



REPUBLIC OF KENYA
IN THE HIGH COURT OF KENYA AT NAIROBI

MILIMANI LAW COURTS

ELC NO. 643 OF 2012

MARKY NJOROGE NJUNGE & OTHERS.....PLAINTIFF

VERSUS

STEPHEN MBUGUA GATHUNA & ANOTHER.....DEFENDANT

RULING

The Plaintiffs/Applicants have brought this Notice of Motion dated 28th September, 2012 brought under ***Section 1A, 1B, 3A, 63(c) and (e) of the Civil Procedure Act Cap 21 Laws of Kenya, Order 40 Rule 1, 2,3,4 and 51 Rule 1 of the Civil Procedure Rules*** and all enabling provisions of the Law.

The applicants have sought for these Orders:-

- a. Interim Injunction restraining Defendants/Respondents, their agents, and/or employees from evicting the Plaintiffs members, demolishing their developments, or in any manner whatsoever interfere with the Plaintiffs members quiet and peaceful occupation and possession of the property known as Title number ***Dagoretti/Riruta/159*** pending the hearing and determination of this suit.
- b. For an interim injunction restraining the Defendants, their employees and/or agents from advertising for sale, selling, disposing off, transferring, alienating or in any manner whatsoever dealing with the property known as Title number ***Dagoretti/Riruta 159*** pending the hearing and determination of this suit.
- c. That the compliance of the Orders be enforced by the OCS Kabete Police Station.
- d. That the costs of this application be borne by the Defendants.

The application was supported by the grounds on the face of the application notably;

- i. Between the year 1999 2001, the 1st Defendant requested the Plaintiff members to enter into his property known as Title number ***Dagoretti/Riruta /159***.
- ii. The property was then vacant and un inhabitable due to fact that it was water logged and marshy.
- iii. The 1st Defendant gave each Plaintiff member a lease for a portion of the property and they were allowed to develop residential premises for themselves.
- iv. Due to the fact that the property was vacant and un inhabitable, the 1st Defendant informed the Plaintiff members that they would remain on the property indefinitely so long as they paid the agreed rental fee. The 1st Defendant further informed them that in the event that he decided to sell the property then, the Plaintiff members would have the first option to purchase the property.
- v. Based on this understanding, the Plaintiff members invested millions of shillings to develop their individual plots with residential premises which are now connected with water and electricity.

- vi. On 25th September, 2012, the Plaintiffs members received notices dated 6th September, 2012 informing them that they should vacate the property by the 1st October, 2012 failure to which their development would be demolished.
- vii. That Plaintiff members would suffer irreparable loss and damage because they have been resident on the property for more than 10 years and they have nowhere-else to go and would be rendered destitute and homeless.
- viii. That the Plaintiff members have invested heavily in the property in the honest belief that they would one day own the property.

The application was also supported by the affidavit of Marky Njoroge Njunge the chairman of ***Kwa Mbugua Residents Self Help Group*** who was authorised to swear the affidavit by other plaintiffs. He averred that each of the Plaintiff members has entered into a Lease Agreement with the 1st Defendant as evidenced by annexure **MNN4** – a bundle of leases.

That the Plaintiffs spent a vast sum of money to make the property habitable and the 1st Defendant assured them that they would remain on the property indefinitely so long as the agreed rental fee was paid. He further averred that on 25th September, 2012, the Plaintiffs received notices dated 6th September, 2012 informing them to vacate the property by 1st October 2012 failure to which their residential premises would be demolished.

The application was opposed. One ***Jane Wanjuhi Kinyanjui*** who is allegedly the 2nd Defendant and allegedly wrongly named as ***Jane Muthoni Mbugua*** swore a Replying Affidavit. She averred that the 1st Respondent is her husband who has duly appointed her as his lawful attorney generally especially in regard to all issues pertaining to his Parcel of Land title ***No. Dagoretti/Riruta /159*** which is the subject of these proceedings. She claimed that she was not aware of the group purporting to be the Plaintiff in this matter. She further contended that, the 1st Respondent let out various portions of his Land to individuals and not to any group. That the latest lease commenced on 1st October, 2009 for a period of 3 years and it was to expire on 1st October, 2012. She annexed such Tenancy Agreement as **JM 2**. She also alleged she issued the notices upon expiring of the Tenancy Agreement and it would be contrary to the constitutional right to property for the 1st Respondent to be restrained from evicting the Plaintiffs or selling, transferring or dealing with his own property and it would amount to vesting the Plaintiffs with will proprietary any interest in the suit property while they have none.

The parties canvassed the application by way of written submissions.

I have now carefully considered the pleadings, the written submissions and the cited authorities and I make the following findings.

