REPUBLIC OF KENYA

IN THE ENVIRONMENT AND LAND COURT

AT NAIROBI

MILIMANI LAW COURTS

ELC. CASE NO. 956 OF 2016

DRUMVALE FARMERS CO-OPERATIVE SO. LTD.....1ST PLAINTIFF

CATHERINE WANGUI MWANGI.....2ND PLAINTIFF

SAMUEL MAINA NJARIA.....3RD PLAINTIFF

VERSUS

KOTO HOUSING KENYA LIMITED.....1ST DEFENDANT

BONCO BUILDERS CONSTRUCTION LTD.....2ND DEFENDANT

THE INSPECTOR GENERAL OF POLICE

REPUBLIC OF KENYA.....3RD DEFENDANT

THE HON. ATTORNEY GENERAL

REPUBLIC OF KENYA.....4TH DEFENDANT

RULING

Coming up before me for determination is the Notice of Motion dated and filed on 8th August 2016 in which the Plaintiffs/Applicants seek for an order of temporary injunction restraining the Defendants /Respondents from encroaching, digging trenches, trespassing, damaging, destroying, constructing, fencing, selling, leasing, sub- leasing, charging, transferring or dealing in any manner whatsoever with a parcel of land known as Nairobi block 118/1192 (hereinafter referred to as their "suit property") pending the hearing and determination of this suit.

The Application is premised on the grounds appearing on its face together with the Supporting Affidavit of the 3rd Plaintiff/Applicant, Samuel Maina Njaria, in which he averred that he and the 2nd Plaintiff bought the suit property from the 1st Plaintiff for value in the year 2000 and that the suit property was transferred to them on 20th June 2016. He further averred that they are in the process of registering the transfer in their favour at the Lands Office. He averred further that they are in use, occupation and ownership of the suit property since the year 2000 and the 1st Plaintiff has since written to the Ministry of Lands on change of ownership. He annexed a copy of the letter and a copy of the title deed in the name of the 1st Plaintiff. He then stated that they are highly apprehensive that they may lose their only asset due to the illegal and unlawful encroachment of the suit property by the Defendant/Respondents. He added that the Defendant/Respondents descended on the suit property on 25th of July 2016 in the company of police officers and commenced destruction of the maize plantation, the fence, barbed wire, and illegally and without authority commenced construction of a water tank thereon. It is on that ground that he seeks that this Application be allowed.

The Application is further supported by the Supporting Affidavit of Peter Wanjohi, sworn and filed on 6 September 2016 in which he averred that he is the liquidator of the first plaintiff. He further averred that in discharge of his duties under section 66 of the Co-operative Society Act (Amended) 2004 number 12 of 1997, he allocated land parcel number Nairobi/Block 118/1193 to the national police and Kenya Prison Services and that he allocated the suit property to the 2nd and 3rd Plaintiffs. It was his further averment that it was possible that the parcel of land allocated to the police being Nairobi/Block 118/1193 could have encroached into the suit property, hence the boundary dispute.

The Application is contested. Moses Nderitu filed his Replying Affidavit sworn by him on 30th August 2016 and filed on 31st of August 2016 in which he averred that he is the Chief Executive Officer of the 1st Defendant. He further averred that the Plaintiffs have no *locus standi* to institute this suit as they do not own the suit property. He annexed a copy of an official search showing that the suit property is owned by one Kondwani M. Munene. He further averred that there is no proof of ownership of the suit property provided by the 2nd and 3rd Plaintiffs and they therefore have no beneficial or legal interest over the suit property. He averred that the 1st Defendant has been contracted as an agent by the Ministry of Land, Housing and Urban Development (hereinafter referred to as the "Ministry") to construct proposed National Police and Kenya Prisons Services housing project at Kamulu. He further stated that upon being handed over the site in March 2016, the 1st Defendant engaged a surveyor who identified the beacons for purposes of site layout and placement. He then added that the 1st Defendant thereafter subcontracted the 2nd Defendant to undertake construction works on behalf of the 1st Defendant. He also added that as part of contract documents, the 1st Defendant generated drawings based on the typographical survey which drawings were duly approved by the government. He then stated that at the end of June 2016 while digging the drains on the site identified by the surveyor and handed over to them, the 3rd Plaintiff informed the 2nd Defendant that the 2nd Defendant had encroached on the suit property by way of digging. He then said that the 1st Defendant relayed this information to his client, the Ministry, who directed them to proceed with the construction. He then stated that the 1st and 2nd Defendants are agents of a known principal and hence no action can be maintained against them. On those grounds, they sought for this Application to be dismissed.

