REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA

ENVIRONMENT AND LAND COURT AT NAIROBI

ELC CASE NO. 888 OF 2013

MEULEDI KITONGO ISEME……PLAINTIFF

VERSUS

NAIROBI CITY COUNTY…….1ST DEFENDANT

(RTD COL. WILLY MAGANGA……2ND DEFENDANT

RULING

Coming up before me for determination is the Notice of Motion dated 18th September 2015 in which the Plaintiff/Applicant seeks orders of temporary injunction restraining the Defendants/Respondents from interfering with the parcel of land known as Nairobi/Block 32/1041 situated within Magiwa Estate (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, Meuledi Kitongo Iseme, sworn on 18th September 2015 in which she averred that she is the registered proprietor of the suit property. In support of that assertion, she annexed a copy of her Certificate of Lease. She averred further that being desirous of extending and improving the suit property, she retained a firm of architects who developed the concept, designed the same and supervised the implementation. She added that the building plans for the project were submitted by the architect to the 1st Defendant/Respondent for approval and were duly approved as Plan No. CPFAA 218 on 30th January 2014. She annexed a copy of the approved plans. She further averred that the approval was communicated to her by the 1st Defendant/Respondent vide its letter dated 30th January 2014 and was made subject to conditions which included adherence to the 1st Defendant's by-laws and regulations. She added that she paid to the 1st Defendant the required approval fees amounting to Kshs. 139,000/-. She annexed a copy of the receipt evidencing payment. She further averred that she proceeded to invite tenders for the construction of the project on the basis of the Bill of Quantities developed by her Quantity Surveyors and settled on Nam Builders. She stated that the contractor undertook the works under the supervision of her architect up to completion and upheld high professional standards in compliance with the by-laws and conditions upon which the 1st Defendant's approval was granted. She then averred that on 9th September 2015 or thereabouts, the 2nd Defendant/Respondent in the company of employees of the 1st Defendant/Respondent came to the suit property and in her absence proceeded to mark "X" upon the side and the rear of the building erected thereon with the words "Remove", "Remove illegal bldg." and "Remove X NCC" all in red. She averred that the 1st Defendant has never served her with any notice or otherwise requested her to remove or change any part of her development on the suit property. She further averred that the 2nd Defendant maliciously and wrongfully caused his friends and cronies who are in the

1st Defendant's staff to deface the Plaintiff's property under the pretext that residents of Magiwa Estate were opposed to the development when in reality no meeting o the residents of Magiwa Estate were opposed to the development. She added that the Defendants have issued verbal threats to her indicating their joint and several desire to pull down and destroy the Plaintiff's development in the suit property and she sought the protection of this court through the issuance of an order of temporary injunction.

The Application is unopposed. The Defendants/Respondents were granted a last opportunity to file and serve their respective responses to the Application on 19th January 2016 but they failed to comply. The Plaintiff filed her written submissions.

The issue I must determine is whether or not to grant the Plaintiff/Applicant the temporary injunction she seeks. In deciding whether to grant the temporary injunction sought after by the Plaintiff/Applicant, 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."*

Has the Plaintiff/Applicant demonstrated that she has a genuine and arguable case? In asserting her ownership rights over the suit property, the Plaintiff/Applicant has produced her document of ownership. Specifically, the Plaintiff/Applicant produced a copy of her Certificate of Lease in respect of the suit property which shows that she is the registered proprietor of the suit property. The law is very clear on the position of a holder of a title deed in respect 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-*
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> 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 Defendants/Respondents on their part have not challenged the Plaintiff/Applicant's ownership rights over the suit property which would entitle her to deal with the suit property as she desires. In exercise of her ownership rights over the suit property, the Plaintiff/Applicant has proceeded to carry out a development thereon. She has established on a prima facie basis that she sought and obtained the approval of the 1st Defendant/Respondent before proceeding to carry out the development. This fact is uncontroverted by either of the Defendants/Respondents. In light of this, this court finds that the Plaintiff/Applicant has proved, on a prima face basis, that she is indeed the duly registered proprietor of the suit property and is entitled to all the rights appurtenant thereto, which include the right to develop the same as she deems fit. In light of this, I find that the Plaintiff/Applicant has proved that she has a prima

facie case with high chances of success at the main trial.

Does an award of damages suffice to the Plaintiff/Applicant? 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."*

Further, land is unique and no one parcel can be equated in value to another. Though the value of the suit property can be ascertained, it would not be right to say that the Plaintiff can be compensated in damages. I hold the view that damages are not always a suitable remedy where the Plaintiff has established a clear legal right or breach. See **JM GICHANGA versus CO-OPERATIVE BANK OF KENYA LTD (2005) eKLR**.

To that extent therefore, I find that damages would not suffice to atone for the breach of the Plaintiff's right of ownership over the suit property.

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 compare with that of the respondent if it is granted."*

The demolition of the development on the suit property if the temporary injunction is not granted is in my view a greater inconvenience on the party of the Plaintiff/Applicant than any inconvenience that the Defendants/Respondents would experience if the temporary injunction is awarded for the simple reason that the development is entirely located within the suit property which has been proved, on a prima facie basis, to be registered in the name of the Plaintiff/Applicant. The balance of convenience tilts in favour of the Plaintiff/Applicant.

Arising from the foregoing, I find that the Plaintiff/Applicant has satisfied all the 3 grounds set out for the grant of a temporary injunction. Accordingly, I hereby allow the Application with costs to the Plaintiff.

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

MARY M. GITUMBI

JUDGE