



REPUBLIC OF KENYA

ENVIRONMENT AND LAND COURT

AT MOMBASA

ELC NO. 226 OF 2019

NEW DESIGN CONSTRUCTION LIMITED PLAINTIFF

VERSUS

LYNE KERUBO MANDIEKA DEFENDANT

RULING

(Application for a mandatory injunction; principles to be applied; case must be clear enough; plaintiff/applicant being the registered proprietor of the suit property; defendant/respondent being in possession of the same; plaintiff stating that it had allowed the late husband to the defendant to keep possession of the suit property while he was a director of the plaintiff; deceased later resigning from directorship of the plaintiff and selling his shares in the company but company still allowing him to continue with occupation until his demise; defendant being wife to the deceased; defendant claiming that she is entitled to continue being in possession of the suit property by virtue of being wife to the deceased; defendant further claiming that the deceased never sold his shares in the plaintiff company; plaintiff as owner entitled to possession of the suit land; no right of possession on the part of the defendant on the sole reason that she was wife to a former director of the company; at most the deceased and defendant held a licence to occupy the suit land which licence has been terminated; issue of whether transfer of shares was illegal not related to occupation of the suit property; case clear enough for the grant of a mandatory injunction; application allowed)

1. This suit was commenced through a plaint which was filed on 17 December 2019. In the plaint, the plaintiff pleaded that it is the owner of the land parcel LR No. Subdivision No. 222 (Original No. 179/25) Section IV Mainland North CR No. 17914 Mtwapa (the suit property). It is pleaded that the plaintiff acquired the suit property in the year 2013 for a consideration of KShs. 28,000,000/- paid to one Jean Claude Tounissoux and the transfer was registered on 7 May 2013. It is pleaded that the defendant was a girlfriend of one Mustafa Sahin Hakcil (now deceased) who was residing on a show house erected on the suit property. Mr. Hakcil is said to have been a shareholder and director of the plaintiff company until 10 August 2018 when he resigned as a director and transferred his 20 shares held in the company to one Seyfullah Gurdal and his interest in the plaintiff and the suit property ended. The plaintiff avers that it allowed the late Hakcil to continue residing on the show house on a non-rental basis owing to the nature of relationship that existed between them. The plaintiff avers that on 4 November 2019, it issued a demand through its advocates, to the defendant, asking the defendant to vacate the suit premises. The defendant replied asserting that her husband was a director and shareholder of the plaintiff and as such she has a right of occupation. She refused to move out hence this suit.

2. The plaintiff avers that it is suffering considerable damage and is deprived of the use of the suit property. It is the contention of the plaintiff that the defendant is a trespasser. In the suit, the plaintiff has asked for orders of a declaration of ownership of the suit land; an order of eviction against the defendant; a mandatory injunction compelling the defendant to give vacant possession; mesne profits of KShs. 30,000/- per month until vacant possession is given; general damages for trespass; and costs.

3. Together with the suit the plaintiff filed an application seeking the following orders :-

(i) Spent

(ii) That pending the hearing and determination of this suit, there be an interlocutory mandatory (sic) compelling the defendant, her employees, agents and servants to forthwith remove at their own costs all her items unlawfully brought by her on (the suit property) and to grant the plaintiff vacant possession of (the suit land).

(iii) That in default of the compliance with order (ii) above, the plaintiff be at liberty, without need to apply, to evict the 1st, 2nd and 3rd defendants through the court bailiff and the Officer Commanding Central Police Station, Mtwapa to provide security during eviction.

(iv) That the costs of this application be awarded to the plaintiff against the defendant jointly and severally.

4. It is that application which is the subject of this ruling.

5. The application is supported by the affidavit of Mariam Abdikadir a director and shareholder of the plaintiff. She has annexed a copy of the certificate of title to the suit land. She has averred that the plaintiff has never authorised the defendant to occupy the suit premises for any purpose whatsoever. She has annexed copies of the demand letter of 4 November 2019, the defendant's reply in her letter dated 7 November 2019, and their response contained in a letter dated 11 November 2019. She has stated that the plaintiff is losing revenue and not in possession of property that it rightfully owns.

6. The defendant entered appearance, filed defence, and responded to the application. Her position is that she is residing on the suit property by virtue of being the legal wife to Mr. Hakcil (deceased) who she states was a director of the plaintiff holding 20 shares. She has averred that she has commenced succession proceedings over his estate. She has contended that Mr. Hakcil never resigned as a director of the plaintiff and that any purported resignation letter or affidavit affirming resignation is a forgery aimed at stealing his property. She has asserted that she is in possession of the land as the legal wife to the deceased and her occupation of the suit land is therefore lawful. To her replying affidavit, she has annexed a copy of a certificate of marriage to the late Hakcil.

