



REPUBLIC OF KENYA

IN THE ENVIRONMENT & LAND COURT AT THIKA

ELC NO 58 OF 2021

TERESIA VICTORIA WAIRIMU NDUNGU.....PLAINTIFF /APPLICANT

VS

JOHN NJOROGE MBURU.....1ST DEFENDANT /REPENDENT

PETER MWANIKI MBUGUA..... 2ND DEFENDANT/RESPONDENT

ONESMUS MUTURI MBURU..... 3RD DEFENDANT /RESPONDENT

THE LAND REGISTRAR, THIKA.....4TH DEFENDANT/RESPONDENT

RULING

1. The Plaintiff/Applicant filed instant Application dated 30/9/2021 under Section Order 40 Rule 1, Order 51 Rule 1, Section 68 of Land Registration Act and Sections 1A and 1B of the Civil Procedure Rules (CPR) for Orders THAT;

a. Spent.

b. THAT this Honorable Court be pleased to issue an order prohibiting the Defendants jointly and severally, by themselves, their agents and or employees from distressing for rent and /or evicting the Plaintiff or in any way interfering with the Plaintiff occupation of the property namely Title Number: Thika Municipality Block 9/904 pending the hearing and determination of this application and suit.

c. THAT this Honorable Court be pleased to issue an order directed to Gladsom Auctioneers Ltd and/or the 3rd Defendant by himself or his agents and/or employees from selling the attached proclaimed items listed in the proclamation and notification of sale pending the hearing and determination of this application and suit.

d. THAT this Honorable Court be pleased to issue an order directed to Gladsom Auctioneers Ltd and/or the 3rd Defendant by himself or his agents and/or employees to return the attached property belonging to the Plaintiff allegedly distressed for rent arrears from the Plaintiff pending the hearing and determination of this application and suit.

e. THAT this Honorable Court be pleased to issue inhibition orders or any other order that can preserve the suit property known as Title Number Thika Municipality Block9/904 or maintenance of status quo pending the hearing and determination of this application and suit.

f. THAT costs of this application be provided for.

2. The Application is based on the grounds thereto and the Supporting Affidavit of the Applicant, **Teresia Victoria Wairimu Ndungu** sworn on even date.

3. The Applicant averred that she purchased the suit property namely Thika Municipality Block 9/904 and has occupied it for over 15 years. In 2020 she transferred the suit land to the 1st Defendant who was then her boyfriend. By his persuasion, they sold the property to the 2nd Defendant at Kshs 14 Million out of which he paid only Kshs. 2 Million out of the total purchase price. Despite default on the part of the 2nd Defendant, it is her case that the 1st and 2nd Defendants colluded to sell the suit land to the 3rd Defendant. That on the 30/9/2021 the 3rd Defendant caused the attachment of her household goods on account of the alleged rent arrears. She argued that she is not a tenant in the property and neither has she entered into a tenancy agreement with the 3rd Defendant. She terms the actions of the Defendants as aimed at evicting her from the suit land. She attached the proclamation and attachment of moveable goods dated the 23/8/2021 marked as **TVWN 1**.

4. The Application is opposed by the 2nd and 3rd Defendants. The 1st and 4th Defendants did not file any objections to the motion.

5. The 2nd Respondent explained the background of the transaction and admitted purchasing the property at the cost of Kshs 14 Million which payment was paid before the execution of the agreement of sale dated the 27/2/2021. He stated that Kshs 2 Million was paid through the joint account of the vendors and the balance went to set up the joint business partnership between the trio pursuant to a partnership agreement dated the 27/2/2021. She blamed the Applicant for being in default of clause 9 of the said agreement where the Applicant bound herself to vacate the house within 90 days of the signing of the agreement. That later he sold the property to the 3rd Defendant. That the Plaintiff and 1st Defendants transferred the title direct to the 3rd Defendant as by then the property was still in the names of the Plaintiff and the 1st Defendant. In the end he avowed that the Plaintiff has not come to Court with clean hands and therefore is not deserving of the injunctive reliefs.

6. The 3rd Respondent avowed that he purchased the suit land from the 2nd Defendant and that it was a part of the agreement that the vendor would give vacant possession within 90 days in default she would be deemed a tenant. That on the 31/5/2021 he demanded the payment for rent from the Plaintiff and when no response was forthcoming authorized the auctioneer to recover the rents. She accused the Plaintiff of criminal conduct for voluntarily transferring the suit land to him and now purporting to feign ignorance and urged the Court to decline the prayers.

7. On 1/11/2021, directions were taken for parties to canvass the application by way of written submissions. None of the parties complied, hence denying the Court the opportunity to benefit from the submissions.

8. Is the application merited? Although the Applicant has sought orders prohibiting the Respondents from distressing for rent inter alia it is evident that what the Applicant is seeking is a temporary injunction against the Defendants who are intent on levying distress for rent. The application is founded on Order 40 rule 1 of the Civil Procedure Rules which states:-

“Where in any suit it is proved by affidavit or otherwise— (a) that any property in dispute in a suit is in danger of being wasted, damaged, or alienated by any party to the suit, or wrongfully sold in execution of a decree; or (b) that the Defendant threatens or intends to remove or dispose of his property in circumstances affording reasonable probability that the Plaintiff will or may be obstructed or delayed in the execution of any decree that may be passed against the Defendant in the suit, the Court may by order grant a temporary injunction to restrain such act, or make such other order for the purpose of staying and preventing the wasting, damaging, alienation, sale, removal, or disposition of the property as the Court thinks fit until the disposal of the suit or until further orders”

9. For the Court to determine whether or not the application is merited the principles laid down in the case of **Giella vs. Cassman Brown & Co. Ltd [1973] EA 358** which has settled the law that the granting of injunctive reliefs is a discretionary exercise predicated upon three sequential limbs to wit: that the claimant has established a prima facie case with a probability of success; once established, the claimant ought to prove that an award of damages would be insufficient to alleviate any damage caused and finally, when in doubt, the Court would decide the application on a balance of convenience.

10. The Court of Appeal in **Mrao Ltd vs. First American Bank of Kenya Ltd & 2 Others [2003] KLR 123**, defined a prima facie case as:

"A Prima facie case in a civil application includes but not confined to a genuine and arguable case. It is a case in which on the material presented to the Court a tribunal properly directing itself will conclude that there exists a right which has apparently been infringed by the opposite party as to call for an explanation or rebuttal from the latter."

11. In **Nguruman Limited vs. Jan Bonde Nielsen & 2 Others (2014)eKLR** the Court of Appeal went on to further state that in considering whether or not a prima facie case has been established, the Court does not hold a mini trial and must not examine the merits of the case closely. 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 or is threatened with violation. 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.

12. It is against that background that I will analyze whether the Applicant has established a prima facie case herein. The Applicant maintains that she was coerced to transfer the suit property by her then boyfriend, the 2nd Defendant. That in an attempt to sell the property, a sale agreement was entered in to which according to her no consideration was paid. In her Supporting Affidavit, the Applicant only annexed copies of the proclamation notices and no more. The Respondents denied these allegations and went to great length to explain the background of facts leading to the instant case. The arguments and counterarguments by the parties are issues for the trial Court to resolve.

13. I have seen a letter from the 3rd Defendant stating that the Plaintiff sold the property to the 3rd Defendant where upon she was given a grace period of 90 days to vacate the suit land. That on expiry of the grace period the Applicant is now deemed to be a tenant of the 3rd Defendant and should pay rent. I have looked at the agreement being referred to date the 9/3/2021 and note that the same is between the 2nd Defendant and the 3rd Defendant. Paragraph 9 of the said agreement states that the 2nd Defendant has been given 3 months' grace period to deliver vacant possession to the 3rd Defendant. The affidavit of consent dated the 9/3/2021 under Paragraph 4 between the Plaintiff and the 1st Defendant gave their blessings to the sale of the property to the 3rd Defendant. Paragraph 9 of the agreement acknowledges that the suit land had not been transferred to the 2nd Defendant, the vendor herein. It is therefore not in dispute that the 3rd Defendant is now the registered owner of the land. The applicants case is that the said transfer was fraudulently and illegally acquired, issues that will be determined at the trial. Until that fact is established, it is only fair that the status quo prevailing be maintained. I understand the Injunction sought by the Plaintiff is for purposes of maintaining the status quo prevailing until the case is heard and determined. The Respondents hold the position that the Applicant is a tenant of the 3rd Defendant.

14. In the case of **Virginia Edith Wambui vs. Joash Ochieng Ougo, Civil Appeal No.3 of 1987 (1987) eKLR**, the Court of Appeal held that:

“The general principle which has been applied by this Court is where there are serious conflicts of facts, the trial Court should maintain the status quo until the dispute has been decided on a trial.”

15. Courts in Kenya have held the view that favours attainment of substantive justice that is to say that it is better to maintain status quo for purposes of preserving the subject matter of the claim pending the hearing and determination of the substantive dispute. In the case of **Mawji –v- International University & Another (1976-80)KLR 229, Madan J** (as he then was) stated as follows;

“It would be a poor and insufficient system of justice, unethical to contemplate, if a successful Plaintiff is forced to litigate again and again to restore the status quo either by further proceedings in the same suit or by fresh suit if the property in dispute is transferred to a third party. The Court must therefore protect the status quo.”

16. From the facts of the case the just thing to do is to issue preservative orders over the property so that the claim is not rendered an academic exercise. The orders commendable in this matter are those of status quo to preserve the suit property pending the hearing and determination of the suit.

17. **Final orders and disposal;**

a. Prayers (a), (b) and (c) are hereby granted.

b. Prayer (d) is granted in terms of status quo to be maintained pending the hearing and determination of the suit.

c. Costs shall be borne by the applicant.

d. The Parties are directed to prepare the suit for expedient hearing on priority basis.

18. It is so ordered.

DELIVERED, DATED AND SIGNED AT THIKA THIS 7TH DAY OF DECEMBER 2021 VIA MICROSOFT TEAMS.

J. G. KEMEI

JUDGE

Delivered online in the presence of;

Chege for the Plaintiff/Applicant

1st and 2nd Defendant/Respondent – absent

Mrs. Musyoka for the 3rd Defendant/Respondent

Ms. Phyllis – Court Assistant