



REPUBLIC OF KENYA

IN THE ENVIRONMENT & LAND COURT

AT MOMBASA

ELC NO. 141 OF 2019

MWANAUWANI NASSIR & 8 OTHERS..... PLAINTIFFS

VERSUS

THE REGISTERED TRUSTEES,

KENYA PORTS AUTHORITY PENSION SCHEME..... DEFENDANT

RULING

(Application for injunction and preliminary objection that suit has abated due to a defect in summons; summons merely a means of making the defendant aware of the suit; no prejudice to defendant as defendant already entered appearance and filed defence; purpose for the summons thus spent; preliminary objection dismissed; case of plaintiffs being that they are tenants and members of the defendant, a pension scheme; defendant selling the premises that they reside in; argument of the plaintiffs that they ought to have been given first right of purchase; novel point of law that deserves ventilation having been raised; process of sale of the suit property questionable as no evidence that the property was specifically advertised to the public as claimed; prima facie case established and balance of convenience also tilting towards the plaintiffs; order of injunction issued)

1. This suit was commenced through a plaint which was filed on 31 July 2019. In the plaint, the plaintiffs have pleaded that they are tenants of some various units of houses in the land parcel MSA/XVIII.35 (the suit property) situated in Msanifu Kombo estate within Mwembe Tayari area of Mombasa County. It is pleaded that the suit property is held by the defendant in trust for the members of the Kenya Ports Authority Pension Scheme (the Pension Scheme). The plaintiffs aver that they are also members of the Pension Scheme. It is pleaded that the immovable class limit that the Pension Scheme may hold is 30% of its property portfolio set by the Retirement Benefits Authority Act, but that the Pension Scheme's portfolio stood at 52% and the defendant approved the sale of various of its properties including the suit property. In August 2019, the plaintiffs were served with a notice to vacate the suit property. I understand their case to be that they ought to have been given first priority to purchase the units that they reside in before the same could be sold to other persons. It is also their case that the property was sold at an undervalue. In the suit, they seek the following orders :-

(a) There be an injunction restraining the defendant, its servants, employees or agents from leasing, offering for sale, transferring, presenting any instrument for registration dispossessing, evicting the plaintiffs or in any other way interfering with the plaintiffs' right and occupation of premises situated on LR No. MSA/XVIII/335.

(b) The plaintiffs be afforded an opportunity to purchase their respective units under the tenant purchase scheme pursuant to the doctrine of legitimate expectation.

(c) Costs and interest.

2. Together with the suit, the plaintiffs filed an application seeking the following substantive order :-

There be a temporary interlocutory injunction, pending the hearing and determination of the suit, restraining the defendant, its servants, employees or agents from leasing, offering for sale, transferring, presenting any instrument for registration, dispossessing, evicting the plaintiffs or in any other way interfering with the plaintiffs' rights and occupation of premises situated on LR NO. MSA/XVIII/335.

3. The application is supported by the affidavit of Mwanauwani Nassir, who is the 1st plaintiff. He has deposed inter alia that the plaintiffs are members of the Pension Scheme and they reside in the 12 units developed on the suit property. He has deposed that they have been occupying the suit property pursuant to an Occupation Order for staff quarters from Kenya Ports Authority. He has deposed that the suit property was handed over by Kenya Ports Authority (KPA) to the Pension Scheme. He has deposed that they ought to have been afforded the first opportunity to purchase the units but instead they have been served with notice to vacate. He has further contended that the properties

were sold at an undervalue and that the defendant has acted in breach of its Trust Deed and Regulation of the KPA Pension Scheme.

4. The defendant filed defence where it has pleaded inter alia that the suit property was transferred to one Suldanka Harti. It is pleaded that Suldanka Harti is now its registered proprietor and therefore no cause of action exists against the defendant. It is further averred that the defendant never held the suit property in trust for its members and that what members are entitled to are their pension contributions and not the investments made by the defendant. It has contended that the plaintiffs are not entitled to dictate the manner in which the defendant disposes of its properties.

5. In reply to the application, the defendant filed a Replying Affidavit sworn by Stephen Kyandih, its Scheme Secretary. He has deposed inter alia that the defendant's decision to sell several of its properties, including the suit property, was aimed at compliance. He has deposed that the defendant advertised the intended sale of its properties in the Daily Nation of 15 October 2018 and invited interested candidates to submit their bids. He has deposed that the plaintiffs did not purchase the tender documents. He has stated that they evaluated the bids and the highest bidder was Suldanka Harti Limited who offered Kshs. 60,102,250/=. They then sold the property to Suldanka Harti. He has averred that if the plaintiffs wanted to purchase the houses they occupy, nothing stopped them from conveying that they wished to do so to the defendant. He has deposed that legally, a month's notice should have sufficed but they gave the plaintiffs two months to vacate the suit premises.

