



REPUBLIC OF KENYA

IN THE ENVIRONMENT AND LAND COURT

AT NAIROBI

ELC SUIT NO 214 OF 2011

CAROLINE WAITHERA KIRUMBA.....1ST PLAINTIFF
MARYANNE WAMAITHA MWAURA.....2ND PLAINTIFF
NEXT TECHNOLOGIES LIMITED.....3RD PLAINTIFF
SIGIMO ENTERPRISES LIMITED.....4TH PLAINTIFF

VERSUS

SUSAN NYAMBURA WACHIRA.....1ST DEFENDANT
KENON COURT MANAGEMENT CO.LTD.....2ND DEFENDANT
HOUSING FINANCE COMPANY OF KENYA LIMITED.....3RD DEFENDANT
KENON PLACE LIMITED.....4TH DEFENDANT

AND

FAITH MUTHEU MUTUKU.....PROPOSED 5TH DEFENDANT
ALBERT OTIENO MAJIWA.....PROPOSED 6TH DEFENDANT
ROBERT BWIRE MARWA.....PROPOSED 7TH DEFENDANT
CHARLES MUNGAH IRRUNGU.....PROPOSED 8TH DEFENDANT
PERIS MUTHONI MBURU.....PROPOSED 9TH DEFENDANT
ELIZABETH WAIRIMU GITHIORA.....PROPOSED 10TH DEFENDANT

RULING

1. This is a Notice of Motion application dated 24th August 2018 brought under order 40 rule 1, order 1 rule 6, order 1 rule 10, order 8 rule 3, order 8 rule 5 and order 51 rule 1 of the Civil Procedure Rule 2010, section 1A, 1B and 3A of the Civil Procedure Act Cap 21 Laws of Kenya and Article 159(2)(d) of the Constitution of Kenya 2010.

2. It seeks orders:-

a) Spent.

b) The applicants be granted leave to amend their defence and counterclaim amended on 16th December 2014 and filed on 23rd December, 2014 as per the annexed further defence and amended counterclaim hereto.

c) *Faith Mutheu Mutuku, Albert Otieno Majiwa, Peter Bwire Marwa, Charles Mungah Irungu, Peris Muthoni Mburu and Elizabeth Wairimu Githiora be enjoined in the suit as the 5th, 6th, 7th, 8th, 9th and 10th Defendants respectively.*

d) *Spent.*

e) *An order of temporary injunction be issued to restrain the Plaintiffs as well as the proposed 5th, 6th, 7th, 8th, 9th and 10th Defendants whether by themselves ,their agents, servants and /or employees from wasting, damaging, alienating, selling, disposing of, causing damage to all apartments Numbers D1, D2, D3, D4, D5, D6, D7, and D8 all erected on parcel of land known as L.R No.1870/V/217 or in any other means dealing with trees or any other property on the common areas situated on the parcel of land known as L.R No.1870/V/217 pending hearing and determination of the suit herein.*

f) *Costs of this application.*

3. The application is based on grounds set out in paragraphs 1-10 on the face of the application.

4. The application is supported by the supporting affidavit of John Wachira Wambugu; a director of the 4th Defendant sworn on 24th August 201 and his supplementary affidavit sworn on 7th June 2021.

5. He deponed that the 4th Defendant was advanced a loan of kshs.10 Million by the 3rd Defendant to erect 8 Apartments namely, D1, D2, D3, D4, D5, D6, D7, D8 and a unit which is separate and distinct from the said apartments on the parcel of land known as **L.R No.1870/V/217**.

6. He deponed further that in a purported exercise of statutory power of sale, the 3rd Defendant fraudulently sold the suit apartments to the Plaintiffs and the proposed Defendants at a purchase price of kshs.3.5 Million each but the purchase price has never been paid to the mortgage Account Number ML-600-0004056 maintained by the 3rd Defendant. He added that the proposed Defendants should be enjoined to enable the court to solve all the issues in controversy.

7. He also deponed that the Plaintiffs and the proposed Defendants caused leases in respect to the suit apartments to be registered in their favour and that his signature and that of his wife; the 1st Defendant were forged on respective leases in order to effect fraudulent transfers .He further deponed that the forgery is confirmed by a forensic document examination reports dated 22nd January 2014.

8. He deponed that the Plaintiffs as well as the proposed Defendants have been felling trees on the common areas of the property, unlawfully and without authorization from the 4th Defendant and causing environmental degradation to the property. He also deponed that they have also advertised the property for sale with the aim of defeating justice.

Response of the Plaintiff and the proposed 5th, 6th, 8th, 9th and 10th Defendants.

9. In response to the application, Charles Munga Irungu; the 8th proposed Defendant swore an undated replying affidavit on behalf of the 5th, 6th, 9th and 10th proposed Defendants.

10. He deponed that the proposed Defendants just like the Plaintiffs purchased apartments within the suit property via the 3rd Defendant's sale by private treaty arrangement which was an arrangement reached between the 3rd & 4th Defendant that the 3rd Defendant would sell the apartment units to recover loan arrears of kshs.21 Million owed by the 4th Defendant.

11. He deponed further that after purchase, leases were duly executed and registered in favour of the Plaintiffs and the proposed Defendants between the 13th day of November 2006 and 7th May 2007.He added that at the time of sale, directors of the 4th Defendant who are the 1st Defendant and her husband one John Wachira Wambugu did not raise any issue of fraudulent and illegal transfer which they now seek to introduce in the proposed amended defence and counterclaim.

