



REPUBLIC OF KENYA

High Court at Nairobi (Nairobi Law Courts)

Civil Suit 368 of 2009

TREVOR LEONARD IAN NANDI.....1ST PLAINTIFF

EUGENE LESLIE ANTHONY OSSEWE.....2ND PLAINTIFF

VERSUS

HASSAN HAMED.....1ST DEFENDANT

DUBAI BANK KENYA LIMITED.....2ND DEFENDANT

RULING

1. The Plaintiffs are the Applicants herein. They have taken out a Notice of Motion under Order 12 Rule 7, order 17 Rule 2 and Order 40 Rules 1 and 4 of the Civil Procedure Rules and section 3A of the Civil Procedure Act and all enabling provisions of the Law. The application was brought under a certificate of urgency. It seeks orders of temporary injunction as hereunder:-

- 1. THAT.....
2. THAT a temporary injunction be and is hereby issued restraining the defendants either by themselves their contractors, agents and tenants from alienating property known as Land Reference Number 330/560 Nairobi, and/or intermeddling with the same in any manner whatsoever pending the hearing of this suit or further orders of this Honourable court.
3. THAT the defendants be restrained from threatening to evict the plaintiff or evicting them from property known as Land Reference Number 330/560, Nairobi.
4. THAT this Honourable court do set aside its orders dated 3rd of February, 2012 dismissing the plaintiff's suit herein as no notice was served on the plaintiffs and/or their advocates on record and have the suit proceed to full hearing.
5. THAT.....
6. THA.....

2. The application is brought on the grounds that the applicants are the administrators of the estate of the late professor Thomas Lesley Odhiambo who is the registered owner of L.R. No. 330/560 Nairobi where the applicants live and the applicants have now been served with a notice to vacate the said property by the advocates of the Defendants. They add that the suit was dismissed without notice to the Plaintiffs or their advocates. That there is already interlocutory judgment entered against the 1st Defendant and the plaintiffs have always been ready to prosecute their suit save that the court file has been missing for a

long time. They concluded that they would suffer substantial and irreparable damage if the orders sought were not granted.

3. The 1st Plaintiff/Applicant swore the affidavit in support of the application and deponed, inter alia, that their late father bought the suit land during 1972 and they have lived on the same since then and they were aware that there had never been a sale of the same and that any attempt by the defendants to claim ownership of the suit land must be due to fraud. There are annexed to the affidavit documents showing the transactions in respect of the suit land.

4. The application is opposed by the Defendants who filed grounds of objection. These are that the court lacks jurisdiction to grant the orders sought. The dismissal was regular and the plaintiffs had due and adequate notice of the dismissal and there was inordinate delay by the plaintiffs in filing the application. Further grounds were that the application was incompetent, misconceived and bad in law and an abuse of court process, the plaintiffs had no capacity to bring the suit and no valid reasons existed to enable the court exercise its discretion in favour of the applicants. That no prima facie case was shown to exist and if the orders sought were granted they would result in great prejudice to the Defendants. Litigation must come to an end, was the final ground raised.

5. The 1st Defendant did file an exact replica of the 2nd Defendants grounds of opposition. One Cyrus Ndiritu Maina who described himself as a partner in the firm of Sichangi and Company Advocates filed an affidavit deponing that he had acted for the 1st Plaintiff and the 1st Defendant in trying to get them to reach an out of court settlement. He annexed to his affidavit a document headed "Without Prejudice – Deed of settlement."

6. All advocates appearing for their respective parties relied wholly on whatever they had filed. They made no submissions.

7. The suit herein was dismissed for want of prosecution on 3/2/2012. On the said date only Mr Kipngeno advocate appeared for the defendants. Neither the Plaintiffs nor their advocate was present in court. A keen perusal of the court file indicates that the court prepared Notices dated 23rd December, 2011 which were addressed to the three firms of advocates representing the plaintiffs on one hand and for those advocates representing the 1st and 2nd Defendants. There are no affidavits of service filed. However, there are two copies of the notices stamped received by Ms Wagaka Koyyoto advocates on 20/1/12 and the other received by Ms Kiplagat advocates on 24/1/2012. There is nothing to indicate that either the plaintiffs themselves or their advocates were served. Now they say they were never served and the court file does not reveal anything to the contrary. It would indeed appear that the plaintiffs and their advocates were not served with the dismissal notice. They were thereby denied an opportunity to show cause why their suit should not have been dismissed.

8. The grounds of opposition were not supported by any submissions and therefore there is no material upon which the court can come to the conclusion that the application under consideration is incompetent, misconceived, bad in law and an abuse of court process. There is nothing to show that the court has no jurisdiction to entertain the application, and the court finds that nothing haunts its jurisdiction to hear and determine the application, which application is proper.

9. The applicants have annexed to the application the title document in respect of the suit land and rates payment receipts. The applicants had earlier obtained injunctive orders similar to those now sought but which lapsed with the dismissal of the suit on 3/2/2012 which dismissal I have found to have been done without notice to the Plaintiffs and/or their advocates as by law required. The applicants raise fraud as the reason for the defendants claiming ownership of the suit land. That is a matter that requires investigation by way of adducing evidence. The suit land must, in these circumstances be preserved until hearing. My finding is that a prima facie case is made out in terms of the principles set out in the case of **GIELLA - VS- CASSMAN BROWN CO. LTD (1973) EA 358**.

The plaintiffs came to court soon after being served with the notice to vacate the suit land as is evident from the annexures. There is no inordinate delay in filing the application.

10. The upshot is that the application under consideration succeeds and it is hereby allowed in its totality. And so that litigation is fairly brought to an end it is hereby ordered that the suit be set down for hearing within six months of today's date in default of which the defendants be at liberty to apply for its dismissal.

It is so ordered.

DATED AND SIGNED AT NAIROBI THIS **30TH** DAY OF **JANUARY, 2013**.

P.M. MWILU

JUDGE

DELIVERED ON **30TH JANUARY, 2013** BY P. NYAMWEYA, JUDGE.

In the presence of:-

.....	Advocate for Plaintiffs
.....	Advocate for 1st Defendant/Applicant
.....	Advocate for 2nd Defendant/Applicant
.....	Court Clerk

P. NYAMWEYA

JUDGE