



REPUBLIC OF KENYA

IN THE ENVIRONMENT AND LAND COURT

AT MERU

ELC APPEAL NO. 45 OF 2020

CAROLINE KAGENDO.....1ST APPELLANT/PLAINTIFF

PETER NGOLUA.....2ND APPELLANT/PLAINTIFF

FRANCIS MUTHIRU.....3RD APPELLANT/PLAINTIFF

RACHEL MAINA.....4TH APPELLANT/PLAINTIFF

TERESIA MWAKITHI.....5TH APPELLANT/PLAINTIFF

SUSAN KATHAMBI.....6TH APPELLANT/PLAINTIFF

JAMES MUREGA.....7TH APPELLANT/PLAINTIFF

VERSUS

JEMA KARIMI.....1ST RESPONDENT/DEFENDANT

CLEAR REAL AUCTIONEERS.....2ND RESPONDENT/DEFENDANT

RULING

1. Before me is a notice of motion dated 27th August 2020 brought pursuant to Section 1A, 1B and 3A of the Civil Procedure Act, Section 3 of CAP 293 and Order 40 rule 1 and 2, of the Civil Procedure Rules. The applicant seeks orders of Injunction restraining the respondents whether by themselves, their employees, servants, agents or auctioneers from evicting, selling whether by public auction or private entity, advertising for sale, collecting, disposing of or otherwise howsoever completing by conveyance or transfer of any sale concluded by auction or private treaty, leasing, letting or otherwise howsoever dispossessing the plaintiffs of the goods distrained by the respondents pending the hearing of the application and the intended appeal. They also pray for costs of the application.

2. The application is based on the grounds on the face of it and on the supporting affidavit dated 27/08/2020 of Teresia Mwakithi, the 5th applicant. She avers that she was served with distress for rent by the 2nd respondent instructed by the 1st respondent and the said action is meant to steal from her as it has nothing to do with rent arrears. She contends that she is not a tenant of the 1st respondent but a co-wife and she is on her husband's property. Further the purported distress for rent does not comply with the law in terms of Cap 293 and is therefore illegal and an abuse of the law.

3. She had filed a suit in the Chief Magistrate's court at Meru being CMCC ELC NO. 126 of 2020 but the same was dismissed. She has filed an appeal which she believes is meritorious and raises triable issues for determination. To this end, she has availed the memorandum of appeal, letter of distress for rent and the lower court's ruling which dismissed her suit.

4. The Application is opposed vide a replying affidavit dated 30/10/2020 sworn by Jema Karimi the 1st respondent. She avers that she is the administratrix of the estate of Justus M'Murithi M'Bagiri (deceased) having been issued with a Grant of Administration for purposes of distribution of his estate. That vide a ruling dated 7/06/2020 in Meru High Court Succession cause no. 15 of 2007, the court ordered that only the administratrix of the estate should collect and receive all income from the estate and that all the applicants herein are tenants within the estate of Justus M'Murithi M'Bagiri (deceased).

5. Further the applicant is not a co-wife but a tenant and the court (in the above mentioned succession matter) vide its judgment dated 18th

December 2019 categorically stated that the 5th applicant herein is not a wife of the deceased. That the instant application is an abuse of the court process as the lower court in its ruling found the suit to be a thinly veiled attempt to revisit, deny the existence of or re-litigate Meru High Court Succession No. 15 of 2007.

6. Also the instant application has been overtaken by events as all the applicants have since vacated the suit premises. She added that the said application is a waste of judicial time and orders sought cannot be issued. She attached a copy of the certificate of confirmation of grant, a copy of the High Court order dated 7/05/2020, copies of letters notifying the tenants of rent collection, copy of the High Court Judgment and copies of the lower court rulings.

7. The applicant submitted that she has made out a prima facie case with a probability of success as she has demonstrated her occupation on the subject matter by explaining to this court that she is the wife of the deceased and a co-wife to the 1st respondent and that she has extensively developed the suit property. She resides on the suit property with her children. Thus an award of damages cannot suffice. That failure to grant her the prayers sought will amount to an eviction order which is inappropriate and thus prays that her application be allowed.

8. The applicant has relied on the following authorities; **Giella V Cassman Brown (1973) EA 358, Mrao V First American Bank of Kenya Limited & 2 Others (2003) KLR, Panari Enterprises Limited vs. Lijoodi & 2 Others (2014) eKLR, Owayo V George Hannington Zephaniah Aduda t/a Aduda Auctioneers & Another (2007) 2 KLR 140, and Hanah Wangui Mathenge & 2 Others vs. Rose Muthoni Mathenge (2017)eKLR.**

9. The respondent submitted that the applicant has failed to satisfy that she has a prima facie case with a probability of success, and she has not demonstrated that an award of damages would not suffice. Further the balance of convenience does not tilt in applicant's favor, thus she doesn't meet the parameters set out for granting of injunctive orders. The respondents prays that the application be dismissed with costs.

10. The respondents relied on the cases of; **Daniel Lomagul Kandeji & 2 others V Kamanga Holdings Limited & 40 others [2017]eKLR** and **Mrao Ltd V First American Bank of Kenya Ltd & 2 others (2003)eKLR.**

11. I have carefully considered the application, the replying affidavits and the submissions proffered by the parties. The issue for determination is whether to grant the injunctive orders pending the hearing of the Appeal.

