



**REPUBLIC OF KENYA**

**IN THE ENVIRONMENT AND LAND COURT**

**NAKURU**

**ELC CASE NO. E89 OF 2021**

HASMUKH RAICHAND SHAH.....1<sup>ST</sup> PLAINTIFF

SANJAY RAICHAND SHAH.....2<sup>ND</sup> PLAINTIFF

VERSUS

PIAVE QUARRY LIMITED.....DEFENDANT

**RULING**

**Application**

1. The plaintiff/applicant moved the court through the Notice of Motion application dated 16/12/2021 brought under **Section 1A and Section 3A** of the **Civil Procedure Act, Order 40** of the **Civil Procedure Rules, Section 152E and 152F** of the **Land Laws (Amendment Act) 2016** seeking the following orders:

(1) ...spent

(2) ...spent

(3) That this honorable court be pleased to issue an order restraining the Defendant/Respondent either by themselves or through their agents, servants or employees from implementing eviction notices dated 7<sup>th</sup> December 2021 and 9<sup>th</sup> December 2021 relating to property known as Title no. Nakuru Municipality/Block10/105 Section '58' Estate, Maasai Avenue-Lions Area Nakuru town against the plaintiff/applicants pending the hearing and determination of this suit.

(4) ...spent

(5) That this honorable court be pleased to direct the defendant/respondent to recall, cancel and/or withdraw the notices dated 7<sup>th</sup> December 2021 and 9<sup>th</sup> December 2021 issued on the plaintiffs/applicants by the defendant/respondent requiring the plaintiff/applicant to vacate property known as title no. Nakuru Municipality/Block 10/105 Section '58' Estate, Maasai Avenue-Lions Area Nakuru town pending the hearing and determination of the suit.

(6) That this honorable court be pleased to declare the contradictory notices issued on the plaintiffs/applicants by the defendant/respondent requiring the plaintiffs/applicants to vacate property known as title no. Nakuru Municipality/Block10/105 Section 58 Estate, Maasai Avenue-Lions Area Nakuru town un-procedural, unlawful, illegal and therefore null and void.

2. The application is supported by the affidavit sworn on 16/12/2021 by Sanjay Raichand Shah. The grounds on the face of the application and the supporting affidavit are that he and the 1<sup>st</sup> plaintiff herein were joint proprietors of title number Nakuru Municipality/Block 10/105 Section '58' Estate, located along Maasai Avenue-Lions Area Nakuru town which they charged to Bank of Baroda; he deposed that the defendant purported to purchase the suit property in an auction that was illegal and on 19/11/2021 and registered the land in its name. He went to state that on 7/12/2021, they received a notice to vacate the suit property from counsels for the defendant under **section 98(4)** of the **Land Act and Regulation 65 Legal Notice 280 of 2017**; that the plaintiffs were required by that notice to vacate the suit property within three (3) months of the said notice; that on 9/12/2021 they received another notice requiring them to vacate the suit property within fourteen days failure to which the defendant would instruct auctioneers to evict them; that the said notices are contrary to **Section 152E and 152F** of the **Land Laws (Amendment Act) 2016**.

3. He also stated that unless the orders sought are granted, they would be evicted from the suit property and they shall stand to suffer

irreparable loss.

### **Response**

4. The respondent filed a replying affidavit sworn on **18/01/2022** by its director, **Kalyan V. Vekariya** who deposed that the respondent is the registered owner of the suit property; that it acquired the land through a public auction which was allowed by the court in **HCC No. 1 of 2021**; that after acquiring the suit property, it advised its advocates on record to issue notices to the plaintiffs to vacate as they did not challenge the auction; that the applicants contention that the notices are illegal is unmerited as the notice issued on **7/12/2021** is backed by the provisions of **Section 98(4)** of the **Land Act** and **Regulation 65** of **Legal Notice 280 of 2017 (Land Regulations)** which provides for evictions of unlawful occupiers of private property; that the subsequent demand letter dated **9/12/2021** reiterated that the applicants had no basis to remain on the suit property as it had been sold to the respondent which process they were aware of and had challenged in **HCC No. 4 of 2020, HCC 19 of 2020** and **HCC No. 1 of 2021**.

