



REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA AT NAIROBI

MILIMANI COMMERCIAL & TAX DIVISION

CIVIL CASE NO. 131 OF 2015

ANITA CHELAGAT O'DONOVAN.....1ST PLAINTIFF/RESPONDENT

ESTATE OF TERENCE PETER O'DONOVAN.....2ND PLAINTIFF/RESPONDENT

ESTATE OF JOYCE JEROTICH O'DONOVAN....3RD PLAINTIFF/RESPONDENT

VERSUS

FREDRICK KWAME KUMAH.....1ST DEFENDANT/APPLICANT

ZIPPORAH WAIRIMU WANJOHI.....2ND DEFENDANT/APPLICANT

NATIONAL BANK OF KENYA LIMITED.....3RD DEFENDANT/APPLICANT

RULING

1. The ruling relates to a notice of motion application dated 16th January 2018. The motion does not indicate the provisions under which it is premised. However, the Applicants are seeking for orders that;

(a) The Honourable court be pleased to issue an order compelling the plaintiffs, their agents and or servants to forthwith give vacant possession of the property known as Nairobi Block 90/143 Loresho South (herein " the suit propert") to the 1st and 2nd defendants;

(b) In the event, the plaintiffs fail to give vacant possession an eviction order do issue against them in respect of the suit property herein, Nairobi Block 90/143 Loresho South and the eviction order be executed by bailiffs of the Honourable Court or any other authorized firm of auctioneers with the assistance of the Officer Commanding Muthangari Police Station Nairobi;

(c) This Honourable Court do issue a permanent injunction restraining the plaintiffs from trespassing upon, engrossing into or in any other manner interfering with the 1st and 2nd defendants possession and ownership of the property;

(d) Any other orders do issue as the Honourable Court may deem fit and just;

(e) Costs of the application be provided for.

2. The application is premised on the grounds on the face of it and an affidavit in support dated 16th January 2018, sworn by Fredrick Kwame Kumah, the 1st defendant (herein "the 1st applicant"). He deposed that, at all material times, the late Peter O'Donovan and the late Joyce Jerotich O'Donovan were the registered proprietors of the subject suit property and upon their demise; the property was vested in their heirs the 2nd and 3rd Plaintiffs (herein the "2nd and 3rd Respondents").

3. That the 1st Plaintiff (herein "the 1st Respondent") borrowed money from the 3rd Defendant (herein "the 3rd Respondent") and provided three (3) properties as security namely: LR Nairobi Block 209/11315, LR Nairobi Block 209/11316 and Nairobi LR No. 90/143. Subsequently, she defaulted in repaying the secured amount and pursuant to the exercise the chargee's statutory property power of sale, the 3rd Respondent sold and transferred the Loresho property to the 1st and 2nd Defendant (herein "the Applicants") and the suit property registered in their names. Therefore the Applicants are entitled to vacant and undisturbed possession of the property.

4. It is averred that, the Respondents' filed an application dated 18th March 2015, seeking for a permanent injunction to restrain the 3rd

Respondent from selling or advertising for sell the suit property and from; evicting the Applicants from the property, entering or levying distress thereon or interfering with their quiet possession.

5. However, the application was dismissed on grounds that the Respondents had not established a prima facie case with a probability of success and neither had they been able to show that they would suffer irreparable loss that may not be adequately compensated for an award in damages. The costs were awarded to the 3rd Respondent and the Applicants. That the finding of the court was based on the finding that, the suit property had been transferred and registered in the names of the Applicants.

6. However, the Plaintiffs/Respondents being dissatisfied with that decision, filed an appeal which was heard and dismissed with costs vide a judgment dated 10th November 2017, upon the Court of Appeal, concurring with the decision of the High Court that, the Appellant had not established a prima facie case with a probability of success. Even then, despite the ruling dismissing the appeal and demands to vacate the suit premises, the 1st to 3rd Plaintiffs/Respondents continue to stay on the suit premises.

7. The Applicants argue that the suit property has been a subject of litigation for long and has occasioned them serious loss, damage and inconvenience having purchased the same in utmost good faith and holding a good title thereto. Therefore, they have been left with no option but to rent a house for which they pay so much rent.

8. The application was supported by the 3rd Defendant/Respondent's Bank through an affidavit dated 29th January 2018, sworn by its legal officer Yasmin Josephine. She joined issues with the Applicants on the facts that, the 1st Respondent borrowed money from the bank and provided three (3) properties referred to herein as security. Subsequently, she defaulted in repaying the secured amount and the bank sold and transferred the Loresho property to the Applicants. It was argued that the issue of right to exercise statutory power of sale was fully dealt with in High Court Civil Case No. 333 of 2008, which upheld the right of sale of subject suit property.

