REPUBLIC OF KENYA

IN THE ENVIRONMENT AND LAND COURT

MILIMANI LAW COURTS

ELC. CASE NO. 621 OF 2012

MICHAEL KARITA MUIRU.....1ST PLAINTIFF

STEPHEN MUIRU KARITA.....2ND PLAINTIFF

VERSUS

EMBAKASI RANCHING COMPANY LTD.....1ST DEFENDANT

TERESA NJERI.....2ND DEFENDANT

RULING

Coming up before me for determination is the Notice of Motion dated 19th September 2012 in which the Plaintiffs/Applicants seek for an order of temporary injunction restraining the Defendants/Respondents from selling or in any other manner interfering with the parcel of land known as Plot No. P6049 situate in Embakasi (hereinafter referred to as the "suit plot") 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 1st Plaintiff/Applicant, Michael Karita Muiru, sworn on 19th September 2012 in which he averred that he is the 1st Plaintiff and the 2nd Plaintiff is his son. He further averred that the 2nd Plaintiff is the owner of the suit plot having purchased it from one Rahab Wangui Thiongo in the year 2008. As proof of that assertion, he annexed a copy of a Non-Member Certificate of Plot Ownership, issued by the 1st Defendant. He further averred that he made all the necessary payments to the 1st Defendant. He then averred that both Rahab Wangui Thiongo and a surveyor of the 1st Defendant pointed out to him the beacons of the suit plot and he took possession. He further averred that sometime in the year 2009, the 1st Defendant informed him that they required to sub-divide the suit plot into two portions so as to allocate to him one portion and allocate the other portion to the 2nd Defendant. He added that despite his inquiries, no justifiable reason was given to him for this. He further averred that on 12th December 2012, the 2nd Defendant invaded the suit plot and started depositing building materials with a view to commencing construction thereon. He sought for this Application to be allowed to stop her intended activities on the suit plot.

The Application is contested. The 2nd Defendant/Respondent, Teresia Njeri, filed her Replying Affidavit sworn on 5th November 2012 in which she averred that she purchased the parcel of land known as Plot No. 6105 on 25th May 1992 and she was issued with a Non-Member Certificate of Plot Ownership by the 1st Defendant, a copy of which she produced. She further averred that in the year 2008, when she had

prepared herself to commence construction, she approached the 1st Defendant to re-establish the beacons on the plot. She annexed a copy of her receipt indicating the payment of site visit fees paid to the 1st Defendant by herself. She further averred that upon proceeding to the plot the 1st Plaintiff came and told her that he had purchased the plot. She further indicated that they both reported the matter to the 1st Defendant who, in an attempt to resolve the dispute, ruled that the plot would be sub-divided into two parcels and each party would get one half thereof. She confirmed that despite this being done, the 1st Plaintiff continued to claim the half share given to her. She asserted that the plot was transferred to her even before the Plaintiffs and her claim was therefore first in time and supersedes the Plaintiffs' claim. On those grounds, she sought for this Application to be dismissed.

Both the Plaintiffs and the Defendants 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. 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 Plaintiffs have established a prima facie case with a probability of success at the main trial. The 1st Plaintiff/Applicant claims that the 2nd Plaintiff, who is his son, is the owner of the suit plot. In support of that assertion, he annexed a copy of a Non-member Certificate of Plot Ownership dated 3rd April 2009, bearing the 2nd Plaintiff's name and is in respect of Plot No. P6049. In other parts of is Supporting Affidavit, the 1st Plaintiff claimed to be the owner of this plot. On the other hand, the 2nd Defendant claims to the owner of Plot No. P6105 and as proof of her ownership, she annexed a copy of a Non-member Certificate of Plot Ownership dated 27th October 2000. The 1st Defendant, who issued these certificates of ownership to the 2nd Plaintiff and the 2nd Defendant, did not file any response to this Application. However, one thing is clear. The plots being claimed by both sides appear to be different plots altogether, with the 1st Plaintiff claiming Plot No. P6049 while the 2nd Defendant is claiming Plot No. P6105. At this juncture and with

the information before the court at this time, it is not possible to ascertain which plot in particular is in dispute and who owns which plot. That is a matter that shall be left to the main trial when all the evidence shall be placed before the court. For now, I find that the Plaintiffs/Applicants have not established that they have a prima facie case with a probability of success at the main trial.

Since the Plaintiffs/Applicants have 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 this Application. Costs shall be in the cause.

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

MARY M. GITUMBI

JUDGE