



REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA AT NAIROBI

ELC. CASE NO. 605 OF 2012

SKYVIEW PROPERTIES LIMITED.....1ST PLAINTIFF

SCENIC COURT LIMITED.....2ND PLAINTIFF

VERSUS

KENNEDY AMOS NJOROGE.....1ST DEFENDANT

IRENE NDUGI NJOROGE.....2ND DEFENDANT

LINET ANGOGO SHIUNDU.....3RD DEFENDANT

SALIM BAKARI.....4TH DEFENDANT

RULING

Coming up before me for determination is the Defendant's Notice of Motion dated 28/2/12 in which the Applicants are seeking a temporary order of injunction restraining the Defendants from interfering with the Applicant's quiet possession over Apartment Number 1,2,3 and 4 all on ground floor together with three basement flats erected on parcel of land known as L. R. No. 209/8879/9 and 209/8879/10 located in Nairobi (hereinafter referred to as the "Suit Properties") pending the hearing and determination of this suit and application and that the Officer Commanding Kileleshwa Police Station do ensure compliance with the court orders. They also requested for the cost of this application.

The Application is supported by the grounds appearing on the face of it as well as the Supporting Affidavit of Susan Nyambura sworn on 27/12/12 in which she stated that she is a director of the 1st and 2nd Plaintiff/Applicants. She indicated that the 1st Applicant is the registered owner of L. R. No. 209/8879/9 and has erected thereon certain building consisting of 10 apartments. She also indicated that the 2nd Applicant is the registered owner of L. R. No. 209/8879/10 upon which it has constructed certain buildings consisting of 10 apartments. She further stated that by a lease granted on 20/7/06 the 1st Plaintiff transferred the proprietary interest in Apartment No. A8 to the 1st and 2nd Respondents and that by a lease agreement dated 18/8/06 the 2nd Plaintiff transferred the Proprietary interest in Apartment No. B7 to the 3rd Defendant. She further indicated that the Suit Properties have been leased to seven tenants who were already in possession at the time of selling the other units. She further indicated that the Defendants are without basis in law claiming proprietary interests over the Suit Properties which were not part of the lease agreements. She further indicated that the Defendants broke into and attempted to enter into the Suit Properties which were not part of the lease agreements. She further indicated that the Defendants broke into and attempted to enter into the Suit Properties on 27/11/12 claiming ownership, which action was reported to Kileleshwa Police Station yet no action was taken. She also stated that

despite numerous requests and demands, the Defendants have threatened to interfere with the Plaintiff's quiet possession over the Suit Properties.

The application is contested. Francis Kamau Njoroge filed his Replying Affidavit sworn on 30/1/13 in which he stated that he is the Attorney of the 1st and 2nd Defendants. He produced copies of his Powers of Attorney. He stated that he was a director of Scenic Court Management Company Limited (hereinafter referred to as the Management Company) which is the manager of the apartments on

L. R. No. 209/8879/9 and 10. He further stated that the Management Company was incorporated by the Plaintiffs with the sole purpose of managing the apartments and holding the reversionary interest thereto and that each purchaser of the apartments was issued with a share certificate representing one twentieth part of the share capital of the Management Company. He stated that it is true the Applicants had erected 20 apartments on the two parcels of Land known as L. R. No. 209/8879/9 and 10 and had sold them to 16 purchasers as indicated with the 1st and 2nd Defendant buying A8 and the 3rd Defendant buying B7. He further stated that the Applicants only have an interest in 4 apartments and the alleged 3 apartments in the basement comprise of a two roomed flat for the caretaker, one room for the watchman and a store for tools, situated on L. R. No. 209/8879/9. He indicated that those rooms in the basement are part of the common areas. He further indicated that the Applicant has been using the basement rooms as quarters for their workers in spite of the fact that the Management Company has always requested them to vacate and release them for use by the Management Company's workers. He further averred that when the Applicant's watchman vacated the quarters, the Management Company asked the 4th Defendant who was living in the store with no ventilation to move into the said quarters. He further stated that the Applicants reported this matter to the police who took no action resulting in the Applicants breaking into the said quarters and removing the 4th Defendants personal effects comprising of household goods. He stated further that they have no interests in the Apartments marked 1, 2,3, and 4 but that as members and directors of the Management Company, they are entitled to the quarters in the basement. He swore that the basement quarters form part of the common areas to be managed by the Management Company. He further denied that anybody has interfered with the four apartments belonging to the Applicants.

