



REPUBLIC OF KENYA
IN THE HIGH COURT OF KENYA
AT NAIROBI
MILIMANI LAW COURTS
LAND AND ENVIRONMENTAL DIVISION
ELC CIVIL SUIT NO. 59 OF 2011

BEATRICE IMBWEYA ALUMASI..... PLAINTIFF

VERSUS

GERALD ALUMASI1ST DEFENDANT

CHARLES NGIRUBIU.....2ND DEFENDANT

ESTHER WAITHERA KARANJA.....3RD DEFENDANT

RULING

The 2nd and 3rd Defendants filed an application dated 26th July 2011 by way of notice of motion, wherein they are seeking the following two orders from this Court:

1. That a mandatory injunction be issued restraining the Plaintiff, her servants and/or agents from interfering with the right of ownership of the 2nd & 3rd Defendant by collecting rental income or otherwise howsoever trespassing upon all that parcel of land known as Nairobi/Block/73/328 Buru Buru Estate Nairobi 9 (hereinafter referred to as the suit property).
2. That Summary Judgment be entered in favour of the 2nd and 3rd Defendants against the Plaintiff in terms of prayer (b) and (c) of the Counterclaim for vacant possession and mesne profits.

The grounds for the application are that the 2nd and 3rd Defendants are *bona fide* purchasers for value without notice and are currently servicing a mortgage in respect of the suit property, and the Plaintiff has no proprietary rights over the said property yet she is collecting rental income. Further that the Plaintiff does not have any defence to the 2nd and 3rd Defendant's Counterclaim.

The Plaintiff's suit was filed by way of Plaint dated 15th February 2011, in which she claims that she has been in occupation of the suit property which is also her matrimonial home, and which is registered in the name of the 1st Defendant. The Plaintiff further claims that the 1st Defendant has fraudulently

transferred the suit premises to the 2nd Defendant, and that the 2nd and 3rd Defendants knew or ought to have known of the Plaintiff's interest in the suit property. She seeks relief in terms of an injunction against the Defendants from evicting her from the suit premises or interfering with her possession of the same, and a declaration that she is entitled to occupation or in the alternative to proper notice before eviction.

The 2nd and 3rd Defendants filed a Defence and Counterclaim dated 26th July 2011 in which they claim to have legally purchased the suit property from the 1st Defendant, and that have issued a notice to the Plaintiff to vacate the suit property. The 2nd and 3rd Defendants also state that the Plaintiff has no proprietary interest in the suit property and cannot purport to collect monies on account of rent from the same. They seek relief in terms of injunction against the Plaintiff from interfering with their right of ownership and possession by collecting rent or otherwise, and that the Plaintiffs hand over the vacant possession or be forcefully evicted therefrom. The 2nd and 3rd Defendants also seek mesne profits.

The present application was filed on the same date as the Defence and Counterclaim, and the above-stated facts are reiterated in the supporting affidavit sworn by the 3rd Defendant on 26th July 2011. The 3rd Defendant in addition states that she instructed the firm of Mungai Kalande & Co. Advocates to commence proceedings for distress of rent against the tenants which culminated in court action. Annexed to the affidavit is a copy of a certificate of lease for the suit property registered in the 2nd and 3rd Defendants name, a copy of a notice to vacate addressed to the tenants on the suit property issued by the 2nd and 3rd Defendants' Advocate and dated 22nd December 2010, and a copy of the pleadings filed in the suit brought by the 2nd and 3rd Defendants in the subordinate court for distress for rent.

The Plaintiff in opposition to the application filed a replying affidavit sworn on 30th November 2011. The Plaintiff in addition to the facts stated in her Complaint, avers that although the 1st Defendant moved out of the matrimonial home more than 12 years ago, their marriage is still subsisting and she is therefore entitled to the whole share of the property. The Plaintiff disputes that she has no proprietary rights over the suit property, and claims to be entitled to the said property as she has invested in the construction of the three units of 1-bedroomed self contained units on the suit property.

Further, that the 2nd and 3rd Defendants cannot claim to be innocent purchasers for value when they knew very well that the Plaintiff was in occupation and did not inform her of the intended purchase. The Plaintiff also states that the suit property was bought during her marriage that is still subsisting, despite the 1st Defendant having deserted, and she is therefore entitled to the whole share of the property.

