REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA AT NAIROBI

CIVIL CASE NO. E146 OF 2020

MARIAKANI ESTATE WELFARE ASSOCIATION

(SUING THROUGH ITS VICE

CHAIRPERSON AGGREY OWITI).....PLAINTIFF

VERSUS

LOCAL AUTHORITY PROVIDENT FUND.....1ST DEFENDANT

PREVIEW REALTORS LIMITED.....2ND DEFENDANT

BEELINE AUCTIONEERS.....3RD DEFENDANT

NAIROBI METROPOLITAN SERVICE.....INTERESTED PARTY

RULING

By their Notice of Motion dated 16th October, 2020 the plaintiffs are seeking the following orders:-

a) THAT this Honourable Court be pleased to issue orders restraining the Respondents or their agents from attaching and / or selling any property of the residents of Mariakani Estate erected on the land Known as Land Reference Number 209/6612 pending hearing and determination of this Application.

b) THAT this Honourable Court be pleased to issue orders restraining the Respondents or their agents from instituting any actions aimed at levying distress of rent against the residents of Mariakani Estate erected on the land Known as Land Reference Number 209/6612 pending hearing and determination of this Application.

c) THAT this Honourable Court be pleased to issue orders restraining the Respondents or their agents from evicting or in any way interfering with the quiet possession by the residents of Mariakani estate of their respective houses developed on Land Reference Number 200/6612 pending hearing and determination of this Applications

d) THAT this Honourable Court be pleased to issue orders restraining the Respondents or their agents from attaching and / or selling any property of the residents of Mariakani Estate erected on the land Known as Land Reference Number 209/6612 pending hearing and determination of the suit filed herewith

e) THAT this Honourable Court be pleased to issue orders restraining the Respondents or their agents from instituting any actions aimed at levying distress of rent against the residents of Mariakani Estate erected on the land Known as Land Reference Number 209/6612 pending hearing and determination of the suit file herewith.

f) THAT this Honourable Court be pleased to issue orders restraining the Respondents or their agents from evicting or in any way interfering with the quiet possession by the residents of Mariakani estate of their respective houses developed on Land Reference Number 209/6612 pending hearing and determination of the suit filed herewith.

g) THAT the officer Commanding Industrial Area Police station does ensure compliance with the orders herein.

h) THAT costs of this Application be borne by the Plaintiff / Respondent.

The application is founded on the supporting grounds and a further affidavit sworn by **AGGREY OWITI** on 25th January, 2021. The 1st respondent filed a replying affidavit sworn by **DAVID KOROS** on the 4th day of May, 2021. The 2nd defendant filed a replying affidavit sworn by **JAMES GACHERU MACHARIA** on 6th May, 2021. Parties agreed to determine the application by way of written submissions.

The appellant submit that the property in dispute originally belonged to the Nairobi City Council before it was transferred to the 1st respondent through Petition Number 199 of 2018. Despite that transfer, when power was transited from the Nairobi County Government to the Nairobi Metropolitan Services (NMS), the Kenya Revenue Authority was mandated by NMS to collect the rent and this was a surprise to the appellant's members. This led to payment of rent to the Interested Party. Counsel for the applicant contend that the applicant has established a *prima facie* case with a probability of success. Counsel relies on the case of **MRAO –V- FIRST AMERICAN BANK OF KENYA LIMITED & 2 OTHERS (2003) KLR 125** where the court stated:-

> **"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."**

It is submitted that the mix up as to who should collect the rent from the residents jeopardizes their right to quiet and peaceful possession of the property. The presence of the residents who are tenants in the premises establishes a *prima facie* case. The tenants only required official communication from the 1st defendant which was essential in cementing the landlord-tenant relationship between the plaintiff and the 1st defendant.

On the issue of irreparable loss that cannot be compensated by an award of damages, it is submitted that the applicant has been paying rent to the interested party through the KRA who are the interested party's agent. The entire estate is on the verge of dissolution and eviction of the tenants because the respondents have refused to clarify on who should receive rent for the legal owner of the estate. The applicant's members have lived in the estate for over five decades some of them were born and raised in the estate.

