



REPUBLIC OF KENYA
IN THE HIGH COURT OF KENYA
AT NAIROBI (NAIROBI LAW COURTS)

Civil Suit 2259 of 2007

ANTONY FRANCIS WAREHAM.....PLAINTIFF

VERSUS

BRIAN JOHN HAWKES.....1ST DEFENDANT
CHARLES W. RUBIA2ND DEFENDANT

R U L I N G

1. This suit was filed by the plaintiff Antony Francis Wareham, who is the son and beneficiary of the Late Ivor Leonard Wareham (hereinafter referred to as the deceased). The plaintiff has been in occupation of premises known as LR No.209/10530/121 Siwaka Estate (hereinafter referred to as the suit premises). The property formed part of the estate of the deceased who died on 11th November, 1994. The plaintiff sued Brian John Hawkes and Charles W. Rubia who were the executors of the written will of the deceased after they attempted to levy distress and to evict the plaintiff from the suit premises. The plaintiff claimed that he had the right to stay in the suit premises as the son of the deceased. The plaintiff further offered to purchase the suit premises from the estate of the deceased.

2. The plaintiff therefore sought judgment against the defendants for:

- (i) A permanent injunction to restrain the defendants by themselves, their servants or agent or otherwise howsoever from evicting the plaintiff from Maisonette Number 134 LR Number 209/10530/121 Siwaka Estate, Nairobi, disturbing or attempting to distress for rent or otherwise interfering with the plaintiff's possession of the said property in any way whatsoever.
- (ii) A permanent injunction to restrain the defendants by themselves, their servants or agents or otherwise howsoever from alienating, selling or disposing of the property known as Maisonette Number 134, LR Number 209/10530, Siwaka Estate, Nairobi.
- (iii) A declaration that the plaintiff is not a tenant of the defendants and that the plaintiff is entitled to the possession and occupation of Maisonette Number 34 LR Number 209/10530/121 Siwaka Estate Nairobi or in the alternative a right to purchase the property.
- (iv) Damages.
- (v) Costs of this suit.

3. Filed simultaneously with the plaint was a chamber summons brought under Sections 3, 3A and 63(e) of the Civil Procedure Act; Order XXXIX Rule 2 & 9 of the Civil Procedure Rules. In the application, the plaintiff sought *inter alia*, orders of temporary injunction restraining the defendants from levying distress for rent against the plaintiff, evicting the plaintiff or in any way interfering with the plaintiff's occupation and possession of the suit premises. The plaintiff also sought an order of temporary injunction restraining the defendants from selling, offering for

sale, disposing off, or in any way interfering with the suit premises pending the hearing and determination of the suit.

4. On 23rd November, 2007, the executors filed a defence in which they maintained that under the will of the deceased all property was vested with the defendants as the executors and trustees. The executors maintained that the plaintiff had no right to occupy the suit property and was in illegal occupation of the suit property. They further contended that they were obligated to distribute the estate equally among the four beneficiaries of the deceased's estate, and the plaintiff was not entitled to any preferential treatment. The defendants therefore maintained that they were entitled to take any action as they deem necessary as regards the plaintiff's illegal occupation of the suit premises. The defendants urged the court to dismiss the plaintiff's suit.

5. Following several appearances in court by the parties, for the hearing of chamber summons dated 8th November, 2007, on 28th July, 2008, a consent duly agreed upon by the parties was recorded by the court. That consent highlighted the background of the suit and it is appropriate to reproduce the consent verbatim:

“Whereas by a consent made on 12th March 2008;

Whereas the parties agreed to meet and discuss the following issues:

- (i) Question of the payment of rent, the period and the quantum***
- (ii) Question of the purchase by the plaintiff of the suit property namely LR No.209/10530/121.***

Whereas the parties further agreed on the maintenance of status quo and matter be mentioned on 15th May, 2008.

