



**REPUBLIC OF KENYA  
IN THE HIGH COURT OF KENYA**

**AT MOMBASA**

**Civil Suit 416 of 2009**

**HENSON NIGEL GRAHAM  
STEPHEN FEWELL.....PLAINTIFFS/APPLICANTS  
-VERSUS-  
DIVINA JEROP CHERUIYOT.....DEFENDANT/RESPONDENT**

**RULING**

The applicants came before the Court by Notice of Motion dated 18<sup>th</sup> November, 2009 and brought under Order L, rule 1 of the Civil procedure Rules, and ss. 3A and 63(e) of the Civil Procedure Act (Cap. 21, Laws of Kenya).

The applicants' prayer was for grant of an order of mandatory injunction to compel the defendant/respondent to leave and vacate the plaintiffs' premises known as Plot No. 2847/I/MN pending the hearing and determination of the suit.

The supporting grounds for the application were as follows:

- (i) ***the plaintiffs are the registered owners of the parcel of land known as Plot No. 2847/I/MN situated at Shanzu, Mombasa;***
- (ii) ***the defendant is unlawfully operating a business on the plaintiffs' premises aforesaid, with no colour of right whatsoever;***
- (iii) ***the defendant has refused to vacate the plaintiffs' premises despite many requests;***
- (iv) ***the plaintiffs are unable to access their premises to conduct business and to enjoy their investments.***

One of the plaintiffs, **Henson Nigel Graham**, swore a supporting affidavit deponing that the plaintiffs had purchased the suit premises from the administrators of the late **Jasper Aliwa Ongor**, and the property was duly transferred into the names of the plaintiffs; at the time of purchase, the title was clean and unencumbered, and there was no lease registered against the title of the suit premises; the defendant is now unlawfully occupying the suit premises and running a business there; on several occasions the plaintiffs have, through their advocates, requested the defendant to vacate the suit premises, but she has refused, claiming that she had purchased the same property. The deponent expresses his belief that the defendant is merely a trespasser with no rights to the suit property.

Counsel for the plaintiffs began from the facts as deponed, that, by an agreement executed on **25<sup>th</sup> July, 2008** the plaintiffs purchased the suit property from the administrators of the estate, and the transfer was executed on **7<sup>th</sup> October, 2009** and registered on **16<sup>th</sup> October, 2009**, being entered in the certificate of title as entry No. 4.

From these facts, counsel submitted that 'the applicants are the legal and registered owners of Plot No. 2847/I/MN'.

The annexures to the affidavit show that at the time of purchase of the suit property, there was a tenant in occupation, one **Richard Nyambane Maseke**, and the plaintiffs (in clause 3 of the agreement for sale) had agreed to buy the unexpired period of the tenant's lease.

Counsel urged that the applicants were unable to take possession of the suit premises, as they found the defendant operating the business which was previously being operated by **Richard Nyambane Maseke**.

The defendant in her replying affidavit alleged that she too is a *bona fide* purchaser of the suit property; and she exhibits copy of an agreement for sale to her dated **12<sup>th</sup> July, 2009**. The defendant alleges that the plaintiffs are not the registered owners of the suit property.

The defendant depones that there is a lease between her and the administrators of the estate – with an agreement dated **1<sup>st</sup> December, 2008**. The respondent also exhibited copy of a caveat showing that she was claiming a purchaser's interest.

Counsel for the plaintiffs submitted that the plaintiffs/applicants have satisfied the conditions for grant of an injunction, as laid down in *Giella v. Cassman Brown & Co. Ltd* [1973] E. A. 358. Counsel urged that the plaintiffs had demonstrated a *prima facie* case with a probability of success: they are the registered owners of the suit land together with all the developments thereon; they have exhibited the sale agreement duly executed on **25<sup>th</sup> July, 2008**; they have exhibited a transfer dated **7<sup>th</sup> October, 2009**, endorsed as entry No. 4 on **16<sup>th</sup> October, 2009** in their favour. On that basis, counsel contended that “the plaintiffs/applicants are the legal registered owners of Plot No. 2847/I/MN and are therefore entitled to the exclusive use of the plot.”