5. He also stated that these proceedings are an abuse of the court process as the court can only operationalize the three month notice issued on **7/12/2021**; that **Sections 152E and 152F** of the **Land Laws (Amendment Act) 2016** cited by the applicants are the substantive provisions of the three month eviction notice that was issued and supported by the procedural provisions of **Regulation 65 Legal Notice 280 of 2017(Land Regulations)**; that the three month notice issued on **7/12/2021** was procedurally issued; that if the court is inclined to issue an order restraining the defendant from implementing eviction orders then the respondent will be denied its constitutional right to enjoy vacant and quiet possession of the suit property.

6. He further stated that the defendant would suffer irreparable loss if the orders sought are granted as the plaintiffs have conceded that they are not the registered owners of the suit property and it urged the court to dismiss the plaintiffs' application for being incompetent, an abuse of the court process and has no merit.

### **Submissions**

7. The plaintiffs/applicants filed their submissions dated **27/01/2022** on **02/02/2022** while the defendant filed its submissions dated **28/01/2022** on **31/01/2022**.

8. In their submissions the plaintiffs addressed the court on whether their intended eviction was procedural. They relied on **Regulation 65 Legal Notice 280 of 2017** and submitted that the court cannot operationalize the notice dated **7/12/2021**. They also relied on Sections 152E, 152G and 152F of the **Land Laws (Amendment Act) 2016** and the case of **Atik Mohamed Omar Atik & 3 others v Joseph Katana & Another [2019] eKLR** among other cases and submitted that they were not given adequate notice to move out of the suit property.

9. On whether the intended eviction of the plaintiffs/applicants from the suit property is malicious, it was submitted that the plaintiffs have been in occupation together with their families for over a long period of time and they therefore require reasonable time to move out. They relied on the case of **Mitu-bell Welfare Society V Attorney General & 2 Others [2013] eKLR** and concluded their submissions by praying that their application be allowed with costs.

10. In its submissions the defendant addressed the court on whether the impugned eviction notice dated **7/12/2021** was procedurally issued. It submitted that the plaintiffs defaulted in repaying its loan and therefore the suit property was sold at a public auction after it was allowed by the **High Court in HCC No. 1 of 2021**. It relied on **Section 98(4)** of the **Land Laws Amendment Act, Regulation 65** of **Legal Notice 280 of 2017 (Land Regulations)** and sections **152E** and **152F** of the **Land Act**. They also relied on the case of **Atik Mohamed Omar Atik & 3 others v Joseph Katana & Another (supra)**.

11. On whether the notice issued on **9/12/2021** was procedural, it was submitted that the said notice was a reiteration that the applicants had no basis to continue being in occupation of the suit property as they were aware that it had been sold to the respondent. On whether the applicant has met the conditions for granting injunctive orders, it was submitted that the applicants have not met the conditions set out in the case of **Giella v Cassman Brown Co. Ltd 1973 E.A 358**. In conclusion the respondent urged the court to dismiss the plaintiffs/applicants application with costs.

### **Analysis and determination**

12. After considering the application, the replying affidavit and the submissions the issues for determination are:

*a. Whether an injunction ought to issue restraining the defendant from implementing the eviction notices;*

*b. Who ought to bear the costs of the application.*

13. The applicants allege that they were owners of the suit property which they had charged to Bank of Baroda and upon defaulting, it was sold through a public auction to the defendant who was registered as the owner on **19/11/2021**. On **7/12/2021**, they were served with an eviction notice requiring them to vacate the suit property within three months and subsequently on **9/12/2021**, they received another notice requiring them to vacate the suit property within fourteen days failure to which they would be evicted. This is not disputed by the defendant.

14. The defendant has attached to its replying affidavit a certificate of lease that shows that it was registered as the owner of the suit property on **19/11/2021**.

