REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA AT NAIROBI

MILIMANI LAW COURTS

ENVIRONMENT AND LAND COURT

ELC. CASE NO. 633 OF 2014

BHANUMATI ISHWARLAL GHADIALY…....……..…APPLICANT

VERSUS

THOMAS MASEKI MAERA……..…..…1ST DEFENDANT

COMMISSIONER OF LANDS…….....…….2ND DEFENDANT

RULING

Coming up before me for determination is two applications: the Plaintiff's Notice of Motion dated 21st May 2014 (hereinafter referred to as the "Plaintiff's Application") and the 1st Defendant's Notice of Motion dated 17th March 2015 (hereinafter referred to as the "1st Defendant's Application").

In the Plaintiff's Application, the Plaintiff seeks for an order of temporary injunction restraining the Defendants from trespassing, encroaching, constructing, selling, assigning, charging, alienating or parting with possession of the parcel of land known as Land Reference Number 209/13126 formerly Land Reference Number 209/2239 (hereinafter referred to as the "suit property") pending the hearing and determination of this suit.

The Plaintiff's Application is premised on the grounds appearing on its face together with the Supporting Affidavit of Sanjay Isverlal Ghadialy, sworn on 21st May 2014 in which he averred that he is the son of the Plaintiff who granted him authority to act for her and execute all documents relating to the suit property. He annexed a copy of that authority. He further averred that the Plaintiff and one Amritlal Tulsidas Dharamshi Ghadialy purchased the suit property. He annexed a copy of the transfer. He further averred that the said Amritlal Tulsidas Dharamshi Ghadialy passed away on 15th October 2007. He annexed a copy of the Death Certificate. He further stated that erected on the suit property was a permanent residential building occupied by a relative of the late Amritlal Tulsidas Dharamshi Ghadialy He further averred that the suit property was held for a term of 99 years from 1st December 1903. He annexed a copy of the title deed. He added that his mother informed him that the late Amritlal Tulsidas Dharamshi Ghadialy had applied for an extension of lease sometimes in 1999. He further added that his efforts to trace that application for extension of lease made by the late Amritlal Tulsidas Dharamshi Ghadialy were not successful because the file for the suit property could not be traced at the Government Land Registry Nairobi. He further added that the Plaintiff has always paid land rent and rates levied by the Government and the then City Council of Nairobi. He further averred that he believed that the

Government policy was to extend all expiring leases if the plot owns had complied with conditions imposed by the Government and that the power to approve extension of leases was now vested in the National Land Commission. He added that he had re-applied for extension of the lease over the suit property. He added that on 4th January 2014, his relative who was residing in the suit property informed him that a group of people had descended on the property and completely demolished the residential building erected thereon. He added that upon travelling to Kenya from the United Kingdom where he lives, he verified this position for himself. He averred further that his family was not aware of the intended demolition as no suit had been served on the Plaintiff or her deceased co-owner. He added that he came to learn that on 16th August 2011, the 2nd Defendant, the Commissioner of Lands, purported to allocate the suit property to the 1st Defendant and to issue him with a title deed, a copy of which he annexed. He noted that the suit property had been changed from Land Reference Number 209/2239 to Land Reference Number 209/20173 yet the location and size of the plot remains the same. He stated that this allocation was contrary to sections 12 and 13 of the Government Lands Act (now repealed) which was applicable at the time.

The Plaintiff's Application is contested. The 1st Defendant filed his Replying Affidavit sworn on 23rd July 2014 in which he averred that after carrying out searches both at the then Nairobi City Council and the Ministry of Lands, he confirmed that the original lease over the suit property expired in 2002 so on 30th September 2010, he applied to the then Commissioner of Lands for the same to be allocated to him. He annexed a copy of his application letter. He further averred that the then Commissioner of Lands accepted his application and issued him with an Allotment Letter dated 15th February 2011, a copy of which he annexed. He further stated that he wrote his acceptance letter on 24th February 2011 and also paid the stand premium and annual rent by a bankers cheque No. 88864, copies of which he annexed. He added that he was issued with a Receipt No. 2102437 which confirms his payment of the required charges. He annexed a copy of the Receipt. He further stated that he was thereafter issued with a title deed to the suit property being Grant No. I.R. 131366, a copy of which he annexed. He confirmed having been paying land rents and rates as required both to the Government and to the County Government of Nairobi. He further averred that upon going to the suit property he found the same to be in occupation by one Khimji Patel who refused to vacate, thereby prompting him to go to the Businesses Premises Rent Tribunal to terminate the tenancy. He stated that the said tenant was issued with a notice to vacate but that he declined to vacate. He further averred that he filed suit in **ELC No. 330 of 2012** where he prayed for the court to enter judgment against the tenant and order him to vacate the suit property. He added that the court granted him an eviction order on 4th November 2013. He annexed a copy of the order. He further averred that once a lease expires, the property automatically reverts back to the Government which has the authority to grant it to any Kenyan who applies for it. He added that this suit is frustrating his efforts to develop the suit property which was his intention in applying for the lease.

