



**REPUBLIC OF KENYA**

**IN THE ENVIRONMENT AND LAND COURT AT NAIROBI**

**ELC SUIT NO. 7 OF 2019**

**DIANA NJERI KATAMBANI .....1<sup>ST</sup> PLAINTIFF**

**CHARLES KASYOKA MALINDA.....2<sup>ND</sup> PLAINTIFF**

**VERSUS**

**YUSUF BASHIR.....1<sup>ST</sup> DEFENDANT**

**RAJAB HAMISI ZUMA.....2<sup>ND</sup> DEFENDANT**

**RULING**

What is before the court is the plaintiffs' application brought by way of Notice of Motion dated 17<sup>th</sup> January, 2019 seeking the following orders;

- (i) An order certifying the matter as urgent.
- (ii) An order of a permanent injunction barring the respondents from occupying, possessing and residing on L.R 209/10352/36 or House Number 14 Kariba Estate (hereinafter referred to as "the suit property").
- (iii) An order permitting the eviction of the respondents from the suit property pending the hearing and determination of this suit.
- (iv) An order sanctioning the officer commanding police station Industrial Area to superintend over the eviction of respondents from the suit property upon the issuance of orders (ii) and (iii) aforesaid.
- (v) In the alternative, an order of the court commanding the respondents to pay the applicants the market rent of the suit property which is Kshs. 150,000/= per month pending the hearing and determination of the suit failure to which orders (ii), (iii) and (iv) of this application be granted.
- (vi) Costs of the application.

The application that was supported by the affidavit of the 2<sup>nd</sup> plaintiff sworn on 16<sup>th</sup> January, 2019 was brought on the following grounds: The suit property was owned by the 1<sup>st</sup> plaintiff and one, Myra Malia Katambani, deceased (hereinafter referred to only as "the deceased"). The deceased died on 7<sup>th</sup> June, 2017 leaving the 1<sup>st</sup> plaintiff as the sole owner of the suit property. The suit property was let to the 1<sup>st</sup> defendant by the 2<sup>nd</sup> defendant without the 1<sup>st</sup> plaintiff's authority. Since the 2<sup>nd</sup> defendant had no interest in the suit property, he had no legal basis for letting the property to the 1<sup>st</sup> defendant. The 1<sup>st</sup> and 2<sup>nd</sup> defendants were occupying the suit property illegally as they had no consent, permission or authority of the 1<sup>st</sup> plaintiff to be in possession of the suit property. The 2<sup>nd</sup> defendant was not married to the deceased but was a mere cohabitee. The 2<sup>nd</sup> defendant was therefore not a survivor of the estate of the deceased.

In his affidavit, the 2<sup>nd</sup> plaintiff who was the 1<sup>st</sup> plaintiff's attorney averred that the suit property was leased by the 2<sup>nd</sup> defendant to the 1<sup>st</sup> defendant after the death of the deceased without the permission of the 1<sup>st</sup> plaintiff. The 2<sup>nd</sup> plaintiff averred that before her demise, the deceased was staying on the suit property with the 2<sup>nd</sup> defendant as his boyfriend and not as her husband. The 2<sup>nd</sup> plaintiff averred that the 2<sup>nd</sup> defendant was not entitled to receive rent from the suit property since he lacked legal capacity to claim the suit property that was vested solely in the 1<sup>st</sup> plaintiff who was the legal representative of the estate of the deceased and a co-owner of the property. The 2<sup>nd</sup> plaintiff averred that the defendants were occupying the suit property illegally to the detriment of the 1<sup>st</sup> plaintiff who was the legal owner thereof.

The application was opposed by the defendants through a replying affidavit sworn by the 2<sup>nd</sup> defendant on 22<sup>nd</sup> March, 2019. In the

affidavit, the 2<sup>nd</sup> defendant averred that the plaintiffs' application was based on lies and concealment of material facts. The 2<sup>nd</sup> defendant averred that on 16<sup>th</sup> January, 2009, the suit property was transferred to the 1<sup>st</sup> plaintiff and the deceased to hold as tenants in common. The 2<sup>nd</sup> defendant averred that the 1<sup>st</sup> plaintiff and the deceased had leased the suit property to several tenants in the past and that the 1<sup>st</sup> defendant was the then current tenant on the property. The 2<sup>nd</sup> defendant averred that the 1<sup>st</sup> plaintiff had allowed the deceased to collect and use the rent from the suit property to sustain herself and her family while she was alive. The 2<sup>nd</sup> defendant averred that she lived with the deceased as her husband in the servant quarter on the suit property from 2007 until the death of the deceased on 7<sup>th</sup> June, 2017.

