



REPUBLIC OF KENYA

IN THE ENVIRONMENT AND LAND COURT

AT NAIROBI

ELC SUIT NO. E142 OF 2020

ADDAH NDUTA.....PLAINTIFF

-VERSUS-

NELLIE APARTMENTS LIMITED.....DEFENDANT

RULING

What is before this court is a Notice of Motion application dated 16th September, 2020 by the Plaintiff/ Applicant seeking the following orders;

1. Spent.
2. Spent.
3. Spent.
4. That a temporary injunction does issue against the Respondent restraining it by itself, its agents, employees or otherwise howsoever from proceeding with the distress for rent based on the Proclamation of Distress dated 1st July, 2019 or at all on account of the alleged sum due of Kshs. 900,000/= or any part thereof pending the hearing and determination of the Plaintiff's suit.
5. That the court does make such further or other orders as may be in the interest of justice in this case.
6. That the costs of this application be provided for.

The application was brought on the grounds set out on the body thereof and on the affidavit and supplementary affidavit sworn by the plaintiff (hereinafter referred to only as "the Applicant") on 16th September, 2020 and 26th November, 2020 respectively. The Applicant's case as set out in the said affidavits is as follows: At all material times, the Defendant (hereinafter referred to only as "the Respondent") was the proprietor and manager of the premises known as Apartment Unit No. B6, Block B on L.R No 330/317(hereinafter referred to only as "the suit property." The Applicant entered into a tenancy agreement dated 15th February, 2018 in respect of the suit property with one, Francis Njuguna (deceased) (hereinafter referred to only as "the deceased") in his capacity as a director and shareholder of the Respondent. The Applicant thereafter signed an offer letter dated 9th March, 2018 to purchase the suit property for Ksh.32 Million. Before the offer letter could be acted on, the deceased who was the only surviving director and shareholder of the Respondent died.

On 29th March, 2018, the deceased received from the Applicant Kshs.6 Million as initial deposit of the purchase price for the suit property. The Applicant was to pay a further deposit of Kshs.10 Million after the processing of a grant in respect of the estate of the other director of the Respondent, Nellie Wanjiku Njuguna who had died earlier. The final deposit of Ksh.16 Million was payable during the transfer of the title of the suit property to the Applicant. One, Nicky Njuguna who was a son to the deceased (also deceased) purporting to act on behalf of the Respondent issued a demand letter dated 23rd May, 2019 to the Applicant claiming alleged rent arrears of Kshs. 540,000/- for the months of February, 2019 to April, 2019. He subsequently instructed Nairobi Connection Service Auctioneers to levy distress for rent against the Applicant. That said Auctioneers issued a proclamation notice dated 1st July, 2019 for recovery of alleged rent arrears amounting to Kshs.900, 000/-.

The Applicant's proprietary interest in the suit property was threatened by the conduct of the deceased's sons, Athony Njuguna and Dennis Njuguna. The two had alleged that the Applicant forged the transaction documents relating to the suit property. They reported the Applicant to the Directorate of Criminal Investigations. The Applicant was arrested and charged at Kiambu Law Court in Criminal Case No. 1788/19. The said criminal case was still pending. The Respondent had failed to acknowledge the Applicant's interest in the suit property as a

purchaser or to refund the purchase price that she paid for the property. The Applicant was a purchaser of the suit property and not a tenant and unless she was protected by the court, the beneficiaries of the deceased's estate who had issued threats of distress for rent against her would keep on harassing her.

In her supplementary affidavit, the Applicant stated that Dennis Charles Njuguna lacked *locus standi* to swear an affidavit on behalf of the Respondent. The Applicant stated that the letter of offer that she had produced was subjected to examination by a forensic document examiner who confirmed that it was genuine and that the same was executed by the deceased. The Applicant contended that the tenancy agreement that she entered into with the deceased was rescinded upon her signing the letter of offer to purchase the suit property.

