REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA AT NAIROBI

MILIMANI LAW COURTS

ENVIRONMENT AND LAND COURT

ELC. CASE NO. 930 OF 2013

LUCY NCHEBEERE……..……..PLAINTIFF

VERSUS

ROSE NDULULU MUSEE…...…….……...…….DEFENDANT

RULING

Coming up before me for determination is the Notice of Motion dated 30th July 2013 in which the Plaintiff/applicant seeks for orders of temporary injunction restraining the Defendant from interfering, constructing, mortgaging, selling, alienating the parcel of land known as Plot No. 90 Athi River registered as L.R No. 20480 (hereinafter referred to as the "suit property") pending the hearing and determination of this Application and suit. The Plaintiff/Applicant also seeks for an order that the OCS Mavoko Police Station to be directed to assist and ensure compliance with orders issued by this court and that the costs of this Application be awarded to the Plaintiff/Applicant.

The Application is premised on the grounds appearing on the face of it together with the Supporting Affidavit of the Plaintiff/Applicant, Lucy Nchebeere, sworn on 30th July 2013 in which she averred that her late sister Mary Marogu Ngove and herself were allotted the suit property by way of a Letter of Allotment dated 3rd December 1994 at a consideration of Kshs. 45,317/- which was payable within 30 days. She annexed a copy of that Letter of Allotment. She further averred that she wrote a letter dated 19th May 2010 to the Commissioner of Lands requesting to make payments in order to comply with the terms laid out in the Letter of Allotment dated 3rd December 1994. She further averred that upon receipt of her said letter, the Commissioner of Lands wrote to the District Land Administration Officer, Machakos requesting him to avail a current ground status of the suit property whereby it was revealed that the suit property had since been allotted to another person being the Defendant herein, Rose Ndululu Musee, on 26th November 1997. She annexed a copy of the Letter of Allotment dated 26th November 1997. She further averred that the Commissioner of Lands issued her with a fresh Letter of Allotment dated 4th October 2010 and advised her to proceed to pay the amount indicated which she did on 14th October 2010. She further averred that she came to learn that the suit property had been surveyed and a title issued to the Defendant/Respondent, Rose Ndululu Musee, on 28th July 2010. She annexed a copy of the said title deed. She further stated that upon this discovery, she wrote to the Commissioner of Lands requesting him to conduct investigations to the matter but that she received no response leading her to lodge a caveat against the suit property in order to preserve it. She further averred that she also came to learn that the Defendant/Respondent was a former employee of the Ministry of Lands and that she had colluded with her workmates to fraudulently obtain title and acquire the suit property which had been

initially allotted to her. She averred further that the Commissioner of Lands wrote to the Defendant/Respondent its letters dated 14th May 2012 and 21st May 2012 requesting her to return and submit the original title document and duly executed surrender documents as this was a case of double allocation. She confirmed having paid up the consideration for the suit property but that the Registrar of Titles had refused to issue her with a title document over the suit property.

The Application is contested. The Defendant/Respondent, Rose Ndululu Musee, filed her Replying Affidavit sworn on 7th October 2013 in which she averred that she is the legal owner of the suit property, the same having been allotted to her on 26th November 1997 by the Commissioner of Lands. She annexed a copy of her Letter of Allotment. She confirmed that upon acceptance of the allotment letter and the conditions therein, she duly paid the stand premium and other charges enumerated thereon as demanded. She further confirmed having paid land rent amounting to Kshs. 104,080/- and application fees of Kshs. 500/- upon which she was issued with a Grant for the suit property on 23rd August 2010 for a term of 99 years with effect from 1st December 1997. She annexed a copy of the Grant. She further added that she has continued to make timely regular payment of ground rent and other charges to the Mavoko Municipal Council (as it then was) and annexed copies of the payment receipts. She further averred that on 23rd September 2011 she entered into a sale agreement with a third party (Kiranga Produce Limited) for the sale of the suit property for a consideration of Kshs. 2 million upon which they discovered that the Registrar had entered a caveat on the suit property on 22nd February 2012. She further indicated that arising from this, she filed suit in ELC No. 702 of 2012 asking for the removal of the caveat, which suit is still pending determination. She confirmed that the said third party was now in possession of the suit property and has commenced developments thereon. She further added that it is true that she was an employee of the Ministry of Lands which does not bar her from owning property in the country. She confirmed that she retired in the year 2007. She further added that she had no capacity to allot the suit property to herself this being the preserve of the Commissioner of Lands.

