



IN THE HIGH COURT OF KENYA

AT NAKURU

CIVIL SUIT NO.134 OF 2011

1. VIRGINIA NJERI

2. PATRICK KING'ORI

3. NIKE OTIENDE

4. BONIFACE MAINA

5. ROSELYNE WAIRIMU

6. BRIAN SISHUNGU

7. SAMWEL MARINSA

8. FAITH WAMAITHA

9. EMMANUEL GACHECHA

10. SIMON MACHARIA

11. MICHAEL IREGI

12. ANN NJOKI

13. SARAH WANGARI

14. LUCY MWANGI

15. MARY WANJIRU

16. GRACE MUGURE

17. MERCY WANGARI

18. MOSES MURAGE

19. ALBERT OSINDE

20. LOISE BUNGANJI

21. JACOB NGETETA.....
.....PLAINTIFFS

VERSUS

SIMON NENGA KAMAU.....
.....1ST DEFENDANT

DOUGLAS WAINAINA KAMAU.....
.....2ND DEFENDANT

RULING

The late James Kamau Kagiri was the registered owner of residential premises on plot Nos. 315, 316, 318 and 385 Pangani Estate Nakuru. Upon his death a limited grant of probate was issued to Simon Njenga Kamau, the 1st respondent in this application and Jane Wanjiru Kamau.

The twenty one (21) applicants in this action are tenants of the premises in question. They have brought simultaneously the instant application and a plaint against the 1st respondent and one Douglas Wainaina Kamau claiming that on 7th June, 2011 the respondents with 30 hired goons descended upon the premises issuing threats and insults to the tenants and dislodged all the gates to the premises. The action surprised the applicants who have been paying rent to Elizabeth Nyambura Kamau and Stephen Kungu Kamau following the death of the original landlord, the deceased. The matter was reported to Bondeni Police Station who declined to intervene arguing that the issue was a family dispute. The applicants brought this action together with an application in which they sought both prohibitory and mandatory orders of injunction. Being clear to the court that the removal of the gates posed a security threat to the tenants, the respondents were ordered to restore the gates which were duly re-erected.

The respondents have replied to the claims of harassment by stating that the court having issued to the 1st respondent a grant of probate, it was his responsibility to collect and receive the estate of the deceased. It is deposed further that the rent from the premises in question was collected by Muigai Commercial Agencies but confusion arose when two of the deceased person's dependents began to intermeddle with the estate by collecting rent directly from the tenants without accounting for it.

The court ordered on 20th September 2010, among other things, the appointment of point "A" Commercial Agencies to collect rent from the suit premises and to deposit the same in Account No. 045-104117204, Kenya Commercial Bank, Nakuru Branch. It was also averred that the applicants have declined to comply with the order and have continued to pay rent to Stephen Kungu Kamau and Elizabeth Nyambura Kamau. The respondents finally averred that they have no intention of evicting tenants who are up-to-date with rent payment and who have made payment to the appointed agent.

I have considered these arguments together with the cited authorities **Belle Maison Limited V. Yaya Towers Limited**, Civil Case No. 2225 of 1992 and **Wildlife Lodges Limited T/A Land Mark Hotel V Jacarada Hotel Limited**, HCCC. No.521 of 1999.

I have already stated that the mandatory order of injunction was issued at the interlocutory stage in accordance with the principles enunciated in **Belle Maison** case (Supra). What remains for consideration is the prayer for prohibitory injunction.

For that prayer to succeed the applicants must demonstrate that they have a *prima facie* case with a probability of success; that an award of damages is not sufficient remedy and that the balance of convenience is in their favour - **Geilla V. Cassman Brown & Co. Ltd.** (1973) EA 358

In considering whether or not there is a *prima facie* case, the court is not called upon to make definite findings of either fact or law. All the court is concerned with at this stage is to ascertain if the applicants' rights have been violated by the respondents as to require the latter to offer an explanation. See **Mrao Ltd. V. First American Bank of Kenya Ltd.** (2003) KLR 125. It appears to me that the respondents took the action that precipitated into the filing of this action when the applicants failed to pay rent to the court appointed agent. It is also apparent that the dependants of the deceased are or were divided on the management of the suit property. No doubt in terms of **Sections 79 & 82, the Law of Succession Act**, it is only the 1st respondent and Jane Wanjiru Kamau who are entrusted by the court to preserve and protect the estate of the deceased on behalf of the other dependants. To that end they are entitled indeed duty-bound to take all steps to do this. However the steps envisaged are lawful steps. Forcible entry and dislodging of the gates is not only unlawful but also uncivil irrespective of the respondents' transgression. As was observed by Shah, JA in **M/s. Gusii Mwalimu Investment Ltd & 2 others V. M/s. Mwalimu Hotel Kisii Ltd**, CA No, 160 of 1995 cited **Wildlife Lodges** case (Supra)

“A court of Law cannot allow such state of affairs whereby the law of the judge takes over”

In their replying affidavit the respondents have conveniently avoided mention of anything to do with their action of removing the gates.

For the reasons given, I came to the conclusion that the applicants' fears are not unfounded and as long as the dispute in the family of the deceased persists, there is likelihood of interference. The applicants have a *prime facie* case. An award of damages is inappropriate and the applicants are in occupation. It is for the beneficiaries of the estate to understand their roles in the administration of the estate and to respect the orders of the court.

For these reasons, it is ordered that an injunction will issue as prayed in paragraph (c) of the motion pending hearing of the suit. In the meantime it is ordered that all the applicants to pay all due rents to Point "A" Commercial Agencies.

I make no orders as to costs.

Dated, Delivered and Signed at Nakuru this 16th day of December, 2011.

W. OUKO

JUDGE