The application was opposed by the Respondent through a Replying affidavit sworn on 12th October, 2020 by Dennis Charles Njuguna. Dennis Charles Njuguna was one of the administrators of the estates of Francis Njuguna (the deceased) and Nellie Wanjiku Njuguna (also deceased) who were the directors and shareholders of the Respondent. The Respondent's case as set out in the said affidavit is as follows: The suit property was registered in the name of the Respondent as the owner thereof. Francis Njuguna (the deceased) and Nellie Wanjiku Njuguna who were former directors and shareholders of the Respondent were the parents of Dennis Charles Njuguna. The Applicant entered into a tenancy agreement with the Respondent in respect of the suit property which was fully furnished for a term of one year with effect from 15th February, 2018 to 14th February, 2019 at a monthly rent of Kshs.180, 000/-.

No deposit was paid under the said tenancy agreement as the Applicant had expressed interest in purchasing the suit property before the expiry of the term of the tenancy. The Respondent's advocates received a letter and email dated 24th May, 2018 from the firm of E.M. Mulinya & Company Advocates stating that the firm had received instructions from the Applicant to take over the conduct of the sale transaction and requested to be supplied with the draft sale agreement and other relevant documents. The Respondent's Advocates informed the Applicant's said advocates through an email dated 24th May, 2018 and a letter dated 31st May, 2018 that the documents that they had requested for had been forwarded to the Applicant's advocates on record. There was no mention of any money having been paid by the Applicant in the said letter from her advocates. After the death of Francis Njuguna (the deceased), the Respondent's advocates wrote to the Applicant's said advocates, E.M. Mulinya & Company Advocates asking whether the Applicant was still interested in purchasing the suit property. No response or further communication was received from the said advocates.

The Applicant was all along paying rent for the suit property to the deceased's sons' designated account until January, 2019 when she stopped and continued to live in the suit property rent free. On 15th March, 2019, the Respondent served a notice upon the Applicant to vacate the suit property but she refused to do so. In a meeting held on 15th May, 2019 with the Applicant's partner, Samuel Ndinguri to discuss settlement of the outstanding rent arrears, it was agreed that the Applicant pays an agreed lump sum rent on 20th May, 2019. This agreement was confirmed by the Respondent's advocates in a letter dated 20th May, 2019. The Applicant did not honour this agreement. Since no rent was received as had been agreed, the Respondent instructed auctioneers to levy distress against the Applicant for the recovery of rent arrears due from the Applicant.

After the distress for rent was levied against the Applicant, the Applicant instituted a suit against the Respondent in the lower court in Nairobi Milimani Commercial Court CMCC No. 5012 of 2019 where she obtained an injunction order *ex parte* stopping the distress proceedings. The lower court suit was dismissed on a notice of preliminary objection by the Respondent based on the pecuniary jurisdiction of the court.

The Respondent contended that the letter of offer relied on by the Applicant as a basis for her claim was not stamped by the Respondent, was unknown to the deceased's sons and employees and that there was no indication of the deceased's Identity Card Number. The Respondent contended that the said letter was also not given to the Respondent's advocates despite being copied to them. The Respondent contended that the said letter did not emanate from the Respondent or its advocates. The Respondent contended that upon investigation of the alleged signature of the deceased on the said letter of offer by the Directorate of Criminal Investigations, the same was found to be a forgery. The Respondent contended that, in any event, the said letter of offer was marked as subject to contract.

The Respondent contended that the Applicant had not produced evidence showing payment of the alleged deposit of the purchase price in the sum of Kshs. 6 Million. The Respondent averred further that the Applicant had continued to be in arrears of rent which she last paid in January, 2019. The Respondent averred that as of October, 2020 the Applicant was in rent arrears to the tune of Kshs. 3,780,000/-. The Respondent averred that, in the lower court, the Applicant had claimed that the sum of Kshs.180, 000/- per month that she was paying for the suit property was on account of the purchase price of Kshs.32, 000,000/-. The Respondent urged the court to strike out the Applicant's application and compel the Applicant to pay rent arrears to the Respondent or in the alternative to deposit the amount in court for preservation pending the hearing and determination of this suit.

