



REPUBLIC OF KENYA

IN THE ENVIRONMENT AND LAND COURT

AT MOMBASA

ELC SUIT NO. 3 OF 2020

SWABAHA MOHAMMED ALI.....1ST PLAINTIFF

FAZATI MOHAMMED YUSUF.....2ND PLAINTIFF

VERSUS

MBARAK SAID WALLY.....1ST DEFENDANT

LAWRENCE KIOKO.....2ND DEFENDANT

RULING

(Application for injunction filed by plaintiffs; defendants filing an application for striking out plaintiffs' entire suit; in issue being a Swahili house owned by the 2nd plaintiff on a house without land basis; 3 rooms of this house sold to the 2nd defendant; plaintiffs alleging fraud; from the evidence, no indication of any fraud; no affidavit sworn by 2nd plaintiff to claim that the sale agreement is not valid; application for injunction dismissed; application for striking out suit also dismissed as plaintiffs entitled to a hearing)

1. The 1st plaintiff in this suit is daughter of the 2nd plaintiff whereas the 1st defendant is her step-brother. The plaintiffs commenced this suit through a plaint which they later amended. It is the plaintiffs' pleading that the 2nd plaintiff is owner of house without land and it is pleaded that the 1st defendant fraudulently sold it to the 2nd defendant. The orders sought in the case are for vacant possession, refund of rent collected by the 2nd defendant, damages and costs. Together with the plaint, the plaintiffs also filed an application for injunction, which they also amended on 18 September 2020. They are seeking for orders for a temporary injunction against the defendants, restraining them from accessing, dealing, selling, transferring or in any way interfering with the plaintiffs' quiet possession and occupation of the disputed property pending the hearing and determination of this suit.

2. The supporting affidavit is sworn by the 1st plaintiff. She has deposed that the 2nd plaintiff (who is her mother), is the owner of a house without land situated in Kisauni area, Mombasa County and known as Plot No. 49 Section II MN (hereinafter referred to as the 'suit property'). She avers that before 1994, her mother used to pay rent to the land owners but she (1st plaintiff) started paying the rent after that period. She has deposed that the house consists of nine rooms but it was initially a house of 7 rooms. It is said that the 2nd plaintiff distributed these 7 rooms to the 1st plaintiff, 1st defendant, and an uncle by name of Mohammed Hussein, and that it is her (1st plaintiff) and her mother who constructed the house. She has deposed that in 2017, her mother made her last wishes known through a document dated 13 June 2017, and that she bequeathed 3 rooms to the 1st plaintiff, 3 rooms to the 1st defendant, and one room to her uncle. The document was later reduced into a will on 13 June 2018. She avers that when her mother started having health issues in 2018, the 1st defendant threatened to sell the house but did not make true his threats. She avers that on a certain day, the defendants took her mother to a place that she does not know, and she seems to insinuate that her mother (2nd plaintiff) was forced to enter into a sale agreement with the 2nd defendant, dated 1 November 2019, for the sale of the house at a consideration of Kshs. 600,000/=. She avers that the 2nd defendant operates a kiosk where the 2nd plaintiff used to take food stuffs on credit and have the same set off from the purchase price. She has attached some copies of records kept. She states that her mother is 67 years old and her health is failing, and she claims that the 1st and 2nd defendants took advantage of this to defraud her of her property. She states that she is the one who takes care of her mother's needs and that she will suffer great loss if the 2nd defendant is not restrained by this court from dealing further with the property. She has annexed various documents to her affidavit which I have seen. Among these documents are a sale agreement between herself and the 2nd plaintiff, dated 17 June 2019, vide which states that, she (2nd plaintiff), has sold to the 1st plaintiff 4 rooms on the right side of the house. The other sale agreement that I have seen annexed is one dated 1 November 2019, which states that the 2nd plaintiff has sold three rooms on the left side of the house to the 2nd defendant. There is also the will annexed.

