REPUBLIC OF KENYA

IN THE ENVIRONMENT AND LAND COURT

MILIMANI LAW COURTS

ELC. CASE NO. 1045 OF 2015

STEPHEN NGARUIYA GITAU…..…….…… PLAINTIFF

VERSUS

PAUL MWAURA MWANGI……...……..…….. DEFENDANT

RULING

Coming up before me for determination is the Notice of Motion dated 22nd October 2015 in which the Plaintiff/Applicant seeks for an order of temporary injunction to issue restraining the Defendant from developing, trespassing or otherwise interfering with the parcel of land known as Nairobi/Block 127/757 Komarock Village (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, Stephen Ngaruiya Gitau, sworn on 16th October 2015, in which he averred that he is the registered proprietor of the suit property. In support of that averment, he produced a copy of his Certificate of Lease. He added that he purchased the suit property from one Richard Kariuki who had acquired it from the City Council of Nairobi as it then was vide a Letter of Allotment dated 11th March 1996, a copy of which he produced. He averred further that the Defendant/Respondent has encroached into the suit property, demolished the structure he had put up and has started to develop the same without his consent or authority. On this ground, he sought that this Application be allowed.

The Application is contested. The Defendant/Respondent, Paul Mwaura Mwangi, filed his Replying Affidavit sworn on 18th December 2015 in which he averred that the property known as Unsurvyed Plot No. B Komarock situate within Komarock East Scheme along Kangundo Road belongs to him. He stated that it was allocated to him by the defunct Nairobi City Council on 15th June 1996. In support of that averment, he produced a copy of his Letter of Allotment dated 15th June 1996. He further averred that he has been in possession of the plot since the year 1996 and has commenced development thereon. He averred further that Stephen Kameri who is named as the allotee of the suit property in the purported letter of allotment attached to the Plaintiff's Supporting Affidavit and the Richard Kariuki who purportedly purchased it have never owned the suit property. It was his averment that when the said Stephen Kameri first alleged to own the suit property, he reported the matter to the now defunct City Council of Nairobi who after a thorough investigation revealed that Stephen Kameri's allegation was false and the documents in his possession were forged. He annexed copies of Report dated 25th June 2012 by the defunct City Council of Nairobi's Directorate of Investigations and Information Analysis, Report dated 8th June by the Kenya Police and Minutes of the General Purpose Committee of the now defunct

City Council of Nairobi dated 11th September 2012. He averred that in light of this, the purported Certificate of Lease for the suit property whichis annexed to the Plaintiff's Supporting Affidavit can only refer to a different property and not Plot No. B Komarock. He denied that the now defunct City Council of Nairobi ever allocated or issued any lease to either Stephen Kameri or Richard Kariuki in respect of Plot No. B Komarock. He further pointed out that he is in actual physical possession of the suit property and the allegation by the Plaintiff/Applicant that he has fenced it is false.

The issue I am called upon to determine is whether or not to grant to the Plaintiff/Applicant the temporary injunction he seeks. 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."***

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, does the Plaintiff/Applicant have a 'genuine and arguable case' and therefore a prima facie case? In asserting his ownership rights over the suit property, the Plaintiff/Applicant annexed a copy of Certificate of Lease issued on 12th May 2015. The position of the law in regard to this is to be found in **Section 26(1)** of the **Land Registration Act** which provides as follows:

> ***"The certificate of title issued by the Registrar upon registration, or to a purchaser of land upon a transfer … shall be taken by all courts as prima facie evidence that the person named as proprietor of the land is the absolute and indefeasible owner , … and the title of that proprietor shall not be subject to challenge, except-***
>
> > ***(a) On the ground of fraud or misrepresentation to which the person is proved to be a party; or***
> >
> > ***(b) Where the certificate of title has been acquired illegally, unprocedurally or through a corrupt scheme."***

