REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA AT NAIROBI

MILIMANI LAW COURTS

ENVIRONMENT AND LAND COURT

ELC. CASE NO. 238 OF 2015

KIDBROOKE INVESTMENT LTD……..…PLAINTIFF

VERSUS

ISAAC MWANGI……..…… DEFENDANT

RULING

Coming up before me for determination is the Notice of Motion dated 23rd March 2015 in which the Plaintiff/Applicant seeks for an order of temporary injunction restraining the Defendant/Respondent from interfering with the Plaintiff's quite possession and from trespassing on the parcel of land known as Thika Municipality Block 1/801 (hereinafter referred to as the "suit property"). It also seeks an order of mandatory injunction compelling the Defendant/Respondent to give the Plaintiff vacant possession of the suit property. It also seeks an order directed at the OCS Thika Police Station to provide security for purposes of eviction and enforcing the mandatory injunctive orders.

The Application is premised on the grounds appearing on its face together with the Supporting Affidavit of Rose Wangare, a director of the Plaintiff, sworn on 23rd March 2015 in which she averred that the Plaintiff is the registered proprietor of the suit property. She annexed a copy of the Certificate of Lease as proof of that assertion. She averred further that the Plaintiff/Applicant acquired the suit property for valuable consideration from one Ms. Virginia Wanjiru pursuant to a Sale Agreement dated 18th August 2014, a copy of which she annexed. She added that the suit property is developed with a residential house which has for a long time been occupied by the Defendant/Respondent as a tenant. She further averred that upon acquisition of the suit property, the Plaintiff informed the Defendant of its intention to take possession of the suit property but that the Defendant was unwilling to give up vacant possession. She added that by a letter dated 18th November 2014, the Plaintiff gave the Defendant notice to vacate the suit property which notice expired on 31st December 2014. She added that despite receiving that notice, the Defendant has remained defiant and still occupies the suit property without paying any rent to the Plaintiff. She stated that this continued occupation of the suit property by the Defendant amounts to a violation of the Plaintiff's right to property as enshrined in **Article 40 of the Constitution** and that the facts of this case are plain and clear which commend it for a grant of an order of mandatory injunction.

The Application is contested. The Defendant/Respondent, Isaac Mwangi, filed his Replying Affidavit sworn on 4th May 2015 in which he averred that he is a co-owner of the suit property by virtue of the fact that he is married to Ms. Virginia Wanjiru under Kikuyu customary law and they are blessed with two children. He added that in the year 2009, he together with the said Virginia Wanjiru acquired the suit

property which was registered in her name. He further added that at the time of purchasing the suit property, it was developed with one building which had two units, each being two bedroomed and that they rented out one house and moved into the other as their matrimonial home. He stated that he is living in that house to date. He further averred that he has been collecting rent from the occupant of the other house since they purchased the suit property and that he is not aware that his wife disposed off the suit property as she never communicated to him. He averred that his consent was never sought prior to the sale and that the suit property is matrimonial property which required his consent as a spouse prior to its sale to the Plaintiff. He added that the alleged sale of the suit property to the Plaintiff was marred with fraud and misrepresentation of facts because on the date the Plaintiff alleges to have purchased the suit property i.e. 18th August 2014, it was not in existence, having been incorporated on 28th August 2014. He further added that the date the Plaintiff is alleging to have bought the suit property from Ms. Virginia Wanjiru, she was not in the country. He added further that the Plaintiff bought the suit property with full knowledge of his interest therein and therefore had constructive and actual notice of the same since he resided in the suit property and a simple conduct of due diligence would have established this fact. He averred further that the Plaintiff is a stranger to him and that upon receiving the notice to vacate, he responded to the Plaintiff informing it of his position which it ignored. He annexed a copy of his reply letter dated 20th December 2014. On those grounds, he sought for this Application to be dismissed.

The Plaintiff filed its submissions.

I am called upon to determine two issues, one being whether or not to grant the Plaintiff/Application a temporary injunction and secondly whether or not to grant it a mandatory injunction.

