**REPUBLIC OF KENYA**

**IN THE ENVIRONMENT AND LAND COURT**

**AT NAIROBI**

**MILIMANI LAW COURTS**

**ELC. MACHAKOS CASE NO. 244 OF 2015**

**ANNAH NTHAMBI MATHEKA…….…….…….1ST PLAINTIFF**

**STEPHEN MUASYA MATHEKA…….……..2ND PLAINTIFF**

**DAVID MUNYAO MATHEKA……..…..……3RD PLAINTIFF**

**JONATHAN MUSEMBI MATHEKA…….……..4TH PLAINTIFF**

**VERSUS**

**BONIFACE MBITHI MATHEKA……..…..……...… DEFENDANT**

**RULING**

Coming up before me for determination is the Notice of Motion dated 21st January 2016 in which the Plaintiffs/Applicants seek for an order of temporary injunction restraining the Defendant/Respondent from chasing and or evicting the Plaintiffs/Applicants, selling, alienating, wasting and or interfering with the parcel of land known as Mavindini/Mavindini/328 (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 3rd Plaintiff/Applicant, David Munyao Matheka, sworn on 21st January 2016 in which he averred that the 1st Plaintiff is his mother while the 2nd and 4th Plaintiffs are his brothers. He also stated that the Defendant/Respondent is his brother and Matheka Kaseu, who is deceased, was their father. He further averred that he was informed by his mother, the 1st Plaintiff, that both she and their late father were summoned by his grandfather, one Mr. Kinaka Nzile (his mother's father) who gave the suit property, which is ancestral land, to his mother. He further averred that since he was born in 1967, they have always lived on the suit property up to date. He further added that his father passed away in the year 1978 while they were still living on the suit property. He then stated that in the 1990s, when land adjudication commenced in Makueni County where the suit property is situate, his elder brother the Defendant/Respondent followed up the survey process and the suit property was registered in his name as the 1st Plaintiff was old and illiterate. He further averred that in May 2015, they were shocked to learn that the Defendant/Respondent had obtained a title deed for the suit property in his name and is now attempting to evict them out of the suit property, which is the only place they have to call home. He added that the Defendant/Respondent is also threatening to sell the suit property. He informed the court that

unless it intervenes and allows this Application, they stand the danger of being evicted out of their ancestral land, the suit property.

The Application is opposed. The Defendant/Respondent, Boniface Mbithi Matheka, filed his Replying Affidavit sworn on 26th February 2016 in which he averred that he bought the suit property from his late grandfather, Kinaka Nzile, in 1977 at a price of Kshs. 900/-. He further averred that at the time of the purchase, the land had not been surveyed until the year 1995 when demarcation was done.

Both the Plaintiffs and the Defendant filed their written submissions.

The issue that I am called upon to determine is whether or not to issue an order of temporary injunction as sought by the Plaintiffs/Applicants pending the hearing and determination of this suit. 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."***

Have the Plaintiffs/Applicants 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."***

Do the Plaintiffs/Applicants 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 point out to 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 Plaintiffs/Applicants have 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 Plaintiffs/Applicants have admitted that though the suit property is registered in the name of the Defendant/Respondent and a title deed has been issued to him, this was done fraudulently because the suit property is ancestral land which was meant for the enjoyment of the entire family, not just the Defendant/Respondent. It is the Plaintiffs/Applicants' case that the suit property is ancestral land which was only registered in the name of the Defendant/Respondent because he was the eldest brother and their mother was elderly and illiterate. On this ground, they challenge the title deed held in the name of the Defendant/Respondent. The Defendant/Respondent has on his part defended his title deed, asserting that he bought the suit property from his late grandfather for a sum of Kshs. 900/- which he paid in full. He did not annex any sale agreement or anything else in writing to support this assertion. He did not deny that the Plaintiffs and brothers ended up living on the suit property. The law is very clear as regards the position of a title holder of land. **Section 26(1)** of the **Land Registration Act** 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."***

The Plaintiffs/Applicants have alleged that the title deed held by the Defendant/Respondent was obtained by way of fraud. To that assertion, I will be guided by **Section 107** of the **Evidence Act Cap 80** which provides that:

**"Whoever desires any Court to give judgment as to any legal right or liability dependent on the existence of facts which he asserts must prove that those facts exist."**

I am further guided by the finding of the former Court of Appeal for Eastern Africa in **R.G. Patel versus Lalji Makanji (1957) EA 314** which stated as follows:

***"Allegations of fraud must be strictly proved: although the standard of proof may not be so heavy as to require proof beyond reasonable doubt, something more than a mere balance of probabilities is required."***

The onus is upon the Plaintiffs/Applicants to demonstrate that the title deed to the suit property held by the Plaintiff was acquired fraudulently or by misrepresentation to which they have been proved to have been a party and neither has it been demonstrated that that title were acquired illegally, unprocedurally or through a corrupt scheme. The Plaintiffs/Applicants have challenged the title deed held by the Defendant/Respondent, asserting that they were born and bred on the suit property and live in the suit property to date. They have asserted that their late father passed on in the year 1978 while they were still living on the suit property. The Defendant/Respondent has not denied any of these assertions. He merely asserts that he purchased the suit property from his late grandfather on his maternal side. He has not produced any documentation to prove that purchase. The law on the issue of disposition of an interest in land is very clear. The **Law of Contract Act** at **section 3(3)** clearly indicates as follows:

***"No suit shall be brought upon a contract for the disposition of an interest in land unless-***

***a. The contract upon which the suit is founded***

***a. Is in writing***

***b. Is signed by all the parties thereto: and***

***b. The signature of each party signing has been attested by a witness who is present when the contract was signed by such party…"***

Going by these legal provisions, the Defendant fails in demonstrating his ownership of the suit property as he has not produced any documentary evidence upon which he relies. The Plaintiffs/Applicants' claim that the suit property is ancestral land seems to be a valid claim. In the circumstances, I find that that the Plaintiffs/Applicants have established that they have a prima facie case with a probability of success at the main trial.

Does an award of damages suffice to the Plaintiffs/Applicants? My answer to that question is aptly captured in the case of **Niaz Mohamed Jan Mohamed versus The Commissioner of Lands (1996) eKLR** where it was stated as follows:

> ***"it is no answer to the prayer sought that the Applicant may be compensated in damages. No amount of money can compensate the infringement of such a right or atone for transgression against the law if this turn out to have been the case."***

To that extent therefore, I find that damages would not suffice to atone for the breach of the Plaintiff's right of possession over the suit property pending the hearing and determination of this suit.

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."**

It is my finding that the Plaintiffs/Applicants are in possession of the suit property and have resided thereon to date. In these circumstances, I have no difficulty in holding that the balance of convenience also tilts in favour of the Plaintiffs/Applicants.

In light of the foregoing, I hereby allow this Application with costs to the Plaintiffs.

**DELIVERED, DATED AND SIGNED AT NAIROBI THIS 1ST DAY OF SEPTEMBER 2017.**

**MARY M. GITUMBI**

**JUDGE**