



**REPUBLIC OF KENYA**

**IN THE ENVIRONMENT AND LAND COURT**

**AT NAIROBI**

**MILIMANI LAW COURTS**

**ELC. CASE NO. 570 OF 2015**

**BONIFACE KIMANI CHOMBA.....PLAINTIFF**

**VERSUS**

**EMBAKASI RANCHING COMPANY LIMITED.....1<sup>ST</sup> DEFENDANT**

**BENJAMIN KIAMBUTHI MUTHURI.....2<sup>ND</sup> DEFENDANT**

**CHIEF LAND REGISTRAR.....3<sup>RD</sup> DEFENDANT**

**RULING**

Coming up before me for determination is the Notice of Motion dated 23<sup>rd</sup> June 2015 in which the Plaintiff/Applicant seeks for an order of temporary injunction restraining the Defendants/Respondents from entering into or transferring the parcel of land known as Nairobi Block 136/5323 (hereinafter referred to as the “suit property”) pending the hearing and determination of this suit.

The Application is premised on the Supporting Affidavit of the Plaintiff/Applicant, Boniface Kimani Chomba, sworn on 23<sup>rd</sup> June 2015, in which he averred that in the year 1991, he purchased 3 plots from the 1<sup>st</sup> Defendant, Embakasi Ranching Company Limited, and that one of those plots of land was then identified as V3801 and was the suit property. As proof of ownership of that plot he annexed a copy of the Non-Member Certificate of Plot Ownership dated 14<sup>th</sup> March 2006 for Plot No. V3801. He averred further that he took possession of and has been farming on the suit property uninterrupted since the year 1991. He then stated that the 1<sup>st</sup> Defendant submitted the subdivision plan to the Director of Survey and his plot number V3801 was given land parcel Nairobi/Block 136/5323. He then averred that the 1<sup>st</sup> Defendant in collusion with the 2<sup>nd</sup> Defendant now claim that the suit property is plot number 3469. He confirmed that this is what has prompted him to file this suit to protect his ownership rights to the suit property and requested the court to allow this Application.

Despite being served with this Application, none of the Defendants/Respondents opposed this Application.

The issue arising for determination is whether or not to grant the prayer of a temporary injunction. 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.”***

Has the Plaintiff/Applicant 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.”***

Does the Plaintiff/Applicant 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 warn 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.”***

Admittedly, in this particular suit, there is no contradictory affidavit evidence from the Defendants/Respondents. Still, the findings made by this court in this unopposed Application remain inconclusive and must await the full trial. With that background laid down, the Plaintiff/Applicant claims ownership of the suit property. In support of his claim, he has annexed a copy of his Non-Member Certificate of Plot Ownership issued by the 1<sup>st</sup> Defendant/Respondent. There is no opposition to that document of ownership from any of the Defendants/Respondents. My finding at this interlocutory stage is that the Plaintiff/Application has succeeded in demonstrating that he has a prima facie case with a probability of success at the main trial.

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 of possession 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 plot is the Plaintiff. I find that the balance of convenience lies in his favour.

Having satisfied all the 3 conditions for the grant of a temporary injunction, this Application is allowed with costs to the Plaintiff.

It is so ordered.

**SIGNED AND DATED BY HON. LADY JUSTICE MARY M. GITUMBI**

**AT NAIROBI THIS 12<sup>TH</sup> DAY OF APRIL 2018.**

**MARY M. GITUMBI**

**JUDGE**

**DELIVERED BY HON. MR. JUSTICE SAMSON OKONGO THIS 19<sup>TH</sup> DAY OF APRIL 2018.**

**SAMSON OKONGO**

**PRESIDING JUDGE**

**In the presence of:-**

.....Advocate for the Plaintiff

.....Advocate for the Defendant

.....Court clerk