3. The defendants on their part filed an application dated 19 October 2020 seeking to have the plaintiffs' suit and the application for

injunction dismissed. The application is said to be filed under Order 2 Rule 15 (1) (b) of the Civil Procedure Rules. They contend that the suit and the application are an abuse of the court process. The supporting affidavit is sworn by Mbarak Said Wally, the 1st defendant. He acknowledges that the 2nd plaintiff is his mother and the 1st plaintiff his sister, and that the suit property was owned by the 2nd plaintiff and consisted of 7 rooms. He deposes that the 2nd plaintiff together with their father called a meeting, attended by himself and also the 1st plaintiff, and she gave him 3 rooms of the house, the 1st plaintiff also given 3 rooms, and their uncle given one room. He avers that each could deal with the rooms as they thought fit including selling. He states further that the 1st plaintiff was asked to pay ground rent. He deposes that on 1 November 2019, he sold his rooms to the 2nd defendant and avers that the sale agreement was witnessed by his mother (2nd plaintiff). He contends to be false the averments of the 1st plaintiff that she purchased the house through the sale agreement of 19 June 2019 from the 2nd plaintiff. He believes that the same is a forgery. He states that he lives with his mother who is not too old as alleged, as she is only about 67 years old.

4. The plaintiffs filed a Notice of Preliminary Objection to oppose the defendants' motion. It is said that the application offends Order 2 Rule 15 (d) as it is not a response to the amended motion or amended plaint; that the application is fatally defective as it offends Order 7 Rule 5 of the Civil Procedure Rules; that there has been no response to the application for injunction.

5. I directed that the two applications and the preliminary objection be heard together and counsel relied on the material filed. I have taken the same into consideration.

6. The plaintiffs' case is premised on the claim that the house is owned by the 2nd plaintiff and that the sale to the 2nd defendant is fraudulent. I have seen the sale agreement entered into with the 2nd defendant. It is dated 1 November 2019. The sellers in that agreement are Mbarak Said Wally (1st defendant) and Fazat Mohamed Yusuf (2nd plaintiff) (though in some part the vendor is also noted to be the 1st defendant). What is sold is three rooms on the right side of the Swahili house. The agreement specifies that the 1st defendant is selling his entitlement in the Swahili house as per Islamic law. Kshs. 300,000/= is said to have been paid and the balance would be paid in installments of Kshs. 50,000/= per month. Possession of the 3 rooms is given to the purchaser. The agreement is signed by the parties before an advocate and there are two other witnesses. It is this agreement which the plaintiffs claim to be fraudulent.

7. At this moment in time, I cannot tell from the face of it, that this agreement is fraudulent. I can see nothing wrong with it, at least at this stage of the proceedings. As far as I can see, that sale tallies with what the 1st plaintiff deposes was bequeathed to the 1st defendant. It appears that the 2nd plaintiff had no problem if this portion is sold thus the sale agreement to the 2nd defendant. There is nothing before me, at this stage, which would lead me to believe that the sale agreement is fraudulent. Significantly, the 2nd plaintiff has not sworn any affidavit to disown this sale agreement. I am afraid that the plaintiffs will need to prove the fraud at the hearing of the case. In so far as the injunction application is concerned, I regret that I am not persuaded that a prima facie case has been established. Further, there can be no substantial loss, because if the case succeeds, what the plaintiffs will be entitled to is the accumulated rent, which is already claimed in the plaint. They can thus be compensated by an award of damages. I also see no loss to the 1st plaintiff as what she alleges was bequeathed to her, still remains in her hands. The balance of convenience further tilts towards maintaining the status quo. For the above reasons, the application for injunction fails. The costs thereof will be to the defendants.

8. On the application for dismissal of suit, I am afraid that I also cannot allow it. I cannot outrightly dismiss the plaintiffs' case without hearing it on merits. It will be unfair to dismiss it without first giving the parties a chance to be heard. This application is dismissed with costs to the plaintiffs.

9. I need not say anything on the preliminary objection as it was filed to oppose the application for dismissal of suit, which application, as I have said above, I am not persuaded to allow.

10. Before I close, I get the impression this fight is between the 1st plaintiff and the defendants, and I wonder if at all the 2nd plaintiff is aware of this dispute. I think this is one case where the 1st plaintiff cannot purport to represent the 2nd plaintiff without the personal input of the 2nd plaintiff. That however, is a matter to be picked up in the course of this case. For now, the two applications are hereby dismissed as above.

11. Orders accordingly.

DATED AND DELIVERED THIS 10TH DAY OF MARCH 2021

JUSTICE MUNYAO SILA

JUDGE, ENVIRONMENT AND LAND COURT OF KENYA

AT MOMBASA