The 2<sup>nd</sup> defendant averred that their union with the deceased was blessed with one child, Hakeem Rajab Zuma. The 2<sup>nd</sup> defendant averred that the deceased's family was aware of his union with the deceased and that none raised an objection. The 2<sup>nd</sup> defendant averred that before the death of the deceased, her son with the 2<sup>nd</sup> defendant aforesaid and the 2<sup>nd</sup> defendant were fully dependent on her and that upon her death, the 2<sup>nd</sup> defendant and their said child remained in occupation of the said servant quarter and continued to collect rent from the main house on the suit property which was leased to the 1<sup>st</sup> defendant for their subsistence. The 2<sup>nd</sup> defendant averred that he was a husband of the deceased and her dependant together with their son.

The 2<sup>nd</sup> defendant averred that they had a right to claim the deceased's share in the suit property. The 2<sup>nd</sup> defendant averred that since the suit property was owned by the deceased and the 1<sup>st</sup> plaintiff as tenants in common, no right of survivorship accrued in favour of the 1<sup>st</sup> plaintiff in respect thereof. The 2<sup>nd</sup> defendant reiterated that he together with his son with the deceased were dependants of deceased and as such were entitled to the deceased's share in the suit property. The 2<sup>nd</sup> defendant averred that, the suit property was leased to the 1<sup>st</sup> defendant while the deceased was alive and that the 1<sup>st</sup> plaintiff was involved in the process. The 2<sup>nd</sup> defendant averred that, he was using the rent collected from the suit property to sustain his son with the deceased. The 2<sup>nd</sup> defendant averred that the dispute before the court should have been taken to the High Court which had jurisdiction over succession disputes.

The 2<sup>nd</sup> defendant averred that he had filed a petition for grant of letters of administration in respect of the estate of the deceased to secure his interest and that of his minor son in the suit property as beneficiaries of the estate of the deceased. The plaintiffs filed a supplementary affidavit sworn by the 2<sup>nd</sup> plaintiff on 25<sup>th</sup> September, 2019. The 2<sup>nd</sup> plaintiff averred that the 1<sup>st</sup> plaintiff did not enter into any tenancy agreement with the 1<sup>st</sup> defendant in respect of the suit property. The 2<sup>nd</sup> plaintiff averred that the 1<sup>st</sup> plaintiff had complained of not receiving her share of rent from the suit property. The 2<sup>nd</sup> plaintiff admitted that the 1<sup>st</sup> plaintiff and the deceased owned the suit property as tenants in common. The 2<sup>nd</sup> plaintiff contented however that the deceased's share in the suit property vests on her son Hakeem Rajab Zuma and not on the 2<sup>nd</sup> defendant. The 2<sup>nd</sup> plaintiff averred that there was nothing showing that the deceased was married to the 2<sup>nd</sup> defendant and that the Birth Certificate for Hakeem Zuma was issued 5 months after the death of the deceased. The 2<sup>nd</sup> plaintiff averred that the 2<sup>nd</sup> defendant was not a dependant of the deceased until he was declared as one by the succession court. The 2<sup>nd</sup> plaintiff averred that the 2<sup>nd</sup> defendant had no right to collect rent from the suit property and to occupy the property. The 2<sup>nd</sup> plaintiff averred that in the absence of evidence of marriage between the 2<sup>nd</sup> defendant and the deceased, the 2<sup>nd</sup> defendant was not a beneficiary of the estate of the deceased. The 2<sup>nd</sup> plaintiff averred that only the deceased's son, Hakeem Zuma was entitled to 50% share in the suit property which share the 1<sup>st</sup> plaintiff would hold in trust for him. The 2<sup>nd</sup> plaintiff averred that the 1<sup>st</sup> plaintiff's share of rent was being collected and appropriated by the 2<sup>nd</sup> defendant without her permission. The 2<sup>nd</sup> plaintiff averred that the deceased was buried within a day of her death in accordance with Islamic rites and family members were not given opportunity to attend her funeral.

The 2<sup>nd</sup> plaintiff averred that the High Court had no jurisdiction in this matter since the plaintiffs had not sought a grant of letters of administration and none had been issued. The 2<sup>nd</sup> plaintiff averred that the 2<sup>nd</sup> defendant had not filed any succession proceedings in respect of the estate of the deceased and that the intention of the plaintiffs was to get the management rights over the suit property which was being mismanaged.

The application was heard by way of written submissions. The plaintiffs filed their submissions on 18<sup>th</sup> May, 2020 while the defendants filed their submissions on 29<sup>th</sup> November, 2019. I have considered the plaintiffs' application together with the supporting affidavits. I have also considered the defendants' affidavit filed in opposition to the application. Finally, I have considered the submissions by the advocates for the parties and the authorities cited in support thereof. The plaintiffs have sought prohibitory and mandatory injunction. There is also an alternative prayer for rent at the rate of KShs. 150,000/- per month in lieu of the said injunctive orders. The principles upon which this court exercises its discretion in applications for prohibitory and mandatory injunction are now well settled. In the case of Giella v Cassman Brown & Co. Ltd. [1973] E.A 358, it was held that an applicant for a temporary injunction must establish a prima facie case with a probability of success and the injunction will not normally be granted unless the applicant might otherwise suffer irreparable injury which cannot be adequately compensated by an award of damages. It was held further that if the court is in doubt as to the foregoing, the application would be determined on a balance of convenience.

