



REPUBLIC OF KENYA
IN THE HIGH COURT OF KENYA
AT MOMBASA
Civil Suit 456 of 2009

1. JOHN RAMA KENGA
 2. PAUL MWAURA NDUNGU
 3. JACOB MGENYI
 4. BEERNARD MWADIME
 5. PAUL MAINA NDEGWA
 6. MARIAM LELA
 7. JAPHET MUTUA
 8. REHEMA ALMASI
 9. MWINYIHAJI MZEE
 10. LEILA SHABAN
 11. MWINYIHAJI ABDALLA
 12. ABDALLA NZIOKI
 13. SALAMA NZISA
 14. MWAURA CHIKOVE
 15. OMAR MWAMBIRE.....PLAINTIFFS
- VERSUS**
- MOHAMED SOUD FAKIH.....DEFENDANT**

RULING

I have before me an application by the 15 plaintiffs who seek primarily an order restraining the defendant from selling or otherwise interfering with the plaintiffs' peaceful possession of their houses built on LR No. 135R/V/M (hereinafter "*the suit premises*") pending the hearing and/or determination of this suit. The main grounds for the application as expressed on the face of the application are that the defendant has threatened the plaintiffs with the sale of the suit premises and their eviction therefrom which threat, if carried out, will cause them irreparable harm and loss; that the defendant's threatened action is against established custom and usage and that it is, in the premises, in the interests of justice to grant the injunction sought.

The application is supported by an affidavit sworn by **Mwaura Chikove** the 14th plaintiff. The affidavit elaborates the above grounds. The application is opposed and there is a replying affidavit sworn by the defendant. It is deponed in the affidavit, *inter alia*, that the claims made by the plaintiffs are baseless and false; that some of the plaintiffs are unknown and are not in occupation of the suit premises; that others moved onto the suit premises recently as squatters; that the receipts exhibited reflect different premises; that the plaintiffs' interest is not evidenced in writing; that the plaintiffs' tenancy over the suit premises could at best be one terminable at will on notice; that the suit premises are threatened with sale for none payment of rates of Kshs. 2,887,862.03 hence the decision to sell the same and that the plaintiffs do not stand to suffer irreparable damage if the suit premises are sold.

When the application came up before me for hearing on 25th February, 2010, counsel agreed to file written submissions which were in place by 16th June, 2010. I have considered the application, the affidavits filed both for and in opposition to the application and the

submissions made. I have further considered the authorities relied upon. Having done so, I take the following view of this matter. At this stage, the court cannot determine with conclusiveness the rights and duties of the parties. The applicants are however, required to show that they have a prima facie case with a probability of success at the trial. They must also show that they would suffer irreparable injury which would not be adequately compensated by way of damages and where the court is in doubt the application is to be considered on a balance of convenience. Those principles were crystallized in the rule making case of **Giella – v – Cassman Brown & Company Limited [1973] EA 358.** I am bound to consider the plaintiffs' application on the basis of those principles.

The plaintiffs' basis for their application is that they were allowed to construct houses on the suit premises and did construct houses of permanent nature thereon and pay the requisite ground rent to the defendant. In the premises, they contend that they are not squatters but lawful occupiers of the premises. The defendant's main argument on the other hand is that the plaintiffs have no interest in the suit premises which can be enforced as the same is not supported by written evidence and the annexed ground rent receipts relate to a different property.

The plaintiffs' interest in the suit property commonly known as ***"house without land"*** seems to be an accepted form of land tenure at the Coast. The tenure would appear to operate outside the Law of Contract. The plaintiffs allege that they have constructed permanent houses on the suit property and own a life interest in the same as long as they pay what they call ground rent which they claim they have regularly paid. That is a novel land system. I cannot at this stage determine definitively whether the Law should recognize the same. That will require a full trial. The plaintiffs' interest may be lacking documentary support but they appear to have somehow gained access to the suit premises and put up houses thereon. It is because the plaintiffs are in possession that the defendant seeks vacant possession of the same. It cannot be gainsaid that to decline this application will in reality be allowing the defendant's counter-claim without a hearing.

In the premises, I have come to the conclusion that the plaintiffs have demonstrated a prima facie case with a probability of success at the trial and that damages will not be an adequate remedy. Accordingly, an order shall issue that pending the hearing and determination of this suit the defendant by himself, his agents, servants, assignees, employees successors or anybody claiming under him is restrained from selling or otherwise interfering with the plaintiffs' possession of all the houses built on the suit premises. The plaintiff shall file separate undertakings under oath as to damages within the next 7 days.

Costs shall be in the cause.

Orders accordingly.

DATED AND DELIVERED AT MOMBASA THIS 12TH DAY OF JULY 2010.

F. AZANGALALA

JUDGE

Read in the presence of:-

Ogolla for the Defendant.

F. AZANGALALA

JUDGE

12TH JULY 2010