Whereas the parties met and discussed issues and recorded a further consent on 4th June, 2008 in the following terms:

- (i) That the plaintiff do pay an agreed monthly rent of Kshs.25,000/=. It is hereby acknowledged the plaintiff has paid Kshs.25,000/= on account.***
- (ii) The parties do discuss and agree the effective date from when the rent would be payable.***
- (iii) That the parties do agree that the plaintiff do proceed to purchase the suit property and to this effect the parties have jointly instructed Ms Lloyd Masika to update this valuation report.***

Whereas the valuation report has now been received by the parties and the parties hereby record a further consent in the following terms:

By consent the plaintiff's application dated 8th November, 2007 be and is hereby allowed:

- (i) The defendants are not to levy distress against the plaintiff provided the plaintiff continues to pay rent of Kshs.25,000/=.***
- (ii) The plaintiff do purchase the suit property LR 209/10530/121 upon a value to be agreed upon between the parties or failing agreement by parties, upon a value determined by the court.***
- (iii) The defendants consequently not to offer the property LR No.209/10530/121 to any other persons or party save the plaintiff, and not in any manner to interfere with the plaintiff's possession of the suit property pending the hearing and final determination of the suit property.***

By consent leave be and is hereby granted to file a reply to defence within 10 days from the date hereof. That the defendant's replying affidavit sworn on 23rd November, 2007 be and is hereby expunged from the record. That the parties do hereby meet on 8th August, 2008, at 2.30 p.m. at the chambers of Ochieng Onyango Kibet and Ohaga Advocates for purposes of holding a pretrial conference and agree on documents, list of issues and admitted facts. That this matter be mentioned

on 23rd September, 2008.”

6. The matter was subsequently mentioned on several occasions. The parties were not able to reach any compromise on the purchase price for the suit property. On 16th June, 2010, the parties agreed to make oral submissions to enable the court determine the only outstanding issue which was the value at which the plaintiff should purchase the suit property. The valuation report prepared in 2006 and the second valuation report in 2008 were both admitted in evidence by consent.

7. Mr. Kibet who appeared for the plaintiff submitted that it was in the interest of all beneficiaries that the plaintiff purchases the suit property at the sum of Kshs.6,250,000/= which was a valuation given in the year 2008. Mr. Mwela who appeared for the defendants on the other hand argued that although the valuation was done pursuant to a joint request, it was still within the contractual limit of the defendants to deal with the estate in the manner they deem fit as they were to act for the benefit of all the beneficiaries. Mr. Mwela therefore argued that the property should be sold at the current market value and not what was stated in the valuation report.

8. I have carefully perused the court record, and also considered the submissions made before me. I have also taken note of the two valuation reports which were produced in evidence. It is evident that pursuant to the consent recorded on 28th July, 2008, the parties agreed to have the suit property sold to the plaintiff subject to the valuation being agreed upon by the parties or failing agreement, determined by the court. Towards that end, the parties had earlier jointly instructed Lloyd Masika Ltd, who valued the property on 2nd July, 2008. It would appear that the parties ignored that valuation and continued arguing about the purchase price. None of the parties has challenged the valuation of 2008 or offered any evidence or information to confirm that it did not represent the appropriate valuation as at that date. Moreover, none of the parties has produced any other valuation to confirm the current market price of the property. I find that it would have been fair and just for the plaintiff to purchase the suit property in July, 2008, at the appropriate valuation given by Lloyd Masika on 2nd July, 2008. Since the parties have been unable to agree on the purchase price, and the parties did consent that the court would fix the purchase price in the event of such a disagreement, I find that the plaintiff should pay the purchase price of Kshs.6,250,000/=. However, the plaintiff not having deposited this money, it is obvious that the defendants are entitled to be compensated. I would therefore order that the plaintiff should pay interest on the purchase price at court rates from 28th July, 2008 to date, subject to the rent paid by the plaintiff from 1st August, 2008 to date being offset against the interest due. Each party shall bear their own costs. Orders accordingly.

Dated and delivered this 16th day of September, 2010

H. M. OKWENGU

JUDGE

In the presence of: -

Sankale H/B for Akide for the plaintiff

Okanga H/B for Kibet for the defendants

Kosgei - Court clerk