The 4th Defendant, Khesi Karisa Mwambiema *alias* Salim Bakari also filed his Replying Affidavit sworn on 30/1/13 in which he stated that he was employed by Gem Court a sister company to the Plaintiff in the year 2000 as a gardener but was transferred to Kenon Court in 2006 in the same capacity. He stated further that Kenon Court comprises 20 apartments in two blocks which were sold by the Plaintiffs leaving only the apartments on the ground floor marked A1 & 2 and B1& 2. He further stated that the Plaintiff's employed their own watchman who was staying in one of the rooms in the basement. He further stated that after the 2007-2008 post-election violence, the 3rd Defendant asked him to move from Kawangware and occupy the store at the basement which he did. He said he stayed in the room for about a year after which he was told to move out when a security guard was employed. He further said that in 2011, the guard left and he was asked to move back in. He further said that in November 2012, he was told to move into another room in the basement which fell vacant. He said when he was on holiday in Mombasa, he received a phone call to the effect that his house had been broken into and all his goods removed. He further stated that he was not guilty of breaking into the Plaintiff's units as in the basement, there are only two roomed house, one room and a store.

There was also filed a Supporting Affidavit sworn by one Davis Ouma who indicated that he was employed by the 3rd Defendant as a security guard at Kenon Court. He stated that he remembers 2/1/13 when two vehicles entered the compound and 6 people alighted and went straight to the basement. He further stated that one of the people described himself as Mr. Wambugu, the owner of the entire development. He further stated that one of those people broke into the room where the 4th Defendant was staying at the basement and the store. That they removed the goods therein and dumped them in front of the 3rd Defendant's apartment.

There was filed a Supplementary Affidavit sworn by Susan Nyambura on 11/2/13 in which she averred that after the Plaintiff's completed construction of the 20 apartments, they erected 3 basement units/flats at their own cost. She further averred that the Plaintiff companies leased out 16 of the 20 Apartments and

were left with 4 flats and 3 units/flats in the basement. She further stated that at no time did the Plaintiff lease the 3 basement units to the Defendants and that their claim to the said basement units were misguided. She further stated that the Plaintiffs have never leased out the basement units. She further indicated that the Plaintiffs have not yet transferred the Suit Properties and still remains the Head Lessors. She further averred that the Defendants have no title documents to the basement units to rightly claim any proprietary interest thereto.

A reply to Supplementary Affidavit sworn by Francis Njoroge sworn on 21/2/13 was filed in which he stated that the Management Company, which is owned and managed by the purchasers of the apartments, cannot manage their operations without the basement units used as store, watchman's and caretaker's quarters. He further contended that the basement units are owned by the Management Company as they are part of the common areas. He also stated that the Management Company was created for the purpose of holding the reversionary interest. He also stated that the basement units are not for sale by way of long term leases. He also said that the fact that the Plaintiffs have not transferred the reversionary interest to the Management Company is illegal and fraudulent. He also stated that the Plaintiffs have no evidence of title to the Suit Properties and neither are they absolute owners of the reversionary interest to land parcels 209/8879/9 & 10.

Both counsels for the Plaintiffs and Defendants filed their written submissions all of which have been read and taken into account by this court.

A reading of all the papers filed in respect to this application reveal that the main issue for determination is the question whether the basement units belong to the Applicants or to the Management Company. The Defendants assertion is that the basement units belong to the Management Company and that entitles them to control their use. They assert that the basement units form part of the "Common areas" which are vested in the Management Company. On the other hand, the Plaintiff/Applicants assertion is that they have title over the two parcels of land known as 209/8879/9 & 10 on which they have erected 20 apartments and 3 basement units. Their assertion is that though they have sold 16 out of the 20 apartments to purchasers including the 1st -3rd Defendants, they have not sold to anybody 4 ground floor apartments and the basements units which are the bone of contention in this suit. They produced copies of their title to the two parcels of land. Their assertion is that the 1st -3rd Defendants are only entitled to claim ownership as declared in their lease agreement and nothing more.

The principles to be applied when determining whether or not to grant an interlocutory injunction are well enunciated in the celebrated case of ***Giella v. Cassman Brown [1973] EA 358***. Having regard to the foregoing, it is quite clear that this is a straightforward case. The Plaintiffs have demonstrated their ownership over the two parcels of land cited herein. They have demonstrated that they still hold the reversionary interest therein. They are therefore the *bona fide* owners of all the common areas, the basement units and the 4 ground floor apartments. They have therefore established a *prima facie* case.

Have they shown that if not granted orders sought, they stand to suffer irreparable injury which cannot be compensated by an award of damages? I would answer this question in the affirmative arising out of the fact that land is unique and no one parcel of land can be equated equally in value with another parcel. On a balance of convenience, I also find that it tilts in favour of the Plaintiff/Applicants.

Accordingly, the application is allowed with costs to the Applicants.

SIGNED AND DELIVERED AT NAIROBI THIS 26TH DAY OF JULY 2013.

MARY M. GITUMBI

JUDGE