7. I invited counsel to file written submissions which they did and I have taken note of the same alongside the authorities that they cited. Clearly, the plaintiff wants a mandatory interlocutory injunction and in order to succeed, one needs to demonstrate special circumstances and an exceptionally strong case. In the case of *Kamau Mucuha vs Ripples Limited (1993) eKLR*, Hancox CJ, stated as follows on the issue of grant of mandatory injunctions at an interlocutory stage :-

“Speaking for myself, I entirely agree that, historically, the principles laid down with regard to temporary mandatory injunctions are that they will only be granted exceptionally and in the clearest cases. In Canadian Pacific Railway v Gaud [1949] 2KB, Cohn LJ said at page 249:

“I entirely agree..... that the granting of a mandatory injunction on interlocutory relief is a very exceptional form of relief to grant, but it can be granted.”

The reason for the rule is plain. Megarry J put it succinctly in a subsequent passage in the Shepherd Homes case (Shepherd Homes vs Sandham (1970) 3 WLR 348) as follows:

“ if a mandatory injunction is granted on motion, there will normally be no question of granting a further mandatory injunction at the trial; what is done is done and the plaintiff has, on motion, obtained once and for all the demolition or destruction that he seeks. Where an injunction is prohibitory, however, there will often still be a question at the trial whether the injunction should be dissolved or contained.”

8. I am alive to the above principles in granting a mandatory injunction. In the case at hand, I have seen that the plaintiff has displayed that it purchased the suit property and has title to it. It asserts that the defendant is in illegal occupation of the suit property. The defendant's response is that she is wife of a shareholder of the company and thus entitled to reside in the suit property. Without deciding the issue of transfer of shares, the prima facie evidence that I have before me is that the deceased was no longer a shareholder of the company when he died. Prima facie therefore, he had no interest in the suit property at the time of his demise, and at this stage of the proceedings, based on the material before me, I am more inclined to believe the plaintiff, when she states that it allowed the deceased to have use of the suit premises principally under a licence. But even assuming that the deceased was a shareholder of the suit property when he died, and even assuming that the estate of the deceased still held some shares, this would still not help the defendant. The plaintiff being a limited liability company, is distinct from its shareholders and directors. It follows that even if the deceased was alive and in possession of the suit property, and still held shares in the company, and the plaintiff had wanted to have the suit premises for its own use, barring any exceptional circumstances, the plaintiff would still be entitled, as proprietor, to the use and possession of the land, and could maintain a suit for trespass against the deceased. I therefore do not see how the argument that the defendant is wife to a shareholder of the plaintiff can help the defendant ; the plaintiff could still have sued its own shareholder for possession of the suit property.

9. The defendant has not raised any counterclaim for the suit property meaning that she is not claiming it, either for herself, or for the estate of the deceased. I therefore wonder what right would entitle her to remain in the suit property, without paying any rent or other form of compensation to the plaintiff. I am aware that the defendant claims that the transfer of the shares of the deceased was fraudulent but that is a separate issue and has nothing to do with possession of the suit land.

10. My view, at this stage of the case, is that the plaintiff had allowed the deceased a licence to occupy the premises, which licence terminated when he died. The plaintiff does not wish to extend that licence to the defendant, and I cannot fault the plaintiff for that decision. The plaintiff as owner of the suit premises is entitled to use the suit premises as it wishes. I am thus persuaded that the plaintiff has established an exceptionally strong case to warrant the issue of an order, at this interlocutory stage, directing the defendant to vacate the suit premises, pending hearing of the suit.

11. I therefore allow the application and order the defendant to give vacant possession of the suit premises and to stay away from any interference with the same, pending the hearing and determination of this suit. This order should take effect immediately, but being a little sympathetic to the plaintiff, I suspend the order to take effect upon the lapse of 30 days from today. In other words, the defendant will defend the suit while being outside the suit premises, and she must give vacant possession within 30 days from today. In default the plaintiff is at liberty to evict her with the assistance of the Court Bailiff.

12. The plaintiff will also have the costs of this application.

13. Orders accordingly.

DATED AND DELIVERED THIS 4TH OF JUNE 2020

JUSTICE MUNYAO SILA

JUDGE, ENVIRONMENT AND LAND COURT

AT MOMBASA.