6. In addition to the above, the defendant also raised a preliminary objection that the suit has abated by operation of Order 5 Rule 1 (6) of the Civil Procedure Rules, for failure to take out and serve summons to enter appearance.

7. The plaintiffs filed a Supplementary Affidavit sworn by Mohamed Hassan, the 7th plaintiff. He has deposed that the plaintiffs do not oppose the sale of the scheme houses but has asserted that before floating the houses for public bidding, the tenants ought to have been given first priority to purchase through the doctrine of legitimate expectation. He has stated that they do not have the financial muscle to purchase the whole of the property but only the power to purchase the respective units that they occupy. He has explained that the premises comprises of 12 units and three commercial plots which they could purchase through mortgage. He has further pointed out that what the defendant has annexed is only proof of the deposit but not the complete purchase price.

8. In invited counsel for the plaintiffs and defendant to file written submissions in respect of the application and the preliminary objection and they both did so. I have taken these into account before arriving at my decision.

9. What I have before me is an application for injunction and a preliminary objection on the veracity of the suit based on the provisions of Order 5 rule 1 (6). I directed the preliminary objection to be argued alongside the application and it is prudent for me to start with the preliminary point, for if I am to allow it, then the result would be strike out the suit.

10. Order 5 Rule 1 (6) provides as follows :-

(6) Every summons, except where the court is to effect service, shall be collected for service within thirty days of issue or notification, whichever is later, failing which the suit shall abate.

11. In his submissions, Mr. K'Ongere, learned counsel for the respondent, argued that in this case, summons have never been presented for sealing. He referred me to various authorities which I have read and I do not need to refer to them individually. My own view of summons is that they are meant to inform the defendant of the presence of a suit so that the defendant may be able to defend the matter. The suit itself is not the "summons" but is the plaint or such other instrument through which the suit was instituted. The purpose of the summons is thus to advise the defendant that there is such a suit filed and gives the defendant the requisite period that he ought to file a defence or such response as the defendant may deem appropriate. Once a defence is filed, it matters not that there was a defect in the summons, for by filing defence, the defendant has essentially responded to the suit and the purpose of the summonses is thus spent. The filing of a defence, in my view, thus overrides any defect that the summonses may have had and the defendant cannot now be heard to argue that the summonses were defective. In the instance of this case, a defence has already been filed. Even if we are to assume that there was a defect in the summons, I ask myself what prejudice the defendant has suffered, and I can find none. Given that position, I see no point of interrogating whether the summonses were properly sealed or not, for it serves no purpose. I reiterate that summonses are meant to inform the defendant of the presence of a suit and in this instance the defendant is well aware of the presence of this suit and has already responded to it. It is pointless to now go backwards to see whether the summonses conform to what the rules prescribe. Given the above the preliminary objection is dismissed.

12. I now turn to the application and the principles upon which an application of this nature is tested were laid down in the case of *Giella vs Cassman Brown (1973) EA 358*. Principally, the plaintiffs need to demonstrate a prima facie case with a probability of success; demonstrate that they stand to suffer irreparable loss if the orders of injunction are not granted; and where the court is in doubt, it will decide the application on a balance of convenience.

13. In a nutshell, the plaintiffs/applicants seek to stop the sale of the suit property and further wish to be afforded an opportunity to purchase the respective units that they reside in. What the defendant/respondent states in its statement of defence, is that the property has already been sold and transferred to Suldanka Harti Limited. I have however gone through the replying affidavit sworn by Mr. Kyandih and I have not seen any proof that the property has been transferred to the said Suldanka Harti Limited. If ever there was a transfer to Suldanka Harti, there would have been nothing easier than to annex the transfer instrument. What I have seen is that the respondent made a decision to sell the suit property to the said Suldanka Harti Limited and they informed the said company of their decision in their letter dated 7 December 2018. In the letter, Suldanka Harti Limited is supposed to pay 10% deposit within five days of the letter and pay the balance within 90 days. I have only seen payment of the deposit of 10%, which was done on 10 December 2018, but I have not seen any proof of payment of the balance, and it is certainly now beyond 90 days of the sale. Again, if ever the balance of the purchase price was paid, there would have been nothing easier than to annex proof of the same. I therefore do not see how the respondent can argue that the sale is complete from the material that they have presented. I will thus proceed with this application on the premise that the intended sale to Suldanka Harti Limited is yet to be completed and that the property is still under the proprietorship of the respondent.