It is further submitted that the balance of convenience favours the applicant as its members will be more inconvenienced if an order of injunction is not granted. Counsel referred to the case of **PIUS KIPCHIRCHIR KOGO –V- FRANK KEMEI TENAI Eldoret ELC No. 221 of 2017 (2018) eKLR** where the court held:-

> **"The court should issue an injunction where the *balance of convenience* is in favour of the plaintiff and not where the balance is in favour of the opposite party. The meaning of *balance of convenience* in favour of the plaintiff is that if an injunction is not granted and the suit is ultimately decided in favour of the plaintiffs, the inconvenience caused to the plaintiff would be greater than that which would be caused to the defendants if an injunction is granted but the suit is ultimately dismissed. Although it is called balance of convenience it is really the *balance of inconvenience* and it is for the plaintiffs to show that the inconvenience caused to them would be greater than that which may be caused to the defendants. Should the inconvenience be equal, it is the plaintiffs who suffer. In other words, the plaintiffs have to show that the comparative mischief from the inconvenience which is likely to arise from withholding the injunction will be greater than which is likely to arise from granting it."**

According to the applicant, they found it strange when the 2nd defendant started demanding rent without any official communication from the 1st defendant. It is also submitted that the plaintiff is in limbo as to who is the actual owner of the property known as LR 209/6612. The interested party had demanded rent through KRA while the 1st defendant has threatened to proclaim the tenants' properties through the 2nd and 3rd defendants.

Counsel for the 1st defendant submit that the 1st defendant is the lawfully registered proprietor of Land Reference Number 209/6612 where Mariakani Estates is located. The plaintiffs are tenants in the estate. It is further submitted that the property was transferred to the 1st respondent so that it could recover monthly contributions that were deducted from the employees of the defunct Nairobi City Council but not remitted to the 1st defendant. The transfer was meant to facilitate a debt swap and the plaintiffs are fully aware of that position. The transfer instruments were registered on 3rd April, 2013. It is argued that vide a letter dated 12th January, 2018 all the tenants were notified that the rent would be paid to the 1st respondent. The plaintiff was opposed to the transfer and instituted suits challenging the change of ownership of the property. This led to a consent recorded in court on 22nd July, 2016 whereby the plaintiff and its members acknowledged that the property belongs to the 1st respondent. Counsel for the 1st respondent further submits that an attempt was made to set aside the consent, vide constitutional petition number 199 of 2018 but the same was dismissed by Justice Weldon Korir in his judgment delivered on 30th April, 2020.

Counsel for the 1st respondent further contend that the applicants are fully aware that rent is payable to the first respondent and their allegation that there is no clear communication from the 1st respondent cannot be true. The plaintiff has accumulated rent arrears and the 1st defendant was exercising its right as the registered owner to levy distress Counsel referred to the case of **JULIUS MOGAKA GEKONDE T/A E-SMART TECHNICAL COLLEGE –V- OURU POWER LTD & ANOTHER (2016) eKLR** where the court held:-

> **"I find that once the Plaintiff has acknowledged that he is indeed in arrears of rent, it means that he is in breach of the most critical term of their tenancy agreement and being a defaulting party, he cannot be seen to approach the court for an order of injunction which is an equitable relief/remedy only available to parties who come to court with clean hands."**

It is also submitted that the applicants have not fulfilled the conditions for granting injunctive relief. Counsel relies on the case of **GIELLA –V- CASSMAN BROWN & CO. LIMITED (1972) E.A, 358** where the court held:-

"First, an applicant must show a *prima facie* case with a probability of success. Secondly, an interlocutory injunction will not normally be granted unless the applicant might otherwise suffer irreparable harm, which would not adequately be compensated by an award of damages. Thirdly, if the court is in doubt, it will decide an application on a balance of convenience."

The second respondent opposes the application. Counsel for the 2nd respondent submit that the plaintiffs/applicants individually entered into an agreement where they were to honour their contractual obligations to pay rental arrears every month to the 1st defendant. The 2nd defendant is the 1st defendant's agent who was tasked with the responsibility of collecting the rent arrears. It is also submitted that the applicants have failed to comply with the lease conditions which require payment of rent. Counsel also relies on the case of **GIELLA –V- CASSMAN BROWN** (supra). It is contended that the applicants have no *prima facie* case with a probability of success. They are seeking equity yet they have not acted equitably. They have not paid their rent yet they continue to enjoy peaceful occupation of the premises.