An applicant for a temporary mandatory injunction must show that he has a very strong case that is likely to succeed at the trial. The likelihood of success must be higher than that which is required for a prohibitory injunction. The general principles which the court apply in applications for interlocutory mandatory injunction were set out in the case of Locabail International Finance Limited v Agro-Export (1988) 1 All ER 901, where the court 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 thinks 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 has attempted to steal a march on the Plaintiff. Moreover, before granting a mandatory 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 prohibition injunction.”**

In the case of Shepherd Homes Ltd. v Shandahu [1971] 1 Ch.304, Meggary J. stated as follows:

**“It is plain that in most circumstances a mandatory injunction is likely other things being equal, to be more drastic in its effect than a prohibitory injunction. At the trial of the action, the court will of course grant such injunction as the justice of the case requires; but at the interlocutory stage, when the final result of the case cannot be known and the court has to do the best it can, I think the case has to be unusually strong and clear before a mandatory injunction can be granted even if it is sought to enforce a contractual obligation.”**

The orders sought by the plaintiffs are prohibitory in nature to the extent that they seek to restrain the defendants from occupying the suit property and mandatory in nature to the extent that they seek the eviction of the defendants from the suit property. The eviction orders should have been sought by the plaintiffs under Order 36 Rule 1(1)(b) of the Civil Procedure Rules. In the present application, the court has been moved under sections 1A and 3A of the Civil Procedure Act and Article 40 of the Constitution. I believe that the threshold under Order 36 Rule 1(1)(b) of the Civil Procedure Rules aforesaid is higher and stringent. In Taylor v Bolus [1981] KLR 536, it was held that:

**“It is an established principle of law that where the Plaintiff’s claim is undoubted and clear and the defence is only a sham or a spurious one, the court would grant summary judgment as prayed and where the Defendant demonstrates a fairly arguable case or show triable issue, summary judgment would not issue and he must be given leave to defend.”**

Irrespective of what may have informed the plaintiffs’ decision to bring the application under the provisions of the law that I have cited, I am not satisfied from the material before me that the plaintiffs have established a case that would warrant the grant of the orders of a mandatory nature sought against the defendants. Although the plaintiffs claimed in the plaint that after the death of the deceased, the 1<sup>st</sup> plaintiff became the sole owner of the suit property, they conceded subsequently in their supplementary affidavit that the deceased and the 1<sup>st</sup> plaintiff owned the suit property as tenants in common and as such the share of the deceased in the suit property would vest in her estate. None of the plaintiffs is a legal representative of the estate of the deceased. Although the 1<sup>st</sup> plaintiff claimed to be the administrator of the estate of the deceased, no grant of letters of administration was placed before the court in proof of this allegation. Since the plaintiffs are not the legal representatives of the estate of the deceased, they have no right to claim the deceased’s share in the suit property. The 1<sup>st</sup> plaintiff can only bring a claim in respect of her share in the property.

The 2<sup>nd</sup> defendant contended that he lived with the deceased as husband and wife in the servant quarter on the suit property while the deceased was alive and that their union was blessed with a child. The 2<sup>nd</sup> defendant contended that when the deceased died, he remained in occupation of the said servant quarter with the issue of their marriage. The 2<sup>nd</sup> defendant contended that the main house on the suit property was let to the 1<sup>st</sup> defendant while the deceased was alive and that the 1<sup>st</sup> plaintiff had allowed the deceased to collect and keep the rent from the suit property for her upkeep and that of her family. The 2<sup>nd</sup> defendant admitted that he continued to collect and keep the rent for the main house from the 1<sup>st</sup> defendant. The plaintiffs admitted that the 2<sup>nd</sup> defendant used to stay with the deceased on the suit property. The disagreement was on whether they were staying as a husband and wife in which case the 2<sup>nd</sup> defendant would have an interest in the suit property or as a girlfriend and a boyfriend in which case he would have no interest in the suit property. The plaintiffs admitted however that the deceased had a child with the 2<sup>nd</sup> defendant.

