REPUBLIC OF KENYA

IN THE ENVIRONMENT AND LAND COURT OF KENYA

AT EMBU

E.L.C. CASE NO. 345 OF 2015

ELIAS MUCHANGI NJERU.....1ST PLAINTIFF

MOSES MUCANGI KARAGIRWA.....2ND PLAINTIFF

JOYCE WANJA KIURA.....3RD PLAINTIFF

VERSUS

GEORGE NTHIGA NYAGA.....1ST DEFENDANT

BEATRICE GATWIRI MUGAMBI.....2ND DEFENDANT

RULING

1. By a notice of motion dated 15th January 2018 brought under the provisions of **Order 40 Rules 1 & 2, Order 25 Rules 1, section 3A of the Civil Procedure Act** and all **other provisions of the law**, the Plaintiffs sought an injunction to restrain the Defendants from further constructing any temporary or permanent structures on *Title No. Gaturi/Weru/5890* (hereinafter "parcel No. 5890").

2. The said application was based on the grounds that the Plaintiffs were the registered owners of parcel No. 5890 and that the Defendants had trespassed upon it. The said application was supported by the 1st Plaintiff's supporting affidavit sworn on 16th January 2018 in which it was stated that the Defendants had wrongfully erected a perimeter fence and constructed a tin structure on parcel No. 5890.

3. The Defendants filed a replying affidavit sworn by the 1st Defendant on 21st February 2018 in opposition to the application. It was stated in the said affidavit that the Defendant had purchased *Title No. Gaturi/Weru/5889* (hereinafter known as "parcel No. 5889") from the previous owner, Hellen Muthoni Muriuki. It was further stated that the vendor pointed out the beacons of parcel 5889 whereupon they took possession, fenced it and erected a semi-permanent house and other structures thereon.

4. The 1st Defendant, however, acknowledged that there was a mix-up of the titles issued in respect of parcel Nos. 5889 and 5890. He further stated that since both parcels initially belonged to members of the same family, steps had been taken to resolve the anomaly. He annexed a copy of an affidavit in support of an application for rectification and amendment by the said family members.

5. It was the Defendants' case that the two parcels of land were exactly the same in acreage and were adjacent to each other. They, therefore, considered the Plaintiffs' application for injunction to be premature and asked the court to stay further proceedings herein pending resolution of the issue by the said family members.

6. It would appear from the record that the parties appeared before the Deputy Registrar and agreed to dispose of the said application through written submissions. The Plaintiffs filed their submissions on 14th March 2018 whereas the Defendants filed theirs on 22nd March 2018.

7. The court has considered the Plaintiffs' said application, the Defendants' replying affidavit and the Plaintiffs' further affidavit with respect to the said application. The court has also considered the parties' respective written submissions. The main question for consideration and determination is whether or not the Plaintiffs have satisfied the requirements for the grant of an interlocutory injunction as enunciated in the case of **Giella Vs Cassman Brown & Co. Ltd [1973] EA 358.**

8. The first principle is whether the Plaintiffs have established a prima *facie case* with a probability of success at the trial. There is no doubt from the evidence on record that the Plaintiffs are the current owners of parcel No. 5890. There is also no doubt that it is the Defendants who were mistaken as to the location of their plot. The mistake appears to be an honest mistake. That does not, however, derogate from any of the Plaintiffs' property rights. The court is, therefore, satisfied that the Plaintiffs have satisfied the 1st principle for the grant of an interim

injunction.

9. The 2nd principle relates to the adequacy of monetary damages. An injunction will not normally be issued unless the applicant might otherwise suffer irreparable harm or loss which cannot be compensated by an award of damages. The Plaintiffs are apprehensive that the Defendants might put up permanent and costly structures which might be difficult to remove in future. They are also apprehensive that the Defendants might otherwise damage the land.

10. The court is not persuaded that the Plaintiffs have demonstrated what irreparable loss or damage they may suffer which cannot be compensated by an award of damages. The mere fact that the Defendants may incur considerable expense to erect permanent structures can only be a loss to the Defendants and not the Plaintiffs. It is the Defendants who stand to lose out should they undertake expensive investments on parcel No. 5890 before the issue of the mix-up of location or titles is resolved. The allegation that the Defendants might otherwise damage the parcel No. 5890 is purely speculative. No evidence was adduced to support it. The court, therefore, finds that the Plaintiffs have failed to satisfy the 2nd principle.

11. In view of the court's holding on the 2nd principle, it is not necessary to consider the 3rd principle on the balance of convenience. The Plaintiffs' application for injunction must, therefore fail.

12. The upshot of the foregoing is that the court finds no merit in the Plaintiffs' notice of motion dated 15th January 2018 and the same is hereby dismissed. In view of the circumstances of the case, costs of the application shall be in the cause.

13. Orders accordingly.

RULING DATED, SIGNED and **DELIVERED** in open court at **EMBU** this **18TH** day of **OCTOBER, 2018.**

In the absence of the parties.

Court clerk Muinde.

Y.M. ANGIMA

JUDGE

18.10.18