The application was argued by way of written submissions. In her submissions, the Applicant argued that she had established grounds for granting a temporary injunction. On its part, the Respondent argued to the contrary. Both parties cited several authorities in support of their submissions. I have considered the application together with the affidavits filed in support thereof. I have also considered the replying affidavit filed in opposition thereto. Finally, I have considered the submissions by the advocates for the parties. The principles upon which this court exercises its discretion in applications for interlocutory injunction are now well settled. In 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.

In Nguruman Limited v Jan Bonde Nielsen & 2 Others [2014] eKLR the Court of Appeal adopted the definition of a prima facie case that was given in Mrao Limited v. First American Bank of Kenya Limited & 2 Others [2003] KLR 125 and went further to state as follows:

“The party on whom the burden of proving a prima facie case lies must show a clear and unmistakable right to be protected which is directly threatened by an act sought to be restrained, the invasion of the right has to be material and substantive

and there must be an urgent necessity to prevent the irreparable damage that may result from the invasion. ...All that the court is to see is that on the face of it the person applying for an injunction has a right which has been threatened with violation...The applicant need not establish title it is enough if he can show that he has a fair and bona fide question to raise as to the existence of the right which he alleges. The standard of proof of that prima facie case is on a balance or, as otherwise put on a preponderance of probabilities. This means no more than that the court takes the view that on the face of it, the applicant's case is more likely than not to ultimately succeed."

Before I delve into the merit of the application, I wish to dispose of a preliminary point that was raised by the Applicant. The Applicant had contended that Dennis Charles Njuguna who swore a replying affidavit in response to the application before court had no *locus standi* to do so. I find no merit in this argument. It is the Applicant who sued the Respondent. It is not disputed that the only natural person directors and shareholders of the Respondent were the deceased and his wife Nellie Wanjiku Njuguna who is also deceased. Dennis Charles Njuguna deposed that he was a legal representative of both the deceased and Nellie Wanjiku Njuguna. This averment was not rebutted by the Applicant. I am in agreement with the Applicant that the Respondent is a limited company and as such it has a separate and distinct legal personality from that of its members. It must be appreciated however that in this case, the Respondent had no surviving directors and shareholders who could act on its behalf when it was sued. In Halsburys Laws of England Vol.6, 3rd Edition, the authors have stated as follows at page 262:

"upon the death of the sole shareholder the title to his shares devolves upon his personal representative who may transfer the shares without being registered in the register of shareholders."

The shares of the deceased and his wife, Nellie Wanjiku Njuguna (also deceased) in the Respondent were vested upon their legal representative, Dennis Charles Njuguna. Without determining the issue with finality, I am of the view that Dennis Charles Njuguna as a legal representative of the deceased and his wife who were the only natural person directors and shareholders of the Respondent was competent to swear an affidavit on behalf of the Respondent in this suit.

On the merit of the Application, I am not satisfied that the Applicant has satisfied the conditions for grant of the injunction sought. The Applicant's case is that she is a purchaser of the suit property and as such she is not liable to pay rent to the Respondent pending the completion of the sale transaction. The Applicant relied of a contested letter of offer to prove the existence of the alleged sale transaction. The Applicant claimed to have paid Kshs. 6 Million to the deceased in cash as a deposit and that she was to pay additional sum of Kshs. 10 Million upon the processing of a grant in respect of the estate of Nellie Wanjiku Njuguna as aforesaid and the balance in the sum of Kshs. 16,000,000/- on completion. The Applicant has not rebutted the Respondent's assertion that even after executing the contested letter of offer she continued to pay rent. The Applicant has also not shown any agreement between her and the deceased to the effect that she was not supposed to pay rent pending completion. The draft agreement for sale that was produced by the Applicant in evidence in support of her case shows that it was the intention of the parties that the Applicant who was a tenant on the suit property was to continue paying rent until the suit property was transferred to her. This may explain why the Applicant continued to pay rent after executing the letter of offer. The Applicant's contention that the tenancy agreement between her and the Respondent was terminated by the said letter of offer does not find support in the evidence before the court.

