



REPUBLIC OF KENYA

IN THE ENVIRONMENT AND LAND COURT

AT MOMBASA

ELC. NO. 338 OF 2015

1. ELKANNA OMWENGA

2. HELLEN MANZANO

3. T/A SEA SIDE MEDICAL FACILITY.....PLAINTIFFS

VERSUS

1. ANTOINETTE CARVALHO

2. SEAN PAUL CARVALHO

3. LOUZA KARIBU.....DEFENDANTS

RULING

1. By a Notice of Motion dated 25th June 2019, brought under Order 40 Rule 1(a) of the Civil Procedure Rules, Sections 1A, 1B, 3A and 63(e) of the Civil Procedure Act, the Defendants/Applicants seek the following orders:

1. Spent

2. Spent

3. That pending the hearing and determination of this suit, the Honourable Court be pleased to issue a temporary injunction restraining the Plaintiffs, whether acting by themselves, or their servants, employees, agents, contracted third parties or any other person acting under their instructions, from altering, adding, making adjustments and/or improvements, reconstructing, remodeling, varying modifying or in any other manner interfering with the structure of the building situate on all that piece of land known as LAND TITLE NUMBER MOMBABASA/BLOCK XXI/104 Mombasa

4. That in the alternative, the Honourable Court be pleased to order that the status quo currently prevailing on all that piece of land known as LAND TITLE NUMBER MOMBASA/BLOCK XXI/104 Mombasa be maintained until the hearing and determination of this suit.

5. That the costs of this Application be provided for.

2. The Application is based on the grounds on the face of the Motion and supported by the affidavit of Sean Paul Carvalho, the 2nd Defendant sworn on 25th June 2019. It is deponed that the 1st and 2nd Defendants together with one Richard Bellarmino Carvalho are registered as the absolute proprietors of the property known as TITLE NUMBER MOMBASA/BLOCK XXI/104 which consists of two residential flats which were let to the Plaintiffs in the year 2002 to be used as a residential property but the Plaintiffs have unilaterally converted both flats into a commercial medical facility known as Sea Side Medical Facility. That the Plaintiffs' tenancy on the suit property was periodic and could therefore be terminated by either party by one month's notice. The Defendants aver that they have issued several termination notices and have demanded that the Plaintiffs restore the Defendants vacant possession of the suit property but the Plaintiffs have without lawful cause of right refused to comply. The Defendants sought an order of eviction against the Plaintiffs by way of the notice of motion dated 5th June 2015 but the said application was dismissed on 7th May 2019 as being premature and the Defendants directed to canvass the issues raised therein at the main trial.

3. The Defendants aver that they have become aware from press reports that the Mvita Sub-County Medical Officer of Health conducted an

inspection of Seaside Medical Facility on 14th May, 2019 and found several deficiencies therein including patient mismanagement, inappropriate infection control and prevention, lack of free flowing water in the out-patient wing and the theatre not being designed as per stipulated standards. That the Plaintiffs were found to have contravened several statutory provisions including the Building Code and the Occupational Safety and Health Act, 2007. Consequently, the Plaintiffs were ordered to cease all operations at the medical facility until all the defects are remedied to the satisfaction of the Health office. The Defendants aver that they are reasonably and justifiably apprehensive that some of the defects could expose the patients at the medical facility to serious health risk and visit attendant legal consequences and penalties upon the Defendants under the Occupational Safety and Health Act, in spite of the fact that they have not acquiesced to the Plaintiffs' occupation of the suit property.

