



**REPUBLIC OF KENYA**

**ENVIRONMENT AND LAND COURT**

**AT MOMBASA**

**ELC NO. 172 OF 2019**

**SHAMMY RAJINDER MANDAL & NIRMALA DEVI R.K. MANDAL**

**(Suing as the administrators/personal representatives and on**

**behalf of the estate of RAJINDER KUMAR MANDAL (Deceased) .....PLAINTIFFS**

**VERSUS**

**MOHAMED AHMED BAKRAN .....DEFENDANT**

**RULING**

*(Application for injunction; applicants represented estate of deceased person who held a lease together with three others over the disputed property; defendant, the lessor moving to evict the applicants and attach their goods claiming non-payment of rates and rent; respondent claiming that the lease no longer exists and was forfeited for breach; no evidence of any notice issued to the applicants that the lease will be forfeited or seeking to have them remedy a breach; no indication in the proclamation for attachment what money is being claimed from the applicants; applicants demonstrating a prima facie case and stand to suffer irreparable loss if they were to be evicted; application allowed)*

1. This suit was commenced through a plaint which was filed on 26 September 2019. The plaintiffs are the legal representatives of the estate of Rajinder Kumar Mandal (deceased). They aver that the deceased held a leasehold interest over the land parcel Mombasa/Block X/Parcel 254A in common in equal shares with Ved Prakash Mandal, Prem Prakash Mandal, and Vijay Kumar Mandal. It is pleaded that the leasehold interest has subsisted since the year 1951 when the lessor, Kassam Ramji, leased the suit premises to the said persons for a period of 99 years at an annual rent of KShs. 1,500/=. It is pleaded that in the year 1971, Kassam Ramji transferred his freehold interest to Alykhan Satchu and Jamil Satchu, and they now became the lessors. On 4 September 1986, Alykhan and Jamil, transferred their interest to the defendant. The plaintiffs aver that they have been diligently paying the annual rent of KShs. 1,500/= and have continued to enjoy peaceful and quiet occupation. It is pleaded that on 20 September 2019, the defendant issued a demand that the plaintiffs vacate the suit property by 23 September 2019. The notice was closely followed by an auctioneers' notice of attachment and/or repossession dated 23 September 2019 with a claimed amount of KShs. 1,141,000/= which amount the plaintiffs aver is unknown to them. In the suit, the plaintiffs seek orders for a declaration that they are entitled to quiet enjoyment of the premises and a permanent injunction to restrain the defendant from evicting them.

2. Together with the plaint, the plaintiffs filed an application for injunction seeking orders to restrain the defendant and/or its appointed auctioneer and advocate from evicting the plaintiffs or in any other way interfering with the plaintiffs' possession of the suit property pending hearing and determination of this suit. It is that application which is the subject of this ruling.

3. The supporting affidavit is sworn by Shabby Rajinder Mandal and he has more or less reiterated what is pleaded in the plaint. He has also annexed the Lease and Certificate of Lease. He has deposed that upon purchase of the freehold title, the defendant appointed M/s Shimoni Enterprises to collect rent on his behalf and they dutifully paid the said agent. In the year 2017, the agent informed them, through a letter dated 29 December 2017, that he is leaving the agency and thus the rent of KShs. 1,500/= should be paid directly to the defendant as landlord. He has deposed that rent was then paid directly to the defendant and he has annexed a receipt dated 2 January 2019 evidencing the rental payment of KShs. 1,500/=. He has annexed a demand from Isaaka Advocate, dated 20 September 2019, seeking vacant possession by 23 September 2019.

4. The defendant filed defence wherein he pleaded inter alia that the plaintiffs breached the lease inter alia by failing to pay government taxes (rates) and that they also fraudulently tried to obtain the freehold title. The defendant denied that the lease is still existing.

