



REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA AT NAIROBI

Civil Suit 445 of 2003

CECILIA WAIRIMU NJAGI)

MARGARET NJERI NJAGI)PLAINTIFFS/APPLICANTS

VERSUS

PERIS KEMUMA NYAREGA..... DEFENDANT/RESPONDENT

RULING

This Ruling relates to the notice of motion dated 29.06.04 filed on 30.06.04 and stated to be brought under section 3A of the Civil Procedure Act (Cap.21) and Order L rule 1 of the Civil Procedure Rules seeking orders which may be condensed as under:-

- a) That the defendant/respondent vacates House No. H.153 Umoja1 Estate, Nairobi which she forcefully invaded and took occupation of one of the units thereof on 17.06.04 and that the status quo prevailing before 17.06.04 be maintained until hearing and determination of the suit herein.
- b) That the defendant/respondent be stopped and restrained from harassing tenants and /or occupants of the suit premises until hearing and determination of the suit.
- c) That the defendant/respondent pays the costs of this application in any event. The grounds upon which the application is based may be summarized as follows:-
 - a) That the suit herein filed on 15.05.03 sought a declaration that the suit property belonged to the plaintiffs' late husband, Joseph Njagi acquired by him on 08.09.76 and that the suit premises have since been in the possession of the deceased and subsequently in the possession of his widows, the plaintiffs herein and that the defendant invaded the said premises on 17.06.04 while the suit was pending.
 - b) That the defendant's invasion was not backed by a court order and, further, that there has never been any landlord/tenant relationship between the defendant and tenants occupying the suit premises; that the invasion was to pre-empt the pending suit; and that the said invasion is illegal.

The notice of motion application is supported by the affidavit of the first plaintiff/applicant, Cecilia Wairimu Njagi sworn on 27.06.04. In it Cecilia deponed that she and the second plaintiff/applicant Margaret Njeri Njagi are administrators of the estate of Joseph Njagi Ndiga who was their husband and that he died in June, 1996. Cecilia further deponed that after the deceased's death the defendant/respondent started claiming that she had bought the suit premises from the deceased and she started to harass tenants living therein by sending auctioneers to proclaim alleged arrears of rent while there has never been any landlord/tenant relationship between the defendant/respondent and the tenants.

When the application came up for hearing before me on 21.02.05 and 09.05.05, the plaintiffs/applicants were represented by learned counsel, Mr. J.K.M. Gichachi while the defendant/respondent was represented by learned counsel, Mr. J. Omwenga. Plaintiffs'/applicants' counsel pointed out that the defendant/respondent alleged to have bought the suit premises during the lifetime of the deceased, Joseph Njagi Ndiga, yet the only time the defendant/respondent started occupying the premises was from 17.06.04 when she invaded them while this suit was pending. Counsel submitted that the issue whether the defendant/respondent bought the suit premises from the deceased or not is a subject for determination at the hearing of the suit and questioned why the defendant/respondent never brought any dispute to court between herself and the deceased during his lifetime despite her claim that she bought the house from him some 6 years before his death. Plaintiffs'/applicants' counsel pointed out that there is no landlord/tenant relationship between the defendant/respondent and the tenants she evicted from the suit premises; that the premises ought to be preserved in the state they were in before the defendant's/respondent's invasion thereof and urged the court to grant the application and restore the suit premises to their status before the defendant/respondent invaded them on 17.06.04.

On the other hand, defendant's/respondents' counsel opposed the application and relied on the replying affidavit of the defendant/respondent, Peris Kemuma Nyarega sworn on 14.07.04. The essence of the defendant's/respondent's affidavit is that she bought the suit premises from the late Joseph N. Ndiga on 26.07.91 whereafter she and Joseph executed an assignment approved by the then Nairobi City Commission and the defendant/respondent left the assignment with the Commission which stood in for the Nairobi City Council for purposes of registration with the Ministry of Lands. That the assignment was registered on or about 1996. That in 1996 the plaintiffs/applicants filed HCCC No.3079 of 1996 against the present defendant/respondent and obtained an ex-parte injunction restraining her from evicting tenants from the suit premises or otherwise interfering with their peaceful occupation of the premises and also restraining her from disposing of the said premises until hearing and determination of that suit, i.e. HCCC No.3079 of 1996. That when that suit came up for hearing before Mbitio, J (as he then was), objections were raised to the suit and the plaintiffs withdrew it in June 2003. The defendant/respondent in the present suit has further deposed that she paid the outstanding loan for the suit premises to the City Council of Nairobi and annexed a letter of 22.05.03 (Exhibit "PK8") from the council to that effect. The defendant/respondent herein added that when HCCC No.3079 of 1996 was withdrawn against her, she gave notice to the tenants in the suit premises and that they moved out and that the plaintiffs in the withdrawn HCCC No.3079 of 1996 then filed the present suit and the notice of motion application now under consideration. The defendant/respondent to the present application denies invading the suit premises and avers that auctioneers went to levy distress on the tenants in the suit premises and that they fled with the rent arrears due and that she never removed any of the tenants' goods.

Defendant's/respondent's counsel's submissions revolved around the above depositions by the defendant/respondent. Counsel submitted that the application under consideration is defective and not properly before court and that the prayers sought cannot be granted. In the latter connection, defendant's/respondent's counsel referred to High Court Milimani Commercial Courts Civil Case No. 33 of 2002, Paul Muhoro Kihara - vs - Barclays Bank (K) Ltd; Giella - vs - Cassman Brown & Co. Ltd [1973] E.A. 358; and HCCC No.1130 of 1996, Lucy Wairimu -vs - Ashvindchand Hirji Shah & 3 others. The main point sought to be relied on in these cases is that for an interlocutory injunction to issue, the applicant must establish a prima facie case with probability of success and it was defendant's/respondent's submission that no such case has been established.

