



REPUBLIC OF KENYA

IN THE ENVIRONMENT AND LAND COURT

AT EMBU

ELC CASE NO. 7 OF 2019

ALBERT MWANIKI KWENJA.....1ST PLAINTIFF

LEONARD IRERI KWENJA.....2ND PLAINTIFF

BERNARD KIURA KWENJA.....3RD PLAINTIFF

VERSUS

JERNADO NJOKA KWENJA.....DEFENDANT

RULING

1. By a notice of motion dated and filed on 6th March 2019 and expressed to be brought under **Sections 1A, 1B, 3 and 3A of Civil Procedure Act (Cap. 21) and Order 40 Rule 2, Order 51 Rules 1 of the Civil Procedure Rules 2010 and all enabling provisions of the law**, the Plaintiffs sought the following orders:

a. Spent

b. That the honourable court do issue an order of injunction restraining the defendant herein either by themselves or their agent or by anyone acting on their behalf from interfering, transferring, disposing or alienating or in any way interfering with the ownership of plot No. Embu/Municipality/317 until this application is heard and determined.

c. That the honourable court do issue an order of injunction restraining the defendant herein either by themselves or their agent or by anyone acting on their behalf from interfering, transferring, disposing or alienating or in any way interfering with the ownership of plot No. Embu/Municipality/317 until this suit is heard and determined.

d. The defendant be restrained from receiving or collecting any rent from the premises Embu/Municipality/317 known as Nguviu House until this application is heard and determined.

e. The defendant be restrained from receiving or collecting any rent from the premises Embu/Municipality/317 known as Nguviu House until this suit is heard and determined.

f. That all rents collected by the Defendant in the past and all future rents from plot No. Embu/Municipality/317 be paid into the account No. 1102849954 Nguviu House Investment Limited pending determination of this application.

g. That all rents collected by the defendant in the past and all future rents from plot No. Embu/Municipality/317 be paid into the account No. 1102849952 Nguviu House Investment Limited pending determination of this suit.

h. The cost of this application be paid by the defendant herein.

2. The said application was based upon the grounds set out on the face of the motion and the contents of the supporting affidavit sworn by the 3rd Plaintiff, Bernard Kiura Kwenja, on 6th March 2019. The subject matter of the dispute is Plot No. *Embu/Municipality/317* (hereafter the *suit property*) on which there is erected a building known as Nguviu House. The Plaintiffs contended that the suit property was acquired and developed through the joint efforts and contributions of all the parties to the suit. The Plaintiffs further contended that the Defendant had wrongfully excluded them from the management of the suit property and that he had failed to account for rent collections. The Plaintiffs further contended that the Defendant had granted her daughter a power of attorney over the suit property hence they were apprehensive that the same might be alienated or disposed of during the pendency of the suit.

3. The Defendant filed a replying affidavit sworn on 16th March 2019 in opposition to the said application. The Defendant stated that sometime in 1964 he applied to the then Embu County Council for allocation of the suit property pursuant to an advertisement by the Regional Government Agent, Embu. He further stated that upon allocation he paid the allotment and other related fees in the sum of Kshs. 2,278.84 from his own salary savings since he was an employee of the defunct East African Posts and Telecommunications Corporation.

4. The Defendant further stated that he sourced for loans from the Grindlays Bank Limited (now Kenya Commercial Bank) to expand the developments on the suit property. It was contended that he also invested his retirement benefits into further development of the suit property and that the Plaintiffs did not make any contribution towards its acquisition or development. It was further contended that he had only allowed the 3rd Plaintiff to become a signatory to his bank account to enable the latter to make payments to the contractor whilst he was away on official engagements.

5. The Defendant's further response was that he was the one who initiated the incorporation of Nguviu House Investments Ltd (hereafter *the Company*) and invited the Plaintiffs to join in for the purpose of meaningfully investing the rental income from the suit property for their general benefit. He further stated that the intended venture did not materialize since the Plaintiffs failed to inject personal funds into the project. He stated that any benefits the Plaintiffs had enjoyed from the suit property was as a result of his love and goodwill and not because they were co-owners. The Defendant, therefore, asked the court to dismiss the said application with costs.

6. When the said application was listed for hearing on 20th March 2019 the parties were given the liberty to canvass it through written submissions. The Plaintiffs filed their written submissions on 29th May 2019 whereas the Defendant filed his on 11th June 2019. The parties were thereafter allowed to highlight their submissions on 11th June 2019.

7. The court has considered the Plaintiffs' said application, the Defendant's replying affidavit in opposition thereto as well as the submissions on record. The court is of the opinion that the following issues arise for determination in this matter:

- a. Whether the Plaintiffs have made out a case for the grant of an interlocutory injunction.
- b. Whether the Plaintiffs have made out a case for an order directing the deposit of the rent into the account of the Company.
- c. Who shall bear the costs of the application.

8. The principles for the grant of an interim injunction were settled in the case of **Giella V Cassman Brown & Co. Ltd [1973] EA 358**. First, an applicant must demonstrate a *prima facie* case with a probability of success at the trial. Second, an injunction will not normally be issued unless the Appellant might otherwise suffer irreparable damage i.e. damage which cannot be adequately compensated by monetary damages. Third, when the court is in doubt the application shall be decided on a balance of convenience.

9. But what is meant by a *prima facie* case in law? That question was considered in the case of **Mrao Limited Vs First American Bank Ltd & 2 Others [2003] KLR 123 at p. 137** as follows:

“So, what is a prima facie case? I would say that in civil cases 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.”

10. At page 138 of the said case Bosire JA asserted as follows:

“But as I earlier endeavoured to show, and I cited ample authority for it, a prima facie case is more than an arguable case. It is not sufficient to raise issues. The evidence must show an infringement of a right, and the probability of success of the applicant's case upon trial. That is clearly a standard which is higher than an arguable case.”

11. The court has considered the entire material on record on the first principle. Whereas the Plaintiffs claimed to be co-owners of the suit property, the Defendant asserted that he solely acquired and developed the suit property. The Defendant exhibited evidence of the application for the plot, payment of the allotment fees, application for a development loan, and the issuance of the certificate of lease in his name. The Plaintiffs, on the other hand, did not clearly demonstrate their role or contribution to the acquisition and development of the suit property.

12. The court is aware that in an interlocutory application, it must refrain from making any definitive or conclusive findings of fact. It is the function of the trial judge to make conclusive findings on disputed matters of fact. However, on the basis of the material on record, the court is not satisfied that the Plaintiffs have made out a *prima facie* case with a probability of success at the trial. The mere fact that the Plaintiffs are shareholders of the company does not necessarily mean that they are co-owners of the suit property.

13. The court is also not satisfied that whatever loss or damage the Plaintiffs might suffer if the injunction is not granted is irreparable. The material on record indicates that whatever loss they may suffer would be purely financial and clearly quantifiable. There was no demonstration, or even suggestion, that the Defendant is not a person of means and that he would be unable to meet any award of damages should the Plaintiffs ultimately succeed at the trial.

14. The court is of the opinion that since the Plaintiffs have failed to satisfy the first and second principles for the grant of an injunction, there is no need for consideration of the third principle. The balance of convenience principle only falls for consideration where the court is in doubt on the other two principles. Accordingly, the court finds and holds that the Plaintiffs have failed to satisfy the requirements for the grant of an order of interlocutory injunction.

15. The second issue is whether or not the Plaintiffs are entitled to protective orders with respect to the rental income from the suit property. The Plaintiffs sought orders to prevent the Defendant from collecting rent and a further order directing deposit of the rental income in the Company's account. The court is of the opinion that since the Plaintiffs have failed to demonstrate a *prima facie* case with a probability of success and that whatever loss they may suffer cannot be adequately remedied by an award of damages, then they have not made out a case for the grant of any protective orders with respect to rent. Accordingly, the court is not inclined to grant their prayer for deposit of rental income in the Company account.

16. The 3rd issue relates to costs of the application. Although costs of an action are at the discretion of the court, the general rule is that costs shall follow the event in accordance with the proviso to **Section 27 of the Civil Procedure Act (Cap. 21)**. As such, a successful litigant should ordinarily be awarded costs unless, for good reason, the court directs otherwise. See **Hussein Janmohamed & Sons V Twentsche Overseas Trading Co. [1967] EA 287**. Although the Plaintiffs have failed in their application, the court shall not penalize them in costs since the disputing parties are relatives. The order which commends itself to the court is that the costs of the application shall be in the cause.

17. The upshot of the foregoing is that the court finds no merit in the Plaintiffs' notice of motion dated 6th March 2019. Accordingly, the same is hereby dismissed in its entirety. Each party shall bear his own costs of the application.

18. It is so decided.

RULING DATED, SIGNED and DELIVERED in open court at **EMBU** this **13TH DAY** of **FEBRUARY, 2020**.

In the presence of Mr. Gikunda for the 2nd & 3rd Plaintiffs, Ms. Mungai for the Defendant and in the absence of the 1st Plaintiff.

Court Assistant: Mr. Muinde

Y.M. ANGIMA

JUDGE

13.02.2020