



REPUBLIC OF KENYA

IN THE ENVIRONMENT AND LAND COURT

AT MOMBASA

LAND CASE NO. 148 OF 2016

STEPHEN OLANG MISIGAH.....PLAINTIFF/APPLICANT

-VERSUS-

LUSH HOME PROPERTIES LIMITED.....DEFENDANT/RESPONDENT

RULING

1. This is the Notice of Motion dated 7th June, 2016. It is brought under section 1A, 1B and 3A of the Civil Procedure Act Order 40 Rule 4, Order 51 Rule of the Civil Procedure rules and all enabling provisions of the law.

2. It seeks orders;

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2. That this Honourable court be pleased to issue an order of injunction restraining the Defendant/Respondent whether by itself or its servants and/or otherwise howsoever from continuing with unlawful developments/erectments of premises and/or continuing in occupation of the property.

3. That the Honourable court be pleased to issue an order that the Plaintiff/Applicant has been registered and/or beneficial owner of that piece of land known as plot Numbers 13611 and 13612 all of section 1/MN Utange and is entitled to the possession of the said piece of land.

3. The grounds relied upon are on the face of the application.

i) That Stephen Olang Misigah is the registered and/or beneficial owner of all that piece of land known as plot Numbers 13611 and 13612 all of section I/MN Utange.

ii) Sometime on or about the year 2016, the defendant/respondent illegally and/or unlawfully entered into the said piece of land plot Numbers 13611 and 13612 all of section I/MN Utange having no permission or any authority from the Plaintiff/Applicant.

iii) The Defendant/Respondent has continued to remain in wrongful and illegal occupation of the said piece of land and has proceeded to unlawfully develop/erect premises thereon.

iv) The Defendant/Respondent has no permission or any authority to remain and develop the said piece of land without compensating or paying the Plaintiff/Applicant his property rights.

v) It is in the interest of justice and overriding objectives principles that the Defendant/Applicant be restrained from occupation and from developing/erecting of the premises in the suit property.

4. The application is supported by the affidavit of Stephen Olang Misigah, the Plaintiff/Applicant herein sworn on the 7th June 2016 and a further affidavit sworn on the 6th July, 2017.

5. The application is opposed. There is a replying affidavit sworn by Sam Gichuru a Director of the defendants company sworn on the 14th February, 2017.

6. I have considered the pleadings, the application, submissions of counsel and the authorities cited. In written submissions counsel

substantiated their clients respective positions stated in their respective affidavits.

7. The issue for determination is whether the Plaintiff/Applicant has satisfied the conditions for grant of temporary injunctions.

It is now appropriate to consider the facts that have emerged and the legal principles applicable. The principles were laid down in the precedent setting case of **Giella –vs- Cassman Brown & Company Limited [1973] EA 358.**

First, the applicant must show a prima facie case with a probability of success. Secondly, that an interlocutory injunction will not normally be 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 should act on a balance of convenience.

8. It is the plaintiff's case that he is the registered and/or beneficial owner of plot Numbers 13611 and 13612 section I/MN Utange he annexed a copy of the title deed marked "SOM1".

He admits the intention was to sell the three plots to the defendants. The defendant was only able to pay for one plot hence Number 13610 was transferred to the defendant.

Since the defendant was not able to pay the balance in time, plot Numbers 13611 and 13612 still remain registered in the plaintiff's name. Further that the defendant was undertaking construction on all the plots contrary to the terms of the sale agreement.

The respondent on the other hand through the replying affidavit of Sam Gichuru, one of its Directors, admitted that plot Number MN/1/13610 is fully paid for and registered in the defendant's name. In paragraph 8 of the affidavit, he admits the registration of plot Numbers 13611 and 13612 is pending full payment due to the plaintiff. This means the defendant admits that the two plots have not been paid for.

I have looked at the sale agreement dated 6th August 2013. Nowhere does it state that the payment of the balance would be upon completion and sale of the houses which were being constructed by the defendant.

9. I find that the Applicant has demonstrated that the defendant has breached the agreement with regard to the two plots.

I find that they have demonstrated that he has a prima facie case with a probability of success as deferred in the case of **Mrao Limited –vs- First American Bank of Kenya Limited and 2 others [2003]eKLR** where it was held;

“so what is a prima facie case? I would say that in Civil cases this is a case in which on the material presented to the court, a tribunal property 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”.

10. I also find that the Plaintiff/Applicant is likely to suffer irreparably if the defendant is allowed to go on with construction. The defendant has admitted that it has not paid for the two plots. The plaintiff has expressed his intention of not selling the two plots.

I have considered prayer (3) of the application my humble view is that it ought to go to full trial.

11. All in all I find merit in this application and I grant the orders sought namely;

(i) That a temporary injunction do and is hereby issued restraining the Defendant/Respondent whether by itself or its servants and/or otherwise howsoever from continuing with unlawful developments/erecting of premises and/or continuing in occupation of plot numbers 13611 and 13612 all of section I/MN Utange, pending the hearing and determination of the suit herein.

(ii) That costs of this application do abide the outcome of the main suit. The main suit should be set down for hearing with expedition.

It is so ordered.

Signed, dated and delivered at Mombasa this 20th day of September 2017.

L. KOMINGOI

JUDGE