



REPUBLIC OF KENYA

IN THE ENVIRONMENT AND LAND COURT AT BUSIA

ELC CASE NO. 43 OF 2020 (FORMELY KISUMU ELC NO. 1 OF 2019)

JEREMIAH ARNOLD OPANDE ARODI &

IDA NEREAH ADHIAMBO ARODI

(suing as through their Attorney

NICODEMUS ATITO ARODI).....PLAINTIFFS/APPLICANTS

= VERSUS =

WASHINGTON JAKOYO MIDIWO.....DEFENDANT/RESPONDENT

R U L I N G

1. The Applicants filed an application dated 9th January, 2019 seeking for orders THAT:

(a) Spent;

(b) Pending the hearing and determination of this application, a temporary injunction do issue restraining the Defendant, whether by himself, his agents, servants or any person claiming through him from trespassing upon and remaining on the property described as No. KISUMU/MANYATTA 'A'/3304 and from interfering in any manner whatsoever with the Plaintiffs' possession of and rights over the property as proprietors and/or landlords;

(c) Pending the hearing and determination of this suit, a temporary injunction do issue restraining the Defendant, whether by himself, his agents, servants or any person claiming through him from trespassing upon and remaining on the property described as No. KISUMU/MANYATTA 'A'/3304 and from interfering in any manner whatsoever with the Plaintiffs' possession of and rights over the property as proprietors and/or landlords;

(d) Pending the hearing and determination of this suit, a mandatory injunction do issue directing the Defendant to vacate the property known as No. KISUMU/MANYATTA 'A'/3304 and to hand over the same to the Plaintiff or the Plaintiffs' agents;

(e) Interim orders do issue ex parte in the first instance in terms of prayer 2 foregoing;

(f) The costs of this application be provided for.

2. The Application was supported by the affidavit of **NICODEMUS ATITO ARODI** sworn on 9th January, 2019 and on the following grounds;

(a) That the Defendant has unlawfully taken over the suit property after breaching an agreement for the purchase of the property;

(b) That the Defendant unlawfully assumed the position of landlord in respect of the suit property and has been collecting rent from tenants without the Plaintiffs' authorization thereby denying the Plaintiff a source of livelihood;

(c) That the Defendant is destroying and dismembering the property to suit his purposes; and

(d) That this application meets the criteria for the grant of the orders.

3. The Respondent filed his replying affidavit on the 24th of January, 2019 deposing inter alia THAT:

(a) The Applicant expressed to him the desire to sell the suit land to avoid a forced sale by public auction by Housing Finance Limited, and that the property had already been advertised for sale by Housing Finance Limited necessitating the inclusion of an express term and conditions in the Sale Agreement that the deposit towards the purchase price being K.Shs.8,000,000 shall be paid to Housing Finance directly;

(b) In addition to the K.Shs.8,000,000 the Respondent made further payments to the Applicants' accounts amounting to K.Shs.25,000,000 in anticipation of the completion date being 60 days on or before the 12th day of August, 2018;

(c) Despite paying the outstanding balance of K.Shs.4,900,000 the Applicant's advocates failed to furnish the Respondent with all the completion documents spelt out in the Sale Agreements;

(d) The Respondent decided to do some further inquiry into the property and found out from the County Government of Kisumu Department of Housing that the property was constructed on a road reserve and also from the Kisumu Water and Sewerage Company that the property was constructed illegally on top a main sewer line;

(e) The Applicants, their advocates, Housing Finance and the valuers were all aware of this and fraudulently colluded to actively conceal these material facts;

(f) Upon meeting with the Applicants with regards to the foregoing, they agreed to refund the Respondent the monies paid towards the purchase price in the terms of the Sale Agreement and even drafted an Agreement of Acknowledgement of Debt and Guarantee to pay;

(g) In the said agreement, the Applicants offered Title Deeds as security for the refund of the debt acknowledged;

(h) After carrying due diligence on all the title deeds issued to him, the Respondent opted not to execute the agreement and sought to secure the moneys already paid to the Applicants and he was afraid that he would not get a good title from them;

(i) The Applicants have repaid K.Shs.11,410,000/= out of the K.Shs.25,000,000 and following a meeting on the 6th of September, 2018 between the parties and in the Applicant's bid to settle their outstanding debt agreed to the following terms;

(i) That the Respondent collect rents to recover the sums paid towards the botched purchase price;

(ii) That the Attorney vacates the Suit Property by 1st October, 2018 to enable the Respondent put another tenant in order to recoup the sums paid; and

(iii) That the costs of the renovation which the Respondent incurred be equally refunded.