Learned counsel discounted the defendant's claim, that she bought the suit land from the administrators of the estate for Kshs. 800,000/=; as the plaintiffs purchased it at the price of Kshs. 4,000,000/= and paid stamp duty during transfer. Counsel urged that the defendant has herself recognized, in her replying affidavit, that if she had any grievance she would have to sue the administrators in a separate suit. Counsel submitted that “there is no relationship between the plaintiffs and the defendant in respect of the subject plot, and the defendant/respondent has no colour of right to remain on the plaintiffs' .....plot.” Counsel urged that the balance of convenience tilts in favour of the applicants.

Learned counsel submitted that there was no right in law which the defendant was trying to protect or seek, as the plaintiff was not the party any such claim could be made against. Since the suit property is registered in the name of the plaintiffs, counsel submitted, there existed no landlord whom the defendant could claim to be tenant of. Moreover, counsel urged, the defendant could not claim purchaser's interest against the plaintiffs herein.

Learned counsel urged that documents exhibited by the defendant – sale agreement and lease – “have no force of law in the face of a clear transaction [culminating in] a transfer in favour of the applicants”.

Counsel submitted that the defendant has produced no evidence to support her claim to the suit property, and she was merely a trespasser. But the plaintiffs, counsel submitted, have shown special circumstances that warranted the Court granting an order of mandatory injunction against the respondent. The test for the grant of a mandatory injunction, counsel urged, was as set out in *Halsbury's Laws of England*, 4<sup>th</sup> ed(Vol.24) at para. 948:

**“A mandatory injunction can be granted on interlocutory application as well as at the hearing, but in the absence of special circumstances, it will not normally be granted. However, if the case is clear and one which the court thinks ought to be decided at once, or if the act done is a simple and summary one which can be easily remedied, or if the defendant attempted to steal a march on the plaintiff, .....mandatory injunction will be granted on an interlocutory application”.**

Counsel urged that the defendant had not demonstrated any right to be on the suit land but was merely stealing a march on the plaintiffs, by operating a restaurant business upon land which is the property of the plaintiffs. And counsel called in aid several Court decisions, in support of the plaintiffs' case: *Shell & B.P. (Malindi) Kenya Ltd v. Kings Motors Limited*, Nakuru HCCC No. 265 of 2004 (*Kimaru, Ag. J.*); *Kenya Breweries Ltd v. Okeyo* (Ct of Appeal) [2002] 1E.A. 109; *Showind Industries Ltd. v. Guardian Bank Ltd. & Another (Ringera, J)* [2001] 1E.A. 284.

For the defendant, counsel submitted that she had done a postal search on the title to the suit property, and that the same did not show the plaintiffs herein to be the owners as from **22<sup>nd</sup> October, 2009** – and yet the plaintiffs averred they were registered as owners on **16<sup>th</sup> October, 2009**. Counsel urged that this question raised an uncertainty which merited disposal through the full trial of the main cause.

Counsel urged that the issues of merit could only be determined if the “legal representatives of the registered owner of the suit property” are joined in the suit; and so, on this account, the respondent has applied for leave to issue third-party notice to the said legal representatives.

It was submitted for the respondent that the main cause has several issues for trial, and that the same should be ventilated at the trial itself.

In the plaint filed on 18<sup>th</sup> November, 2009 the prayers in the instant application constitute the main part of the orders sought. It follows that if the orders now sought are not granted now, the matter will be resolved within the framework of the suit itself. However, it is the plaintiffs' contention that there are special circumstances giving the case based on the prayers in

the application, such overwhelming merit that it is only proper the Court should grant them right away.

It is common cause that the suit land, prior to the sale-and-purchase transaction, belonged to the estate of **Jasper Aliwa Ongor**. The agreement for sale between vendor and purchasers (plaintiffs) was made on **25<sup>th</sup> July, 2008**; the transfer was executed on **7<sup>th</sup> October, 2009**; the transfer was entered in the register as entry No. 4 on **16<sup>th</sup> October, 2009**.