The issue arising for determination is whether or not to grant the prayer for a temporary injunction pending the hearing and determination of this suit. 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 the Plaintiffs/Applicants 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."***

Do the Plaintiffs/Applicants 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 Plaintiffs/Applicants lay claim to the suit property, stating that the Defendants/Respondents are guilty of encroaching into the suit property. The 1st Plaintiff is a company under liquidation and have supported the ownership claim of the 2nd and 3rd Plaintiffs. Ownership of land is proved through the production of title documents. In this particular case, the only document that supports the claim of ownership of the 2nd and 3rd Plaintiffs is a letter dated 20th June 2016 written by the liquidator of the 1st Plaintiff. The only copy of title deed to the suit property produced by the Plaintiffs is in the name of the 1st Plaintiff. The Defendants/Respondents on their part claim that the parcel of land that they occupy and lay claim to is a different parcel apart from the suit property. They claim to be in occupation of the parcel of land known as Nairobi/Block 118/1193 while the suit property is the neighbouring parcel known as Nairobi/Block 118/1192. The Plaintiffs/Applicants have not responded to this very pertinent position. The Liquidator of the 1st Plaintiff did confirm having allocated to the National Police the parcel of land Nairobi/Block 118/1193 and allocated to the 2nd and 3rd Plaintiff the neighbouring suit property. As I stated earlier, the court is faced by conflicting affidavit evidence and would not make a conclusive finding at this interlocutory stage. However, the overall finding at this stage is that the Plaintiffs/Applicants have not succeeded in convincing this court that they own the suit property or that the suit property has been encroached upon having regard to the fact that the Defendants claim to be in occupation of the neighbouring parcel of land Nairobi/Block 118/1193. That being the finding, the Plaintiffs/Applicants have not established a prima facie case with a probability of success at the trial.

Since the Plaintiffs/Applicants have failed to prove the first ground in the grounds set down in the celebrated case of Giella versus Cassman Brown, this Honourable Court need not venture into the other grounds. This position was upheld in the Court of Appeal case of **Kenya Commercial Finance Co. Ltd versus Afraha Education Society (2001) 1 EA 86** as follows:

> ***"The sequence of granting an interlocutory injunction is firstly that an applicant must show a prima facie case with a probability of success if this discretionary remedy will inure in his favour. Secondly, that such an injunction will not normally be granted unless the applicant might otherwise suffer irreparable injury: and thirdly where the court is in doubt it will decide the application on a balance of convenience. See Giella vs. Cassman Brown and Co. Ltd 1973 EA at page 360 Letter E. These conditions are sequential so that the second condition can only be addressed if the first one is satisfied and when the court is in doubt then the third condition can be addressed."***

Also, in the case of **Nguruman Ltd versus Jan Bonde Nielsen (2014) eKLR**, the Court of Appeal had this to say:

"If prima facie case is not established, then irreparable injury and balance of convenience need no consideration."

In light of the foregoing, I hereby dismiss this Application. Each party shall bear their own costs.

DATED AND SIGNED AT NAIROBI BY LADY JUSTICE

MARY M. GITUMBI THIS 12TH DAY OF APRIL 2018

MARY M. GITUMBI

JUDGE

DELIVERED BY HON. JUSTICE SAMSON OKONGO ON THIS 19TH DAY OF APRIL 2018

SAMSON O. OKONG'O

PRESIDING JUDGE