(j) It is therefore false to allege that the Respondent forcefully and vide intimidation and threats took repossession of the suit property because Clause 11 of the Sale Agreement dated 12th July, 2018 clearly provided for his taken over possession upon the execution of the agreement;

(k) The Respondent denied forcibly detain the Applicants or their Attorney's property as alleged, denied trespassing on the property or compelling the tenants to pay him the rent as mutually and amicably agreed between the parties verbally and contractually in writing;

(l) The Respondent also denied carting away assorted building material from the suit property nor evicting the attorney from the property. Further that the averment that the Respondent subjected the Applicants to undignified and inhuman treatment and left him without a home is false and that the Applicants opted to voluntarily vacate the property as per the sale agreement dated 12th July, 2018 and the subsequent meeting of 6th September, 2018; and

4. Parties agreed to canvass the application by way of written submissions and the Applicants filed theirs on the 5th of March, 2020. They submitted that they have been inconvenienced by looking for alternative accommodations and have no access to rent which is their sole source of income. That these tilt the balance of convenience to favor granting the injunction. With regard to the mandatory injunction, the Applicants submitted that there are several reasons for this Court to issue the same which are stated as follows:

(a) That although the Respondent has a right to be refunded the purchase price paid, he has no right to take possession of the suit property;

(b) The Applicants want to be put back in possession of the Suit Property;

(c) The Respondent has acted in complete impunity during the transaction; and

(d) The Respondent continues to collect rent from the property every month and unless the Court orders that he vacates the property and surrenders possession to the Plaintiff's he will have collected all the money for which he seeks judgement for in the counterclaim.

5. The Applicants quoted the case of **Lucy Wangui Gachara vs. Minudi Okemba Lore (2015) eKLR** where the Court of Appeal while

quoting the case of **Nadan Pictures Ltd vs. Art Pictures Ltd & Others** stated that, “*At the same time, I may point out what the accepted principles have been and what has been accorded to the reported cases, the practices of courts. It would appear that if a mandatory injunction is granted only to restore status quo and not granted to establish a new state of things, differing from the state which existed at the date when the suit was instituted. The one case in which a mandatory injunction is issued on an interlocutory application is where, with notice of the institution of the plaintiff’s suit and the prayer made in it for an injunction to restrain the doing of a certain act, the defendant does that act and thereby alters the factual basis upon which a plaintiff claimed his relief. An injunction issues in such a case in order that the Defendant cannot take advantage of his own act and defeat the suit by saying that the old cause or action no longer survived and a new cause of action for a new type of suit had arisen. When such is found to be the position, the Court grants a mandatory injunction even on an interlocutory application, directing the defendant to undo what he has done with notice of the plaintiff’s suit and the claim therein and thereby compels him to restore the position which existed at the date of the suit.*”

6. The Respondent filed his submissions on the 11th of March, 2020. He submitted that it is not in dispute that he had taken possession of the premises and that the same had been granted to him by the Applicants’ attorney when he signed the sale agreement, accepted deposit and voluntarily agreed to vacate the premises and relocated to his rural home.

7. He further submitted that a prima facie case is not a case which must succeed at the hearing of the main case and is not frivolous. That the Applicants have not established a prima facie case with a probability of success. That further the Applicants have not demonstrated that they would suffer an irreparable loss that is incapable of compensation by an award damages. He continued further that the Applicants have not demonstrated to the Court that the Defendant is not in a position to pay the damages that this Court may find recoverable upon determination of this Suit.

8. The Respondent finally submitted that the balance of convenience tilts in their favour and that no inconvenience will be occasioned to the Applicants as they no longer live on the suit property. He proposed on the other hand that the Respondent will be highly inconvenienced because the reasons for his occupation of the suit property was to enable him recover the monies he had paid towards the purchase of the property as well as those incurred in renovation of the property. That the Applicants have not met the threshold set in the case of **Giella vs. Cassman Brown & Co. Ltd (1973) E.A 358** and as such that the court should not conduct a mini-trial and must examine the merits of the case closely.

9. The Respondent relied on the following cases: **Mrao Ltd vs. First American Bank of Kenya Ltd & 2 others (2003) KLR 125**, **Giella vs. Cassman Brown & Co. Ltd (1973) E.A 358**, **Mbuthia vs. Jimba Credit Finance Corporation & another (1988) KLR 1** and **Thomas Mumo Maingey (suing on his own behalf and on behalf of the Franciscans of Our Lady of Good Counsel Sisters Registered Trustees) vs. Sarah Nyiva Hillman & 3 others (2018) eKLR**.

10. The Applicants filed supplementary submissions on the 19th March, 2020 submitting that the Respondent’s submissions were founded on the misunderstanding of the law on injunctions.