9. That the court held in the High Court Civil Case No. 333 of 2008, that there was no dispute as to the issuance of statutory notices and that the bank issued the notices dated the 24th October 2013, handed to Jactone Oyla Owidhi, a process server, for service upon the 2nd Respondent and an affidavit of service filed to that effect. The other guarantors were served vide registered mail. Even then almost six good months down the line up to the 15th April 2014, the Respondents had taken no action as per the statutory notices. The bank then instructed Legacy Auctioneering Services to serve the 2nd and 3rd Respondents with a Forty five (45) days Redemption notice, which was served and a notification of sale also duly served upon the 2nd Respondent herein by registered post.

10. On 5th June 2014, the Administrators of the Estate of the 2nd and 3rd Respondents obtained stay orders for thirty (30) days only. The Respondents were encouraged to hold talks with the bank with a view of paying off the outstanding amounts. By a letter dated 5th June 2014, the 1st Respondent's Administrator wrote to the bank making inter alia, a conditional offer to pay Kshs. 8,000,000 followed up by a letter dated 27th June 2014. However the 3rd Defendant/Respondent vide letters dated 20th June 2014 and 8th July 2014, categorically declined the conditional offer and informed the Respondents to redeem the suit property at market rates based on the then current valuation. The Respondents were also invited to undertake an independent valuation of the suit property.

11. However, the Respondent took no steps to redeem the suit property thereafter and the suit property was sold to the Applicants. Therefore, the Respondents should vacate the suit premises forthwith. The 3rd Defendant averred that even after the realization of the suit property, the Respondents are still indebted to it to the tune of Kshs. 87,467,522.52 and have taken no steps to liquidate the same.

12. The application was opposed by the Respondents; vide a Replying affidavit dated 7th February 2018, sworn by Brenda O'Donovan, on her own behalf and on behalf of her sister, Anita O'Donovan who is the Co-Administrator of Terence Peter O'Donovan, her father who died on 1st August 2008 and Joyce O'Donovan, her mother who died on 23rd November 2013.

13. She averred that, the subject suit property LR No. Nairobi Block 90/143 Loresho South has been their late parents and their family home since 1979 and the late parents are the registered owners thereof. The Respondents are currently, in occupation. That on or around 3^{1st} January 2015, the Applicants send a horde of thugs who descended upon the property and attempted to forcefully and unlawfully evict them. The thugs caused extensive material damage to the property including the gate, fence and stole valuable items.

14. The Respondents argue that the 3rd Defendant/Respondent's interest in the Loresho home has been impugned and is the subject of ongoing proceedings in the Court of Appeal; in Civil Appeal No. 300 of 2015, which involve the Respondents and the 3rd Defendant. The Respondents are challenging the 3rd Defendant's attempt to exercise statutory power of sale over the suit property and another property comprised in LR Nairobi/Block 209/11316 (hereinafter "the Industrial area properties"). The Respondents argued that they did not receive the requisite notices or any other notices from the 3rd Defendant, as required by law under the provisions of the Lands Act 2012. Thus any dealings in the suit property, including the attempt to evict them is un-procedural and unlawful. The Respondents argued that the suit filed raises legitimate matters to be adjudicated and determined and therefore the eviction should await these determinations.

15. Further, the Appeal No, 45 of 2014, raises the following issues for determination, inter alia:-

a) The only amount secured against Loresho home is up to a maximum of 6 million which the 3rd Defendant unlawfully exaggerated to fetter the plaintiff's option to redeem where necessary;

b) The sale was completely illegal because:-

i) The auction notices were missing in some instances and invalid in other instance and did not allow for private sales. The 1st and 2nd Defendant's claims are based on alleged private treaty, which was not lawfully conducted;

ii) *The negotiations to try and settle the account with the 3rd Defendant were frustrated by false escalation of the debt allegedly owed by the 3rd Defendant to ensure it was not attainable;*

iii) *The first knowledge the Plaintiffs had of the sale was when the 1st and 2nd Defendants illegally broke into the house without a warrant or eviction order. This was the first time they had even viewed the house. This shows they must have known that there were issues with the sale and it was not clean;*

iv) *That the 1st and 2nd Defendants make the false claim that the house looked unoccupied. This is untrue as there is always someone at home, there is a well-fed dog, perfectly maintained gardens and an active electricity supply;*

v) *In clear evidence of knowledge that they were pursuing unfounded cause the 1st and 2nd Defendants despite knowing that the house is not in the jurisdiction of Muthangari Police Station but Spring Valley Police, attempted to use Muthangari police station. They later made an irregular retrospective entry to their incident book post eviction.*

16. The Respondents argued that owing to the unprocedural and contested handling of accounts and the sale by the 3rd Defendant, they have suffered not only commercial loss, but also emotional loss part of which explains the deaths of the father and the mother. The violent unlawful eviction has created pervasive fear of invasion, attack and damage to the family who live in near permanent fear since 30th January 2015. In any event the 1st and 2nd Defendants/Applicants have made a counter-claim for eviction in their reply to defence and counter-claim hence the orders of eviction should wait the conclusion of the case.