Both the Plaintiff and the Defendant filed their written submissions which have been read and taken into account in this ruling.

In deciding whether to grant the temporary injunction sought after by the Plaintiff/Applicant, 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.”

The first ground is to determine whether or not the Plaintiff/Applicant has established a prima facie case. In this case, the Plaintiff/Applicant has based her claim of ownership over the suit property on a Letter of Allotment dated 3rd December 1994 a copy of which she produced to this court. The Plaintiff/Applicant further indicated that under that Letter of Allotment, she and her sister were required to pay a consideration of Kshs. 45,317/- which was payable within 30 days of the date of the letter. The said Letter of Allotment had the following condition:

> **"If acceptance and payment respectively are not received within the said thirty (30) days from the date hereof the offer herein contained will be considered to have lapsed."**

The Plaintiff/Applicant disclosed that it is only upon the death of her sister that she discovered that that consideration had not been paid as required. In fact, in her letter dated 19th May 2010 to the Commissioner of Lands which she annexed to her Supporting Affidavit, she stated as follows:

> **"The letter of allotment was under my late sister's custody (Mary Marigu Ngove). I thought she had paid as earlier pledged only to realize later after her demised that she had not done so and yet we have made quite a lot of improvements and development on the plot."**

In the circumstances, where does that glaring omission leave the Plaintiff/Applicant? There are several decisions that address this issue quite succinctly. In **Ahmed Obo versus Kenya Airport Authority ELC Case No. 141 of 2013**, the court stated as follows:

> **"The Plaintiff has not stated if he met the conditions in the letter of allotment dated 24th September 1998 which was an offer by the Government for land measuring 13.64 Ha. In the absence of evidence by the Plaintiff that he accepted the offer by paying the amount of money stipulated in the letter of offer, the Plaintiff cannot claim to have any proprietary rights over Plot "A" Manda that can be protected by the Constitution. The Constitution only protects existing rights."**

In the case of **John Mukora Wachichi & Others versus Minister of Lands & Others High Court Petition No. 82 of 2010**, the court had this to say:

> **"… the court observed that the distinction is based on the fact that the right to property under the law and Constitution is afforded to the registered owners of land, that a letter of allotment is not proof of title as it is only a step in the process of allocation of land."**

I will also quote the decision of the Court of Appeal in **Joseph Arap Ng'ok versus Justice Moijo Ole Keiwua Nai Civil Application No. 60 of 1997** where it stated as follows:

> **"It is trite that such a title to landed property can only come into existence after issuance of the letter of allotment, meeting the conditions stated in such letter and actual issuance thereafter of the title document pursuant to the provision of the Act under which the property is held."**

Going by these decisions, it is quite clear that the Plaintiff/Applicant had failed to demonstrate that she indeed satisfied the conditions laid out in her letter of allotment as a first step towards becoming the registered proprietor of the suit property. On the other hand, the Defendant/Respondent not only produced her Letter of Allotment dated 26th November 1997, she also produced her title document for the suit property. The title document was issued under the provisions of the **Registration of Titles Act** Cap 281 Laws of Kenya (now repealed). **Section 23(1)** of the **Registration of Titles Act** (repealed) provides as follows:

> **"The certificate of title issued by the registrar to a purchaser of land upon a transfer … shall be taken by all courts as conclusive evidence that the person named therein as proprietor of the land is the absolute and indefeasible owner thereof … and the title of that proprietor shall not be subject to challenge, except on the ground of fraud or misrepresentation to which he is proved to be a party."**

The Land Registration Act No. 3 of 2012 under **section 26(1)** more or less reproduces the provisions of **section 23(1)** of the **Registration of Titles Act** (supra) save that it extends the grounds on which a registered title could be challenged to include where the title has been acquired illegally, unprocedurally or through a corrupt scheme.

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."**

The Plaintiff/Applicant did plead particulars of fraud by the Defendant in obtaining her title document over the suit property but I must say that proof of the same has not be produced to this court to enable me to agree with that. At this stage of these proceedings, I find that the Plaintiff/Applicant has failed to establish that she has a genuine and arguable case and therefore 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 steps to be followed in the enquiry into whether to grant an interlocutory injunction is … sequential so that the second condition can only be addressed if the first one is satisfied…"**

In light of the foregoing, I hereby dismiss this Application. Costs shall be in the cause.

DELIVERED AND SIGNED IN NAIROBI THIS 29TH DAY OF MAY 2015.

MARY M. GITUMBI

JUDGE