



REPUBLIC OF KENYA

IN THE ENVIRONMENT & LAND COURT

AT MOMBASA

ELC NO. 194 OF 2019

LYDIAH MARY MUNYOKI

REUBEN MUGAMBI

(Suing for KISIMA CHA NEEMA CHA MWANA WA DAUDI CHURCH....PLAINTIFFS

VERSUS

SAMUEL CHENGO

DAVID MBOJA

GEORGE KENGA & OTHERS T/A KALOLENI ENTERPRISE.....DEFENDANT

RULING

(Application for injunction; principles to be applied; applicant being a church in occupation of the suit property; respondents issued a notice for vacant possession; applicant now seeking an injunction claiming that it is a tenant on the premises and/or it is on the premises as a purchaser; tenancy agreement displayed having lapsed; offer to sell having lapsed because the applicant failed to raise the requisite deposit; no prima facie case established; application for injunction dismissed with costs)

1. This suit was commenced through a plaint which was filed on 31 October 2019 and amended on 10 December 2019. Together with the plaint, the plaintiffs filed an application for injunction and it is that application which is the subject of this ruling. The application is opposed by the defendants.

2. The plaintiffs/applicants are trustees of Kisima Cha Neema Cha Mwana Wa Daudi Church (the Church). They worship in the land parcel 117/II/MN (the suit property) which land is owned by the respondents. They have been in the premises by virtue of a tenancy agreement dated 3 June 2009. In the course of time, the Church developed interest in purchasing the suit property and they entered into negotiations. On 17 October 2019, the respondents issued a notice to the applicant church asking the church to vacate the suit property by 31 October 2019. It is that notice which prompted the applicants to file suit. The applicants aver that they are still willing to purchase the suit property and have paid a deposit for it. In the suit, the applicants seek orders of injunction to restrain the respondents from evicting them so long as rent is paid; a declaration that the notice of 17 October 2019 is illegal; an order of specific performance regarding the sale agreement for the whole land or the 5 acres that the applicants occupy; a declaration that a constructive trust has been created and that the title is now held in trust for the applicants pending completion of the sale transaction; costs of the suit and interest.

3. In the application for injunction, the applicants wish to have orders restraining the respondents from evicting them or interfering with the applicants' use and quiet possession of the suit property pending hearing of the suit. The supporting affidavit to the application is sworn by Lydia Mary Munyoki (also known as Bishop Mary Kagendo). She has more or less reiterated what is in the plaint and has annexed the tenancy agreement of 2009 and various correspondences over the proposed sale of the property. She has averred that the respondents are now unrealistically demanding a sum of Kshs. 600,000,000/= for the suit property. She believes that it is unfair and unjust for the respondent to treat them as strangers yet they have activities on the suit property that has given the land good market value. She has deposed that the church is ready to purchase the portion that it occupies (which I believe is the 5 acres mentioned in the plaint) if the total price for the whole plot is beyond their reach.

4. The defendants/respondents upon being served filed a defence and counterclaim and a response to the application. In their defence, they admit entering into a tenancy agreement with Huduma Ya Kisima Cha Neema Cha Mwana Wa Daudi church but have denied that there was a sale agreement. It is pleaded that an offer was made but the applicants breached the terms of the offer and the offer lapsed and was cancelled. They have complained that in the year 2018, the applicants started defaulting on rent and had accumulated arrears of Kshs.

3,230,530/=. It is pleaded that a deposit of Kshs. 2,000,000/= that was made for purchase of the property was used to defray the rent arrears and the balance of Kshs. 1,230,530/= was subject to distress. It is pleaded that notice of termination of tenancy was issued on 1 September 2019 and not 17 October 2019 and it is after notice was issued that the applicants started making several unsolicited deposits into the respondents' account which exceeded the monthly rent. In the counterclaim they seek orders of vacant possession and mesne profits together with costs and interest.

