REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA

MILIMANI LAW COURTS

ENVIRONMENTAL & LAND DIVISION

ELC NO. 988 OF 2014

ROBERT NG'ANG'A MARUBU...1ST PLAINTIFF

CAROLINE MURUGI...2ND PLAINTIFF

-VERSUS-

JULIUS MBOYA MUNYORA alias WAMUNYORA......................1ST DEFENDANT

GICHUKI MATHENGE alias WAMOTHER..................................2ND DEFENDANT

SAMUEL NJUGUNA MWANGI...3RD DEFENDANT

IRUNGU MUCHANGI...4TH DEFENDANT

RULING

1. In their application dated 18th July, 2013, the Plaintiffs seek an interlocutory mandatory injunction to have the Defendants deliver up vacant possession of the suit premises namely Land Reference No. 209/4401/384, 209/4401/385 and 209/4401/390 Nairobi (all hereinafter and jointly "the suit property"). The Plaintiffs also seek orders that the O.C.S. Jogoo Road Police Station do provide security for purposes of eviction and enforcing the mandatory orders.

2. The Plaintiffs claim is simple. They are the registered proprietors as lessees of the suit property from the now defunct City Council of Nairobi. Their lease which is exhibited as 'RNM-1' to the affidavit of the first Plaintiff sworn on 18th July, 2013 in support of the application is dated 24th October, 2008 and was registered on 11th November, 2008. The Plaintiffs say that they gave notice to the Defendants to vacate the suit property but the trespassers, as the Plaintiffs call the Defendants, have failed to deliver up possession to the Plaintiffs. Yet the Defendants do not pay any rent. The Plaintiff further state that the Defendants have failed to heed the Plaintiff's demands, prompting the Plaintiffs to move the court. The Plaintiffs in support of the application have also exhibited copies of the rates payment receipts for rates paid to the title paramount the County Government of Nairobi. There is also exhibited correspondence to demonstrate that the title paramount recognizes the Plaintiffs as the owners of the suit property.

3. The Defendants reply to both the application and the suit is also simple and straightforward. Firstly, they submit that they have been on the suit property for the last thirty (30) years and that their possession

thereof has been uninterrupted and continuous. They not only claim a right to continue occupying the suit property to the exclusion of all including the Plaintiffs but also to be recognized as the registered proprietors by reason of the adverse possession they have had. Secondly, the Defendants also submit that the Plaintiffs' title is impeachable. The Defendants state that the transfer infavour of the Plaintiffs was obtained through fraud and collusion. They seek to demonstrate that fact further by stating that the suit property was as late as 2009 still shackled with a legal encumbrance. A transfer they said could possibly not have been possible. The Defendants, placing reliance on the case of **Giella –v- Cassman Brown Ltd [1973] EA 358** submit that the Plaintiffs have not established a prima facie case not met the threshold of Giella to be entitled to an injunction.

4. I have considered the rival submissions. I have also read through the Replying Affidavit as well as both the Supporting Affidavit and the Further Affidavit sworn by the 1st Plaintiff. Foremost, I would like to point out that the principles laid out in **Giella –v- Cassman Brown Ltd (ibid)** would not be substantially relevant as **Giella** dealt with an interlocutory prohibitory injunction. The Plaintiffs on the other hand are seeking a mandatory injunction at an interlocutory stage. Whilst prohibitory injunctions seek to maintain and preserve the status quo: see **Bonde –v- Steyn [2013]2 EA 8**, mandatory injunctions are intended to completely undo situations: see **Despina Pontikos [1975] EA 38**. The considerations to be placed, as the court considers whether or not to grant either injunction, will certainly also be different.

5. The principles as to the grant of mandatory injunctions at all interlocutory stage if one reviews the various authorities may be summarized as follows.

