



REPUBLIC OF KENYA

IN THE ENVIRONMENT AND LAND COURT

AT NAIROBI

MILIMANI LAW COURTS

ELC. CASE NO. 141 OF 2016

ESTHER WAMBUI KIBE.....PLAINTIFF/APPLICANT

VERSUS

CHUNA HOUSING CO-OPERATIVE SOCIETY LTD....DEFENDANT/RESPONDENT

RULING

Coming up before me for determination is the Notice of Motion dated 12th February 2016 in which the Plaintiff/Applicant seeks for an order of temporary injunction restraining the Defendant/Respondent from interfering, trespassing, transferring, allocating the parcel of land known as Plot No. 588 Section B 3035 within Ngong/Kaputiei/3035 (hereinafter referred to as the "suit plot") 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 Plaintiff/Applicant, Esther Wambui Kibe, sworn on 12th February 2016, in which she averred that she purchased the suit plot from the Defendant/Respondent and was issued with an Ownership Certificate a copy of which she annexed. She further averred that the Defendant/Respondent also issued her with a Beacon Certificate a copy of which she produced. She further averred that in the year 2011, she visited the suit plot and noted that the beacons had been tampered with. She further indicated that upon enquiring from the Defendant/Respondent, they made unreasonable demands on her. On that ground, she sought for this Application to be allowed.

The Application is unopposed.

I am called upon to determine the issue on whether or not to grant the Plaintiff/Application 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."

With that background laid down, the Plaintiff/Applicant has asserted that she purchased the suit plot from the Defendant/Respondent and produced a Plot Ownership Certificate as evidence of this assertion. On its part, the Defendant/Respondent did not in any way contest this assertion. That being the case, I find no difficulty in finding that the Plaintiff/Applicant has convinced this court that she is indeed the owner of the suit plot.

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 her favour.

Having satisfied all the 3 conditions for the grant of a temporary injunction, this Application is allowed in terms of prayer nos. 2 and 4 with costs to the Plaintiff.

It is so ordered.

SIGNED AND DATED BY HON. LADY JUSTICE MARY M. GITUMBI AT NAIROBI THIS 12TH DAY OF APRIL 2018.

MARY M. GITUMBI

JUDGE

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

SAMSON OKONGO

PRESIDING JUDGE

In the presence of:-

.....Advocate for the Plaintiff

.....Advocate for the Defendant

.....Court clerk