



REPUBLIC OF KENYA

IN THE ENVIRONMENT AND LAND COURT

MILIMANI LAW COURTS

ELC NO. 510 OF 2018

FRANCIS NZUKI MALINDA & ABIGAEL OBONYO MAKORI.....PLAINTIFFS

- VERSUS-

JEFFERSON NYATUKA NYANGWESO..... DEFENDANT

RULING

1. The Plaintiffs/Applicants filed a notice of motion dated 7th July 2020 in which they seek the following orders: -

1. That this Honourable Court be pleased to appoint and or direct the joint appointment by the Advocates of a manager to manage the property described as Nairobi/Block 97/329 for purposes of collecting the monthly rent and income generated from the property.

2. That this Honourable Court be pleased to order that the rent/income so collected by the manager appointed as hereinabove be deposited into the court or in a joint interest earning account in the name of the Advocates for both parties.

3. That this honourable court be pleased to order that the Defendant does provide true copies of each lease and/or tenancy agreements and all the income/rent collected in respect of all the units in the property described as Nairobi/Block 97/329 from January, 2020 until the date of the appointment of the manager.

4. That costs of this application be borne by the Defendant.

2. The Applicants contend that the Respondent has put up a five storey apartment on their plot which he is currently leasing out to tenants who pay him rent. The Applicants argue that the court had stopped the Respondent from further construction but that the Respondent proceeded with the construction which is now complete. The Applicants therefore argue that rental income should be deposited in the joint names of the Advocates for the parties herein.

3. The Respondent has opposed the Applicants application based on a replying affidavit sworn on 11th November 2020. The Respondent contends that the orders being sought by the Applicants cannot be granted as they are outside the pleadings filed by the Applicant. The Respondent states that he has been willing to exchange the plot with the applicants and that this is what was agreed when this matter was referred to the court annexed mediator but that the Applicants have not been keen to have the exchange to go on.

4. The Respondent denies the Applicants' claim that he has put in tenants in the property. He states that he completed two floors and invited neighbours to come and occupy the houses as a measure of deterring thieves who were vandalizing the building which he had stopped from constructing when the court stopped him from undertaking any further construction.

5. I have considered the Applicants' application as well as the opposition to the same by the Respondent. I have also considered the submissions by the parties herein. This is a case where the Respondent without any bad intention occupied a plot belonging to the Applicants. The Applicants also occupied the plot belonging to the Respondent which is adjacent to their plot. It was later discovered that each of the parties herein were occupying a plot belonging to the other.

6. There have been attempts to exchange the plots with the cost of the exchange being borne by the Respondent. The Applicants however seem to be intent on occupying their own plot. It is on the above background that I will decide whether the prayers sought by the Applicant can be granted. There is no doubt that the Applicants never contributed towards the construction of the building which is now on the suit property. It is also not disputed that the Respondent did not unlawfully trespass into the suit property.

7. There is no dispute as to ownership. The question which this courts asks is whether in the circumstances, the Applicants are entitled to an

order for deposit of rental income in court or in a bank in the joint names of the Advocates for the parties. The Applicants have relied on my decision in **Francis M Kimani & Another Vs Nancy W Munyua & 2 Others (2018) eKLR** where I ordered that rental income from the structures which had been erected in a disputed property be held in a joint account in the name of the Advocates.

8. My decision in the **Francis M Kimani & another Vs Nancy W Munyua & 2 Others (supra)** is distinguishable. In that case, there was an ownership dispute. It is unlike in this case where there is no ownership dispute. There is therefore no basis upon which the court can order that rent either be deposited in court or in a joint interest earning account. Equally, there is no basis upon which this court can order that a manager be appointed to manage the suit property or accounts be rendered. I find no merit in this application which is dismissed with costs to the Respondent. This is a matter which the Advocates should advise their respective clients to settle.

It is so ordered.

DATED, SIGNED AND DELIVERED AT NAIROBI ON THIS 11TH DAY OF MARCH 2021

E.O.OBAGA

JUDGE

In the Virtual presence of:-

M/s Irungu for Plaintiffs/Applicants

M/s Onyancha for Mr. Babu for Defendant/Respondent

Court Assistant: John

E.O.OBAGA

JUDGE