The principles for granting temporary injunctions are well established. The applicant has to establish a prima facie case with a probability of success, the applicant has to show that an irreparable injury will be suffered if the orders of injunction are not granted and where the court is in doubt as to whether or not to grant an injunction, the balance of convenience is to be considered.

In the case of **TRICOR ENTERPRISES LTD & 2 OTHERS –V- MWOK –HANDA (1990) KLR, 475,** Mango J (as he then was) held:-

1. An applicant must show a *prima facie* case with a probability of success before an injunction can be granted.

2. An injunction will not normally be granted unless the applicant might otherwise suffer irreparable injury.

3. The burden is on the applicant to show, on the preponderance of a probability, that he has a *prima facie* case with probability of success and that he might suffer irreparable injury if the injunction is not granted.

4. Where the Court is in doubt on whether or not to grant an injunction, it will decide the application on the balance of convenience.

The above principles have been reiterated in several cases involving applications for injunctions. In the case of **ORANO & ANOTHER –V- MISTRI & OTHERS (1990) KLR 45**, Msagha Mbogholi J (as he then was) held:-

"The conditions for the grant of an interlocutory injunction are set out in the case of Giella v Cassman Brown [1973] EA 358. The applicant must show a *prima facie* case with a probability of success or that if the injunction is not granted the applicant will suffer irreparable injury that cannot be compensated by an award of damages. If in doubt the court shall decide the application on the balance of convenience."

In the case of **KAMAU –V- JAFFER (1991) KLR 294,** the landlord issued a notice terminating the tenancy. Even before the notice expired, the landlord forcefully entered the premises since the tenant had rent arears. The court granted an order of injunction and held (Mbito J, as he then was) as follows:-

"1. The principles on which the court acts in such cases are now well settled.

They are:

a) An applicant should show a *prima facie* case with a probability of success.

b) The applicant should show that he would suffer irreparable loss which cannot be adequately compensated by damages.

c) If in doubt, the court should act on the balance of convenience.

2. At the time of interference the notice had not expired and entry was obtained by use of guards. Consequently, the applicant had a prima facie case with likelihood of success.

3. In present day Nairobi with acute shortage of middle class accommodation, a tenant who has been in premises for nearly 20 years could not be adequately compensated by damages.

4. Since the interference with possession was due to the superior force of security guards, the balance of convenience was on the part of the applicant as the alleged third party could remain wherever he was and the respondent's interest could be secured by an undertaking in damages."

The applicant's main contention in the application is that they do not know who between the 1st defendant and the Interested party is legally entitled to be paid the monthly rent. They are willing to pay the rent but there is confusion since the Interested Party instructed the Kenya Revenue Authority to collect the rent on its behalf.

On its part the 1st defendant reiterate that the plaintiff and its members are fully aware that rent is to be paid to the 1st defendant. Annexed to

the affidavit of David Koros is a notice dated 12th January, 2018. The notice reads as follows:-

> **"All Tenants,**
>
> **Mariakani Estate South B.**
>
> **NAIROBI**
>
> **RE: NOTICE OF PAYMENT OF RENT (MARIAKANI ESTATE SOUTH B - LR. NO.209/6612)**
>
> **LAPFUND is a body Corporate established by an Act of Parliament Cap 272 to manage retirement benefits for employees of County Governments and associated companies in Kenya, Employees of Nairobi City County Government are members of LAPFUND.**
>
> **The defunct City Council of Nairobi failed to remit monthly employee pension deductions to LAPFUND and a substantial amount of debt was accumulated that resulted into a payment negotiation interceded by the Ministry of Local Government. A debt property swap arrangement was entered into and hence the transfer of the Mariakani Estate South B (L.R. No. 209/6612) to LAPFUND on 3rd April 2013.**
>
> **This is therefore to inform you that, LAPFUND is the registered legal owner of MARIAKANI ESTATE SOUTH B (LR. NO. 209/6612) with effect from 3rd April 2013. It has come to our notice that a number of tenants have not been paying the monthly rental dues to the rightful owner. You are now reminded to ensure that rent is paid to LAPFUND and NOT to Nairobi City County Government on the due date.**
>
> **However, it is important for you to note that the rate of rent payable to LAPFUND remains the same as what you had been paying to the County Government of Nairobi till further notice.**
>
> **Your cooperation on this matter is paramount.**
>
> **LEBOO OLE MORINTAT, OGW**
>
> **AG. COUNTY SECRETARY"**

