

REPUBLIC OF KENYA

IN THE ENVIRONMENT AND LAND COURT

AT MOMBASA

ELC CASE NO 327 OF 2016

JOYCE AKINYI ODHAIMBO.....PLAINTIFF

VERSUS

GIDEON KATHIANI KASUKI.....DEFENDANT

RULING

1. By a Notice of Motion application dated 3rd November 2016 and brought under Order 40 Rules 1,2, 3 and 4 of the Civil Procedure Rules, and Section 1A, 1B, 3, 3A, 63 (C) and (E) of the Civil Procedure Act, the Plaintiff seeks an order of temporary injunction to restrain the Defendant/Respondent by himself, his employees, servant, agents and assignees or any other person acting for him from entering, living, occupying, constructing, selling, transferring, leasing, mortgaging, or in any other way dealing with all that parcel of land know as **MOMBASA/ZIWA LA NGOMBE SCHEME/1219** pending the hearing and determination of the suit.

2. The application is grounded on the grounds in the body of the application and contents of the supporting affidavit of Joan Akinyi Odhiambo sworn on 3rd November 2016 and a supplementary affidavit dated 31st March 2017. In the said affidavit, the deponent deposes that she has sworn the affidavit by virtue of a power of Attorney donated to her by the Plaintiff who is the registered owner of land parcel number **MOMBASA/ZIWA LA NGOMBE SCHEME/1219**. It is deposed that the Plaintiff applied for a plot and vide a letter of offer dated 15th February 2002, the Director of Land Adjudication and Settlement offered her plot No1355 measuring 0.05 hectares at **ZIWA LA NGOMBE SETTLEMENT SCHEME** but following re-survey of the scheme, the Plaintiff was issued with a fresh letter of offer dated 2/1/2013 in which the Plaintiff was offered to buy **PLOT NUMBER 1219** measuring approximately 0.0077 hectares. That the Plaintiff in compliance with the terms of offer paid the outright purchase price and was subsequently registered as the proprietor and issued with a title deed for the plot in October 2013. The Plaintiff avers that she has been paying annual rates and enjoying quiet possession of the suit property until when the Defendant forcefully and without any colour of right entered into it and erected buildings thereon. It is the Plaintiff's contention that unless the Defendant is restrained, he will continue to carry out illegal constructions or even waste the suit property or sell it to non-suspecting third parties to the detriment and disadvantage of the Plaintiff who stands to suffer irreparable harm or damage.

3. The application is opposed by the Defendant who filed a replying Affidavit dated 6th March 2017. The Defendant deposes on 14th February 2011 he bought the property known as **PLOT NO.1276 AT ZIWA LA NGOMBE SQUATTER SETTLEMENT SCHEME** in Mombasa District measuring 0.02 hectares from one Eunice Sela Kulumba for valuable consideration of Kshs.140, 000.00. That before purchasing the plot, he confirmed from the records at the Land Adjudication office, Mombasa that the said Eunice Sela Kulumba was the owner and indeed had a letter of allotment dated 15th February 2002 together with receipts for payment made to the Settlement Fund Trustees. The Defendant states that he had known the said Eunice Sela Kulumba for many years and was in possession until she leased out the structure thereon and later sold the plot to him. The Defendant avers that he has been in possession of **PLOT NO.1276** since the year 2011 and the orders sought by the Plaintiff cannot issue as the Plaintiff is claiming a different plot. The Defendant also attached an affidavit sworn by Eunice Sela Kulumba in which she deposes that she settled on the suit plot in the year 1996 and the same was surveyed in the year 1999 after

which she was issued with an allotment letter dated 15th February 2002 and she paid the outright purchase for it she states that she sold the plot to the Defendant in the year 2011 and prior to moving out, had leased out the structure thereon. She further states that sometimes in the year 2004, she was summoned by the chief of Kongowea following a claim over the same plot by one Joan Anyango Odhiambo (not the Plaintiff's attorney) and the matter was reported to the Land Adjudication and Settlement offices Mombasa where she found out that the said Joan Anyango Odhiambo was working. According to Eunice Sela Kulumba, the said Joan Anyango Odhiambo was discovered to have attempted to tamper with the records at the said office with an intention to allocate herself the suit property but she was reprimanded and ordered to rectify the records. She avers that she was the lawful and bona fide owner of **PLOT NO.1276** before she validly sold it to the Defendant who took possession in the year 2011.