6. Firstly, the overriding consideration is which cause is likely to involve the least risk of injustice if it turns out to be 'wrong'. Is it the granting of an interlocutory injunction to a party who fails to establish his right of trial (or would fail if there was a trial) or alternatively, the failing to grant an injunction to a party who succeeds (or would succeed) at trial? Secondly, the court when considering whether to grant a mandatory injunction must keep in mind that an order which requires a party to take some positive step at an interlocutory stage may well carry a greater risk of injustice if it turns out to have been wrongly made than an order which merely prohibits action thereby preserving the status quo. Thirdly, it is quite legitimate where a mandatory injunction is sought to consider whether the court does feel a higher degree of assurance that the claimant will be able to establish his right at trial. That is because the greater the degree of assurance that the claimant will ultimately establish his right, the lesser will be the risk of injustice if the injunction is granted. There is need to establish a special case in favour of the Plaintiff at the interlocutory stage. Finally, even where the court is unable to feel any high degree of assurance that the Plaintiff can establish his right, there may be still circumstances in which it is appropriate to grant a mandatory injunction at an interlocutory stage. Those circumstances will exist where the risk of injustice if the injunction is refused sufficiently outweighs the risk of an injustice it is granted. These principles run through and could be threaded together in the cases of **Films Rover International Ltd –v- Cannon Film Sales Ltd [1987]1 WLR 670, 680; Locabail International Finance Ltd –v- Agroexport & others [1986]1 All ER 901. The Siskina [1979] AC 2010, Shepherd Homes Ltd –v- Sandham [1970]3 All ER 412; Hassan –v- Adan [2007]2 EA 178, Mwangi –v- Braeburn Ltd [2004]2E.A 196** and the **Despina Pontikos [1975] E.A** 38. A good summary may also be obtained from **Halsburly's Laws of England Vol. 24, 4th Edition** paragraphs 946 – 952.

7. Nonetheless, it is still clear from a reading of the mandatory injunction authorities that the first principle enuciated in **Giella –v- Cassman Brown [1973] EA 358** as to establishment of a prima facie case and now more settled in **Mrao Ltd –v- first American Bank of Kenya & 2 others [2003] eKLR** would still be applicable save that the case established must be beyond the mere calling upon the Respondent to retort but rather it must be so special as to let the court have the feeling that the orders ought to be made at once. Evidently the standard is higher than is required for prohibitory injunctions: see **Kenya Breweries Ltd –v- Washington Okeyo [2002]1 EA 109**.

8. On the basis of the foregoing principles and the facts of the case, in my judgment, fairness, justice and convenience do not weigh clearly as it should in favour of the relief sought. I have my doubts and also lack the requisite assurance that if I granted the relief sought and this matter went on trial with only the evidence now before me I would still be vindicated and the Plaintiffs found to be deserving of the

mandatory relief. The reason is this. The Plaintiffs have exhibited their title document. It is in the form of a Lease. It was registered in the year 2008. Annexed to the said Lease are three deed plans. They are numbers 325968, 325969 and 325970. They are all dated 7th June, 2011. If truly the Lease in favour of the Plaintiffs was procedurally registered in the year 2008 then the Deed plans were non-existent. There will be need for additional explanation. That is the first point of doubt. Such a defect if ultimately proven may lead to the Plaintiff's title being impeached for substantive irregularity. **Sections 24 and 25 of the Land Registration Act**, would then not help the Plaintiffs.

9. Secondly, the Defendants have raised the point that it was not possible to register the Plaintiff's titles (lease) when there was a legal charge still registered against the titles. There is prima facie evidence that as of the year 2009 the suit property was still enumbered. The evidence is in the copy of the Kenya Gazzette Notice No. 3186 of 2009. It is exhibited to the Defendants Replying Affidavit. In the said Notice, the Register of Titles seeks to register a discharge of three legal charges in the year 2009. The Plaintiffs have not addressed this issue. The Lease also does not in any way suggest that it was registered subject to the encumbrances either under the recitals to the Lease or a memorandum to the Lease. I hold the view that such evidence would shake the very root of a title and in this case it has.

10. Thirdly, there is the Defendants claim in adverse possession. It is couched both in the defence as well as in the counterclaim. I doubt that the same could be summarily dealt with. It is to be noted that even if the Plaintiffs acquired a title in 2008, it was subject to the existence of such claims as adverse possession: see **Githu –v- Ndeete [1984] KLR 776**. A mandatory injunction if granted now and is not ultimately vindicated at trial would cause more injustice in the circumstances.

11. For the foregoing, I am not convinced that this is a special case of trespass where the holder of a title is to be immediately protected by dint of the provisions of **Section 24 and 25** of the **Land Registration Act**. I will not grant a mandatory injunction as sought. The application dated 18th July, 2013 must fail and it is hereby dismissed with costs.

12. Orders accordingly.

Dated, signed and delivered at Nairobi this 26th day of January, 2015.

J. L. ONGUTO

JUDGE

In the presence of:-

.... for the Plaintiffs

.... for the Defendants