17. The 1st and 3rd Respondents also filed a preliminary objection to be heard and determined in limine. The objection is the effect that the Honourable Court cannot grant the orders sought at an interlocutory stage of the underlying suit and counterclaim.

18. The Applicants filed a further affidavit dated 20th February 2018, sworn by Fredrick Kwame Kumah, who deposed that, the Respondents have either misunderstood the basis and purport of their application or have decided to deliberately misrepresent the issue in contention. It was argued that there is a deliberate attempt by the Respondents to distort the issue for determination under the Application and re-litigate issues which were the subject of the High Court's ruling delivered on 21st October 2015 and the Judgment by the Court of Appeal delivered on 10th November 2017, thus abusing the Court process in an attempt to prolong their unlawful occupation of the suit property.

19. That there is no pending Appeal as alleged the Judgment in Civil Appeal No. 300 of 2015 having been delivered on 10th November 2017. That the Applicants have a right to approach the Honourable Court for reliefs as the registered owners of the suit property and the alleged protection sought by the Respondents finds no basis in law. Finally it was argued that the preliminary objection does not properly constitute a preliminary objection and cannot therefore be sustained.

20. The 2nd Respondent supported the preliminary objection and relied on the same facts as deposed in the response to the application and argued inter alia that; the Applicants are not purchasers and have no bona fide interest in the parcel of land, as they did not get good title from the 3rd Defendant as the sale was unlawful. The issue of ownership and eviction is still live in court and should be determined before orders sought are granted. The grant of orders of eviction would be unfair as they would amount to granting the Applicants summary judgment outside the proper legal framework and render the Respondent's suit substantially nugatory.

21. The parties disposed of the Application and the preliminary objection by filing submissions. The Applicants filed submissions dated 6th February 2018 and argued that, the preliminary objection is based on misconception as to the difference between jurisdiction and the standard required to be met in relation to mandatory injunctions. That the Honourable Court has jurisdiction to grant mandatory injunction at any stage where special circumstances have been demonstrated. The Applicants relied on inter alia cases of; the Court of Appeal decision of; *Magnate Ventures Limited v Eng Kenya Limited [2009] eKLR*, where the Learned Judges (Visram, Waki and Bosire JJ.A as they then were) stated that, generally the paramount consideration before a Court can grant a mandatory injunction, at interlocutory stage is the existence of special circumstances in clear cases. That all in all, it is a decision dependent on the discretion of a Judge and each case must be decided on the basis of its own peculiar facts and circumstances.

22. Further reliance was based on the case of; *Shariff Abdi Hassan v Nadhif Jama Adan [2006] eKLR* where on Justices E.M. Githinji, J.W. Onyango Otieno & R.S.C Omolo JJAs (as they then were), held that although the Courts have been reluctant to grant mandatory injunction at the interlocutory stage. However, where it is prima facie established as per the standards spelt out in law that the party against whom the mandatory injunction is sought is on the wrong, the Courts have taken action to ensure that justice is meted out without the need to wait for full hearing of the entire case.

23. The Applicants then invited the Court to determine the following issues:-

(i) *Whether the Court of Appeal and the High Court have pronounced themselves on remedies available to the Plaintiffs.*

(ii) *Whether the 1st and 2nd Defendants are entitled to vacant possession of the property as registered owners.*

(iii) *Whether the 1st and 2nd Defendants are in totality, entitled to the orders sought.*

24. The Applicants submitted that the Court of Appeal judgment delivered with regard to the matter in question settled the question of remedies available to the Respondents, which the Court was categorical are not against the Applicants. That Section 24(a) of the Land Registration Act, No.3 of 2012, of the laws of Kenya and submitted that, 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.

25. Similarly Section 26(1) of the Land Registration Act, further states that a certificate of title is considered as conclusive proof of ownership. It stipulates that:-

“26. (1) The certificate of title issued by the Registrar upon registration, or to a purchaser of land upon a transfer or transmission by the proprietor 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, subject to the encumbrances, easements, restrictions and conditions contained or endorsed in the certificate ...”

