



REPUBLIC OF KENYA

IN THE ENVIRONMENTAL AND LAND COURT

AT MOMBASA

ELC NO 23A OF 2020

MARINA SCHELLEKENS.....1ST PLAINTIFF

MICHEL VAN DEN PUTTE.....2ND PLAINTIFF

SAARTJE VAN DEN PUTTE.....3RD PLAINTIFF

VERSUS

LUC VAN DEN PUTTE.....DEFENDANT

RULING

1. This ruling is in respect to a Notice of Motion dated 19th August 2020 brought by the defendant. The application is anchored on Article 159, 162 (2) (b) of the Constitution of Kenya 2010, Section 1A, 1B, 3A of the Civil Procedure Act, Section 3 and 13 of the Environment and Land Court Act and Order 40 Rule 2 and 4, Order 51 Rule 1 of the Civil Procedure Rules and seeks the following orders:-

a. Spent

b. Spent

c. That pending the hearing and determination of the suit herein, the honorable court be pleased to grant an order of temporary injunction restraining the plaintiffs/respondents whether by themselves, their servants or agents from entering, trespassing and or interfering with the defendant/applicant's enjoyment, use and possession of the land Subdivision no 2107 (Original No. 1669/1) of Section 1 Mainland North.

d. That the subject of Order 2 and 3 above be served upon the OCS Bamburi Police Station to ensure compliance.

e. That the costs of this application be provided for.

2. The application is based on the supporting affidavit of Luc Van Den Putte the applicant. The applicant avers that he currently resides in the suit premises and states that he purchased the suit property with his own funds from Harald Knupper and Martha Knupper but included the names of the plaintiffs out of love and affection. That the defendant was previously married to the 1st plaintiff and were blessed with the 2nd and 3rd plaintiffs. He stated that while divorcing the 1st plaintiff in 2015 according to the Laws of Belgium, they both entered into an agreement titled 'description and division of possession'. The agreement was to the effect that the applicant would have sole ownership of the suit property and he would cede ownership of all the properties in Belgium for the plaintiffs which he stated he did. That the 1st plaintiff did not undertake the necessary steps needed to notarize the agreement for it to be effective leading to the applicant being unable to effect the change in the lands office.

3. The applicant states that he has all the rights over the suit property exclusive of the plaintiffs who have harassed his young family which currently reside in the suit property. That on 6th February 2020 the plaintiffs caused chaos in the suit property demanding vacant possession from the applicant's fiancé who was at the time pregnant and caused her harm and produced a P3 form dated 13th February 2020. That the plaintiffs have interfered with the suit property by instructing two caretakers to take possession of the guesthouses without the applicant's consent. The applicant believes that a temporary injunction would restrain the plaintiffs from interfering with the suit property and the quiet enjoyment of the applicant and his family failure to which the applicants stand to suffer irreparable harm.

4. The plaintiffs oppose the application vide a grounds of opposition dated 9th October 2020 on the grounds that the application is belated, ill conceived, misinformed and tainted with mala fides for the reasons that it seeks orders that are untenable; that it is vexatious and does not

meet the threshold requirement for grant of the orders sought, that the application is grossly incompetent, fatally defective, frivolous, and vexatious, wholly unmerited and ought to be struck out *ab initio* for being an abuse of court process. That in the interest of justice the application should be dismissed with costs to the plaintiffs.

5. I have considered the application, the grounds in opposition as well as the submissions for and against the application and the issue before me for consideration is whether the applicant should be granted temporary injunction against the plaintiffs pending hearing and determination of the suit.

6. In this case, it is stated that the applicant and the 1st plaintiff entered into a sale agreement dated 28th January 2010 with Harald Josef Knupfer and Martha Knupfer for the sale of the suit property for 190,000€ and a Certificate of Title No C.R 14770 dated 27th January 2011 in the names of the plaintiffs and defendant was produced. The defendant states that he paid the price of the suit property on his own but added the names of the plaintiffs out of love and affection. The plaintiffs on the other hand state that the suit property is held in tenancy in common.