15. **Section 152E** of the **Land Laws (Amendment) Act No. 28 of 2016** provides as follows: -

**152E. Eviction Notice to Unlawful Occupiers of Private Land**

**(1) If, with respect to private land the owner or the person in charge is of the opinion that a person is in occupation of his or her land without consent, the owner or the person in charge may serve on that person a notice, of not less than three months before the date of the intended eviction.**

**(2) The notice under Subsection (1) shall-**

- a) Be in writing and in a national and official language;**
- b) In the case of a large group of persons, be published in at least two daily newspapers of nationwide circulation and be displayed in not less than five strategic locations within the occupied land;**
- c) Specify any terms and conditions as to the removal of buildings, the reaping of growing crops and any other matters as the case may require; and**
- d) Be served on the Deputy County Commissioner in charge of the area as well as the Officer Commanding the Police Division of the area.**

**16. Section 152F of the Land Laws (Amendment) Act No. 28 of 2016 provides as follows: -**

**(1) Any person or persons served with a notice in terms of sections 152C, 152D and 152E may apply to Court for relief against the notice.**

**(2) The Court, after considering the matters set out in sections 152C, 152D and 1528, may-**

- (a) confirm the notice and order the person to vacate;**
- (b) cancel, vary, alter or make additions to the notice on such terms as it deems equitable and just;**
- (c) suspend the operation of the notice for any period which the court shall determine; or**
- (d) order for compensation.**

**17. Regulation 65 of Legal Notice 280 of 2017 (Land Regulations) provides as follows:**

**65. Upon establishing that a particular parcel of private land is unlawfully occupied, the owner of the land shall issue a notice in Form LA 57 set out in the Third Schedule to the unlawful occupiers to vacate the land.**

**18.** The applicants allege that the two notices issued to them were issued contrary to the provisions of the law as they are contradictory. The notice issued on 7/12/2021 gave them three months to vacate the suit property while the notice dated 9/12/2021 gave them fourteen days. The respondent alleges that it issued the notice dated 7/12/2021 as provided for under **Section 98(4) of the Land Act and Regulation 65 of Legal Notice 280 of 2017** while the notice dated 9/12/2021 which gives the applicants fourteen days to vacate the property within fourteen days, is alleged to be a demand letter.

**19.** The court in the case of **Atik Mohamed Omar Atik & 3 others v Joseph Katana & Another (supra)** stated as follows on the procedure for eviction of persons unlawfully occupying public, community or public land:

***In this regard, the first step in an eviction is for the lawful owner to serve a notice of eviction in accordance with the law. The essence of serving an adequate and reasonable eviction notice lies in the need to give the persons affected an opportunity to seek relief in court. Under Section 152E of the land Act, any person or persons served with such notice may apply to court for relief against the notice.***

**20. Section 152E of the Land Laws (Amendment) Act No. 28 of 2016** clearly provides that the notice to vacate must be issued not less than three months before the intended date of eviction.

**21.** The applicants acknowledge that the suit land is no longer theirs, it having been sold at a public auction upon their default servicing a credit facility from the Bank of Baroda. They cry foul regarding the legality of that auction but that is not the focus of the instant litigation.

**22.** In the respondent's replying affidavit however, it is averred that the auction was valid, having been virtually permitted by the dismissal of the applicant's application for injunction in **Nakuru HCCC No 1 Of 2021**. A copy of the ruling to that effect is attached to the replying affidavit. The Bank of Baroda was the 1<sup>st</sup> defendant in that case. The application that gave rise to the ruling in **Nakuru HCCC No 1 Of 2021** sought injunctive orders against the bank and the auctioneer restraining them from organizing or advertising any public auction or disposing of the suit property which therein included the suit land in the present suit. The court held that the applicants therein, who included the applicants herein, had not established a *prima facie* case with probability of success or that they would suffer irreparable loss and that they had received all mandatory notices from the chargee and sat on them. The court also held that they had filed a multiplicity of suits and lacked utmost good faith in coming to court yet again, and therefore dismissed the application.