This court has no jurisdiction to determine whether the deceased was lawfully married to the 2<sup>nd</sup> defendant and whether the 2<sup>nd</sup> defendant has a right to benefit from the estate of the deceased. That jurisdiction rests with the High Court. The burden of proof was upon the plaintiffs. The plaintiffs have not satisfied me that the 2<sup>nd</sup> defendant is occupying the suit property illegally. In the absence of an order from the High Court to the effect that the 2<sup>nd</sup> defendant is not a beneficiary of the estate of the deceased, the 2<sup>nd</sup> defendant’s claim that he is a beneficiary of the deceased’s estate cannot be wished away having regard to the fact that they lived together with the deceased during her life time and upon her death he was the one who buried her. It is also common ground that he had a child with the deceased who is still in his custody. I wish to add that even if this court had jurisdiction to determine the foregoing issues, the same cannot be determined summarily on affidavit evidence.

The 2<sup>nd</sup> defendant had contended that the main house on the suit property was leased to the 1<sup>st</sup> defendant by the deceased while she was alive. From the emails attached to the plaintiffs’ supplementary affidavit, it is clear that the 1<sup>st</sup> plaintiff had by 2015 left the deceased to collect rent from the suit property and to use the whole of it as she deemed fit. In her email of 8<sup>th</sup> August, 2015 to the deceased, the 1<sup>st</sup> plaintiff stated as follows in part *“I have been lenient enough not to demand my share of any monies generated from the house. You assumed the responsibility to (sic) collecting money generated and should have in turn been responsible enough to pay any taxes/rates owed.... Never got any proceedings (sic) from the house in years, and don’t intend to live in it.”*

It is clear from the foregoing email that the deceased had full control of the suit property with the knowledge of the 1<sup>st</sup> plaintiff. As a co-owner of the suit property and the one in control of the same, to a third party, the deceased had a right to lease out the property and to collect rent therefrom. The lease with Kirimi Jediel Rutere that I have seen in the defendants’ bundle of documents was for one year with effect from 1<sup>st</sup> September, 2009. Nothing could have prevented the deceased from leasing out the property to other tenants after the expiry of that tenancy. I am not persuaded therefore that the 1<sup>st</sup> defendant is occupying the suit property illegally simply because the 1<sup>st</sup> plaintiff was not a party to the tenancy agreement pursuant he was given possession of the premises.

For the foregoing reasons, a prima facie case of illegal occupation of the suit property by the defendants has not been established. There is no basis therefore for the orders of mandatory injunction and eviction sought by the plaintiffs against the defendants.

The plaintiffs have however demonstrated that the 1<sup>st</sup> plaintiff is a co-owner of the suit property and that she is entitled to a share of rent from the property. The plaintiffs have also demonstrated that the 1<sup>st</sup> plaintiff has not been receiving her share of the rent being paid by the 1<sup>st</sup> defendant to the 2<sup>nd</sup> defendant for the main house on the suit property. The plaintiffs have established further that chances of recovering

the rent being paid by the 1<sup>st</sup> defendant to the 2<sup>nd</sup> defendant from the 1<sup>st</sup> defendant should the plaintiffs succeed in their claim at the trial are minimal. In the circumstances, I am of the view that a case has been made out for the defendants to be compelled to pay half (½) of the rent being collected from the suit property to the plaintiff pending the hearing and determination of the suit. It is not however clear to me how the plaintiffs arrived at a monthly rent of Kshs. 150,000/- which they claimed to be the market rent for the suit property. The court will order the defendants to pay to the 1<sup>st</sup> plaintiff whatever rent is being paid by the 1<sup>st</sup> defendant for the suit property.

In the final analysis and for the foregoing reasons, I hereby make the following orders in respect of the plaintiffs' Notice of Motion application dated 17<sup>th</sup> January, 2019;

1. Prayer (i) is spent.
2. Prayers (ii), (iii) and (iv) are refused.
3. Prayer (v) is allowed on the following terms;
  - (i) The defendants shall file in court within 14 days from the date hereof a true statement of rent paid by the 1<sup>st</sup> defendant to the 2<sup>nd</sup> defendant from 1<sup>st</sup> January, 2021 to 31<sup>st</sup> May, 2021 in respect of his occupation of the suit property.
  - (ii) The defendants shall pay to the 1<sup>st</sup> plaintiff a half (½) of the monthly rent being paid by the 1<sup>st</sup> defendant for the suit property with effect from 10<sup>th</sup> June, 2021 and on the 10<sup>th</sup> day of each succeeding month until the determination of this suit.
  - (iii) In the event that the 1<sup>st</sup> defendant's tenancy is terminated by effluxion of time or otherwise, the 2<sup>nd</sup> defendant shall ensure that a half (½) of the rent paid by the new tenant is given to the 1<sup>st</sup> plaintiff in accordance with order (ii) above.
4. The costs of the application shall be in the cause.

**Delivered and Dated at Nairobi this 10<sup>th</sup> day of June 2021**

**S. OKONG'O**

**JUDGE**

**Ruling delivered virtually through Microsoft Teams Video Conferencing Platform in the presence of:**

Ms. Koki Mbolu for the Plaintiffs

Ms. Ooga for the Defendants

Ms. C. Nyokabi-Court Assistant