5. To oppose the application for injunction, the defendant filed a replying affidavit. He deposed that he purchased the suit premises. He deposed that by Gazette Notice No. 1678 dated 9 April 1998, Ved Prakash Mandal, Prem Prakash Mandal, Rajinder Kumar Mandal, and Vijay Kumar Mandal, claimed that the title that had been issued to them was lost. He has deposed that his agent, Shimoni Enterprises, wrote to the registrar, cautioning him not to issue any title to the said persons as the lease had terminated. A copy of the letter dated 31 July 1998 is

annexed. He has deposed that the plaintiffs are not his lessees as the lease was breached by not paying rates for over 6 years. He has deposed that due to the breach of contract, he sent auctioneers to recover the sums owed so as to enable him transfer the land to a third party. He has deposed that the applicants are guilty of fraud and in breach of contract hence do not have a right to come to equity. He has annexed some correspondences and the rates record for the suit land to demonstrate that rates have not been paid.

6. I invited counsel to file written submissions towards the application and I have seen the submissions of both counsel for the plaintiffs and defendant. I have taken note of these alongside the oral submissions of Mr. Gikandi for the applicants. Mr. Isaaka did not attend during the oral hearing of the application.

7. The defendant does not deny leasing the suit property to Rajinder Kumar Mandal, Ved Prakash Mandal, Prem Prakash Mandal, and Vijay Kumar Mandal. I have indeed seen that the four proprietors have a certificate of lease over the suit premises. The rent payable is KShs. 1,500/=. There is contention by the defendant that he terminated the lease owing to breach and that the plaintiffs have not been paying rates. Well, if the defendant terminated the lease, why did he accept rent for the year 2019 ? I can see that he himself issued the receipt for the rent for the year 2019, and prima facie therefore, he still recognises the four persons as proprietors of the leasehold interest. If the defendant, as lessor, was of opinion that there is a breach of the tenancy, then, as one would expect of any reasonable and prudent lessor, he ought to have issued notice to the plaintiffs of the breach, and given them opportunity to remedy the same, or issue a notice of forfeiture of the lease. I have gone through the documents presented and nowhere have I seen any notice issued to the plaintiffs outlining what they have breached and the consequences of not remedying the breach.

8. In his replying affidavit, the defendant claimed that he sent auctioneers to recover the sums owed. I have seen the notice issued by Tip Top Auctioneers. It wishes to undertake an attachment inter alia to recover the sum of KShs. 1, 141,000/= . The notice does not say what this money is for. We cannot speculate what it is for if the document itself does not make this clear. Even assuming that it is for recovery of rates, a lessor cannot simply ambush a lessee without giving notice. It remains to be a point for trial as to whether or not the plaintiffs have forfeited the lease for failure to pay rates or for any other breach. I cannot at this stage determine summarily that the lease is forfeited without first hearing the parties. Further, whether the defendant has a right to attach the property of the plaintiffs in order to obtain money in respect of payment of government taxes is also subject for determination at the hearing of the suit.

9. From the foregoing, I am persuaded that the plaintiffs have demonstrated a prima facie case with a probability of success. They indeed stand to suffer irreparably if the defendant proceeds to evict them from the suit premises. Even if I was to consider the balance of convenience, the same tilts towards maintaining the status quo until the suit is determined. The plaintiffs are deserving of an injunction restraining the defendant from evicting them or interfering with their possession of the suit property until this case is concluded. I therefore allow this application for injunction. The plaintiffs will also have the costs of the application.

10. Away from the application before me, I observe that the lease herein is held in the names of three other persons namely Ved Prakash Mandal, Prem Prakash Mandal, and Vijay Kumar Mandal. The outcome of this suit will certainly affect them. I order that they be enjoined as interested parties to this suit and they are at liberty to file pleadings, either in support or in opposition, to this suit. It may also be prudent for parties to try and see whether they can embark on some negotiations to see whether they can iron out whatever differences they seem to have.

11. Orders accordingly.

**DATED AND DELIVERED THIS 23RD DAY OF SEPTEMBER 2020**

**JUSTICE MUNYAO SILA**

**JUDGE, ENVIRONMENT AND LAND COURT OF KENYA**

**AT MOMBASA**