12. He also deponed that in an attempt to infer that the sale transactions were fraudulent, one of the 4th Defendants directors namely John Wachira Wambugu filed a complaint with the DCI and he was a complainant in **Criminal case No.95/2014** where the Advocate who handled the sale transactions one Migui Machira Mungai of Mamicha & Co. Advocates and other accused persons were accused of fraud & forgery in respect to the transactions.

13. He averred that the Director of Criminal Investigations withdrew the charges against the accused person and the complainant's attempt to revive the suit vide **High Court Judicial Review Misc. Application No.620 of 2017** was thwarted vide the judgement delivered on 28th September 2018.

14. He further deponed that the Plaintiffs & the proposed Defendants are the registered owners of 8 units erected on parcel **L.R NO. 1870/V/2017** thus the Applicant has no right to injunct them from the free use of their respective properties & the common area.

1st & 4th Defendant's/Applicant's submissions.

15. They are dated 9th June 2021.The only contested issue is whether the Applicants should be granted an order of temporary injunction.

16. Counsel for the Applicants submitted that the applicants had established a prima facie case to warrant grant of the orders sought since they had established through evidence that the Plaintiffs and the proposed Defendants were sourcing for purchasers to dispose of the apartments in order to defeat justice. He cited **Paul Gitonga Wanjau v. Gathuthi Tea Factory Company Ltd & Others [2016] e KLR** where Justice Mativo quoted in approval the case of **Moses C. Muhia Njoroge & 2 Others v. Jane W Lesaloi & 5 Others [High court ELC Case No.514 of [2013.]**

17. He also submitted that since the 4th Defendant is still the registered proprietor of the suit property, its right to the suit property cannot be vindicated if an order of temporary injunction is not granted. He further submitted that the Applicants irreparable injury if orders sought are not granted. He cited the case of **Muigai Housing Finance Co. Ltd & Another HCCC No.1678 of 2001** and **Paul Gitonga Wanjau vs Gathuthi Tea Factory Company Limited & 2 Others [2016]e KLR** both cited in **Michael Gitere 7 Another vs Kenya Commercial Bank Limited[2018] e KLR.**

18. He submitted that that the Plaintiffs and the proposed Defendants are currently seeking to benefit from their fraudulent activities of transferring the suit property to themselves at the detriment of the Applicants. He added that the balance of convenience tilts in favour of the Applicants since they stand to lose proprietary rights if the order is not granted.

Submissions of the plaintiffs and the 5th, 6th, 8th and 9th proposed Defendants

19. They are dated 25th June 2021. Counsel for the Plaintiffs and the proposed 5th, 6th, 8th, 9th and 10th Defendants submitted that the Plaintiffs and the proposed Defendants do not oppose the prayer for leave to amend the defence and counterclaim and the prayer for leave to include them as Defendants in the matter. They however prayed that the 1st & 4th Defendants should be given specific timelines within which to file and serve the amended defence and counter claim thereof.

20. Counsel also submitted that the Plaintiffs and the proposed Defendants are opposed to prayers 4, 5 & 6 of the application as the Applicants have not demonstrated that they have a prima facie case with any probabilities of success and that they will suffer irreparable loss & damages incapable of compensation by an award of damage.

21. He further submitted that the Plaintiff and the proposed Defendants purchased the suit apartments but the 4th Defendant has deliberately refused to transfer the reversionary interest to the management company thus it shouldn't be allowed to benefit from that illegality.

22. He added that they have been in occupation and use of the premises for the last 15 years without any orders of injunction in force and the suit property has not been wasted or alienated.

23. He also submitted that the applicants have not satisfied principles of granting a temporary injunction.

24. I have considered the notice of motion and the affidavits in support. I have also considered the replying affidavit, the written submissions filed on behalf of the parties and the authorities cited. the issues for determination are:-

(i) Whether the Plaintiffs'/Applicants' application meets the threshold for grant of temporary injunction.

(ii) Whether the Plaintiffs/Applicants ought to be granted leave to amend their defence.

(iii) Who should bear costs of this application?

25. In an application for injunction the onus is on the Applicant to satisfy the court that it should grant an injunction. The principles were laid down in the precedent setting case of **Giella vs Cassman Brown & Co. Ltd [1973] EA 358**. In the case of **Mrao Ltd vs First American Bank of Kenya Ltd & 2 Others [2003] KLR 125** the Court of Appeal stated what amounts to a prima facie. I am guided by the above authorities.

26. I have considered the reasons advanced by the Applicants and I find that they have failed to demonstrate a prima facie with a probability of success at the trial. I decline to grant the prayer for temporary injunction.

27. The Applicants prayer to amend defence is however granted.

28. Accordingly, I grant the following orders:-

(a) That the 1st and 4th Defendants/Applicants are hereby granted leave to amend their defence and counterclaim within 21 days from the date of this ruling with corresponding leave to the Plaintiffs to amend if need be.

(b) The 5th to 10th Defendants are directed to file their pleadings and documents within 21 days from the date of this ruling.

(c) The costs of this application be borne by the 1st and 4th Defendants/Applicants.

It is so ordered.

Dated, signed and delivered in Nairobi on this 18th day of November 2021.

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L. KOMINGOI

JUDGE

In the presence of:-

Mr. Mwangi for the Plaintiff

Ms Abobo for 1st and 4th Defendants

No appearance for the 2nd and 3rd Defendants

No appearance for the proposed 5th – 10th Defendants

Steve - Court Assistant