REPUBLIC OF KENYA

IN THE ENVIRONMENT AND LAND COURT

AT NAIROBI

MILIMANI LAW COURTS

ELC. CASE NO. 912 OF 2012

MARY NDUTA KIMEMIA……..……..PLAINTIFF

VERSUS

JOHN WARUBI KIBERA…….…….. DEFENDANT

RULING

Coming up before me for determination is the Notice of Motion dated 9th July 2015 in which the Plaintiff/Applicant seeks for an order of temporary injunction restraining the Defendant/Respondent and/or his servants, agents or employees from entering, dealing selling, damaging, trespassing and/or alienating the parcel of land known as Gatamaiyu/Kagwe/1981 (hereinafter referred to as the "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 Plaintiff/Applicant, Mary Nduta Kimemia, sworn on 9th July 2015, in which she averred that the Defendant/Respondent was a beneficiary of 2.96 acres from land parcel Gatamaiyu/Kagwe/220 which formed part of the estate of Daniel Wamburi Kibiria. She further averred that the said parcel of land was subdivided to yield, inter alia, the suit property which is registered in the name of the Defendant. She further averred that through a Sale Agreement dated 5th September 2002, she together with one Esther Wanjiru Evans agreed with the Defendant to purchase a portion of 1 acre out of the suit property at a purchase price of Kshs. 450,000/-. It was her averment that she paid the Defendant Kshs. 255,000/- towards the said purchase price with the balance being payable upon the Defendant availing to her the completion documents comprising of the original title deed, land control board consent and the executed transfer form. She further averred that she then entered into yet another Sale Agreement with the Defendant dated 20th June 2006 for the purchase of yet another 1 acre of land to be curved out of the suit property. For that additional acre, she averred that the purchase price was agreed at Kshs. 500,000/- out of which she paid Kshs. 360,000/-. According to her, the balance was payable upon receipt of the completion documents just like with the first parcel. She added that she made further payments to the Defendant on various dates and that to date, she has paid the Defendant a total amount of Kshs. 710,000/- for the two acres of land in the suit property. She admitted that the Defendant has given her vacant possession of the two acres and that she has made extensive developments thereon over the years. She then averred that on 3rd March 2012, a gentleman by the name Bethuel Njuguna went to her two acres and told her that he was purchasing the land from the Defendant. She stated that upon conducting a search on the suit property, she came to learn that upon conclusion of the succession case, land parcel Gatamaiyu/Kagwe/220 was subdivided into 3 portions to yield Gatamaiyu/Kagwe/1981, 1982 and 1983

and further that the suit property was registered in the Defendant's name and a title issued to him on 13th February 2012. She averred that the Defendant did not disclose to her this fact. She stated that upon learning of this, she together with the said Bethuel Njuguna and her neighbor Peter Kago proceeded to lodge a caution against the suit property. She pointed out that she has always been willing and ready to complete her obligations under the two sale agreements with the Defendant as long as the Defendant furnishes her with the completion documents to enable her to transfer the parcel of land into her name. She further stated that on 20th March 2012, the Defendant was charged in **Limuru Criminal Case No. 250 of 2012** with three counts of obtaining money by false pretense in which he was acquitted and she was advised to seek civil redress which is this suit.

The Application is contested. The Defendant/Respondent, John Waburi Kibera, filed his Replying Affidavit sworn on 20th July 2015 in which he averred that the sale transaction with the Plaintiff was subject to land control board consent which was not obtained within six months of the transaction therefore it became void and unenforceable as held in the **Criminal Case No. 250 of 2012**. He further stated that the Plaintiff's only remedy lies in reclaiming the sums paid as a civil debt. He further stated that this suit is meant to pre-empt his claim of Kshs. 1.6 million from her. He stated that he is ready, able and willing to refund to the Plaintiff the sum of Kshs. 710,000/- which she paid him against his claim for Kshs. 1,600,000/- being the legal fees incurred in the said criminal case, mesne profit for the use of his land and general damages for malicious prosecution and confinement in the police station. He further denied that the Plaintiff has made any substantial development on the suit property stating that all she has planted is napier grass and a few banana plants. He asserted that all the Plaintiff's claims are baseless, misplaced and an abuse of the court process.

In response to the Defendant's Replying Affidavit, the Plaintiff filed her Supplementary Affidavit sworn on 7th September 2015 in which she averred that the sale transactions between her and the Defendant were intentionally frustrated by the Defendant by failing to comply with his obligations thereunder. She emphasized that she purchased 2 acres out of the suit property which measures approximately 3 acres in size.

The Defendant also filed a Supplementary Affidavit sworn on 12th October 2015 in which he averred that the Plaintiff had proceeded to cut down the trees he had planted on the suit property. He further stated that the court cannot force a transaction which had become void and that the only remedy available to the Plaintiff is to seek a refund of the deposit paid less the amount demanded by him in his counterclaim.

The main issue arising for determination is whether or not to issue the order of temporary injunction sought after by the Plaintiff. 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, I turn to assessing whether or not the Plaintiff has met the three conditions for the grant of a temporary injunction. Firstly, I must assess whether the Plaintiff has established a prima facie case with a probability of success at the main trial. The Plaintiff's claim over a portion of two acres from the suit property is based on two sale agreements copies of which she has produced before this court. The Plaintiff has disclosed that the suit property is approximately 3 acres in size out of which she allegedly purchased 2 acres. Neither the Plaintiff nor the Defendant has stated that the suit property was further subdivided to yield the 2 acres allegedly purchased by the Plaintiff. Apparently, no such further subdivision was made. This presents a challenge when it comes to seeking an order for temporary injunction because it is not clear which particular portion of the larger parcel was agreed to be sold. This appears to have been the reasoning behind **section 42** of the **Land Registration Act, Act No. 3 of 2012** which provides as follows:

> ***"No part of the land comprised in a register shall be transferred unless the proprietor has first subdivided the land and duly registered each new subdivision."***

It has not been demonstrated that the Defendant subdivided the suit property to yield the 2 acres claimed by the Plaintiff. There is therefore uncertainty on the actual parcel of land which the Plaintiff allegedly purchased from the Defendant. Further to this, regard must be had to the fact that the sale transaction between the Plaintiff and the Defendant was a controlled transaction under the **Land Control Act Cap 302** of the Laws of Kenya as it relates to agricultural land. Land control board consent was required to be obtained within 6 months of the making of the agreement for the controlled transaction. As conceded by the parties, no land control board consent was obtained within the prescribed time for the two sale transactions. That being the case, the sale transactions became void. **Section 7** of the **Land Control Act** gives the remedy for the purchaser as follows:

> ***"If any money or other valuable consideration has been paid in the course of a controlled transaction that becomes void under this Act, that money or consideration shall be recoverable as a debt by the person who paid it from the person to whom it was paid, but without prejudice to section 22."***

This legal provision points out the remedy available to a party such as the Plaintiff who has indeed paid a total of Kshs. 710,000/- to the Defendant, a fact that the Defendant acknowledges. The finding that I make out of this is that the Plaintiff's remedy does not lie in an order of temporary injunction but rather in a claim for refund. The Plaintiff has therefore not succeeded to demonstrate that she has a prima facie case with a probability of success at the main trial.

Since the Plaintiff has 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 the Plaintiff's Application. Costs shall be in the cause.

DELIVERED, DATED AND SIGNED AT NAIROBI THIS 24TH DAY OF MARCH 2017.

MARY M. GITUMBI

JUDGE