The 1st defendant maintain that the above letter was circulated to all the tenants and they are aware as to who is entitled to collect the rent. There are several other letters addressed to all the tenants while others are addressed to the individual tenants personally. The flat number is indicated. Such letters include one dated 27th September, 2016 addressed to all tenants and the subject is payment of Rent. Letters to individual tenants occupying flat numbers 57, (David Elija Owiti) and House number 001-240 were exhibited by the 1st respondent. The plaintiff filed a further affidavit sworn by Aggrey Owiti on 25th January, 2021. The said affidavit annexed some rent payment receipts issued by the 1st defendant. It is therefore established that the plaintiff and its members have been aware of the claim for rent by the 1st defendant and some members started paying the rent as claimed.

Apart from the above notice, there is the issue of a consent recorded in court whereby the applicant acknowledged that the 1st defendant is the lawful landlord. The applicants were listed as first interested parties in Constitutional petition number 199 of 2018. Paragraph 60 of Justice Weldon Korir's judgment in that matter delivered on 30th April, 2020 states as follows:-

> **"I have already held that the issues raised herein are the issues that were raised in the Environment & Land Court matter. The question is whether that matter has been determined. The answer is in the affirmative. By the time the Petitioner instituted this matter, that suit had been determined by the consent entered before Gitumbi, J in the following terms:-**
>
> > **1. THAT the Applicant, Mariakani Estate Welfare Association acknowledges that the suit property LR No. 209/6612 comprising 240 housing units otherwise known as Mariakan? Estate is hereby validly registered in the Name of LAPFUND, the Interested Party herein.(emphasis added)**
> >
> > **2. THAT Lapfund shall henceforth continue to manage the Estate and receive rents from the valid tenants of the Estate. (emphasis added)**
> >
> > **3. THAT Mariakan? Estate Welfare Association (MEWA) acknowledges the Transfer dated 18 March 2013 as having legal validity.**
> >
> > **4. THAT the tenants of Mariakani Estate who are members of Mariakani Welfare Association to continue their stay as valid tenants from the date of this Consent**
> >
> > **5. THAT Lapfund (The 1" Interested Party) as Legal Owner of LR No. 209/6612 shall henceforth enter into legal agreements/Leases with the Tenants who are members of Mariakani Welfare Association (MEWA). The Tenants shall be afforded the first option to purchase in the event of a sale**

6. THAT the County Government of Nairobi shall upon the execution of this Agreement cease to have any lien on LR No. 209/6612 or to collect Rent or proceeds from the sales of the housing units.

7. THAT the Rent due for the first 12 months from the Tenants shall be paid directly to an Escrow A/C in the joint names of the Legal Representatives of Mewa and Lapfund.

8. THAT there be liberty to apply."

It is common knowledge that rent is payable to the Landlord or his appointed agent. The terms of the consent recorded before Justice Gitumbi of the Environment and Land Court did clear the issue of who was to receive the rent. The plaintiff cannot allege that KRA requested payment of the rent on behalf of the NMS. That request was not a court order. The plaintiff and its members seem to be challenging the ownership of the estate by the 1st defendant. They went ahead and filed an application dated 10th October, 2016 seeking to set aside the consent. Justice B.M. Eboso in his ruling dated 13th December, 2018 dismissed the application. Paragraph 3 of that ruling reads as follows:-

"The case of the applicant is contained in the joint affidavit in support of its application sworn on 10/10/2016. Its case is that prior to the acquisition of Mariakani Estate by the Local Authorities Provident Fund (the Provident Fund), the Estate belonged to the City Council of Nairobi and the residents were therefore tenants of the City Council. Aggrieved by the acquisition of the Estate by the Provident Fund, the Association through M/s Tengo W. Mandara & Co Associates Advocates brought a judicial review motion seeking to quash the disposal and to prohibit the County Government and the Provident Fund against disposing the Estate. The Association is aggrieved by the consent recorded by its advocates on instructions of its officials. It contends that the consent order was obtained through collusion, mischief and without authority and/or instructions from it. Consequently, it urges the court to set aside the consent order."