The defendant, upon receiving summons to enter appearance on **20<sup>th</sup> November, 2009** filed a Notice of Motion application on 16<sup>th</sup> December, 2009 seeking leave to issue third-party notice to the administrators of the original proprietors' estate who had sold the suit land. The applicant's gravamen was that: **Alice Akoth Aliwa** and **Barack Omudho Aliwa** had purported to execute two sale agreements with the plaintiff and with the defendant in regard to the suit property.

The defendant deponed that on **1<sup>st</sup> December, 2008** she entered into a lease agreement with **Barack Omudho Aliwa** for a period of **5 years and 3 months** in respect of the suit property – the sale agreement being executed on **12<sup>th</sup> January, 2009**.

What the defendant is claiming from the administrators of the estate of the deceased is: “specific performance of the lease agreement dated 1<sup>st</sup> December, 2008 and the Agreement for Sale dated 12<sup>th</sup> January, 2009”.

In her exhibits, the defendant shows copy of a **lease agreement** between herself for the one part, and **Barack Omudho Aliwa** for the other part, dated **1<sup>st</sup> December, 2008**; and she shows an **agreement for sale** between herself, for the one part, and **Alice Akoth Aliwa** and **Barack Omudho Aliwa** for the other part, dated **12<sup>th</sup> January, 2009**.

The defendant's gravamina, and her reasons for resisting the plaintiffs' call that she vacates the suit premises, centre on two things: (i) the said **lease** of **1<sup>st</sup> December, 2008**; and (ii) the said agreement for sale dated **12<sup>th</sup> January, 2009**. The defendant reckons that because she has grievances against the administrators of the original title-holder, she can keep out of the suit property the current owners, while she seeks redress from those administrators, in respect of the said lease, and in respect of the said sale agreement.

Such a position, as the basis of the defendant's claim, presents **clear-cut demands** that this Court should, at this interlocutory stage, make certain orders even though they be far-reaching.

There has been no serious challenge to the genuineness of the several formal legal documents relied on by either of the parties. It is clear that the plaintiffs, in **July, 2008** entered into a sale agreement with the administrators of the original property-owner's estate; no less clear is it that those administrators executed a transfer of the suit property to the plaintiffs on **7<sup>th</sup> October, 2009**; and equally clear is it that the transfer was duly **registered** in the names of the plaintiffs on **16<sup>th</sup> October, 2009**. Therefore, as at **16<sup>th</sup> October, 2009** the suit property was under **new ownership**, that of the plaintiffs herein. The defendant as holder of a lease dated **1<sup>st</sup> December, 2008** is not shown to have made any arrangements with the new proprietor – and this point could have been the subject of a legal contest later. Such contest, however, could not change the fact that the legal title holders of the suit property were the plaintiffs herein.

The defendant states that she entered into an agreement for sale, to her, of the suit property on **12<sup>th</sup> January, 2009**; the property was not transferred to her, as on **7<sup>th</sup> October, 2009** it was transferred instead to the plaintiffs herein.

There clearly may be a dispute based on **contract**, as between the defendant and the administrators of the original title-holder's estate; but it does not, as judged from the state of the pleadings, involve the **plaintiffs**, who have every right to enjoy their property. This right cannot be taken away, so as to accord the defendant the opportunity to bring in a third party, as liability is likely to attach only to the **third party**; and the full loss that is destined to fall on the plaintiffs, in those circumstances, may not be remedied.

Consequently, **special circumstances** have, in my opinion, been raised which justify the award of a **mandatory injunction**.

I hereby grant the plaintiffs mandatory injunction in the terms of prayer No. 2 – the same to compel the defendant to vacate the plaintiffs' premises known as Plot No. 2847/I/MN pending the hearing and determination of the suit.

The defendant shall bear the costs of this application.

**DATED and DELIVERED at MOMBASA this 28<sup>th</sup> day of May, 2010.**

**J. B. OJWANG**  
**JUDGE**

Coram: **Ojwang, J.**  
Court Clerk: **Ibrahim**

For the Plaintiffs: *Mr. Muraya*  
For the Defendant: **Mr. Maundu**