



**REPUBLIC OF KENYA**

**IN THE ENVIRONMENT AND LAND COURT OF KENYA**

**AT MOMBASA**

**CIVIL SUIT NO. 194 OF 2019**

**LYDIA MARY MUNYOKI (Also known as Bishop Mary Kagendo) AND**

**REUBEN MUGAMBI (Suing on their own behalf and on behalf of all the**

**members and worshippers of KISIMA CHA NEEMA CHA MWANA WA**

**DAUDI CHURCH) ..... PLAINTIFFS**

**VERSUS**

**SAMUEL CHENGO**

**DAVID MBOJA**

**GEORGE KENGA & OTHERS T/A KALOLENI ENTERPRISES ...DEFENDANTS**

**RULING**

*(Application seeking to strike out the plaintiffs' suit; defendant mainly basing its application on pronouncements made by the court when determining an application for injunction and where the court held that a prima facie case is not established; failure to establish a prima facie case does not necessarily mean that the plaintiff has no case to present for hearing on merits; application dismissed)*

1. The application before me is that dated 8 June 2020 and filed on 12 June 2020 by the defendants. The defendants wish to have orders dismissing this suit, because in their view, it discloses no reasonable cause of action. The application is opposed.
2. This suit was commenced through a plaint filed on 31 October 2019 vide which the plaintiffs sought orders of injunction to stop the applicants from evicting them from the land parcel 117/II/MN; a declaration that a notice dated 17 October 2019 (a notice terminating tenancy) was illegal; an order of specific performance requiring the applicants to sell and transfer the suit land or the 5 acres thereof that the plaintiffs occupy; a declaration of a constructive trust and costs. Together with the suit, the respondents filed an application for injunction which I considered and dismissed in my ruling dated 3 March 2020.
3. The case of the plaintiffs is that on 3 June 2009, they entered into a tenancy agreement with the applicants. It is further the position of the plaintiffs that the applicants offered to sell to them the suit land. On 17 October 2019, the applicants sent to the plaintiffs a letter terminating the tenancy and seeking vacant possession. It is then that the plaintiffs filed this suit.
4. The applicants filed a defence and counterclaim. They denied that they had a sale agreement with the plaintiffs. They however admitted that an offer was made in 2009 but that the plaintiffs breached the terms thereof. They further averred that from the year 2018, the plaintiffs started defaulting in remitting rent. In their counterclaim they sought vacant possession, mesne profits and rent.
5. In this application the defendants reiterate that the offer to sell was terminated and that they also terminated the lease. They have referred to my ruling, in respect of the application for injunction, and pointed out that this court found that the plaintiffs had not established a prima facie case.
6. The plaintiffs have responded to the application through the replying affidavit of Lydia Mary Munyoki also known as Bishop Mary Kagendo. She has averred that apart from the orders of injunction, the plaintiffs also seek orders for a constructive trust. She has stated that she is ready and willing to tender oral evidence and the dismissal of the application for injunction ought not to be a reason to deny the plaintiffs a chance to ventilate their case. She wants her day in court.

7. I have considered the application. The striking out or dismissal of a suit, though a remedy in the discretion of court, is not one that a court is ever quick to dispense. I can see that the applicants have relied heavily on pronouncements made by this court when dealing with the application for injunction. However, it should not be forgotten that those pronouncements and findings were made within the context of the application for injunction and the court had to assess whether a prima facie case has been established. The failure to establish a prima facie case when presenting an application for injunction should not always be equated to mean that the plaintiff has no case on merits or that the case is an abuse of the court process. Indeed, it may happen that after the case is heard, the court can hold in favour of the plaintiff, on the full merits of the case.

8. The plaintiffs have pointed out that apart from the injunction, they have raised issues of constructive trust. They also wish to have orders of specific performance. I cannot, through this application, determine the merits or otherwise of those pleadings. Neither do I wish to enter into a deep interrogation of the respective cases of the parties at this stage, without hearing the full evidence. Let every party be given an opportunity to be heard and then the court can make its decision.

9. I am thus not persuaded, in the circumstances of this case, that the plaintiffs' case should be struck out. I find no merit in this application and it is hereby dismissed with costs.

10. Orders accordingly.

**DATED AND DELIVERED THIS 4<sup>TH</sup> DAY OF FEBRUARY 2021**

**JUSTICE MUNYAO SILA**

**JUDGE, ENVIRONMENT AND LAND COURT**

**AT MOMBASA**