26. The Applicants reiterated that their rights as the purchasers is recognized under section 98 (4) of the Land Act, which states that, registration of the land or lease or other interest in land sold and transferred by the chargee passes the interest of the chargor as described therein and vests it in the purchaser free of all liability on account of the charge. Further Section 99 of the Land Act, provides for protection of the purchaser who purchases charged land from the chargee or receiver. Under sub-section 2, a purchaser is not obliged to inquire whether there has been a default by the chargor or whether any notice required to be given in connection with the exercise of the power of sale has been duly given or whether the sale is otherwise necessary, proper or regular and under subsection (4). That a person alleging improper or irregular exercise of the power of sale shall have a remedy in damages against the person exercising that power.

27. It was further submitted that, the Applicants have proved that they are the registered owners of the suit property and should have physical occupation thereof and if the Respondent will suffer any prejudice they will be compensated in damages. The Applicants relied on several authorities inter alia; *Cheruiyot v Bartiony [1988] eKLR* where it was held that one of the acknowledged rights of ownership of land is the right to its possession. It was argued that the continued occupation by the Respondents on L.R Nairobi/ Block 90/143 Loresho South violates the Applicants' right to property recognized under Article 40 of the Constitution of Kenya and the Court ought to protect them. That as the Applicants has proved lawful ownership of the property they are entitled to vacant and a mandatory injunction.

28. The 3rd Defendant filed its submissions and fully associated itself with the Applicants submissions both on law and facts. It was submitted that, the Applicants should be granted vacant possession to the property as the court has already determined that they are the registered owners, since they have indefeasible title the suit property. The case of; *Simmers Plaza Ltd & Another vs National Bank of Kenya & 3 Others (2014) eKLR*, was relied on where it was held that, an order for mandatory injunction sought of possession of the suit property should issue where the registered owner of the suit property is entitled to possession of the same. Further reference was made to the cases of; *Joel Kipchirchir Kitur vs David Kimutai Langat & Another 2002*, *Gladys Wanjiru Kirubi vs John Kangethe Kibe 2005* and *Ahmed Ibrahim Suleiman and Another vs Noor Khamisi (2013) Eklr* and argued that the Plaintiffs/Respondents have failed to demonstrate that the Applicants acquired the title to the suit property by fraud or misrepresentation or collusion.

29. However the Respondents submitted in support of the preliminary objection dated 6th February 2018 and reiterated that, whereas the Applicants have applied for an order of eviction at this interlocutory stage, the same cannot be granted in the circumstances of the suit at an interlocutory stage because there is already a prayer by the Defendants in their defence and counter claim dated 14th April 2015, for an order of vacant possession and the Respondents have a reply thereto dated 22nd January 2016 in which it is prayed that the counter claim be dismissed with costs. It follows that, the matter of whether or not the prayers sought by the Plaintiffs and the Defendants are poised for a hearing on the merits thereof; upon which the court will render a considered judgment.

30. Thus, any orders that would pre-empt the prayer for vacant possession will render the suit moot and visit injustice upon the parties. Further a mandatory injunction cannot be granted at this stage. Reference was made to the case of; *Rajput vs Barclays Bank of Kenya Ltd & 3 others (2004) KLR 393*, where the court held that, no final order may issue on an interlocutory application. Similarly, in the case of; *Kenya Airports Authority vs New Jambo Taxis Nairobi Civil Appeal NO. 29 of 1997 (CA)* the Court of Appeal, applied the decision of; *Mergary J. (as then was) in Shepherd Homes vs Sandham (1979) 3 WLR* and held that, an order which results in the granting of a major relief claimed in the suit, which may not be granted at a final hearing, ought not to be granted at an interlocutory stage.

31. In addition, the 2nd Defendant/Applicant filed submissions in support to the preliminary objection raised by the 1st and 3rd Plaintiffs/Respondents and also fully associated with the said submissions on the grant of a mandatory injunction orders at an interlocutory stage and the fact that those orders are also a subject of a defence and a counter-claim. That if the court grants the order for vacant possession, the Applicant would stripe the Plaintiffs the right to trial, granted an order of summary judgment and/or of striking out the plaintiff's defence to counterclaim without a substantive prayer for it, and/or granted orders of mandatory injunction without the requisite standard of proof being met.