4. The Defendants aver that it has come to their knowledge that the Plaintiffs have since the said closure commenced extensive structural adjustments on the suit property and have and continue to make structural alterations to the suit property without any notice to or the consent of the Defendants. It is the Defendants' contention that the Plaintiffs are intend to have the medical facility reopened despite being well aware of the user restrictions on the suit property whose purpose as intended by the law is purely residential. The Defendants state that the Plaintiffs' continued enjoyment of the benefit of the suit property at the expense of the Defendants, and their continued occupation coupled with the ongoing alterations are prejudicial to the Defendants' constitutional right to fully exercise ownership of their property. They state that the Plaintiffs' actions are out rightly illegal and presuppose that their claim shall be upheld by the court when the tenets of justice and fairness require that no act is done on the suit property until the suit is conclusively determined, adding that the Plaintiffs have converted one of the toilets in the suit property into a furnace and waste disposal without the authority of the Defendants. It is the Defendants' contention that the impugned acts are solely and maliciously intended to defeat the Defendants' interests in the suit property and the registered user thereof, and that they will ultimately waste the suit property so that the Defendants will have difficulty executing any possible decree in their favour. The Defendants are apprehensive that the Plaintiffs shall severally alter the structure of the suit property during the pendency of this suit and thereby obstruct and/or frustrate the Defendants in the execution of any decree that may be passed against the Plaintiffs.

5. In opposing the application, the Plaintiffs filed a replying affidavit sworn by Elkana Omwenga, the 1st Plaintiff on 2nd July 2019. It is deponed that the application is totally misconceived and amounts to an abuse of the court process. The Plaintiffs aver that they have not done or undertaken and do not do or undertake any adjustments, improvements or reconstruction works on the suit premises and that any improvements and/or adjustments have already been carried out and completed. It is the Plaintiffs' contention that the Defendants are deliberately impeding the final hearing and logical determination and conclusion of this matter by filing one application after another with intent to cause annoyance and delay the matter. The Plaintiffs pointed out that this court on 7th May 2019 delivered a ruling dismissing one of the Defendants' application.

6. The Plaintiffs aver that the prayers of interim injunction being sought by the Defendants are totally misplaced and misconceived because the Defendants have not pleaded for any injunctive orders or similar orders in their defence and that the orders cannot therefore issue. The Plaintiffs state that when they took up the lease of the suit premises it was expressly agreed between the parties the Plaintiffs were to use the premises as commercial medical facility and that they could carry out various alterations and improvements on the property to suit the operations of a hospital. The Plaintiffs urged the court to dismiss the application with costs.

7. Mr. Ogola learned counsel for the applicants in his submissions reiterated the facts contained in the affidavit in support of the application and urged the court to allow the application. On his part, Mr. Mokaya for the Respondents submitted that there is no construction or alteration going on on the suit premises, even though the Defendants had expressly permitted the Plaintiffs to use the premises as a hospital and to carry out alternations and improvements.

8. I have considered the application, the affidavits in support and against and the rival submissions made. The principles to be applied when considering an application for temporary injunction are well settled. In the celebrated case of **Giella –v- Cassman Brown & Co. Ltd (1973) EA 358**, the applicant must show that he has a prima facie case with a probability of success; that he stands to suffer irreparable damage that may not be compensated in damages, and if the court is in doubt, it will decide the matter on a balance of convenience.

9. In this case the Defendants seek a temporary injunction restraining the Plaintiffs from improving or making alterations on the suit premises. The Plaintiffs have maintained that they are not carrying out any improvements or alterations. That the alterations that have been carried out and completed were carried out in accordance with the terms of the lease agreement.

10. I have perused the affidavit in support of the motion. There is no evidence given on the alleged structural alterations. In any event, in the letter dated 1st September, 2003, the Defendants, while renting out the suit premises permitted the Plaintiffs to use the premises as a medical facility and to carry out various alterations and improvements. The court therefore cannot re-write the contract for the parties.

11. From the evidence on record, I find that the Defendants have not established a prima facie case with a probability of success against the Plaintiffs. Secondly, the Defendants have not shown that they stand to suffer irreparable injury not compensable in damages.

12. The upshot is that the Notice of Motion dated 25th June 2019 lacks merit and the same is hereby dismissed with costs.

DATED, SIGNED and DELIVERED at MOMBASA this 2nd day of October 2019.

C.K. YANO

JUDGE

IN THE PRESENCE OF:

Lutta for Mokaya for plaintiff

No appearance for defendants

Yumna Court Assistant

C.K. YANO

JUDGE