REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA AT NAIROBI

ENVIRONMENT AND LAND COURT

CIVIL SUIT NO. 1251 OF 2015

KENNEDY KARIUKI MWANGI……..PLAINTIFF

VERSUS

VERONICAH WAGIO MIRUANI……DEFENDANT

RULING

Coming up before me for determination is the Notice of Motion dated 8th December 2015 in which the Plaintiff/Applicant seeks for an order of temporary injunction restraining the Defendant/Respondent from trespassing and or interfering in any manner with the property identified as Makongeni Settlement Scheme Plot No. 359B (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, Kennedy Kariuki Mwangi, sworn on 8th December 2015, in which he averred that on 16th February 2009, he purchased the suit property from one George Muirungu (he annexed a copy of the sale agreement), he was issued with a certificate of ownership from the Makongeni Settlement Scheme (a copy of which he annexed) and paid the required surveyor fee amounting to Kshs. 3,000/-. He further averred that he proceeded to construct two permanent structures on the suit property as well as poultry houses. He then stated that when he proceeded to erect a fence around the suit property, the Defendant/Respondent started alleging that she is the owner of the suit property and hired goons who destroyed the fence at night. He stated further that on 6th August 2010 he complained to the area chief who summoned the Defendant/Respondent and asked for documentary evidence of ownership of the suit property. He added that the Defendant/Respondent was not able to produce any documents of ownership of the suit property whereas he did and that the area chief declared him the owner of the suit property. He added tat on 12th November 2013, the management of Makongeni Settlement Scheme summoned them to obtain new plot numbers that that he was issued with a new plot number for the suit property being New 2011 Makongeni Settlement Scheme No. 001693. He annexed a copy of the certificate dated 12th November 2013 in support of that assertion. He averred further that the Defendant/Respondent did not, however, relent to harass him thereafter. He stated that on 15th September 2015, the Defendant/Respondent instructed her lawyer to instruct auctioneers to levy distress of Kshs. 90,000/- against him yet no tenancy agreement between them existed. He added that on 15th October 2015, the Defendant/Respondent's agent Wiskam Auctioneers filed Miscellaneous Application No. 815 of 2015 wherein they obtained a court order allowing them to raid the suit property where they destroyed property worth Kshs. 461,860/-. He sought to be indemnified for this loss.

The Application is contested. The Defendant/Respondent, Veronica Wagio Miruani, filed her Replying

Affidavit sworn on 21st December 2015 in which she averred that Plot No. 001693 is not the same as the suit property, which in her opinion, does not exist. She averred further that she owns two plots in the scheme which lie adjacent to each other being Plot No. 1692 and 1693. She further averred that the Plaintiff/Applicant did not tell the truth which is that he is her neighbor and owns and occupies Plot No. 1696. She defended the distress levied upon the Plaintiff/Applicant stating that she followed the due process after giving the Plaintiff/Applicant notice to vacate her Plot No. 1693 failing which he would become liable to pay her rent. She added that the Plaintiff/Applicant was duly notified of the rent due and proclamation was duly served on him. She further added that the Plaintiff/Applicant refused to co-operate with the auctioneers forcing them to obtain a court order. She claimed ownership of Plot No. 001693 and produced a copy of her plot identification certificate dated 22nd October 2011. She denied the Plaintiff's assertion of having developed Plot No. 001693, stating that no permanent structures or poultry houses have been developed thereon. To support her claim of ownership of Plot No. 00163, the Defendant/Respondent annexed a copy of her sale agreement dated 31st July 2008 which she stated shows that she bought it from one Susan Njoki Kariuki which referred to Plot No. 437A to Plot No. 001693.

Both parties filed their written submissions.

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

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."*

Does the Plaintiff/Applicant 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 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, my observation is that the real bone of contention between the Plaintiff/Applicant and the Defendant/Respondent is the identity of the plot in dispute. On the one hand, the Plaintiff/Applicant claims that the plot in dispute is known as Plot No. 359B which was later converted to Plot No. 001693. In support of this position, the Plaintiff/Applicant produced a copy of his sale agreement indicating Plot No. 359B as well as a certificate indicating Plot No. 001693. However, on her part, the Defendant/Respondent claims that the plot in dispute is Plot No. 001693 which was previously known as Plot No. 437A. The sale agreement she annexed refers to Plot No. 437A, which she claims was subsequently renamed Plot No. 001693 as evidenced by a copy of her plot formalization card

which she annexed. The onus of proof of the correct plot in dispute as well as ownership of the same lies with the Plaintiff/Applicant. At this juncture, the Plaintiff/Applicant has failed to show any connection between Plot No. 359B and Plot No. 001693 sufficient to sustain his claim over the same at this interlocutory stage of these proceedings. At this point, with the documentary evidence produced by the Plaintiff/Applicant in support of his Affidavit, the court is not able to determine the exact plot of land the subject matter of this suit. Overall, I am of the view that the Plaintiff/Applicant has failed to satisfy me that he has a prima facie case with high chances of success at the main trial.

Since the Plaintiff/Applicant has 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 steps to be followed in the enquiry into whether to grant an interlocutory injunction is … sequential so that the second condition can only be addressed if the first one is satisfied…"**

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. Each party shall bear their own costs.

DELIVERED AND SIGNED IN NAIROBI THIS 29TH DAY OF JULY 2016

MARY M. GITUMBI

JUDGE