14. It is not denied that the applicants have been residing in the suit property. From what I gather, they are employees of KPA and have been resident on the suit property for some time as KPA staff since the suit premises used to be owned by KPA before being transferred to the respondent. They of course argue that they held a legitimate expectation that they would be given first priority to purchase since they were all along in occupation of the suit property when the decision to sell was made. To me, there is a novel point of law being raised, that is, whether given the fact that the applicants were employees of the former owner of the premises, and being members of the respondent, they ought to have been prioritised in the sale. I do not think that this is a frivolous point of law and I am of the view that it merits determination.

15. Moreover, I have had a critical overview of the process that the respondent claims to have employed in disposing off the suit property. The respondent has mentioned that it advertised the suit property for sale and that the applicants therefore ought to have responded by placing a bid. I have looked at the alleged advertisement, which was annexed by Mr. Kyandih, and the fact of the matter is that the said advertisement does not invite bids for the sale of the suit property. That advertisement is Tender No. KPAPS/PM/02/2018 and states inter alia:-

“The Kenya Ports Authority Pension Scheme invites tenders from eligible bidders who are financially capable of carrying out the under mentioned tender:

Description: Disposal of Scheme Properties...”

16. When one looks at the above description, one would think that the respondent is calling for firms or persons who are able to sell Scheme Properties on behalf of the respondent. Indeed, when you peruse the list of persons who responded to the tender, you will see firms of Advocates, Auctioneers and Estate Agents. I wonder how one would know, merely by reading the above advertisement, that the suit property is up for sale so that a person may make a bid to purchase. What was so hard in simply informing the public that such and such property, properly described, is up for sale and if one is interested he/she can make a bid for it? Given the vagueness of the advertisement, how were the applicants to know that the property that they reside in has been earmarked for sale? I am on my part not persuaded, at least at this stage of the proceedings and subject to being convinced otherwise at the hearing of the suit, that a reasonable opportunity was given to the applicants and indeed to the public at large, to purchase the suit property. As I have mentioned, one would not have deduced, by a mere reading of the advertisement, that the suit property is up for sale as the suit land is not even mentioned in that advertisement.

17. I am not therefore convinced by the respondent’s argument that the applicants were given an opportunity to purchase, but they failed to take the first step, which was purchase of the tender documents, and I have already pointed out that there was no specific advertisement calling for persons to tender to purchase the suit property. As members of the scheme, I believe that apart from their individual claim that they deserve to be given first priority to purchase, they have a legitimate expectation that the sale of Scheme properties will be above board, and they have raised reasonable doubts as to the transparency of the sale which deserves consideration at a full hearing of the suit.

18. Given the above, I am of the view that the applicants have demonstrated a prima facie case with a probability of success, and I am persuaded that they stand to suffer irreparable loss as they are being asked to vacate premises that they have been in occupation of for a long time. Even if I was in doubt, I think the balance of convenience tilts towards maintenance of the status quo, until this suit is heard and determined.

19. I therefore allow the application for injunction and make the following orders :-

(a) That there is hereby issued an order of injunction restraining the defendant, its servants, employees or agents, from leasing, offering for sale, transferring, or in any other way dealing with the property LR No. MSA/XVIII/35, or presenting any instrument for registration, or evicting the plaintiffs from the said property.

(b) That the plaintiffs may continue residing in the suit premises subject to paying the amount of rent that they were paying to the respondent and in default the respondent will have the right to evict any person not paying the said rent and offer the premises to another tenant to reside in. If there are any arrears of rent, the same be paid within 30 days of today.

(c) That the costs of the application and of the preliminary objection shall be to the applicants.

20. Before I close, it has not escaped me that Suldanka Harti Limited may be interested in this suit and I order that the said entity be enjoined as interested party with liberty to respond to the plaintiffs’ suit. This order of joinder be served upon the said Suldanka Harti Limited by the defendant within the next 7 days.

21. Orders accordingly.

DATED, SIGNED and DELIVERED at MOMBASA this 6th day of February, 2020.

MUNYAO SILA,

JUDGE.

IN THE PRESENCE OF:

Mr. Waziri for the applicants.

Mr K'Ongere for the respondent.

Court Assistant; David Koitamet.