REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA AT NAIROBI

ELC. CASE NO. 858 OF 2013

KORARI AGENCIES LIMITED……...…….…..PLAINTIFF

VERSUS

EPCO BUILDERS LIMITED ……..…….. DEFENDANT

RULING

Coming before me for determination is the Notice of Motion dated 16th July 2013 in which the Plaintiff is seeking for an order of temporary injunction restraining the Defendant whether by themselves, their agents, servants, employees, workers or otherwise howsoever from entering onto, wasting, alienating, selling, advertising for sale, charging, constructing on and/or in any other manner howsoever interfering with the Plaintiff's ownership, title to, use and or possession of all that property situated and known as L. R. No. 3734/28 (hereinafter referred to as the "Suit Property") pending the hearing and determination of this application together with costs.

The Application is premised upon the grounds appearing on the face of it as well as the Supporting Affidavit of John Mugo Njeru, a Director of the Plaintiff, who swore that the Plaintiff is the registered proprietor of the Suit Property and that though the original title deed got lost, they obtained a Provisional Certificate of Title a copy of which they produced in evidence. He further stated that sometime in May 2013, the Defendant, without any colour of right illegally entered into the Suit Property, took possession thereof and posted his employees to guard it. He further stated that the Defendant has continued to occupy the Suit Property wrongfully despite their pleas to the Defendant to vacate the Suit Property. He further stated that the Defendant has gone ahead to commence the activity of washing cars on the Suit Property thereby denying the Plaintiff of their proprietary rights over the Suit Property.

The Application is not contested. Despite having been duly served, the Defendant did not file any papers in response to this application nor attend court at the hearing hereof.

In deciding whether 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 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."***

Looking at the facts of this case, the Plaintiff has produced a copy of their Provisional Certificate of Title to support their claim of ownership of the Suit Property.

Section 24(a) of the Land Registration Act provides as follows:

> ***"Subject to this Act, the registration of a person as the proprietor of land shall vest in that person the absolute ownership of that land together with all rights and privileges belonging or appurtenant thereto."***

Section 26 (1) of the Land Registration Act states as follows:

> ***"The Certificate of Title issued by the Registrar upon registration … 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."***

Going by the above provisions, I find that this is a relatively straightforward and simple case in which the Plaintiff has established that they are the duly registered proprietors of the Suit Property and that this court is duty bound to make this finding in these circumstances.

Does an award of damages suffice to the Plaintiff? Land is unique and no one parcel can be equated in value to another. The value of the Suit Property can be ascertained and there is a valid argument that damages would be available. However, it would not be right to say that the Plaintiff can be compensated in damages. I hold the view that damages are now 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) e KLR***.

Being not in doubt, I see no reason to determine in whose favour the balance of convenience tilts.

Arising from all of the above reasons, I find that the Plaintiff has reached the threshold for grant of an interlocutory injunction. I therefore allow their application with costs to the Applicant.

SIGNED AND DELIVERED AT NAIROBI THIS 4th DAY OF OCTOBER 2013

MARY M. GITUMBI

JUDGE