Going by this legal provision, this court is duty bound to hold that the Certificate of Lease produced by the Plaintiff/Applicant is prima facie evidence that the person named as the proprietor, in this case the Plaintiff, is the absolute and indefeasible owner of the suit property and that the title of such a proprietor

shall not be subject to challenge except on the grounds given. The Defendant/Respondent has strenuously challenged the validity of the Certificate of Lease produced by the Plaintiff, alleging that he is the holder of a Letter of Allotment dated 15th June 1996 in respect of Unsurveyed Plot No. B Komarock. He also produced the reports set out above by various government agencies which point to the fact that he is the bona fide owner of Unsurveyed Plot No. B Komarock. In order to challenge the Certificate of Lease produced by the Plaintiff, the Defendant/Respondent would have to demonstrate that the same was obtained by way of fraud or misrepresentation to which the Plaintiff is proved to be a party or that the Plaintiff acquired the same illegally, unprocedurally or through a corrupt scheme. I don't believe that the Defendant/Respondent has been able to achieve this feat. In my view, the basis of competing interests between the letter of allotment and a registered title, the holder of a registered title would be superior to that of the holder of an allotment letter over the same property. This is buttressed in the case of **Njuwangu Holdings Ltd vs. Langata KPA Nairobi & 5 others** (**ELC NO. 139 OF 2013**) where the court held that,

> ***"As matters now stand, the plaintiff who has a registered title over the suit property has a superior title to that of the 1st Defendant who only holds a letter of allotment. I am in agreement with the decision of the court of Appeal in the case of Satya Investments Ltd –Vs- J.K. Mbugua Civil Appeal NO. 164 of 2004, where the court held that a temporary occupation licence could not override a registered title under the Registration of Titles Act Cap 281 Laws of Kenya (repealed). Equally, it is my view that a letter of allotment cannot override a duly registered title under the Act and where there is a registered title and a letter of allotment over the same property barring any fraud on the part of the party holding the registered title, a letter of allotment must of necessity give way. The rights of a party who holds the registered title have crystallized as opposed to those of the party holding a letter of allotment which are yet to crystallize."***

To that extent therefore, I find that the Plaintiff/Applicant has succeeded in demonstrating that he is the bona fide registered proprietor of the suit property notwithstanding the Defendant/Respondent's claims otherwise. A prima facie case with a probability of success at the main trial has been established by the Plaintiff/Applicant.

Has the Plaintiff/Applicant demonstrated that he is bound to suffer irreparable injury which would not be adequately compensated by an award of damages? By definition, an irreparable injury is, in equity, "the type of harm which no monetary compensation can cure or put conditions back the way they were". In **Alternative Media Limited vs. Safaricom Limited (2004) eKLR**, the court held as follows:

> ***"The second principle established by the Giella case for the grant of an interlocutory injunction is that the Plaintiff will suffer irreparable harm which would not be compensated in damages. Considering this very point in the case of Mureithi vs City Council of Nairobi (1979) LLR 12 Madan JA (as he then was) cited with approval the speech of Lord Diplock in the case of American Cynamid Co. vs Ethicon (1975) 1 ALLER 504 at page 506 where he said:- the object of the interlocutory injunction is to protect the Plaintiff against injury by violation of his right for which he could not be adequately compensated in damages recoverable in the action if the uncertainty were resolved in his favour at the trial… if damages in the measure recoverable at common law would be adequate remedy and the Defendant would be in a financial position to pay them, no interlocutory injunction should normally be granted however strong the Plaintiff's claim appeared to be at that stage."***

In this particular case, the nature of the injury that the Plaintiff claims he is suffering is alleged construction on the suit property by the Defendant. If allowed to continue, the Plaintiff asserts he is suffering irreparable injury which cannot be compensated in damages. I am inclined to agree with him. Indeed, the structure that the Defendant is putting up on the suit property is permanent in nature. I therefore find in favour of the Plaintiff/Applicant that he has demonstrated that if the interlocutory injunction is not granted, he will suffer irreparable injury which cannot be compensated in damages.

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."***

I believe that in this matter, the Plaintiff who has demonstrated his rights of ownership in the suit property and that damages would not suffice to compensate him should the Defendant continue with construction of permanent structures of the suit property is the party in whose favour the balance of convenience tilts. That being the position, I have no difficulty in finding that the balance of convenience tilts in favour of the Plaintiff.

It is now obvious that the Plaintiff/Applicant has satisfied all the three conditions for the grant of an interlocutory injunction enunciated in the celebrated case of Giella vs. Cassman Brown cited earlier. On those grounds, this Application is hereby allowed. Costs shall be in the cause.

DELIVERED, DATED AND SIGNED AT NAIROBI THIS 28TH

DAY OF APRIL 2017.

MARY M. GITUMBI

JUDGE