REPUBLIC OF KENYA

IN THE ENVIRONMENT AND LAND COURT

AT NAIROBI

ELC SUIT NO. 114 OF 2019

PATEL RAVJI LALJI...1ST PLAINTIFF

DEVRAJ RAVJI LALJI...2ND PLAINTIFF

=VERSUS=

TOM OWINY...DEFENDANT

RULING

At all material times, the defendant and one, Amsa Jerotich Keitany were registered as the leasehold proprietors of all that parcel of land known as L.R No. 209/11309 Grant No. 143087 (hereinafter referred only as "the suit property") as tenants in common for a term of 99 years with effect from 1st May, 1999. The defendant and the said Amsa Jerotich Keitany were registered as the owners of the suit property on 22nd February, 2013.

By an agreement for sale dated 6th October, 2013 entered into between the defendant and Amsa Jerotich Keitany (hereinafter together referred to only as "the Vendors") on the one hand and the plaintiffs on the other hand, the vendors sold to the plaintiffs the suit property at a consideration of Kshs. 50,000,000/= on the terms and conditions that were set out in the said agreement.

The agreement for sale between the vendors and the plaintiffs (hereinafter referred to only as "the agreement") provided that the plaintiffs would pay to the vendors a deposit of Kshs. 30,000,000/= on or before the signing of the said agreement and that the balance of the purchase price would be paid on completion through R.T.G.S to the vendors' advocates or their order. The agreement provided further that the completion date was 90 days from the date of the agreement or the date of payment of the balance of the purchase price and that the completion was to take place by exchange of the completion documents against the payment of the said balance of the purchase price that was to be held by the vendors' advocates until the transfer was registered.

It was also a term of the agreement that the vendors were erect a wall along the boundary of the suit property at the cost of the plaintiffs which was agreed at Kshs. 8,000,000/= which amount was to be paid together with the deposit. The parties agreed further that in the event that the plaintiffs were unable to complete the payment of the balance of the purchase price in accordance with the terms of the agreement and upon being served within 21 days completion notice, the plaintiffs were to pay to the vendors by way of liquidated damages a sum of Kshs. 6,000,000/= and they were to forfeit their rights and interest in the suit property which the vendors were to be at liberty to sell to any other interested buyer. On 10th September, 2013, prior to the date of the said agreement, the vendors had executed an instrument of transfer of the suit property in favour of the plaintiffs. The transfer was registered on 11th October, 2013 thereby making the plaintiffs the owners of the suit property.

The plaintiffs brought this suit against the defendant on 27th March, 2019 seeking a permanent injunction restraining the defendant from interfering with their peaceful occupation of the suit property. The plaintiffs averred that they were the registered proprietors of the suit property having acquired the same from the defendant and his then co-owner of the property Amsa Jerotich Keitany who is not a party to this suit at a consideration of Kshs. 50,000,000/=. The plaintiffs averred that after purchasing the suit property, they took possession of the same and had used the property for commercial activities peacefully for over 5 years. The plaintiffs averred that since they purchased the suit property, the same had appreciated in value. The plaintiffs averred that as at the time of filing the suit, the suit property was valued at Kshs. 300,000,000/= inclusive of improvements. The plaintiffs averred that on 23rd March, 2019 the defendant invaded the suit property with hired goons, assaulted the guards who were guarding the premises, broke the padlocks at the gate and forced their way into the premises without the plaintiff's permissions. The plaintiffs averred that they reported the incident at Embakasi Police Station. The plaintiffs averred that despite a demand having been made to the defendant to stop his acts of trespass on the suit property, the defendant had refused and/or neglected to cease the said acts thereby rendering the filing of this suit necessary.

Together the plaint, the plaintiffs filed an application by way of Notice of Motion dated 27th March, 2019 seeking a temporary injunction

restraining the defendant from trespassing, remaining on and/or in any way interfering with the plaintiffs' quiet possession of the suit property pending the hearing and determination of the suit. The application that was supported by the affidavit of the 1st plaintiff was brought on the same grounds set out in the plaint that I have highlighted above. The 1st plaintiff annexed to his affidavit in support of the application among others, copies of; Grant No. I.R 143087 for the suit property, agreement for sale dated 6th October, 2013 and an abstract of the Police Occurrence Book on the report that was made by the plaintiffs about the invasion of the suit property. The plaintiffs contended that there was a pending Judicial Review Application No. 28 of 2017 concerning the suit property in which the defendant was an interested party and in which the defendant had admitted having sold the suit property to the plaintiffs.

The defendants opposed the plaintiffs' application through a replying affidavit sworn on 8th April, 2019. The defendant admitted that together with Amsa Jerotich Keitany they sold the suit property to the plaintiffs at Kshs. 50,000,000/= through agreement for sale dated 6th October, 2013. The defendant contended however that the plaintiffs breached the said agreement by failing to pay the balance of the purchase price in the sum of Kshs. 20,000,000/= and the cost for the construction of the perimeter wall around the suit property in the sum of Kshs. 8,000,000/=. The defendant averred further that the plaintiffs had also refused to pay Kshs. 6,000,000/= that was agreed on as liquidated damages in the event of default on the part of the plaintiffs to complete the agreement for sale.

The defendant averred that they released the completion documents to the plaintiffs and allowed them to transfer the suit property into their names before the payment of the balance of the purchase price at the request of the plaintiffs who represented to them that once the property was registered in their names, they would be able to use the property to secure a loan from a financier to pay the balance of the purchase price and the agreed cost for the construction of a perimeter wall around the suit property. The defendant averred that he constructed the said perimeter wall to completion and that as at the time of filing this suit, the plaintiffs had not paid the balance of the purchase price for the suit property and the cost of constructing the perimeter wall. The defendant averred that once the plaintiffs failed to pay the balance of the purchase price, their interest in the suit property ceased. The defendant averred that since 2013, several requests had been made to the plaintiffs to pay the balance of purchase price and the cost of the said perimeter wall which requests had not been honoured by the plaintiffs despite several promises. The defendant denied that the plaintiffs had been in occupation of the suit property since 2013. The defendant averred that he and his previous co-owner of the suit property were in occupation of the suit property at all material times until 20th March, 2019 when the plaintiffs stormed the premises and attempted to forcefully evict them from the suit property. The defendant averred that he reported the incident at Embakasi Police Station on 20th March, 2013 and 23rd March, 2013 and the same was duly recorded in the Police Occurrence Book. The defendant contended that the plaintiffs' application had no merit and that the plaintiffs were guilty of fraud, deceit and non-disclosure of material facts.

The plaintiffs filed a further affidavit on 7th May, 2019 sworn by the 2nd plaintiff in response to the defendant's replying affidavit. In the further affidavit, the plaintiffs denied the defendant's claim that they had breached the agreement for sale by failing to pay the balance of the purchase price. The plaintiffs averred that they paid the full purchase price for the suit property. The plaintiffs averred that the payments for the suit property were made to one, Hezbon Omondi on the instructions of the defendant. The plaintiffs averred that the said Hezbon Omondi was related to the defendant and was said to be the *de facto* owner of the suit property. The plaintiffs averred that there was no way the suit property would have been transferred to them before they had paid the full purchase price. The plaintiffs averred that in addition to the balance of the purchase price, they had also paid the cost of the perimeter wall and an additional sum of Kshs. 62,975.70 for the gate. The plaintiffs annexed to their further affidavit among others, copies of; bank statements of account, requests for transfer of funds through R.T.G.S, cheques, a letter said to have been written to the plaintiffs by the defendant and his then co-owner of the suit property instructing them to make payment to Hezbon Omondi and a statement of the payments made to the defendant and his then co-owner of the suit property totaling Kshs. 58,362,975.70/=.

The defendant also filed a further replying affidavit on 27th June, 2019 in response to the plaintiffs' further affidavit. The defendant reiterated the contents of his replying affidavit that the plaintiffs had failed to pay the balance of the purchase price and the cost of constructing the boundary wall around the suit property. The defendant disputed the evidence that was produced by the plaintiffs in proof of the payment of the said balance of the purchase price and the cost of constructing the said wall. The defendant averred that the alleged payments were not made in accordance with the terms of the agreement for sale. The defendant also denied that he had nominated Hezbon Omondi to receive payment of the balance of the purchase price on his behalf. The plaintiffs filed a further affidavit on 11th July, 2019 in response to the defendant's further affidavit.

The plaintiff's application was heard by way of written submissions. I have considered the plaintiffs' application together with the various affidavits filed in support thereof. I have also considered the defendant's various affidavits filed in response to the application and the submissions by the counsels for both parties. The principles upon which this court exercises its discretion in applications for temporary injunction are now well settled. As was stated in Giella *v* Cassman Brown & Co. Ltd. [1973] EA 358, an applicant for a temporary injunction must show a prima facie case with a probability of success and such injunction will not normally be granted unless the applicant might otherwise suffer irreparable injury which cannot be adequately compensated by an award of damages. It was held further that if the court is in doubt as to the foregoing, the application would be determined on a balance of convenience. In Nguruman Limited *v* Jan Bonde Nielsen & 2 Others [2014] eKLR the Court of Appeal adopted the definition of a prima facie case that was given in Mrao Limited *v* First American Bank of Kenya Limited & 2 Others [2003] KLR 125 and went further to state as follows:

> **"The party on whom the burden of proving a prima facie case lies must show a clear and unmistakable right to be protected which is directly threatened by an act sought to be restrained, the invasion of the right has to be material and substantive and there must be an urgent necessity to prevent the irreparable damage that may result from the invasion. …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 threatened with violation…The applicant need not establish title it is enough if he can show that he has a fair and bona fide question to raise as to the existence of the right which he alleges. 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."**

It is on the foregoing principles that the plaintiffs' application falls for consideration. I am satisfied from the material before me that the plaintiffs have satisfied the threshold for grant of an interlocutory injunction. The plaintiffs have established that they purchased the suit

property from the defendant and another person who is not a party to the suit. The plaintiffs have placed evidence before the court showing that they paid the full purchase price for the suit property. The plaintiffs have established further that the suit property was transferred to them and that they are now the registered proprietors thereof. As the registered owners of the suit property, the plaintiffs are entitled to quiet possession thereof. I am satisfied from the material before me that the defendant attempted to take possession of the suit property forcefully from the plaintiffs. If the opposite was the case as claimed by the defendant, it is the defendant who would have come to court first. I am of the view that the defendant had no right to enter the suit property without the plaintiffs' permission. Even if the plaintiffs had failed to pay the balance of the purchase price as claimed by the defendant, the defendant's remedy was to file a suit for rescission of the agreement for sale and damages for breach of contract. I am satisfied that the plaintiffs have established a prima facie case of trespass against the defendant. I am also satisfied that the plaintiffs stand to suffer irreparable harm which cannot be compensated in damages if the orders sought are not granted.

I wish to add that even if I was not convinced that the plaintiffs have established a prima facie case, I would still have made an order for the maintenance of status quo in the matter for the purposes of preserving the suit property pending the hearing of the suit. 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."**

For the foregoing reasons, I allow the plaintiffs' application dated 27th March, 2019 in terms of prayer 3 thereof. In order to preserve the suit property, I make a further order that pending the hearing and final determination of the suit or further orders by the court, all that parcel of land known as L.R No. 209/11309 shall not be sold, transferred, leased, charged or developed in any manner whatsoever. The costs of the application shall be in the cause.

Delivered and Dated at Nairobi this 18th Day of May 2020

S. OKONG'O

JUDGE

Ruling read through Microsoft Teams video conferencing platform in in the presence of:

Mr. Mutiso for the Plaintiffs

Mr. Wagara for the Defendant

Ms. C. Nyokabi-Court Assistant