It is not in doubt that the 1st Defendant herein Stephen Mbugua Gathuna is the registered owner of ***No. Dagoretti/Rimita/159***. This is admitted by the Plaintiffs herein, the 2nd Defendant and also evident from the copies of the Tenancy Agreements attached to the pleadings.

It is also evident that the 2nd Respondent is the wife of the 1st Respondent. 2nd Respondent alleged that she is known as ***Jane Wanjuhi Kinyanjui*** whereas the Plaintiffs have described her as ***Jane Muthoni Mbugua***. There is evidence that the 1st Defendant entered into tenancy agreements with the various Plaintiffs for various portions of land. The various Tenancy agreements have been attached to the pleadings.

From the 2nd Defendant annexure **JMI**, one ***Jane Wanjuhi Kinyanjui*** was granted general power of attorney by **Stephen Mbugua Gathuna**. The 2nd Defendant alleged that 1st Defendant has been sick since the year 2004. The Plaintiff did admit that the 1st Defendant has been ailing and 2nd Defendant got into the picture in the year 2004.

I have considered the Tenancy Agreements and I have noted that they were periodic Tenancies. In some of the tenancy agreements, the terms of the agreements were,

“The landlord shall let the vacant possession and the tenant shall take the demised premises commencing on the 1st day of October 2009. The tenancy shall be for 3 years with an option to renew the rent to be negotiated for another term”.

It is therefore evident that the Tenancy was to run for 3 years but with an **option** of renew. The applicants have sought for restraining Orders. The applicants needed to establish the conditions that were laid down in the case of **Giella Vs Cassman Brown Co.ltd 1973 EA 358** for grant of Injunctive Orders.

The applicants herein have to establish that:-

- a. They have a **prima facie case** with high probability of success.
- b. That the applicants will suffer irreparable loss and injury which cannot be compensated by damages.
- c. If court is in doubt, to decide on a balance of convenience.

The Plaintiffs have alleged that they entered into the suit premises some as early as 1999 and have been in quiet and un interrupted occupation of the suit premises since then. That they have put up structures and have spent a lot of money on the putting up of the structures. The Plaintiffs admitted that some of them are actually renting out their temporary structures to other persons.

However, the Plaintiffs did admit that they were tenants and they entered into tenancy agreements with the 1st Defendant. The 1st Defendant is the registered owner of the suit property and the 2nd Defendant is his wife with the general power of attorney. The Plaintiffs also alleged that, the 1st Defendant allowed them to remain indefinitely on the land as long as they agreed to pay rent. However, the terms of the tenancy agreement is very clear. The Tenancy was to run for 3 years with an option of renew. The Tenancy herein was expiring on 1st October, 2012. The Defendants had options of renewing the tenancy or not. The Defendants however, has chosen not to renew the Tenancy and the Court cannot fault them for that.

Article 40 of the constitution provides protection to property. It thus reads as follows:-

“Subject to Article 65 every person has the right either individually or in association with others to acquire and own property”.

The 1st Defendants herein owns the suit land. The fact that he let out this land to the Plaintiffs herein, does not deprive him of that right to property. Section 26 of the land Registration Act protects the proprietorship of a registered proprietor of a parcel of land. The section reads as follows.

“The certificate of Title issued by the Registrar upon registration or to a purchaser of land upon transfer or transmission by the proprietor shall be taken by all court as prima facie evidence that the person named as proprietor of land is the absolute and indefeasible owner ...”.

The 1st Defendant herein is the indefeasible owner of the suit property and the Court cannot deprive him of the same by virtue of the alleged promise that he would sell it to the Plaintiffs. The Plaintiffs therefore have been unable to establish that they have a prima facie case with high probability of success.

I have considered the tenancy agreements and it is very clear that the Plaintiffs were to use the land for purposes of putting up temporary structures whose lifespan were limited to the term of the Tenancy agreements. It is therefore evident that the Plaintiffs right to peaceful and quiet occupation of the suit property was only for the Tenancy duration. The Plaintiffs knew they were tenants and they only needed to put up temporary structures. The plaintiffs’ tenancy was for 3 years and was due to expire in October 2012. The Plaintiffs would therefore, not suffer any irreparable injury which cannot be compensated by

damages.

I have considered the authorities cited by the Defendants in their submissions and I find that, the said authorities do support the Defendants contention that an injunction should not be issued at this stage.

Having now carefully considered the Notice of Motion herein and the submissions, I find that the Plaintiffs have been unable to convince the Court that they deserve the discretionary orders sought. *The Court finds the applicants Notice of Motion dated 28th September, 2012 not merited. The same is dismissed with costs to the Respondents.*

It is so ordered.

Dated, Signed and delivered this 20th day of **August, 2013.**

L.N. GACHERU

JUDGE

In the Presence of:-

..... For the Plaintiff's

.....For the Defendant's

Anne :Court Clerk

L.N. GACHERU