



REPUBLIC OF KENYA

High Court at Bungoma

Civil Case 50 of 2011

ISAAC KIMUNYI KUYI.....1ST PLAINTIFF

MARY LUMBASI 2ND PLAINTIFF

ROSEMARY MAKOKHA 3RD PLAINTIFF

VERSUS

STEPHEN LUMBASI KUYI1ST DEFENDANT

SAMSON TOYWA 2ND DEFENDANT

RULING

This ruling is on an application dated 30th May 2011 brought pursuant to the provisions of Section 1A, 3, 3A & 63 (e) of the Civil Procedure Act and order 40 rule (1) of the Civil Procedure Rules seeking orders of ***“temporary injunction restraining the 2nd defendant/respondent by himself, his agents and/or servants or whomsoever from demolishing or doing any construction works on those premises situate upon L.R No. Kimilili/Kimilili/2159, forcing out tenants who are in occupation therein or in any manner impairing the plaintiffs or their tenants from peacefully using the premises and the land, alienating, selling and/or in any manner transacting with the land. They also prayed for costs of the application”***.

The application is supported by the affidavit of Isaac Kimungunyi Kuyi sworn on 30th May 2011 and a supplementary affidavit sworn on 11th November 2011. The applicant contends the suit property Kimilili/Kimilili/2159 was bought by their deceased father and therefore comprised part of his estate.

The respondents have opposed the application. The 1st respondent swore an affidavit dated 7th July 2011 in opposition. Briefly he avers that Kimilili/Kimilili/2159 was never part of the estate of the deceased neither did he carry out any business on it as alleged by the applicants. He also stated that it never belonged to the widow of the deceased as they purported and since she (deceased) didn't own it couldn't give the applicants any shares.

The 2nd defendant/respondent also denied the averments made by the applicants. He exhibited a green card to show the land did not belong to any of the deceased relatives of the applicants. He averred that the applicants have no connection to the suit land hence they have no locus to bring the application.

Each of the parties filed their submissions. The applicant has submitted on three issues i.e. prima facie case, damages and on balance of convenience which in his view have been proved by applicants to merit

the orders sought.

The 1st respondent's submissions highlighted the issues contained in their replying affidavit to wit, that the applicant ought to have filed an O.S under Order 37 Rules 1 & 3 and therefore the claim as filed is defective. Secondly that the 2nd defendant/respondent is currently the registered owner of the plot and the applicants have not demonstrated that this property was comprised in the estate of their deceased father. He annexed copy of certificate of grant which listed the properties of the deceased.

The 2nd respondent has submitted that the applicants have also failed to prove a prima facie case against him. That it is absolute falsehood that the suit property was part of the deceased estate and have not demonstrated how they will suffer irreparable loss if the orders sought are not granted. Neither does the balance of convenience tilt in their favour. The applicants do not thus merit a temporary injunction and their application should be dismissed with costs.

This court will seek to answer the question as to whether the applicants have met any of the principles set out in the renowned case of Giella Vs. Cassman Brown and therefore being entitled to the orders.

The 1st applicant has annexed in his affidavits sale agreement that was drawn between Zephania Wasike Masibo and Alfred Kuyi Namaka between February and March 1972 for sale of a plot measuring 100 x 100 ft Kimilili/Lutonyi market Kimilili "B". The purchase price is indicated at kshs. 2,000/= which was fully paid. There is also annexed lease agreement for a shop and receipts from a tenant Margaret Wandukwa apparently paying rent to the 1st applicant.

The applicants affidavit evidence is that each of them has been receiving rent from the said plot. The 1st respondent is a brother/sibling to the 1st and 2nd applicants and brother- in law to 3rd applicant. The 1st respondent is also the administrator of the estate of their father Alfred Kuyi – deceased.

The 1st respondent changed the suit property into his names on 17th March 1991 seemingly after the grant of letters of administration of his father's estate was issued to him. The previous registered owner as per green card annexed in the replying affidavit is Bernard M. Nabwana. Their deceased father passed on 1st September 1983 and certificate of grant issued to 1st respondent on 27th November 1991 (see annexed grant). In his affidavit he stated the plot never comprised the property of the estate of deceased. He also denied at paragraph 6 that the deceased left behind certain vehicles and land parcels which had not been registered in his name. His affidavit is merely full of denials. He does not explain how he acquired the suit property. He has only made a flimsy attempt at paragraph 10 that the transfer took place after consideration exchanged hands. He does not state how much was the consideration, when he paid for it and copies of documents transferring the plot to him have not been annexed to his affidavit. Had he done so, the court would have deciphered whether it was transfer on transmission or transfer for consideration. Such doubt created, it can only be safe to preserve the status quo as it is to determine real issues during the hearing. The 2nd respondent wholly deponed on the information given by the 1st defendant. What is not cleared by the 1st respondent is if the applicants were not collecting rents then who was before notice by the 2nd Res was issued? Once the 2nd respondent registered himself as owner, he issued fresh notices to the tenants. An inference is thus drawn that rent was being collected by parties other than the 1st respondent. The 1st applicant has shown receipt for rents received.

Given that the applicants are the ones receiving rent, the balance of convenience tilt in their favour. In any case the 2nd respondent has paid for Kshs. 1.2 million which is easily quantifiable in comparison to the loss to be suffered by three of the applicants and their dependants.

On the issue as to whether this suit should have been filed by an originating summons, I answer it that the provisions of article 159 of the Constitution which mandates the court to deal with substance. In any event the property has since been registered into names of parties other than beneficiaries of or relatives of the deceased,

therefore the proper channel to ventilate the claim is through a plaint which then gives the current registered owner an opportunity to participate in the proceedings to defend his title unlike if the pleadings

were commenced by an O.S.

In conclusion I allow the application with costs in the cause.

RULING SIGNED, DELIVERED AND READ in open court this 21st day of MAY 2013.

A. OMOLLO
JUDGE.