The 2nd and 3rd Defendant's Advocate filed written submissions dated 5th December 2011, in which it was argued that upon her clients' registration as joint owners of the suit property they became subject to section 27(b) and section 28 of the Registered Land Act (Cap 300), and their rights cannot be defeated by third party claims. The Advocate relied on the authority of **Joseph Kaburu v S M'Inthinji M'Mburugu (2005) e K.L.R.** The Advocate also submitted that the Plaintiff has never filed a Reply to the Defence and Defence to the Counterclaim and that summary judgment ought to be allowed on this basis alone.

These arguments were reiterated by the 2nd and 3rd Defendant's Advocate at the oral hearing of the application on 6th December 2011, wherein she also submitted that the Plaintiff's application dated 15th February 2011 for an injunction had been dismissed because she had not established a *prima facie* case. The Plaintiff's Advocate also made oral submissions at the said hearing, and contended that triable issues of constructive trust and fraud had been raised which can only be determined at full trial.

I have read and carefully considered the pleadings, evidence and submissions made by the respective parties to this application. The issues in this suit are whether the 2nd and 3rd Defendants are entitled to summary judgment on their counterclaim, and if not, whether they have shown any special circumstance to entitle them to a mandatory injunction. On the grant of summary judgment, a defendant who has served a counterclaim on a plaintiff may apply for summary judgment on the ground that the plaintiff has no

defence to the counterclaim (see **Halsbury's Laws of England, 4th Edition, Volume 37 at paragraph 418**).

The same principles for the grant of summary judgment to a Plaintiff will apply. The principles were stated in **Commercial Advertising and General Agencies Ltd v Qureishi (1985) K.L.R 458** – that there should be no *bona fide* triable issue, and if one is raised the Defendant must be given unconditional leave to defend. In the present application the 2nd and 3rd Defendants' counterclaim does come within the scope of Order 36 Rule I of the Civil Procedure Rules. The liquidated demand claim is for mesne profits at the rate of Kshs 55,000/= per month from 1st December 2010 until the date of judgment. They also counterclaim for vacant possession of the suit property.

I will start by considering the submission by the 2nd and 3rd Defendants that the Plaintiffs have not filed a Reply to the Defence and Defence to the Counterclaim, and therefore this entitles them to summary judgement. A party is allowed under Order 36 Rule 2 of the Civil Procedure Rules to show either by affidavit, or by oral evidence, or otherwise that he/she should have leave to defend the suit. My finding therefore is that the failure to file a defence does not entitle the other party to summary judgment, and is only relevant in applications for default judgement.

The evidence that the 2nd and 3rd Defendants have tendered in support of their application is that of title to the suit property, a notice to vacate to the tenants on the suit property, and court proceedings brought by and against the tenants on the suit property. No evidence is tendered of any tenancy agreement, or of a court decree entitling them to distress for rent or for eviction pursuant to the court proceedings filed by the tenants. The Plaintiff has also raised the issues of occupation, constructive trust, of fraud in the transfer of the suit property to the 2nd and 3rd Defendants, and of proprietary interest in the suit property, which are issues that in my opinion ought to be tried. The Plaintiff should be given the opportunity to bring evidence of and prove the same. I therefore find that this is not a suitable case for summary dismissal.

For the same reasons, I am also of the view that a mandatory injunction cannot be issued in the terms stated, as it will have the effect of disposing of this suit. It was held by the Court of Appeal in **Kenya Breweries Ltd and another v Washington Okeyo (2002) 1 E.A. 109** that there must be special circumstances over and above the establishment of a *prima facie* case for a mandatory injunction to issue, and even then only in clear cases where the court thinks that the matter ought to be decided at once. In my opinion the appropriate course of action in the present case would be for the parties to prove their respective claims at a full trial.

For these reasons the 2nd and 3rd Defendant's application dated 26th July 2011 is hereby dismissed. The costs shall be in the cause.

Dated, signed and delivered in open court at Nairobi this ____16th____ day of ____February____, 2012.

P. NYAMWEYA
JUDGE