ago. In Giella Vs Cassman Brown, in 1973 cast in stone and no new element may be added to that position. I am not, with respect, in agreement with counsel in that point, for the law as always kept growing to greater levels of refinement, as it expands to cover new situations not exactly foreseen before. Justice Hoffman in the English case of Films Rover International made this point regarding the grant of injunctive relief (1986) 3 All ER 772 at page 780-781:- " A fundamental principle of…that the court should take whichever course appears to carry the lower risk of injustice if it should turn out to have been "wrong"…."*
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> *Traditionally, on the basis of the well accepted principles set out by the court of Appeal in Giella Vs Cassman Brown the court has had to consider the following questions before granting injunctive relief.*
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> *i. Is there a prima facie case….*
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> *ii. Does the applicant stand to suffer irreparable harm…*
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> *iii. On which side does the balance of convenience lie? Even as those must remain the basis tests, it is worth adopting a further, albeit rather special and more intrinsic test which is now in the nature of general principle. The Court in responding to prayers for interlocutory injunctive relief, should always opt for the lower rather than the higher risk of injustice.…..…*

The Giella Casman Brown Case is not cast in stone and the court can look at the circumstances surrounding the case to come up with a just decision to preserve the substratum of the case.

The question is whether the applicant has established a prima facie case with a probability of success. The applicant claims ownership of the plot which belonged to the deceased husband. The applicant attached receipts for construction of the shopping uit on the suit plot. These receipts do not indicate which plot the material were used for construction. Be that as it may, the applicant has attached letters to the Commissioner of Lands by Samson Sure and Shem Dienya in respect of the suit plot indicating that one Goerge Andega had put a building on the plot by mistake. The letter further refereed to a letter dated 13th January 1967 allocating the land Samson Sure and Shem Dienya.

The respondent stated that they followed the process of allotment as provided by law and the same was issued erroneously to Samson Sure and Shem Dienya which was acknowledged by the Commissioner of Lands and while in the process of rectification the deceased passed on.

The issue of ownership is contested by the applicant and the respondent each party claiming proprietary rights. In a case both parties claim the same parcel of land and it is not clear who actually has ownership rights at an interlocutory stage, it would be in the interest of justice to preserve the substratum of the case pending the hearing and determination of the suit. This is looking at the circumstances surrounding the case. This is not a clear-cut case where a court would say that the issue of ownership is apparent from the document's annexed to the affidavits. Both the applicant and the respondents admit that there was an error in the processing of the certificate of lease and hence there was need for rectification which was never done.

A party must prove that he or she will suffer irreparable damages if the application is not granted. It is trite law that damages cannot be a substitute for the loss which is occasioned by clear breach of the law as was held in the case of **Joseph Siro Mosiama —vs- HFCK and 3 others Nairobi HCCC No. 265 of 2007, Warsame J** (as he then was) stated that

" Damages is not and cannot be a substitute for the loss, which is occasioned by a clear breach of the law. In any case the financial strength of a party is not always a factor to refuse an injunction. More so a party cannot be condemned to take damages in lieu of his crystallized right which can be protected by an order of injunction.

The applicant needs the protection of an injunction to secure her right in the suit property pending the hearing and determination of this case. There will be no prejudice that will be suffered by the respondents pending the determination of this suit. The parties can fast track the hearing of this suit or try mediation if possible.

In the circumstances I find that the best order to grant in this case is that the status quo obtaining as at the time this application was filed be maintained pending the hearing and determination of this case. Costs of the application in the cause. Parties to comply with Order 11 of the CPR within 30 days.

DATED and ***DELIVERED*** at ***ELDORET*** this ***25th*** **DAY** OF ***September, 2020***

DR. M. A. ODENY

JUDGE