5. The replying affidavit is sworn by Samuel Karisa Chengo. He has deposed that he is a member and partner of Kaloleni Enterprises which owns the suit property. He has annexed the tenancy agreement entered into in June 2009 and has averred that it was only for one year. He has stated that in September 2009, an offer was made for the applicants to purchase the suit property at Kshs. 90,000,000/=. Inter alia, the terms were that the applicants were to make a deposit of Kshs. 9,000,000/=: being 10% of the purchase price. A letter of offer was sent and returned together with a cheque of Kshs. 1,000,000/= and the rest of the deposit was to be paid on or before 30 October 2009. The balance of Kshs. 81,000,000/= was to be paid within 90 days of 31 October 2009 and throughout this period the applicants were to continue paying rent. He has averred that the applicants only paid the sum of Kshs. 2,000,000/= out of the deposit of Kshs. 9,000,000/=. Through a letter dated 26 June 2010, counsel for the applicants was informed that due to non-compliance, the amount of Kshs. 2,000,000/= was forfeited and that the sale had been abandoned. However, this deposit was later used to defray accumulated rent arrears. He stated that they appointed an auctioneer to distress for rent which matter became the subject of the suit *Mombasa CMCC No. 2479 of 2018 Kisima Cha Neema Cha Mwana Wa Daudi vs Kaloleni Enterprises*, where the court dismissed an application seeking to stop the distress. The suit was later withdrawn. He has stated that the applicants refused to sign a new tenancy agreement despite overtures to do so in 2018 and 2019, and because of this, he contends that the tenancy was reduced to a monthly tenancy terminable by a one month's notice. A termination notice was then issued on 1 September 2019. He has also complained about the conduct of the applicants of going to the media to allege that they have bought the property and that the respondents want to illegally grab the same from them and a copy of a newspaper cutting from the Star Newspaper to that effect is annexed. He has further contended that the 2nd applicant wished to engage them in a con scheme where the respondents would need to confirm having received a substantial part of the purchase price which was not the position. He has also complained that the church illegally built a wall around the premises. He thus believes that the applicants have not come to court with clean hands.

6. The applicants filed a supplementary affidavit sworn by Bishop Kagendo where she has insisted that they are up to date with rent and stated that the wall was authorised.

7. I invited counsel to make written submissions but none were filed by counsel for the applicants. I however allowed counsel to make oral submissions during the hearing of the application and I have taken these into account. I have also taken note of the written submissions of counsel for the respondents.

8. This being an application for injunction, the applicants need to demonstrate a prima facie case with a probability of success; demonstrate that they stand to suffer irreparable loss if the injunction is not issued; and where the court is in doubt, it will decide the application on a balance of convenience. These principles were laid down in the case of *Giella vs Cassman Brown (1973) EA 358*.

9. I will straight away proceed to make an analysis of whether or not the applicants have demonstrated a prima facie case. Their case is principally premised on the contention that they have a sale agreement to purchase the suit property and/or that they have an ongoing tenancy for which they are up to date with their rent payments. On the issue of whether there is a sale agreement, I have perused the documents displayed by both parties and I believe that the position is as stated in the supporting affidavit of Mr. Chengo. I have seen the tenancy agreement that the parties first entered into on 3 June 2009 where the suit property was leased out to the Church for a period of 1 year at a rent of Kshs. 100,000/=. There are further tenancy agreements entered into and the last that I have seen is that dated 3 March 2017 leasing out the premises for a period of 6 months from 1st January 2017 at the rent of Kshs. 311,794.58/= per month. I have not seen any other tenancy agreement after this and none has been displayed to me by the applicants. It means therefore that the applicants were at most periodical tenants and their tenancy could be terminated by a one month's notice which is the period that rent was payable. I have seen that a notice terminating the tenancy was duly issued on 17 October 2019 and the applicants do acknowledge receiving the said notice. One cannot fault a land owner for issuing a notice to terminate a tenancy for it is within the right of the land owner to do so unless barred by any law. I have not been directed to any law which would stop the respondents from terminating the tenancy of the applicants in the manner that they have done. I am thus persuaded that the position is that the tenancy is terminated and that being the case I am unable to issue an order of injunction based on the ground that the applicants are tenants of the respondents.

10. The other argument is whether the applicants are purchasers. I have again gone through the documents and it is true that there was an intention to purchase. An offer, subject to contract, was sent to the applicant Church on 3 September 2009. The terms are as described by Mr. Chengo in his affidavit. It is clear to me that this offer was not followed through with any sale agreement and indeed the applicants did not pay the 10% deposit as stipulated in the letter of offer. That offer has since lapsed and I have seen that the deposit was utilised to settle rent arrears that the applicant had. I do not see how the applicants can now allege that they are entitled to stay in the suit property as purchasers.

11. Given the above, I am not persuaded that the applicants have demonstrated a prima facie case with a probability of success and that being the case this application must fail and the same is hereby dismissed with costs.

12. Orders accordingly.

DATED, SIGNED and DELIVERED at MOMBASA this 3rd day of March, 2020.

MUNYAO SILA,

JUDGE.

IN THE PRESENCE OF: