



**REPUBLIC OF KENYA**

**IN THE ENVIRONMENT AND LAND COURT**

**AT NAIROBI**

**ELC SUIT NO. 1205 OF 2016**

**ESTHER ADHIAMBO ONGONG.....1<sup>ST</sup> PLAINTIFF**

**CARILUS OSAMBO ADEMBA.....2<sup>ND</sup> PLAINTIFF**

**VERSUS**

**PARAGON ELECTRONICS LIMITED.....DEFENDANT**

**RULING**

On 29<sup>th</sup> September, 2020, the Defendant brought an application by way of Notice of Motion dated 25<sup>th</sup> September, 2020 seeking the following orders;

1. An order of injunction do issue restraining the Plaintiffs by themselves, their agents, servants or whomsoever from in any manner trespassing, entering upon, wasting, alienating, altering, threatening to enter upon, occupying or remaining on, or in any manner interfering with the suit properties being Apartments No A1-5 or L.R No. 330/355 in Nairobi pending the hearing and determination of the suit.
2. A mandatory injunction be issued directing the Plaintiffs to forthwith, and in any event not later than 7 days from the date of this order, restore the Apartment to status quo ante as at 7 September 2020 and to leave it as such pending the hearing and determination of the suit.
3. Costs of this Application be borne by the Plaintiffs on full indemnity basis

The application was brought on the following grounds;

1. On or about 7<sup>th</sup> September 2020, the 2<sup>nd</sup> Plaintiff during the pendency of the suit herein called the representative of the Defendant, one, Kevin Ayodi on phone and demanded to be given access to Apartment A1-5 which is the subject of the dispute herein.
2. The Defendant declined to do so and through its representatives informed the 2<sup>nd</sup> Plaintiff that the Plaintiffs could not be given access to the property due to the subsistence of this suit and in any event the Plaintiffs have not yet fully paid the purchase price so as to entitle them any occupation.
3. The Defendant's representative advised the 2<sup>nd</sup> Plaintiff to get in touch with the Defendant's lawyers in the matter which the 2<sup>nd</sup> Plaintiff never did.
4. On or about 11-12<sup>th</sup> September 2020, the Plaintiffs and/or persons working at their behest or on their behalf encroached upon the property by breaking into the Apartment A1-5.
5. The Plaintiffs thereby forcefully broke down the entrance door to Apartment A1-5 and replaced it with a less secure and poorer quality door. The Defendant's door that had been broken down and removed was still missing.
6. The Defendant reported the matter to the Police as a breaking in, theft and criminal trespass. The police were still investigating the matter.
7. The Defendant was apprehensive that that was the onset of unlawful occupation, trespass and interference by the Plaintiffs in

order to scatter the substratum of the case herein and thereby frustrate the Defendant's defence and counterclaim herein.

8. The unlawful attempt to take over the Apartment and alter it was intended to also devalue and by dint of alteration of its fixtures had devalued the Defendant's property to proportions that could not be quantified then.
9. The actions of the Plaintiffs amounted to an affront on the authority of the Honourable Court as well as the principle and dictates of *lis pendens*; and the Plaintiffs were thereby liable for appropriate sanctioning by the Honourable Court.
10. The Defendant was apprehensive that unless the Plaintiffs were stopped from carrying on their unlawful conduct and ordered to forthwith restore the apartment that they had vandalised, the authority of the court will continue to be undermined and the outcome of the proceedings herein would be worthless.
11. The circumstances giving rise to the application presented a case that was deserving of the orders sought including the mandatory injunction which was necessary to achieve status quo ante and thereby uphold the authority of the Honourable Court and the integrity of the proceedings.
12. The orders sought, if granted, were also to restore and preserve the substratum of the suit and avoid convolvement of the dispute during the pendency of the suit and avoid reopening of the dispute once it was concluded.
13. The Defendant remained the lawful owner of the Apartment in dispute until the Honourable Court finds otherwise and/or until the Plaintiffs pay the full purchase price including legal fees and meet all the contractual conditions relating thereto.
14. The Plaintiffs had admitted that they had not paid the full purchase price and legal fees, leave alone the stamp duty for the transfer of the property. They were therefore not entitled to occupation of the Apartment.
15. The Plaintiffs' conduct was contradictory to and inconsistent with their own move to place a caveat on the property and the conduct was intended to pre-empt and frustrate the amendments proposed by the Defendant to direct the removal of the unfounded caveat.
16. The security and property devaluation threat, breach of county planning and criminal liability posed by the encroachment and alterations committed and likely to be committed by the Plaintiff had caused, and unless stopped would continue to cause and pose, irreparable loss and injury to the Defendant who remains the lawful owner of the Apartment.
17. The balance of convenience and logic dictate that the status quo ante of the suit property be maintained and preserved pending the hearing and determination of the suit and counterclaim herein.

The court gave directions on the defendant's application dated 25<sup>th</sup> September, 2020 on 5<sup>th</sup> October, 2020. The court ordered that the plaintiffs respond to the application within 14 days with liberty to the defendant to file a supplementary affidavit within 14 days of service. The matter was listed for mention on 19<sup>th</sup> November, 2020 for further directions.

On 19<sup>th</sup> November, 2020, the defendant filed another application dated 16<sup>th</sup> November, 2020 seeking the following orders:

1. The Plaintiffs be restrained from altering, changing, or otherwise interfering with the suit property pending the hearing and determination of this application.
2. The Plaintiffs be restrained from altering, changing, or otherwise interfering with the suit property pending the hearing and determination of the suit herein.
3. This Honourable Court does conduct an in situ visit to the suit property to note, ascertain and record a number of concerns arising from the averments in the Amended Complaint, Amended Defence and Counterclaim, the Defendant's Application dated 25 September 2020 and the Reply Affidavit of CARILUS OSAMBO ADEMBA sworn on 10 November 2020.
4. During the session the Honourable Court does note, ascertain and record the following;
  - a. Whether or not the security entrance door to the suit property has been removed and replaced by entrance different quality and or type of door by the Plaintiffs;
  - b. Whether or not there has been or there are ongoing any alterations to the suit property by the Plaintiffs;
  - c. Any other matter that the court may at its discretion deem necessary to note, ascertain and/or otherwise record
5. The Parties be allowed to record the in situ session by still and motion pictures for their reliance and use.
6. In the alternative, the Court does order that the Plaintiffs do give the Defendant or its representative or agents access and/or entry into the suit property for the purposes of ascertaining whether there are any alterations carried out or ongoing on the suit property and the extent of such alterations and for that purpose the Defendant be allowed to take pictures and/or videos;

7. The Officer in Charge of Kilimani Police Station, any police officer under his/her command and/or any other police officer served with this order be ordered to be present or otherwise assist in enforcing the order for access and inspection by the Defendant.

8. The costs of this application and the in situ session and or inspection by the Defendant be borne by the Plaintiffs on full indemnity basis.

This second application was brought on the following grounds;

a. On 12 November, 2020 the Plaintiffs filed an affidavit herein where they admitted that they had taken possession of the suit property;

b. The Plaintiffs' possession was unlawful and injurious to the Defendant. Under Clause 3.5 of the Agreement for Lease dated 28<sup>th</sup> February, 2012, the Plaintiffs were not entitled to possession of the suit property until all their payments obligations had been satisfied in full.

c. The admitted unlawful possession, considered against the admission that the Plaintiffs had not fully paid the Lease Premium, was unlawful and amounted to breach of the Agreement for Lease.

d. The Defendant was apprehensive that the Plaintiffs, on account and in furtherance of the unlawful possession, were carrying out injurious and wrongful alterations of the suit property.

e. It was therefore fair and just that, in order to ascertain and to the extent possible mitigate the loss and injury that the Defendant had suffered and stood to suffer, the Honourable court does conduct an in situ session or alternatively the Defendant be given access to the suit property so as to inspect, note, ascertain and/or otherwise record all matters relating to the suit property and the dispute herein.

f. The proposed in situ visit and session would enable the court to effectively and completely adjudicate upon and settle all questions involved in the suit.

g. The proposed in situ visit and in the alternative the inspection of the suit property would not occasion any prejudice to the Plaintiffs.

h. The proposed in situ visit and session had been necessitated by the patently unlawful, wrongful and *mala fides* acts of the Plaintiffs and the Plaintiffs should therefore be condemned to pay the costs of the application and the costs incidental to the in situ visit and session. In particular;

i. The possession admitted by the plaintiffs was unlawful and in breach of the principles of *lis pendens*

ii. The plaintiffs had unlawfully resorted to self-help in respect of the very same remedies that they were seeking from Court.

i. The Application was without prejudice to and was made further to the application for injunction dated 25<sup>th</sup> September, 2020.

The application was supported by the affidavit of Bulent Gulbahar sworn on 16<sup>th</sup> November, 2020. He stated that the Plaintiffs had admitted in their affidavit sworn on 12<sup>th</sup> November, 2020 that they had taken possession of the suit property. He stated that the Plaintiffs had admitted that they had not completed the payment of the full purchase price and that a sum of Kshs. 1,630,000/- had remained outstanding. He stated that the Plaintiffs were not entitled to possession of the suit property until the full lease premium was paid. He stated that the Defendant was apprehensive that the Plaintiffs were altering the suit property and would continue to do so. He stated that unless the orders sought were granted, the Defendant would remain in the dark as to the nature, extent and the implications of the said alterations being carried out by the Plaintiffs. He stated that the loss and injury occasioned by the said alterations would also remain unmitigated. He stated that the Defendant's representative had been denied access to the suit property by the Plaintiffs' agents. He stated that the orders sought if granted would assist the court in adjudicating and determining all the issues in controversy between the parties. He stated that the plaintiffs would not suffer any prejudice if the orders sought were granted.

The application was opposed by the Plaintiffs through a replying affidavit sworn by the 2<sup>nd</sup> Plaintiff on 27<sup>th</sup> April, 2021. The Plaintiffs contended that the application was *res sub-judice* in that the application sought the same reliefs sought by the Defendant in its pending application dated 25<sup>th</sup> September, 2020. The Plaintiffs averred that the court was barred under section 6 of the Civil Procedure Rules from entertaining the application. The Plaintiffs contended that the application was an abuse of the process of the court. The Plaintiffs contended further that in the application, the Defendant was inviting the court to carry out investigations and to assist it in gathering evidence. The Plaintiffs contended that a site visit by the court would not be of assistance since the court has no expertise in survey or valuation. The Plaintiffs averred that a quantity surveyor would have been of more assistance. The Plaintiffs averred that the proposed court visit would be a waste of judicial time. The Plaintiffs averred that when they took possession of the apartment in dispute (the suit property) the same was incomplete and that they carried out a valuation to ascertain the material and labour that was required to make the suit property habitable. The Plaintiffs contended that they spent Kshs. 527,218/- on the outstanding works. The Plaintiffs contended that the sum of Kshs. 1,630,000/- claimed by the Defendant to be due to it was payable at the completion of the agreement which did not take place. The Plaintiffs averred that they did not damage the suit property and that there was no reason at all why they could damage their own property. The plaintiffs averred that the Defendant had approached the court with unclean hands.

The Defendant filed a supplementary affidavit sworn by Valentine Ataka on 27<sup>th</sup> April, 2021 in which he claimed that the replying affidavit filed by the Plaintiffs was defective in that the same was commissioned by Gichamba Melvin Nduru advocate who was practising in the firm of Rachier & Amolo Advocates who are on record herein for the Plaintiffs. The Plaintiffs filed a further affidavit sworn by Melvin Nduru Gichamba on 28<sup>th</sup> April, 2021 in which he stated that he ceased to be an employee of Rachier & Amolo Advocates in March, 2017.