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, the Plaintiff/Applicant has asserted that it is the registered proprietor of the suit property and has produced to it a copy of its Certificate of Lease as proof thereof. On that ground, it seeks vacant possession of the suit property from the Defendant/Respondent. 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-***
>
> ***(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."***

In this particular case, the validity of the Plaintiff/Applicant's title deed has been challenged on the grounds of fraud and illegality. The Defendant contends that the suit property is matrimonial property to which he was entitled to give his spousal consent before it could be sold to the Plaintiff/Applicant. Section 28 of the Land Registration Act stated that:-

> ***"Unless the contrary is expressed in the register, all registered land shall be subject to the following overriding interests as may for the time being subsist and affect the same, without their being noted on the register-***
>
> ***(a) spousal rights over matrimonial property."***

It is noteworthy that the question whether or not the Defendant was a spouse to the seller of the suit property Ms. Virginia Wanjiru was not refuted under oath by the Plaintiff/Applicant understandably because it is a limited liability company with no knowledge on this issue. For my purposes therefore, I will go with the Defendant's assertion under oath that indeed he was a spouse to Ms. Virginia Wanjiru. Turning to the question whether or not the suit property is matrimonial property for which the Defendant's spousal consent was required prior to it being sold to the Plaintiff, I will go by the position set out by Mutungi, J. in Alice Wanja Munji v. Samuel Munji Kihanya & 2 Others (2014) eKLR where he stated as follows:

> **"Whereas section 28(a) of the Land Registration Act acknowledges spousal rights over matrimonial property as an overriding interest on registered land, a property has to qualify as matrimonial property for spousal rights to be applicable. For property to qualify to be matrimonial property there has to be evidence that the parties to the marriage jointly contributed to the acquisition of the subject property. Property does not necessarily become matrimonial property merely owing to the act of marriage. There has to be demonstrable evidence that the parties jointly participated in the acquisition of the property."**

Justice Mutungi also quoted Justice Lenaola in the case of Sarah Ayitso Kuria v. Peter Andrew Kuria HCCC No. 7 of 2010 (unreported) who said as follows:

> **Firstly, she ought to establish on a prima facie lever that the properties were jointly acquired because the fact of marriage is not evidence that the properties were jointly acquired. I have seen the annexures to the applicant's affidavit and see no such evidence and therefore I am unable to tell whether indeed the Applicant made any contribution to the purchase of the properties. In other instances, such an applicant would indicate her education levels, her profession, income etc to show that she had the means and capacity to raise funds for the purchase of matrimonial property aside from evidence that in fact … she actually made payment to that end. All that is missing in this case."**

In the present case, the Defendant has asserted that the suit property is matrimonial property. He has however not demonstrated in which way if any he contributed towards the purchase of the suit property. He appears to claim his right over the suit property merely on the fact of his marriage to the vendor Ms.

Virginia Wanjiru. That is not sufficient for my purposes and on that account, I find that the Plaintiff/Applicant has on the production of its title deed to the suit property, succeeded in establishing 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 possession 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 compared with that of the respondent if it is granted."***

In this particular suit, the party in possession of the suit property is the Defendant. It is conceded by the Plaintiff that the Defendant is in possession and has remained so for many years. The Plaintiff must have been aware of the Defendant's occupation of the suit property at the time of purchasing the same. This being the case, I favour the position in which the Defendants remains in occupation until this suit is fully heard and finally determined. For now, the balance of convenience lies in favour of the Defendant. To that extent therefore, I decline to issue the temporary injunction sought after by the Plaintiff.

The other issue arising from this Application is whether or not to grant the mandatory injunction sought after by the Plaintiff. The leading authority on this issue is the case of **Locabail International versus Agro Export (1986) 1 ALLER 901** wherein it was stated at follows:

> **"A mandatory injunction ought not to be granted on an interlocutory application in the absence of special circumstances and only in clear cases where the court thought that the matter ought to be decided at once, or where the injunction was directed at simple and summary act which could easily be remedied or where the Defendant had attempted to steal a match on the Plaintiff. Moreover, before granting a mandatory interlocutory injunction, the court had to feel a high sense of assurance that at the trial it would appear that the injunction had rightly been granted, that being a different and higher standard than was required for a prohibitory injunction."**

Further, in **Homes Limited versus Shandahu (1971) 1Ch. 34**, the following was stated:

> **"It is plain that in most circumstances a mandatory injunction is likely, other things being equal, to be more drastic in its effect than a prohibitory injunction. At the trial of the action, the court will, of course grant such injunctions as the justice of the case requires; but at the interlocutory stage, when the final result of the case cannot be known and the court has to do the best it can, I think the case has to be unusually strong and clear before a mandatory**

injunction will be granted, even if it is sought in order to enforce a contractual obligation."

While I concede that the Plaintiff does have a strong case against the Defendant, my overall finding is that I cannot sanction the eviction of the Defendant from the suit property at this interlocutory stage. I hold the view that this suit should go to full trial and have the court make a final determination on whether or not to evict the Defendant out of the suit property. I therefore decline to issue the mandatory injunction sought after by the Plaintiff.

On those grounds, this Application is hereby dismissed with costs in the cause.

DELIVERED, DATED AND SIGNED AT NAIROBI THIS 9TH DAY OF SEPTEMBER 2016.

MARY M. GITUMBI

JUDGE