



REPUBLIC OF KENYA
IN THE HIGH COURT OF KENYA

AT NAIROBI

ELC NO. 595 OF 2010

CORNELIUS NYABUTI MOGAKAPLAINTIFF/APPLICANT

V E R S U S

FREDRICK NYABUTI MOGAKA.....1ST DEFENDANT/RESPONDENT
DAVID NYAGAH2ND DEFENDANT/RESPONDENT
KELVIN MUDIGI3RD DEFENDANT/RESPONDENT

R U L I N G

The Plaintiff is the father of the 1st Defendant. The 1st Defendant's mother was Agnes Kwamboka who died on 27th March 2010. There is House No. Block F28 located in Kimathi Estate in Nairobi which the Plaintiff claims to be his because he bought it by way of Tenant – Purchase vide Agreement (Exhibit 1) dated 2nd November 1971 from the City Council of Nairobi. He states that about 1996 the deceased (his late wife) occupied the servant quarters of the house and sublet the main house. When she died, the 1st Defendant took away personal belongings of the couple from the servants quarters. The 2nd and 3rd Defendants were the tenants in the main house and apparently took over the servants quarter. The Plaintiff sought that they enter into a new tenancy agreement with him. They declined. He asked them to vacate. They refused. His case is that they are in unlawful occupation of the house. The suit was brought for vacant possession, permanent injunction and *mesne* profits. The house was said to fetch KShs. 40,000/= in rent monthly and it is the 1st Defendant collecting it. A permanent injunction was sought to restrain him from collecting the rent. With the suit was filed a chamber application under Order 39 rules 1 and 2 of the Civil Procedure Rules and sections 3, 3A and 63 (c) of the Civil Procedure Act for a temporary injunction to restrain the Defendants from interfering with the house and to restrain them or their agents from collecting rent. Also sought was an order that the 1st and 2nd Defendants be permanently evicted from the house.

The 1st Defendant swore a replying affidavit to say that this house and another one in Ngong town were jointly bought by the Plaintiff and the deceased. In 1982 the Plaintiff abandoned the deceased here and moved to the Ngong property. In 1997 the couple decided to share the houses. The Plaintiff took the Ngong house and the deceased was left with the suit house. The couple got the suit house assigned to them jointly ("FM 1") by the City Council of Nairobi and this was registered. Further to the assignment, the deceased got approval ("FM 2") to construct one bedroom house at the back. She built it in 2002/03 and moved in and rented the main house. On 5th January 2009 she leased ("FM 3") the main house to the 2nd Defendant for a period of 3 years up to 30th December 2011. The 3rd Defendant moved in on 1st September 2010. The Defendants' case is that the suit house belongs to the deceased, and not to the Plaintiff.

The Plaintiff swore a further affidavit to deny that he abandoned the deceased at any time and said they were happily married up to the time of her death. He stated that the assignment was intended to enable the deceased claim occupier's house allowance. She was then a teacher at Heshima Primary School. He denied they shared the property. He also denied that the deceased sought approval of the Council to build any house, or to improve this one.

The law applicable in case of interlocutory injunction has been settled since the decision in **Giella – Vs- Cassman Brown & Co. Ltd [1973] EA 358**. An applicant must show a *prima facie* case with a probability of success; that he might suffer irreparable loss or injury if the injunction is not granted; and, if the court is in doubt, the matter will be decided on the balance of convenience.

It is not in dispute that the Tenant-Purchase Agreement (Exhibit 1) was between the Plaintiff and the City Council of Nairobi. He was buying the suit house on tenant purchase. The deceased was not mentioned in the Agreement. Subsequent to this the City Council assigned the house to both the Plaintiff and the deceased. It is this assignment ("FM 1") that is the basis of the 1st Defendant's claim that the deceased had an interest in the house. He alleges that this assignment confirmed that the house had been bought and developed jointly by the Plaintiff and the deceased. This is what he says in paragraph 3 of the replying affidavit:-

"3. *THAT my parents jointly purchased the property, the subject matter of this suit, being House Block F28 in Kimathi Estate sometime in 1971.*"

If the suit house was jointly owned, the Plaintiff became the sole owner of the property upon the death of the deceased. M/s Machio for the Plaintiff drew the court's attention to **Land Law And Conveyancing in Kenya** by P. L. Onalo. At pages 19 to 20 on joint tenancy the writer states as follows:-

*"Under joint tenancy two or more persons are treated as one owner. As between themselves they have separate rights. A joint tenancy is distinguished from a tenancy in common by the right of ownership under the principle of **jus-accrecendi** i.e the right of survivorship.*

Jus – accrecendi. *When one of the joint tenants dies, the survivor becomes the sole owner of the whole interest or right in land. The rules of intestacy do not apply to the joint tenancy and at the same time he cannot dispose of his interest under a will. He thus passes nothing to his heirs. But when he becomes a sole owner, he can pass the whole to his heirs. A joint tenant can thus leave nothing or can have the whole. In the joint tenancy there is the unity of title, of possession and time."*

It follows that the 1st Defendant would not lay any claim to the suit house. If the 2nd and 3rd Defendants were tenants of the deceased, upon her death they have become tenants of the Plaintiff to whom they have to make payment. However, any termination of the tenancy has to obey the terms of whatever agreement the Defendants had entered into with the deceased. In short, the Plaintiff has shown he has a *prima facie* case.

As owner of the suit house the Plaintiff has all rights of possession, occupation, use and quiet enjoyment. The 1st Defendant, or any other person, cannot interfere with such right.

Consequently, an injunction shall issue against the 1st Defendant restraining him from collecting any rent from the 2nd and 3rd Defendants. It is also directed that the 1st Defendant accounts in 60 days for all the rent collected since the death of the deceased.

Eviction that is sought in prayer 5 of the motion would be a final order which should await the resolution of the case. It should be recalled that the tenants were lawfully allowed onto the premises by the deceased before she died. What is sought is a mandatory injunction which can only issue at this stage quite sparingly, and in clear and obvious cases as it has the effect of bringing litigation to an end (**National Bank of Kenya –Vs- Duncan Owuor Shakali And Another, Civil Appeal No. 9 of 1997**). Once again, if the Plaintiff wants the 2nd and 3rd Defendants to vacate he can issue to them the requisite notice as stipulated in the tenancy they had entered into. If there was no agreement, a reasonable notice can be issued.

In these terms, the application is allowed. Costs shall be borne by the Defendants.

**DATED AND DELIVERED AT NAIROBI
THIS 31ST DAY OF MAY 2011**

**A. O. MUCHELULE
J U D G E**