12. The law on granting of interlocutory injunction is set out under **Order 40(1) (a) and (b) of the Civil Procedure Rules 2010** which provides:-

"Where in any suit it is proved by affidavit or otherwise—

(a) That any property in dispute in a suit is in danger of being wasted, damaged, or alienated by any party to the suit, or wrongfully sold in execution of a decree; or

(b) That the defendant threatens or intends to remove or dispose of his property in circumstances affording reasonable probability that the plaintiff will or may be obstructed or delayed in the execution of any decree that may be passed against the defendant in the suit, the court may by order grant a temporary injunction to restrain such act, or make such other order for the purpose of staying and preventing the wasting, damaging, alienation, sale, removal, or disposition of the property as the court thinks fit until the disposal of the suit or until further orders."

13. In an application for an interlocutory injunction, the applicant must establish a prima facie case with a probability of success. Even where a prima facie case is established, an injunction ought not to issue if damages can adequately compensate the applicant. Finally, if the court is in doubt as to the answers of the above two tests, then the court should determine the matter on a balance of convenience. These principles were enunciated in the case of **Giella –vs- Cassman Brown & Co. Ltd [1973] E.A 358.**

14. In the case of **Nguruman Limited v Jan Bonde Nielsen & 2 Others [2014] eKLR,** the Court of Appeal elaborated as follows:

"In an interlocutory injunction application, the applicant has to satisfy the triple requirements to;

(a) establish his case only at a prima facie level,

(b) demonstrate irreparable injury if a temporary injunction is not granted, and

(c) ally any doubts as to (b) by showing that the balance of convenience is in his favour.

These are the three pillars on which rests the foundation of any order of injunction, interlocutory or permanent. It is established that all the above three conditions and stages are to be applied as separate, distinct and logical hurdles which the applicant is expected to surmount sequentially. See Kenya Commercial Finance Co. Ltd V. Afraha Education Society [2001] Vol. 1 EA 86. If the applicant establishes a prima facie case that alone is not sufficient basis to grant an interlocutory injunction, the court must further be satisfied that the injury the respondent will suffer, in the event the injunction is not granted, will be irreparable. In other words, if damages recoverable in law is an adequate remedy and the respondent is capable of paying, no interlocutory order of injunction should normally be granted, however strong the applicant's claim may appear at that stage. If prima facie case is not established, then irreparable injury and balance of convenience need no consideration. The existence of a prima facie case does not permit "leap-frogging" by the applicant to injunction directly without crossing the other hurdles in between."

15. Have the applicants established a prima facie case? A prima facie case was defined by the Court of Appeal in *Mrao Ltd v First American Bank of Kenya Ltd & 2 Others*[2003] eKLR as follows:

“A prima facie case in a civil application includes but is not confined to a “genuine and arguable case.” It is a case which, on the material presented to the court, a tribunal properly directing itself will conclude that there exists a right which has apparently been infringed by the opposite party as to call for an explanation or rebuttal from the latter.”

16. The 5th applicant contends that there are no rent arrears nor any known rent between herself and the 1st respondent, that she is not a tenant but a wife living on her deceased husband’s property. It has not been explained to this court, who the other applicants are.

17. First of all this court is having difficulties understanding the locus standi of the 5th applicant. Her argument is that she does not owe rent as she is a wife and resides on her deceased husband’s property. However, the issue of whether she is a wife or not has already been determined in Meru High Court Succession No. 15 of 2007, where it was held that she is not a wife, hence that issue is res judicata. The question begging for an answer is, in what capacity is she residing in the property and which of her rights have been infringed?

18. A look at annexures “JM3” reveals that the notices were issued in tandem with the orders issued on 14.5.2020 in Meru High Court Succession cause no. 15 of 2007, where only the administrator of the estate of the deceased (read 1st respondent) has the mandate to collect and receive rent. The orders sought by the applicants before this court are clearly meant to scuttle the orders issued in the succession cause. Thus this application is not merited from the word go.

19. The 5th applicant also avers that she occupies the property and has extensively developed it, proof of which has not been produced evidencing the alleged developments. She has not stated what loss she may suffer if orders sought are not granted and the court is not convinced that an award of damages will not adequately compensate her. I am thus not persuaded that the applicant has established a prima facie case, in line with **Nguruman Limited v Jan Bonde Nielsen (supra)**.

20. In paragraph 14 of the replying affidavit of the respondents, it is stated that the application has been overtaken by events as all the applicants have vacated the suit premises. The applicants did not rebut this averment by way of a further affidavit, yet on 4.11.2020, the court had granted leave to the applicants to file such a further affidavit. If the applicants have left the suit premises, then it means that the orders sought have been overtaken by events.

21. In light of the foregoing analysis, I find that the application dated 27.8.2020 is not merited. The same is hereby dismissed with costs to the respondents.

DATED, SIGNED AND DELIVERED VIA MICROSOFT TEAMS AT MERU THIS 12TH DAY OF MAY, 2021 IN PRESENCE OF:

C/A: Kananu

Mr. Gachuki for respondent

Ashaba holding brief for M/s Atieno for applicant

HON. LUCY. N. MBUGUA

ELC JUDGE