The issue that I am called upon to determine in the Plaintiff's Application is whether or not to grant a temporary injunction to the Plaintiff injunction restraining the Defendants from trespassing, encroaching, constructing, selling, assigning, charging, alienating or parting with possession of the suit property. In deciding this issue, 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, I turn to assessing whether or not the Plaintiff has 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 high chances of success at the main trial. The Plaintiff through her son has conceded that her title to the suit property expired way back in the year 2002 as the term of her lease was to run for 99 years from the year 1903. It is her case that her deceased co-owner filed an application to extend her expired lease. However, she did not produce a copy of that application or any other evidence to support that allegation. The position on an expired lease is as set out in **section 9(2)(c)(ii)** of the **Land Act** which provides as follows:

"private land may be converted to public land by reversion of leasehold interest to Government after the expiry of a lease"

I also wish to cite the decision of Osiemo, J. in the case of **Charles Mwangi Kagonia versus Dharj D. Popat & Another (2006) eKLR** in which he stated as follows:

"Once the 99 years lease between the Government and the defendant expired and he did not apply for extension which must be granted and executed by the lessee and lessor and registered before the expiry of the then current term the interest of the lessee ceases and the land becomes available for allocation by the Commissioner of Land who is at liberty to allocate the same to any deserving applicant following the laid down procedures."

Going by these provisions, it is evident to me that the leasehold enjoyed by the Plaintiff expired. In the absence of her obtaining an extension as in this case, the suit property reverted to the Government of Kenya and was "**available for allocation by the Commissioner of Land who is at liberty to allocate the same to any deserving applicant following the laid down procedures."** This essentially means that as a preliminary finding, the suit property was properly allotted to the 1st Defendant. The 1st Defendant has been able to demonstrate the entire process he went through in order to be issued with a title deed to 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."

My finding is that the 1st Defendant has succeeded in demonstrating that he is the current registered

proprietor of the suit property and that his title has not been successfully challenged by the Plaintiff whose lease over the suit property expired way back in the year 2002. To that extent therefore, the Plaintiff has failed to establish that she has a prima facie case with high chances of success at the main trial.

Since the Plaintiff 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 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 the Plaintiff's Application with costs to the 1st Defendant.

I now turn to the 1st Defendant's Application in which the 1st Defendant seeks for an order that the Plaintiff do deposit security for costs of Kshs. 5 million or other amounts that this Honourable court may deem just for the 1st Defendant's costs. That Application is premised on the grounds appearing on its face together with the Supporting Affidavit of the 1st Defendant, Thomas Maseki Maera, sworn on 17th March 2015 in which he averred that he believed that the Plaintiff would be unable to pay his costs in the likely event that he is successful in view of the fact that the Plaintiff sated that she is a resident of London in the United Kingdom. He further averred that the Plaintiff is not resident within the jurisdiction of Kenya and has no known assets or interest in property in Kenya. He added that he acquired the suit property with a view to developing the same and that he had gone to the extent of applying for the necessary approvals in preparation for development. He stated that he cannot proceed with those plans because of this suit yet he had incurred great financial loss on the above mentioned undertakings.

The 1st Defendant's Application is contested. The Plaintiff filed the Replying Affidavit of her son, Sanjay Isverlal Ghadialy sworn on 18th June 2015 in which he averred that this court has the discretion to order a party to give security for costs. He added that it is true that the Plaintiff is not resident in Kenya but resides in London, United Kingdom. However, he added that it is well settled law that residence abroad is not per se a ground for making an order for security of costs. He stated that an order for security for costs may only be granted where the circumstances so require. He asserted that the 1st Defendant had not raised any substantive reasons for the Plaintiff to be ordered to give security for costs. He further added that the amount prayed for by the 1st Defendant being Kshs. 5 million is a hefty sum and that his mother, being an investor, stands to be greatly prejudiced in her investment business if she is ordered to deposit that sum. He added that should judgment be entered against the Plaintiff, the 1st Defendant can still recover from her under the provisions of the Foreign Judgments (Reciprocal Enforcement) **Act Cap 43 of the Laws of Kenya.**

In the 1st Defendant's Application, the issue I am called upon to determine is whether or not to issue an order requiring the Plaintiff to deposit the sum of Kshs. 5 million or such other sum as the court deems

just for security of the 1st Defendant's costs in this suit. The law on security for costs as found in Order 26 rule 1 of the Civil Procedure Rules, 2010 provides that:

> ***"In any suit the court may order that security for the whole or any part of the costs of any defendant or third or subsequent party be given by any other party."***

This legal provision gives the court wide latitude on the granting of an order for payment of security for costs. In this particular case, the 1st Defendant's main basis for requesting for an order for security of costs is the fact that the Plaintiff is resident in London, United Kingdom. On the issue of residence in a foreign country, this is what the court had to say in the case of **Shah versus Shah (1982) KLR 95**, at page 98:

> ***"The general rule is that security is normally required from the Plaintiffs resident outside the jurisdiction but as was agreed in the court below, a court has a discretion, to be exercised reasonably and judicially, to refuse to order that security be given."***

In this particular case, having regard even to my finding relating to the Plaintiff's Application, the court gets the general sense that the Plaintiff has little or no interests in Kenya. It is not even clear whether or not she was ever resident in Kenya and if so, she must have left the country many years ago. This can be gleaned from the fact of her expired lease over 12 years ago which she does not appear to have applied for its extension. With this impression, I consider that the 1st Defendant's concern for the non-payment of his costs in the likely event of his success in this suit are well founded. As I have earlier found, the 1st Defendant has a strong defence in this suit while the Plaintiff does not have a prima facie case with high chances of success at the main trial. That being the case, I find no difficulty in finding that the 1st Defendant's Application is merited. To that extent, I do allow it save that I direct that the Plaintiff do deposit in court the sum of Kshs. 1 million being the security of the 1st Defendant's costs. This should be done within 60 days from the date of delivery of this Ruling.

DELIVERED AND SIGNED IN NAIROBI THIS 28TH DAY OF OCTOBER 2016.

MARY M. GITUMBI

JUDGE