Defendant's/respondent's counsel pointed out that the defendant/respondent is in possession of the suit premises and that if the complaint is about wrongful distress for rent, remedy lies in damages by virtue of section 8 of the Distress for Rent Act (Cap. 293). Counsel also referred to HCCC No.1130 of 1996 (supra) on this point. With regard to prayer 2 in the notice of motion that the defendant be restrained from harassing the tenants and/or occupants of the suit premises until hearing and determination of the suit, counsel pointed out that there is no affidavit by any tenant to support the allegation of harassment. In this regard, counsel pointed out that the allegation in paragraph 8 of the first plaintiff's/applicant's affidavit of 29.06.04 that the defendant went to the suit premises on 17.06.04 and forcefully evicted one of the tenants has not disclosed the source of that information and that this omission contravenes Order XVIII rule 3 of the Civil Procedure Rules.

Defendant's/respondent's counsel submitted that there is no order known as status quo in the Civil Procedure Act or Rules and urged that the application be dismissed with costs.

In reply, plaintiff's/applicants' counsel pointed out that as far as his clients are concerned, the sale of the suit premises relied on by the defendant/respondent is a forgery and referred to paragraphs 7, 8, 9 and 10 of the plaint filed on 15.05.03. He complained that no sale agreement was exhibited by the defendant/respondent and that the two assignments exhibited ("PK 1" and "PK 2"), although said to be one document, are different judging by the stamps affixed thereon. Counsel pointed out that although the defendant/respondent said she bought the suit premises in 1991, she never took possession until 17.06.04, forcefully. It was plaintiffs'/applicants' counsel's contention that the defendant/respondent did not repay any loan to Nairobi City Council and challenged annexure "PK 8" to the defendant's/respondent's affidavit of 14.07.04, arguing that it is no evidence of payment. Regarding HCCC No. 33 of 2002 (supra), plaintiffs'/applicants' counsel contended it is not relevant since the action complained of herein had not occurred at the time of filing the suit herein. He said that the purport of the present application is not wrongful distress for rent but that there was no landlord/tenant relationship between the defendant/respondent and the tenants when the defendant/respondent went to the suit premises purporting to carry out distress on people with whom she had no landlord/tenant relationship. Counsel also submitted that HCCC No.1130 of 1996 and Giella's case (supra) are not relevant as they deal with temporary injunction while the plaintiffs/applicants seek removal of defendant/respondent from the suit premises for purposes of preserving the said premises.

Plaintiffs'/applicants' counsel reiterated that the application be granted.

I have duly considered the rival submissions of the parties.

As I understand it, the plaintiffs/applicants seek removal of the defendant/respondent on two principal grounds: firstly, that they (plaintiffs/applicants) are the widows of the late Joseph Njagi Ndiga from whom the defendant/respondent says she bought the suit premises in 1991 before he died and that they (plaintiffs/applicants) are administrators of the said Joseph Njagi Ndiga's estate. Secondly, that the defendant's/respondent's claim to have purchased the suit premises is a forgery. I shall address the two issues in reverse order.

The plaintiffs'/applicants' claim that the defendant's/respondent's purported purchase of the suit premises is a forgery is at the centre of the suit and its determination will have to await hearing of the suit. I note at this interlocutory stage, though, that the defendant/respondent has presented papers to the effect that the suit premises were assigned to her by the late Joseph Njagi Ndiga. The plaintiffs/applicants challenge the bona fides of these papers but, as noted earlier, resolution of this issue has to await hearing of the suit. The plaintiffs/applicants posed the question as to why the defendant/respondent who says she bought the suit premises from the deceased in 1991 never took possession or lodged any dispute over the property during the deceased's lifetime. In this regard, I note that the defendant/respondent says that after execution of the assignment of the property to her, she left the assignment with the Nairobi City Commission which stood in for the Council for the latter to arrange for registration of the assignment, which took place about 1996, and that in 1996 the plaintiffs/applicants filed HCCC No.3079 of 1996 and obtained an ex-parte injunction restraining her from evicting tenants in the suit premises or otherwise interfering with their peaceful occupation of the premises and also restraining her from disposing of the suit premises until hearing and determination of HCCC No.3079 of 1996. That suit was, however, subsequently withdrawn allegedly on a technicality and that thereafter the defendant/respondent gave some unspecified notice to the tenants and they moved out, whereafter the plaintiffs in the withdrawn HCCC No.3079 of 1996 filed the present suit in 2003 and subsequently the notice of motion of 2004 now under consideration. The notice of motion seeks orders that the defendant/respondent vacates the suit premises and that she be restrained from harassing tenants of the premises pending hearing and determination of the suit. It appears from the pleadings and their supporting documents that the defendant/respondent is in occupation of at least part of the suit premises. The issue of her removal is closely intertwined with the whole question of who has a rightful claim to the suit premises. This leads me to the first of the two issues I raised above, i.e. are the plaintiffs/applicants widows of the late Joseph Njagi Ndiga and are they administrators of his estate?

No evidence has been tendered before this court to support the averment of the plaintiffs'/applicants' claim to be widows of the late Joseph Njagi Ndiga and no evidence, e.g. by way of letters of administration, has been tendered to establish that they are administrators of the estate of Joseph Njagi Ndiga. This omission undermines the plaintiffs'/applicants' application and leaves doubt at this stage as to their standing in this matter.

The end result is that the orders sought in the notice of motion application dated 29.06.04 and filed on 30.06.04 are hereby refused. However, the defendant/respondent is hereby restrained from disposing of the suit premises pending hearing and determination of the suit. Costs shall be in the cause.

Orders accordingly.

Delivered at Nairobi this 20th day of July, 2005.

B.P. KUBO

JUDGE