The Defendant's application was heard on 28<sup>th</sup> April, 2021 when Mr. Ataka appeared for the Defendant while Mr. Munyua appeared for the Plaintiff. The Defendant submitted that the Plaintiffs took possession of the suit property and made alterations to the same even though its ownership is in dispute. The Defendant submitted that the Defendant was desirous of knowing what had taken place on the property after the Plaintiff's unilateral take over. The Defendant submitted that it was for that reason that the Defendant was seeking an order for the court to visit the suit property or in the alternative for the Defendant to be granted access to the suit property and be allowed to take photographs. The Defendant argued that the orders sought would assist the court and the parties. The Defendant argued further that it had established a prima facie case. The Defendant submitted that the Plaintiffs were not entitled to possession of the suit property and that it had a right to inspect the property.

The Defendant argued that its application was undefended as the response by the Plaintiffs was filed out of time and without leave of the Court. The Defendant argued further that, the said affidavit was defective as it was commissioned by an advocate who worked at the firm representing the Plaintiffs.

In conclusion the Defendant submitted that its application was not sub-judice as claimed by the Plaintiffs. The Defendant submitted that the current application was filed after the Plaintiffs took possession of the suit property and it sought remedies not included in the application dated 25<sup>th</sup> September, 2020.

In their submissions in reply, the Plaintiffs submitted that the advocate who commissioned the Plaintiffs' replying affidavit left the firm of Rachier & Amolo Advocates in March, 2017 and as such there was nothing wrong with him commissioning the said affidavit. The Plaintiffs submitted further that Defendant's application was sub-judice and that the same was filed contrary to section 6 of the Civil Procedure Act as it was seeking the same reliefs as the application dated 25<sup>th</sup> September, 2020 which has not been prosecuted.

On the issue of the court visiting the suit property, the Plaintiffs reiterated that such visit would be a waste of judicial time as the court is not an expert. The Plaintiffs submitted that they would not mind if an expert visited the suit property for the purposes of obtaining the information sought by the Defendant. The Plaintiffs argued further that all the information needed by the Defendant were in its possession as it was the owner of adjacent properties that are similar to the suit property.

The Plaintiffs argued that they had paid the full purchase price except for Kshs. 1,630,000 which was to be paid during the handover of the suit property. The Plaintiffs submitted that the handover was not done and their money was not refunded. They argued that they are entitled to quiet possession of the suit property and privacy. The Plaintiffs submitted that no good reason had been given to warrant their disturbance.

#### Determination:

The Defendant's application has three limbs. The first limb is seeking an injunction restraining the Plaintiffs from carrying out any alteration on the suit property. The second limb is seeking a site visit by the court while the third limb is seeking an alternative prayer for access to the suit property by the Defendant with police assistance. The parties had raised some preliminary issues that I wish to dispose of before considering the merit of the application. The Defendant had contended that the Plaintiffs' replying affidavit was filed out of time and as such should be disregarded and the Defendant's application treated as undefended. To determine whether the affidavit was filed out of time, it was necessary for the Defendant to file an affidavit of service showing when the application was served upon the Plaintiffs' advocates. In the absence of such an affidavit, I find no merit in the Defendant's objection to the Plaintiffs' replying affidavit on account of late filing. The other objection to the affidavit was that it was incompetent having been commissioned by an advocate who was working at the firm on record herein for the Plaintiffs. I find the response by the Plaintiffs to this objection satisfactory. I find no merit in the objection.

The Plaintiffs had on the other hand claimed that the Defendant's application was sub-judice. I also find no merit in this objection. I am satisfied that the present application was necessitated by developments that occurred after the filing of the Defendant's application dated 25<sup>th</sup> September, 2020 and that the orders sought in the two applications are not all similar.