32. The court was referred to the case of; *Olive Mwhaki Mugenda & Another vs Okiya Omtata Okoiti & 4 Others (2016) eKLR*, where it was stated that final orders at the interlocutory stage can only be granted in exceptional circumstances and the reasons for granting such final orders must be stated. That in the Indian case of; *Deoral vs State of Maharashtra & Others, Civil Appeal No. 2084 of 2004*, it was held that balance of convenience and irreparable injury need to be demonstrated before interlocutory final orders can be granted. Further reference was made to the case of; *Vivo Energy Kenya vs Maloba Petrol Station Limited & 3 Others (2015) eKLR*.

33. I have considered the application, the arguments advanced alongside the submissions and the documents annexed to the affidavit and I find that, there is evidence that the suit property was transferred to the Applicants vide a transfer document dated 8th September 2014 and registered in favour of the 1st and 2nd Defendants/Applicants. I have also noted a certificate of lease dated 8th October 2014, which indicates that, the property is registered in the names of the 1st and the 2nd Defendants/Applicants as joint proprietors. There is no entry of any encumbrance noted on the Certificate of lease.

34. The Applicants have also annexed the ruling of the High court delivered on the 21st October 2015, in which the Plaintiffs/Respondents sought for orders inter alia, that the 1st and 2nd Defendants/Applicants be restrained from dealing with the suit property and/or interfering with their quiet enjoyment of the suit property pending the hearing and determination of the suit. In the decision, the court on that application, found that the Applicants had not established a prima facie case and that the application was a unmeritorious and dismissed it with costs.

35. Similarly, the Applicants have provided the court with the decision of the Court of Appeal in Civil Appeal No. 300 of 2015, whereby the Plaintiffs/Respondents appealed against the aforesaid decision of the High Court and the court of Appeal found that, the Appeal did not have merit and dismissed it with costs. Further and subsequent correspondence indicates that, on 17th November 2017, the Applicants' lawyer wrote to the Respondents lawyers requesting that the Respondents make arrangements to immediately vacate the premises and in any event not more than fifteen days from the date of the letter. It is not clear whether there was compliance with the request. It suffices to note, that this letter was in furtherance of an earlier letter dated January 10th 2017.

36. Be that as it were, there is no indication or evidence that the Plaintiffs/Respondents have appealed against the decision of the Court of Appeal. Therefore as matters stand now, there are no orders restraining the Applicants from dealing with the suit property in a manner inconsistent with the rights of the Respondents. Indeed, the 3rd Defendant/Respondent that sold the property to the Applicants upon the exercise of its statutory power of sale, supports the application and confirms that the Applicants are entitled to the orders sought.

37. The Plaintiffs/Respondents main contention in the notice of is that the court cannot issue the orders sought for at this interlocutory stage and further there is a suit and a counterclaim which is pending for final determination. In considering these two issues, I find that, decisions of the High court and the Court of Appeal clearly state that, in case of the Respondents succeeding in their claim, they can adequately be compensated by an award of damages. In other words, the Plaintiffs/Respondents recourse is not in possession of the suit property. Therefore the orders sought for herein are purely in furtherance of the orders of the two courts.

38. The question that arises is whether, there are special circumstances herein that warrant the grant of orders at this interlocutory stage and whether the grant thereof will prejudice the Applicants. In that regard, it is noteworthy that, it is a period of about four (4) years from the time the Applicants bought the property and had it transferred in their names, yet they are not in physical possession and/or enjoying quiet possession thereof.

39. In any case, if the Plaintiffs/Respondents have any claim, it is mainly against the 3rd Defendant/Respondent with whom they had a contractual relationship. The law cited herein and the statutory provisions referred to tilts in favour of granting the orders sought for. There is no allegation of fraud against the Applicants. They paid for the suit property and it was lawfully transferred to them. They hold the title thereto and prima facie evidence of ownership. In the circumstances, it is only fair that the Applicants be put in possession of the suit property.

40. I have looked at the prayers sought for in the application and I find that, the Applicants are seeking for inter alia, orders that a permanent injunction be issued to restrain the Respondents from trespassing into the suit property.

41. In my considered opinion, if the prayer seeking for an order to compel the Plaintiffs/Respondents forthwith to give back the suit property to the Defendants/Applicants is granted and in the event that they fail to do so, an eviction order do issue, then the prayer for permanent injunction will not be necessary.

42. In that case, I allow the application in terms of prayer (2) and (3). Prayer (4) is not granted and/or is granted on temporal basis. The costs to abide the outcome of the main suit.

43. Those are the orders of the court.

Dated, delivered and signed in an open court this 29th day of August 2019.

G.L. NZIOKA

JUDGE

In the presence of:

Mr Muyuri forfor the Applicants

Ms. Muhoto for Mr. Marete.....for the Respondents

Dennis -----Court Assistant