4. In the supplementary affidavit dated 31st March 2017, Joan Anyango Odhiambo disputes the fact that the Defendant bought the suit land in 2011 and states that she uncounted him on the ground in 2016 when he was putting up a new house. She admitted that she had a dispute with Eunice Kulumba which according to her was resolved by the adjudication officer who ordered Eunice Sela Kulumba to keep off for the Plaintiff's **PLOT NO.1355** before a tiles deed was issued in favour of the Plaintiff.

5. The application was canvassed by way of written submissions and the Plaintiff in her submissions dated 4th April 2017 reiterated the facts set out in the supporting affidavit and the supplementary affidavit and argued that she has established a prima facie case with a probability of success being the registered owner of the suit property unlike the respondent who is replying on an agreement for sale. The Plaintiff further submitted that the property is under threat of illegal occupation, construction and possible transfer or lease or being mortgaged, exposing the Plaintiff to suffer irreparable damage as the subject matter faces danger of being completely destroyed.

6. In his submissions dated 25th May 2017, the Defendant reiterated the facts in the Replying Affidavit and added that the Plaintiff has failed to prove that she has a prima facie case with a probability of success since she held two letters of allotment bearing different numbers and with different measurements, being **PLOT NO 1355 90.02 HA) AND NO.1219 (0.0077 HA)**. That the Plaintiff has admitted that the Defendant is in possession of **PLOT NO.1276** and not the Plaintiff. It was submitted that the balance of convenience tilts in favour of the Defendant who is in possession.

7. I have carefully considered the application herein. The main issue for determination is whether the Plaintiff has met the conditions for the grant of interlocutory injunction as laid down in the **GIELLA – VS- CASSMAN BROWN** case. First, the applicant must show a prima facie case with a probability of success; secondly, an injunction will not normally be granted unless the applicant might otherwise suffer irreparable harm which would not adequately be compensated by an award of damages; and thirdly, if the court is in doubt, it will decide the applicant on the balance of convenience.

In the case of **MRAO LTD –VS- FIRST AMERICAN BANK OF KENYA LTD (2003)KLR 125**, a prima facie case was said to be one in which on the material presented to the court or 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 opposite party.

8. In the instant case, whereas the Plaintiff has exhibited documentary evidence that she owns land known as **MOMBASA/ZIWA LA NGOMBE SCHEME/1219** measuring 0.0077 hectares the Defendant on the other hand has exhibited documentary evidence on how he acquired the land known as plot **NUMBER 1276 AT ZIWA LA NGOMBE SETTLEMENT SCHEME** measuring 0.02 hectares. It is not clear whether the two plots refer to one and the same parcel of land on the ground. The Defendant has denied that the Plaintiff has an interest in plot no.1276. From the facts presented, it is clear that the Defendant is in possession of the suit property and even the original allottee was in occupation before the Defendant acquired it by sale in the year 2011. It has also come out that there has been a dispute over the suit property between the Plaintiff and the original allottee of **PLOT NO.1276**, Eunice Sela Kulumba. Having found that the Defendant had been in occupation for several years, if the court were inclined to grant the orders sought, it would mean that the Defendant be evicted. Such an order would be in the form of a mandatory injunction which the applicant is not seeking and which in any event, has not been

proved. Mandatory injunction can only issue in very clear and special circumstances which is not the case in the present case.

9. Having considered the Plaintiffs' application together with the affidavits in support and against as well as the submissions made and the authorities cited, I am not satisfied that the Plaintiff has established a prima facie case with a probability of success against the Defendants. The Plaintiff's claim is highly contented. On whether or not the Plaintiff would suffer irreparable harm if the orders sought are not granted, I take the view that the Plaintiff has not demonstrated what loss if any she stands to suffer if the orders sought are not granted, and further, that the loss cannot be compensated by an award of damages.

It is my view that the Plaintiff cannot suffer any damage that cannot be compensated by an award of damages in case the injunction is not granted and she is successful at the trial. The value of the suit property could easily be determined at the conclusion of the case. The balance of convenience is clearly in favour of the Defendant who is in possession and has been so for some time.

10. In the premises I find and hold that the Plaintiff has not established that she has a prima facie case with a probability of success and I decline to grant the order of injunction sought. Accordingly, I find that the Plaintiff's notice of motion application dated 3rd November 2016 is without merit and is hereby dismissed with costs to the Defendant.

Ruling delivered, dated and signed at Mombasa this 26th day of July 2017

C. YANO

JUDGE