On the merit of the application, the following is my view. In Republic v Nairobi City County Government & 6 others Ex Parte Mike Sonko Mbuvi [2015] eKLR stated as follows on site visit:

**“...even in ordinary civil proceedings where the Court deals with the merits of the case, a visit to the locus in quo is the exception rather than the rule. Its purpose is primarily to make the Court understand the nature of evidence adduced by the parties rather than to collect missing evidence. It is therefore my view that even in civil cases, there should be special circumstances before a decision to visit the locus in quo is made and the court must feel that adequate material has been placed before it that show that in the interest of justice and to arrive at the truth, it is just and fair to visit the locus in quo.”**

A site visit of a *locus in quo* by the court can only be ordered for special reasons. The Plaintiffs brought this suit against the Defendant seeking specific performance of the agreement for sale of Apartment Number 5, 5<sup>th</sup> Floor, Block A-1 (the suit property) dated 28<sup>th</sup> February, 2012 and in the alternative a refund of Kshs. 14,670,000/- together with interest from 1<sup>st</sup> August, 2012 until payment in full. The Plaintiffs averred that whereas they had performed their part of the said agreement, the Defendant had failed to complete its part. The Plaintiffs contended that the Defendant breached the said agreement by its failure to complete the transaction on or before 1<sup>st</sup> August, 2012 in accordance with the terms of the agreement and by its failure to deliver the suit property to the Plaintiffs.

In its statement of defence and counter-claim, the Defendant admitted entering into a sale agreement dated 28<sup>th</sup> February, 2012 with the

Plaintiffs in respect of the suit property. The Defendant admitted further that the completion date for the agreement was set for August, 2012. The Defendant averred further that it was unable to deliver on its part of the agreement due to many obstacles that it faced during the construction of the development which the suit property formed part. The Defendant averred that the said obstacles were beyond its control. The Defendant averred that the Plaintiffs had failed to pay the balance of the purchase price in the sum of Kshs. 1,630,000/- and a further sum of Kshs. 315,494/- on account of legal fees and disbursements. The Defendant denied that it was in breach of the agreement between it and the Plaintiffs. In its counter-claim against the Plaintiffs, the Defendant averred that the Plaintiffs had breached the agreement dated 28<sup>th</sup> February, 2012 by their refusal or failure to pay the balance of the purchase price in the sum of Kshs. 1,630,000/- within the prescribed period. The Defendant averred that on 7<sup>th</sup> April, 2016, the Defendant demanded from the Plaintiffs the payment of the said balance of the purchase price within 14 days from the date of the letter of demand which demand the Plaintiffs failed to comply with. The Defendant averred that as a result of the Plaintiff's failure to comply with the said demand, the Defendant terminated the agreement between it and the Plaintiffs. The Defendant averred that due to the said termination of the agreement, the Plaintiffs ceased to have any interest in the suit property. The Defendant sought judgment against the Plaintiffs for the cancellation of the lease registered in the names of the Plaintiffs in respect of the suit property and in the alternative, payment of a sum of Kshs. 1,630,000/- together with interest from 1<sup>st</sup> October, 2015. The Defendant also sought the cancellation of the caveat that was registered against the title of the suit property by the Plaintiffs and damages for breach of contract.

As at the time that the Plaintiffs' suit and the Defendant's defence and counter-claim were filed, the Plaintiffs had not taken possession of the suit property. The Plaintiffs have admitted that they took possession of the suit property on 7<sup>th</sup> September, 2020. It is also admitted that the Plaintiffs took possession of the suit property without the Defendant's permission. The Plaintiffs have contended that when they took possession of the suit property, the construction thereof was incomplete and that they spent Kshs. 527,218/- to put the premises in a habitable condition. The Defendant on the other hand has claimed that upon forcefully taking over possession of the suit property, the Plaintiffs carried out alterations on the suit property and have continued to do so which alterations may cause damage to the suit property and loss to the Defendant. It is for this reason that the Defendant has sought an order that the court visits the site to note, ascertain and record whether or not the security entrance door to the suit property was removed and replaced by one of a different quality and or type of door by the Plaintiffs; whether or not there has been or there are ongoing alterations to the suit property by the Plaintiffs and any other matter that the court may at its discretion deem necessary to note, ascertain and/or otherwise record.