11. For this Court to grant an injunction the Applicants needed to demonstrate that: **they have a prima facie case; if the injunction is not granted they shall suffer irreparable loss** and that **the balance of convenience tilt in their favour**.

12. I have analysed prayer (c) of the motion and although pleaded as seeking orders of temporary injunction, it is essentially seeking mandatory orders as it seeks to have the Respondent stopped from “*remaining on the suit property*”. Prayer (d) is clear on seeking of the mandatory orders of injunction. Therefore this court will determine whether or not the Applicants have met the threshold of obtaining mandatory orders.

13. In the Case of **Kenya Breweries Ltd & Ano Vs Washington O. Okeyo (2002) eKLR**, the Court of Appeal stated that “**A mandatory injunction ought not to be granted on an interlocutory application in the absence of special circumstances, and then only in clear cases either where the court thought that the matter ought to be decided at once or where the injunction was directed at a simple and summary act which could be easily remedied or where the defendant had attempted to steal a march on the plaintiff. Moreover, before granting a mandatory interlocutory injunction the court had to feel a high degree of assurance that at the trial it would appear that the injunction had rightly been granted, that being a different and higher standard than was required for a prohibitory injunction.**”

14. The question this court seeks to answer is whether this is a clear case and or whether the Applicant has demonstrated that there is special circumstance that warrants the granting of the orders sought. From the facts pleaded by both sides, it is not dispute that the Applicant entered into an agreement to sell the suit property Kisumu/Manyatta A/3304. There is also no disputed that some money was paid to him. The agreement seems to have fallen through. The dispute before the court pending determination is who between the Applicant and Respondent is liable for the transaction not being completed.

15. The Applicant deposed that the Respondent forcefully took over possession of the suit property. The Respondent denied the allegations leveled against him instead stating that his taking possession was by consent. One of the persons who attended the meeting of 6th September 2019 has sworn an affidavit in support of the Applicants’ case stating that he never attended any such meeting. Although the affidavit denies any meeting taking place, I find issues raised by both parties are very contentious that a determination can be made only after taking of evidence thus the nature of the dispute does not meet the principle of a clear case.

16. The second issue is whether there is special circumstance that warrants the issuance of the orders. The Applicant relied in the decision of **Nadan Pictures Ltd supra** which allowed restoration of an existing status quo. There is no doubt that the Applicant was previously in possession. What is in dispute is how he lost possession. The monies receivable from the suit property as rental income is ascertainable. The Applicant admits the Respondent is entitled to a refund of monies paid. In the circumstances, it serves the interest of justice for parties to retain their status prior the agreement as a determination is made on the main dispute because the subject matter of the dispute is immovable property and depending on the outcome of this case the Respondent’s interest are secured as long as the suit property remains the property of the plaintiff/applicant.

17. The Court of Appeal also went ahead in *Kenya Breweries Ltd & Ano Vs Washington O. Okeyo supra* and stated that “The respondent did not dispute his obligation to the second appellant and the fact that the loan owed to it is serviced and channeled through the first appellant. The obvious resultant effect, therefore, of the mandatory injunction granted by the superior court is to relieve the respondent of his obligation to pay his just debt. He should not be allowed to steal a match by avoiding his just obligations. Moreover, it would certainly be inequitable. It is trite that a contracting party who fails to perform his part of the contract cannot obtain an injunction to restrain a breach of covenant by the other party. In the circumstances, we think that there was nothing to justify the grant of a mandatory injunction on the interlocutory application that fell for consideration before the learned Judge and in that respect the learned Judge erred in granting it.”

18. The ownership of the subject matter had not changed. The Applicants remains the owners hence the balance of convenience tilt in their favour of remaining in occupation. In light of the foregoing, I am persuaded to find that the Applicant has demonstrated a prima facie case to be entitled to the orders sought. The court reaches the conclusion that the application be and is hereby allowed in terms of **prayer (c) and (d)**;

(c) That pending the hearing and determination of this suit, a temporary injunction is hereby issued restraining the Defendant, whether by himself, his agents, servants or any person claiming through him from trespassing upon and remaining on the property described as No. KISUMU/MANYATTA ‘A’/3304 and from interfering in any manner whatsoever with the Plaintiffs’ possession of and rights over the property as proprietors and/or landlords;

(d) That pending the hearing and determination of this suit, a mandatory injunction is hereby issued directing the Defendant to vacate the property known as No. KISUMU/MANYATTA ‘A’/3304 and to hand over the same to the Plaintiff or the Plaintiffs’ agents;

Each party to meet their respective costs.

DATED, SIGNED & DELIVERED AT BUSIA THIS 17TH DAY OF JUNE, 2021.

A. OMOLLO

JUDGE