



REPUBLIC OF KENYA
IN THE HIGH COURT OF KENYA AT NAIROBI

ELC CIVIL CASE NO. 635 OF 2014

BEATRICE WAMUGO NDIRANGU.....1ST PLAINTIFF/APPLICANT

DAVID WANGAI NDIRANGU.....2ND PLAINTIFF/APPLICANT

VERSUS

ERASTUS MAINA NDIRANGU.....1ST DEFENDANT/RESPONDENT

MARY WANGARI.....2ND DEFENDANT/RESPONDENT

ANN WANGUI.....3RD DEFENDANT/RESPONDENT

MARGARET NJOKI.....4TH DEFENDANT/RESPONDENT

RULING

The application before this court for consideration is the Notice of Motion dated **22nd May 2014** brought under **Order 40 Rules 1,2 and 3 of the Civil Procedure Rules** seeking for orders that :-

1. ***The Honourable Court be pleased to grant an order for temporary injunction to restrain the Defendants ,their agents and/or servants from alienating, transferring or howsoever disposing the property in plot Number K.12 Umoja 1and plot No C 2828 Dandora pending the inter parties hearing of the main suit.***
2. ***The defendants be ordered to deposit in Court or with the plaintiffs advocate the rental income of the property in Plot Number K.12 Umoja 1 and plot Number C2828 Dandora until the hearing and determination of this suit.***
3. ***The defendants be ordered to render full account of the income and expenditure incurred in relation to the suit property since 1998.***
4. ***The Honourable Court be pleased to grant Mandatory Order for vacant possession to the plaintiffs of property in Plot Number K.12 Umoja 1 and Plot Number C2828 Dandora.***

This application is premised on the grounds stated on the face of the application and the supporting affidavit of **Beatrice Wamugo Ndirangu** who stated that together with the 2nd plaintiff they were issued with **letters of administration** and later a **confirmation of grant** in respect to the Estate of **Augustino Ndirangu Mbutia** in High Court **Succession No. 3116 of 2004**. She averred that he letters of administration entitled her a life interest in the deceased's property and her sons David Wangai Ndirangu, John Mbutia and Samuel Njuguna would be entitled to the property in equal shares. She

averred that among the properties that were comprised in the Estate were properties the subject of this suit. It is her averment that on 24th July 2006, the 2nd, 3rd and 4th Defendants filed summons for revocation of the letters of administration claiming to be wives of the deceased but the summons were dismissed. Subsequently the 1st defendant filed an injunction against the plaintiffs in executing the confirmation of grant, but the application was also dismissed by the court. That the defendants have been in the suit properties since 1998 and converted part of Plot No K12 into 9 rental units being rented out at Ksh 4000/= per month and Plot Number C2828 into rental units at a monthly income of Ksh 20,000/= per month. She claims that they are apprehensive that the defendants will attempt to dispose of the properties at any time unless restrained by the court. Further, they were also not sure whether the defendants have been paying rates to Nairobi County therefore the need for the prayers sought.

The defendants did not file any response to this application despite seeking for time from the court to file their response to the plaintiffs' application.

The plaintiffs filed their submissions where they reiterated the contents of the supporting affidavit and relied on the case of **Ahmed Ibrahim Suleiman and another –vs- Noor Khamisi Surur[2013]e KLR**, where the court held that the court will not allow the defendant the luxury of delaying justice to the plaintiffs when it is clear that the defendant is a trespasser.

I have duly considered the written submissions of the plaintiffs as well as the facts and circumstances of the case and the authorities cited. The plaintiffs have sought temporary injunction to restrain the defendants from dealing with the suit properties and at the same time a mandatory order for vacant possession of the suit properties. The principles to be applied while considering an application for a temporary prohibitory and mandatory injunction are well settled. For a temporary injunction, an applicant must establish a prima facie case with a probability of success and must also demonstrate that unless the orders sought are granted, he will suffer irreparable harm. If the court is in doubt as to the above, the application would be determined on a balance of convenience. These were the principles that were pronounced in the case of **Giella vs. Cassman Brown & Co. Ltd. (1973) E.A 358**.

The granting of a mandatory injunction effectively determines a case without the benefit of a trial. An applicant applying for a mandatory injunction must show that he has a very strong case that is likely to succeed in trial. The likelihood of success here must be higher than that which is required for a temporary injunction. In the case of **Shepherd Homes Ltd. –vs- Shadahu [1971] 1 ch.34**, Meggery J. held that,

“It is plain that in most circumstances a mandatory injunction is likely other things being equal, to be more drastic in its effect than a prohibitory injunction. At the trial of the action, the court will of course grant such injunction as the justice of the case requires; but at the interlocutory stage, when the final result of the case cannot be known and the court has to do the best it can, I think the case has to be unusually strong and clear before a mandatory injunction can be granted even if it is sought to enforce a contractual obligation”.

Nonetheless, it is still clear from a reading of the mandatory injunction authorities that the first principle enunciated 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 calling upon the defendant to rejoin but rather it must be so special as to let the court have the feeling that the orders ought to be made at once.

The plaintiffs have stated that the suit properties were the property of the late **Augustino Ndirangu Mbuthia** and after his demise the property devolved to the plaintiffs vide High Court Succession Cause No 3116 of 2004 wherein the 1st plaintiff would have a life interest and the three sons would share the properties equally. The plaintiffs have alleged that the defendants have been on the suit properties since 1998 and seem to have developed the said properties and are collecting rent from the rental houses built therein. The two plots have now changed names to that of the plaintiffs pursuant to the grant issued by the court. Since the defendants did not file any response to the plaintiffs' claim then this

court allows the plaintiffs assertion as prima facie evidence.

Further the plaintiffs seek mandatory orders for vacant possession of the suit premises. The Plaintiffs case is plain and clear, in that the property belonged to their deceased father/husband and upon his death in 1998, the defendants occupied the suit properties. The defendants did not rebut the plaintiffs' claim and in my view no purpose will be served by not determining the issue whether or not the defendants are trespassers in the suit premises at this stage. The defendants conduct in this matter is a clear indication that their intention is to delay the determination of this suit which delay will only serve to delay meting justice to the Plaintiffs who have in my view demonstrated they are the rightful owners of the suit premises. The justice of this matter demands that I make a determination of this matter at this interlocutory stage.

The plaintiffs also prayed that the defendants render a full account of the income and expenditure incurred in relation to the suit property since 1998. I note that there was no evidence produced by the plaintiffs that there are indeed rental houses constructed on the suit premises. I expected the plaintiffs to show that there are rental houses that fetch the amount of monies stated in the supporting affidavit. The courts do not grant orders in vain. Since the plaintiffs have not shown that there are rental houses in the premises the court is constrained not to grant this order.

In the premises, this Court allows the Notice of Motion by the Plaintiffs dated *22nd May 2014* in terms of prayers *No 1* and *4* and order that the defendants vacate from the suit premises within a period of 30 days from the date of being served with this order, failing which an Order of eviction against the defendants be effected upon them by the plaintiffs. The Court however, declines to grant prayers No 2 and 3 of the said application. The costs of this application are awarded to the Plaintiffs.

It is so ordered.

Dated, Signed, and Delivered this 15th day of May 2015

L GACHERU

JUDGE

In the presence of Mr Wanda holding brief for Mr Isinte for the Applicant

None attendance for the Respondent.

L GACHERU

JUDGE