**REPUBLIC OF KENYA**

**IN THE HIGH COURT OF KENYA AT NAIROBI**

**MILIMANI LAW COURTS**

**ENVIRONMENT AND LAND COURT**

**ELC. CASE NO. 108 OF 2012**

**STEPHEN ABU MUKHOBI ……..…APPLICANT**

**VERSUS**

**DANIEL ORIA ODHIAMBO……...……...…1ST DEFENDANT**

**ROBERT ODHIAMBO NDIEGE…….…...……..….2ND DEFENDANT**

**RULING**

Coming up before me for determination is the Notice of Motion dated 17th July 2015 in which the Plaintiff/Applicant seeks for an order restraining the Defendants/Respondents from trespassing, entering into, encroaching, building, developing, proceeding with construction or in any way interfering with that piece of land known as Dandora IV Shops Plot No. 46822 situated in Nairobi (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, Stephen Abu Mukhobi, sworn on 17th July 2015 in which he averred that on 8th September 1993 he was allocated the suit property by the then Nairobi City Commission and that he later entered into a lease agreement with them. He annexed copies of his allotment letter and the lease agreement. He further averred that he paid the premium requested for the suit property and that in 1998, he submitted his development plans to the then City Council of Nairobi. He annexed copies of his approved development plans. He further stated that in early 2014, he received a report that someone had invaded the suit property and had started digging trenches for foundation. He added that upon visiting the suit property, he found this information to be true as he found workers digging trenches for foundation. He stated that the said workers gave him the phone number of the person who commissioned them to do the work and that upon calling that number, he spoke with the person who identified himself as the 1st Defendant. He further averred that the 1st Defendant claimed to have been allocated the suit property. He averred further that he proceeded to report the matter to the police and the area chief but that the 1st Defendant continued with work on the suit property. He added that he sought to know whether the suit property had changed hands by conducting a search at the Nairobi City County but that the search results revealed that the suit property was still registered in his name. He added that the 2nd Defendant is a proxy of the 1st Defendant. He further stated that the Defendants seem to be determined to complete the

construction using unorthodox means as they have stationed mean looking men to guard the workers as they continue with the construction. For those reasons, he sought for this Application to be allowed.

The Application is contested. The 1st Defendant, Daniel Oria Odhiambo, filed his Replying Affidavit sworn on 10th August 2015 in which he averred that he does not own the suit property and is therefore a stranger to the status, developments and any other activities going on there. He further stated that the Plaintiff is now known to him and that he has not made any communication with him either directly or through proxies as alleged in the Supporting Affidavit. He further stated that he has no intention of depriving the Plaintiff of the suit property.

The 1st Defendant/Respondent filed their written submissions.

The issue I am called upon to determine is whether or not to grant to the Plaintiff/Applicant the temporary injunction he seeks. 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? In asserting his ownership rights over the suit property, the Plaintiff/Applicant annexed a copy of a letter of allotment dated 8th September 1993 which shows that he was allotted the suit property by the then Nairobi City Commission. In that allotment letter, the Plaintiff was required to pay a total sum of Kshs. 14,400/- comprising stand premium and ground rent. The Plaintiff produced copies of receipts indicating that he did indeed make these payments. He further produced a copy of the lease agreement he entered into with the then City Council of Nairobi, indicating that he was now the owner of the suit property. I believe that to that extent, the Plaintiff has demonstrated to this court that he is the duly registered owner of the suit property. The Defendants on their part have not been able to challenge this position. In fact, the 1st Defendant categorically stated in his Replying Affidavit that he does not know the Plaintiff and does not challenge the Plaintiff's claim of ownership over the suit property. That being the position, I find no difficulty in finding that the Plaintiff/Applicant has established that he has a prima facie case with high chances of success at the main trial.

Has the Plaintiff/Applicant demonstrated that he is bound to suffer irreparable injury which would not be adequately compensated by an award of damages? By definition, an irreparable injury is, in equity, "the type of harm which no monetary compensation can cure or put conditions back the way they were". In **Alternative Media Limited vs. Safaricom Limited (2004) eKLR**, the court held as follows:

> ***"The second principle established by the Giella case for the grant of an interlocutory injunction is that the Plaintiff will suffer irreparable harm which would not be compensated in damages. Considering this very point in the case of Mureithi vs City Council of Nairobi (1979) LLR 12 Madan JA (as he then was) cited with approval the speech of Lord Diplock in the case of***

> ***American Cynamid Co. vs Ethicon (1975) 1 ALLER 504 at page 506 where he said:- the object of the interlocutory injunction is to protect the Plaintiff against injury by violation of his right for which he could not be adequately compensated in damages recoverable in the action if the uncertainty were resolved in his favour at the trial… if damages in the measure recoverable at common law would be adequate remedy and the Defendant would be in a financial position to pay them, no interlocutory injunction should normally be granted however strong the Plaintiff's claim appeared to be at that stage."***

In this particular case, the nature of the injury that the Plaintiff claims he is suffering is alleged construction on the suit property by the Defendants. If allowed to continue, the Plaintiff asserts he is suffering irreparable injury which cannot be compensated in damages. I am inclined to agree with him. Indeed, the structure that the Defendants are putting up on the suit property are structures that are permanent in nature. I therefore find in favour of the Plaintiff/Applicant that he has demonstrated that if the interlocutory injunction is not granted, he will suffer irreparable injury which cannot be compensated in damages.

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."***

I believe that in this matter, the Plaintiff who has demonstrated his rights of ownership in the suit property and that damages would not suffice to compensate him should the Defendants continue with construction of permanent structures of the suit property is the party in whose favour the balance of convience tilts in favour of. The Defendants have further intimated that they are not interested in the suit property and do not even know the Plaintiff. That being their position, I have no difficulty in finding that the balance of convenience tilts in favour of the Plaintiff.

It is now obvious that the Plaintiff/Applicant has satisfied all the three conditions for the grant of an interlocutory injunction enunciated in the celebrated case of *Giella vs. Cassman Brown* cited earlier. On those grounds, this Application is hereby allowed with costs in the Plaintiff.

**DELIVERED, DATED AND SIGNED AT NAIROBI THIS 28TH DAY OF OCTOBER 2016.**

**MARY M. GITUMBI**

**JUDGE**