7. It has not been disputed by either parties that the suit property is registered in the names of both the plaintiffs and defendant. It is not also in dispute that the defendant is currently in possession of the suit property and that the plaintiffs are at the time of making the application residing in Belgium. The defendant is seeking a temporary injunction to restrain the plaintiffs from interfering with this possession which he currently has over the suit property.

8. The law on temporary injunction is provided for under **Order 40 Rule 2 of the Civil Procedure Rules which states:-**

(1) In any suit for restraining the defendant from committing a breach of contract or other injury of any kind, whether compensation is claimed in the suit or not, the plaintiff may, at any time after the commencement of the suit, and either before or after judgment, apply to the court for a temporary injunction to restrain the defendant from committing the breach of contract or injury complained of, or any injury of a like kind arising out of the same contract or relating to the same property or right.

(2) The court may by order grant such injunction on such terms as to an inquiry as to damages, the duration of the injunction, keeping an account, giving security or otherwise, as the court deems fit where a party to a suit may seek temporary injunctions orders from court to restrain another party.

9. The principles for granting a temporary injunction are set out in the case of **Giella vs Cassman Brown (1973) EA 358**. which are: that firstly, an Applicant must show a prima facie case with a probability of success, secondly an interlocutory injunction will not normally be granted unless the Applicant might otherwise suffer irreparable injury, which would not adequately be compensated by an award of damages, and thirdly, if the Court is in doubt, it will decide an application on a balance of convenience.

10. The defendant in his Counterclaim dated 29th April 2020 states that the plaintiffs are in breach of the agreement made where he surrendered all the rights he had in all the properties situated in Belgium in exchange for sole ownership of the suit property. The defendant also states that the plaintiffs are in trespass of the suit property and claims damages against them. The defendant has made serious allegations that are weighty and should be adjudicated upon.

11. The applicant should prove that without the orders sought, he will suffer irreparable damage that cannot be compensated by monetary value. The court's interference is therefore necessary to protect the defendant from the species of injury. In other words irreparable injury or danger would ensue before the legal right would be established at trial. The applicant has produced P3 form that show his fiancé was assaulted during a commotion caused by the plaintiffs when they tried to access the suit property. The applicant also attached copies of birth certificate of his two young children both below the age of 5 years who live in the suit property and they need care and protection. Any injury or harm directed to them in my view cannot be compensated by an award of damages. The defendant has a young family living in the suit property and hardship is likely to occur to them if court withholds itself from granting the injunction.

12. However, the plaintiffs too have shown that they are registered owners of the suit property as tenancy in common with the defendant. Section 91 of the Land Registration Act provides for co-proprietorship or co-tenancy of land and states the following;

1) In this Act co-tenancy means the ownership of land by two or more persons and includes joint tenancy or tenancy in common.

2) Except as otherwise provided in any written law, where the instructions of transfer of an interest of land to the two or more persons does not specify the nature of their rights there shall be a presumption that they hold the interest as tenants in common in equal shares.

13. Being tenancy in common means that both parties have rights over the suit property. The interest of the defendant over the land need to be protected in the same equal measures as those of the plaintiff pending hearing and determination of the suit. Given the above position, it follows that the defendant has established a prima facie case with a probability of success. The defendant certainly stands to suffer irreparable loss if the plaintiffs proceed with their intention of taking over the suit premises and barring the defendant and his family from accessing the same with a view to wrestle for possession of the properties without following the due process of the law. To me it's irrelevant at the moment that the properties are registered in the names of both parties. In my view, the best orders to grant in the circumstances of this case is for maintenance of status quo pending hearing and determination. Until the matter is determined the parties ought not to interfere with the defendant's possession of the suit property. Even if I was to consider the balance of convenience the same tilts towards maintaining the status quo until the suit is heard and determined.

14. The upshot is that the application dated 19th August 2020 is allowed in terms of prayers 3 and 4. Considering the relationship of the

parties, I order that parties bear their own costs.

DATED, SIGNED AND DELIVERED VIRTUALLY AT MOMBASA THIS 20TH DAY OF MAY, 2021.

C.K. YANO

JUDGE

IN THE PRESENCE OF:

Yumna Court Assistant

C.K. YANO

JUDGE