The Applicant has also not convinced me that she paid a deposit of the purchase price in the sum of Kshs.6 Million in cash. The Applicant failed to produce evidence in support of the alleged payment. I have noted that there is no mention of the alleged cash payment of Kshs. 6 Million in all the correspondence exchanged between the Applicant's advocates and the Respondent's advocates on the sale transaction. Evidence of payment of the said sum of Kshs. 6 Million was crucial having regard to the fact that the letter of offer relied on by the Applicant was highly contested by the Respondent. The Applicant did not deny that she paid rent for the last time in January, 2019. In the absence of evidence of any agreement between the Applicant and the Respondent that the Applicant was not supposed to pay rent after the execution of the letter of offer and the fact that the Applicant was in default of rent payment when distress was levied against her, I am not persuaded that the said distress was illegal. It follows therefore that the Applicant has not established a prima facie case with a probability of success against the Respondent.

In EWK v JKN [2020] eKLR the court cited Nguruman Ltd v Jan Bonde Nielsen (supra) and stated that:

"the three conditions apply separately as distinct and logical hurdles to be surmounted sequentially by the Applicant. Such that, it is not enough that the Applicant establishes a prima facie case, he must further successfully establish irreparable injury, that is injury for which damages recoverable at law could not be an adequate remedy. And where there is doubt as to the adequacy of damages, the court will consider the balance of convenience. Conversely, where no prima facie case is established, the court need not consider irreparable injury or balance of convenience.

The Applicant having failed to establish a prima facie case, it is not necessary for me to consider whether the Applicant will suffer irreparable harm that cannot be compensated in damages.

The upshot of the foregoing is that the Applicant has not established the grounds for the grant of the injunction sought. However, having regard to the fact that the Applicant is in possession of the suit property and that she is likely to be evicted and the property sold to a third party while this suit is pending, I will in the interest of justice give a conditional order for the preservation of the suit property and the interest the Applicant may have therein pending the hearing and determination of this suit.

In conclusion, I hereby make the following orders;

1. Pending the hearing and determination of this suit, the Respondent by itself, its agents, employees, servants or any one of them is restrained from interfering with the Applicant's occupation of and interest in Apartment Unit No. B6, Block B on L.R No. 330/317 by selling, offering for sale through public auction or private treaty, transferring, distressing for rent, or in any other manner whatsoever.

2. The Applicant shall pay all rent in arrears from February, 2019 to 30th September, 2021 at the rate of Kshs. 180,000/- per month in an interest earning bank account in the joint names of the advocates on record herein for the Applicant and the Respondent within 60 days from the date hereof and shall continue to pay rent accruing from 1st October, 2021 on the first day of each successive month at the rate of Kshs. 180,000/- per month pending the hearing and determination of the suit.
3. In the alternative to 2 above, the Applicant shall pay into an interest earning bank account in the joint names of the advocates on record herein for the Applicant and the Respondent a sum of Kshs. 26,000,000/- being the balance of the purchase price for the suit property within 60 days from the date hereof pending the hearing and determination of the suit.
4. In the event that the Applicant fails to comply with the order made in paragraph 2 or in the alternative paragraph 3 above, the order of injunction granted in paragraph 1 above shall stand discharged without any further reference to the court.
5. The costs of the application shall be in the course.

DELIVERED AND DATED AT NAIROBI THIS 23RD DAY OF SEPTEMBER 2021

S. OKONG'O

JUDGE

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

N/A for the Plaintiff

Ms. Githii for the Defendant

Ms. C.Nyokabi-Court Assistant