I am in agreement with the Plaintiffs that a court visit to the suit property is not necessary in the circumstances. What the Defendant is seeking is to gather evidence from the suit property of the alterations that have been carried out by the Plaintiffs in the premises since they took over possession. The evidence sought to be gathered is of a technical nature. I am in agreement with the Plaintiffs that the court lacks the expertise that is required to gather the information that the Defendant wants to extract from the suit property during the site visit by the court. Due to the forgoing, it is my finding that a case has not been made out to warrant a site visit by the court to the suit property.

On the alternative prayer for the court to grant the Defendant access to the suit property, I am of the view that the same is well founded. The prayer is premised on similar grounds as the those for the site visit. The Defendant has contended that giving it access to the suit property will help it mitigate the loss/injury suffered or likely to be suffered as a result of Plaintiffs' unlawful possession of the suit property. It is not disputed that it was the duty of the Defendant to give the Plaintiffs possession of the suit property. It is common ground that the Plaintiffs took possession of the suit property without the Defendant's permission or consent and while this suit in which the suit property is in dispute is pending. The Plaintiffs have contended that when they took possession, the construction of the suit property was incomplete and that they spent in excess of Kshs. 500,000/- to put the property in a habitable condition. The Plaintiffs have contended that before they carried out further construction works on the suit property, they engaged an expert to advise them on the labour and material that was required. There is no doubt that the Plaintiffs would tender in evidence at the trial of this suit further works they claim to have carried out on the suit property to make it habitable. I am of the view that the court has a duty to create a level playing field for the parties. It would only be fair if the Defendant is similarly given an opportunity to inspect the suit property to ascertain its condition after the Plaintiffs took possession of the same and to engage an expert to advise it on the nature of the alteration if any that the Plaintiffs have carried out on the suit property and whether the same are injurious to the property or not. I am therefore inclined to grant the Defendant an order for limited access to the suit property for the purposes of inspection and gathering of whatever information it wishes to obtain therefrom.

On whether the Plaintiffs should be restrained from altering the suit property, I am of the view that since there is a dispute which is pending before this court on the ownership of the suit property and on whether or not the Plaintiffs are entitled to possession thereof, it is necessary that the suit property be persevered. In Ougo and Another v Otieno [1997] KLR 364, it was held that:

**“the general principle is that where there are serious conflicts of facts, the trial court should maintain the status quo until the dispute has been decided at the trial.”**

I am satisfied that this is an appropriate case in which the prevailing status quo should be maintained pending the hearing of the suit.

#### Conclusion:

In conclusion, I hereby make the following orders;

1. An order of injunction is issued restraining the Plaintiffs by themselves, their agents, servants or whomsoever from altering, changing, or otherwise interfering with the structures and fixtures of all that property known as Apartment No. 5 Block A-1 (A1-5) (L.R No. 330/355) (the suit property) in Nairobi pending the hearing and determination of this suit.
2. The Plaintiffs shall give the Defendant or its representatives or agents access and/or entry into the suit property once within fourteen (14) days from the date hereof for the purposes of ascertaining whether there are any alterations carried out or ongoing on the suit property and the extent of such alterations and for that purpose the Defendant shall be allowed to take pictures and/or videos;
3. The Plaintiffs' and the Defendant's advocates shall discuss and agree on the date for such visit within the period prescribed by the

court.

4. In the event that it would be necessary for police officers to be present during the Defendant's access to the suit property for the purposes of maintaining peace and order, the Officer in Charge of Kilimani Police Station or any police officer or officers under his/her command shall upon being served with this order be present on the suit property for that purpose.

5. The costs of the application shall be in the cause.

**DELIVERED AND DATED AT NAIROBI THIS 16<sup>TH</sup> DAY OF DECEMBER, 2021**

**S. OKONG'O**

**JUDGE**

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

**Mr. Okech h/b for Mr. Munyua for the Plaintiff**

**Mr. Ataka for the Defendant**

**Ms.**

**Betsy-Court**

**Assistant**