23. The most crucial point in the instant application is that the applicants herein concede that the suit property has been disposed of to a new owner by the bank. Without any claim to title to the land their task of establishing a prima facie case to warrant an order of injunction is clearly an uphill task.

24. A perusal of the plaint shows that the applicants have made the alleged impropriety of notices issued by the respondent the sole backbone of their prayer for temporary and permanent injunction. However, it would appeal to this court to consider that only one notice, the one dated 9/12/2021 appears to go against the law in this case. Flaws in a notice or in the process of issuance thereof may entitle one to file a claim under **section 152F of the Land Laws Amendment Act No 28 Of 2016** whose provisions are set out above. In the instant case only the contradictory nature of the two notices issued by the respondent form the grievance of the applicants.

25. On its part the respondent in explanation avers that the 3-month notice is premised on the provisions of **sections 152 E and 152F of the Land Laws Amendment Act 2016**. The respondent in acknowledging the issuance of contradictory notices further urges that that situation can be cured by the exercise of the discretion of this court on which eviction notice is to operate and I agree with it in that respect. Consequently, the respondent avers, there is no justification for the claim that the applicants ought not be evicted from the suit land and I would agree with that position subject to expiry of the period of the proper notice issued.

26. In addition, the respondent states that there being no pending suit between it and the applicants over the ownership of the suit land there is no justification for the prayers for an interlocutory injunction and that the only right the applicant have is the right to a 3-month notice. On this point I tend to disagree with the respondent since as I have stated herein before an applicant may apply to the court regarding notice and seek reliefs under **section 152F**; in this court's interpretation the claim for ownership of the suit land may play a great role in such proceedings but should not be considered as a prerequisite of as the sole determinant regarding the merits of such action.

27. The respondent also states that the grant of the orders sought would go contrary to its constitutional rights to enjoyment of vacant and quiet possession of the property, thus leading to irreparable loss on its part.

28. I have considered the application before me at length. The whole situation calls for delicate balancing act on the part of this court regarding the ownership rights of the respondent and the rights to due process owed to the applicants as they exit the premises which they had been used to calling theirs.

29. The applicants having admitted to not being the proprietors of the suit premises after the sale by the chargee in exercise of its powers and having no claim of ownership pending between them and the respondent who purchased the land impliedly admit that the only right they have is to a 3-month notice. That notice has been issued by the respondent. It is not clear to this court, why a 14-day notice had to be issued by the respondent after the issuance of the 3-month notice. However, all that is very clear in these proceedings is that the respondents began by recognizing the need for a 3-month notice, and probably that the applicants would have a remedy in law against an eviction prior to expiry of the 3-month notice already issued and that consequently, the 14-day notice is a nullity *ab initio* which this court ought not to have regard for.

30. The next question that arises however is whether this court can proceed to issue a temporary injunction against the implementation of the 3-month notice dated 7/12/2021 apparently issued properly under the law and admittedly received by the applicants. It can not in my view do so as there has to be a substantive complaint either against the format of the notice or the process of issuance and I do not perceive the applicants to be raising complaints regarding these factors. In this court's view therefore the applicants have failed to establish a *prima facie* claim against the respondent regarding the two notices.

31. Owing the lack of a *prima facie* case and also to the fact that the title is no longer in the names of the applicants and that only procedural aspects of their exit from the premises are of concern at the moment, and in view of the fact that there is a 3-month notice issued under the law, I find it superfluous to delve into the issue of irreparable loss as would have been in an ordinary injunction application.

32. Consequently, I find that the application dated 16/12/2021 lacks merit and it is hereby dismissed with costs to the respondent to be borne by the applicants jointly and severally.

**DATED, SIGNED AND DELIVERED AT NAKURU VIA ELECTRONIC MAIL ON THIS 10<sup>TH</sup> DAY OF MARCH, 2022.**

**MWANGI NJOROGE**

**JUDGE, ELC, NAKURU**