The consent therefore subsist and the plaintiff has to live by it. The plaintiff's only interest should be payment of the rent and the welfare of its members. In my view it would be imprudent for the plaintiff to try to chose who should be its landlord. Section 121 of the Evidence Act states as follows:-

"No tenant of immovable property, or person claiming through such tenant, shall, during the continuance of the tenancy, be permitted to deny that the landlord of such tenant had at the beginning of the tenancy a title to such immovable property; and no person who came upon any immovable property by the licence of the person in possession thereof shall be permitted to deny that such person had a right to such possession at the time when the license was given."

In the case of **RODSETH –V- SHAW (1967) E.A, 833, Farreli J** (as he then was) stated as follows at page 835:-

"I propose to deal very shortly with the challenge to the plaintiff's title as land lord. I had always regarded it as elementary law that a tenant cannot be permitted to impugn his landlord's title. There may be exceptions and qualifications to the generality of the rule, but the rule itself is clearly set out in s. 121 of the Evidence Act, which so far as material reads as follows:

"No tenant of immovable property……. shall, during the continuance of the tenancy, be permitted to deny that the landlord of such tenant had at the beginning of the tenancy a title to such immovable property. .."

Counsel for the defendant nevertheless argues that at the time when the plaintiff gave the defendant notice to quit she had no title to the property. He concedes that nothing had happened to detract from her title between the commencement of the tenancy and the date of the notice, and he relies on something which he alleges to have happened some 10 years before the commencement of the tenancy. It would be difficult to imagine a more flagrant disregard of the principle embodied in the section, and I propose to say nothing further about it."

There is no mix up in the issue of where rent is payable. It appears to me that the plaintiff is extending its objection to the ownership of the property by the 1st defendant by frustrating the smooth collection of rent. Any opportunity which raises some issue on where the rent should be paid is hurriedly embraced by the plaintiff and its members stop paying rent to the 1st defendant. This has contributed to the accumulation of rent arrears. The plaintiff was a party to the case before Justice Gitumbi. The plaintiff filed an application before Justice Eboso seeking to set aside a consent. The plaintiff was enjoined as the 1st interested party in constitutional petition number 199 of 2018 before Justice Weldon Korir. The plaintiff has now filed the current suit. Since 2018 the plaintiff has been in court and cannot claim that there is confusion and mix up on the issue of legal ownership of the estate. The Transfer of powers to NMS is a time bound agreement and does not affect the 1st defendant's ownership of the estate. Indeed when the NMS came into operations, the property was already owned by the 1st defendant and the Nairobi City County Government could not transfer what it did not own or control to NMS.

I therefore find that no *prima facie* case with a probability of success has been established by the plaintiff. Eviction from premises for non-payment of rent cannot result to irreparable damage irrespective of the long period of time the tenant would have resided in the premises. The plaintiff's contention that some tenants were born at the estate while others have lived there for over fifty (50) years cannot give rise to ownership of the premises by the tenants through adverse possession. The plaintiff and its members have all along recognized their position as tenants and not the owners of the estate. The plaintiff and its members cannot pray for quite enjoyment of the leased premises without paying rent. The landlord will always come knocking on their doors seeking monthly rent and failure to pay the rent leads to distress being levied. Mariakani Estate cannot be a residential estate where the tenants stay for free. The tenant knows where to pay the rent.

In order to avoid any future claim of mix up or confusion, I do find and hold that rent for Mariakani Estate in Nairobi City County shall be paid to the 1st defendant – Local Authorities Provident Fund (LAPFUND). The first defendant cannot fulfil its obligation to pay pension to retired members of the Nairobi City Council without receiving income from its properties.

On the issue of balance of convenience, I still find that no inconvenience will be caused to the plaintiff if the orders of injunction are not granted. The plaintiff cannot re-litigate on the issue of ownership of the estate and ask the court to stop a landlord from levying distress despite non-payment of rent. Non-payment of rent will always lead to inconvenience. The landlord is more inconvenienced by non-payment of rent than the tenant.

The upshot is that the application dated 16th October, 2020 lacks merit and is hereby dismissed with costs.

DATED AND SIGNED AT NAIROBI THIS 27TH DAY OF SEPTEMBER, 2021.

…….

S. CHITEMBWE

JUDGE