



REPUBLIC OF KENYA

IN THE ENVIRONMENT AND LAND COURT

AT NAIROBI

ELC CASE NO. 102 OF 2020

PALE KENYA LIMITED.....PLAINTIFF

=VERSUS=

PAULINE NGOMI MWANGANGI.....DEFENDANT

RULING

1. The dispute in this suit relates to ownership of **Land Reference Number 209/8313** situated at Dunga Close, Industrial Area, Nairobi, and comprised in **Grant Number IR 27658**. The Grant was first registered on 5/3/1975 in the names of **Esther Njoki Peter Muigai Kenyatta w/o Peter Muigai Kenyatta** and **Gurbachan Singh s/o Sojan Singh** as tenants-in-common. On 12/8/2015, the ½ Share of Esther Njoki Peter Muigai Kenyatta (**hereinafter simply referred to as “Esther”**) was, by assent, registered in the names of Loise Waituire Muigai, Jennifer Wanjiru Muigai, Eugene Munyiri Muigai (Alias Rayford) and Susan Wahu Muigai. On 12/8/2015, the said ½ Share was transferred to Pale (K) Limited (**the plaintiff**).

2. The plaintiff initiated the suit on or about 10/6/2020 through a plaint dated 2/6/2020. They sought the following verbatim orders against the defendant:

a) A declaration that the defendant’s action of issuing a tenancy termination notice against the plaintiff’s tenants in the suit property amounts to interference with the plaintiff’s proprietary rights on the suit property.

b) An order of permanent injunction do issue stopping, baring and/or restraining the defendant whether by herself, her servants, employees or agents from entering and/or trespassing in any way in the suit premises.

c) Costs of the suit.

3. Simultaneous with the plaint, the plaintiff filed a notice of motion dated 2/6/2020, through which they sought the following interlocutory reliefs:

a) Spent

b) Spent

c) Spent

d) That the honourable court does issue a temporary injunction stopping, baring and/or restraining the respondent whether by herself, her servants, employees or agents from interfering with the possession and tenancy of all that land known as LR No 209/8313 situated at Dunga Close in Industrial Area within Nairobi City County pending the hearing and determination of the suit herein.

e) Spent

f) That the Officer Commanding Industrial Area Police Station does oversee the enforcement of these orders.

g) That the costs of this application be provided for .

4. The application was supported by an affidavit sworn on 2/6/2020 by Hon Onesmus Kimani Ngunjiri. He deposed that he was a director

of the plaintiff company. He added that the plaintiff company purchased the suit property from the administrators of the estate of **Esther Njoki Peter Muigai Kenyatta (Esther)** and the suit property was duly conveyed to the plaintiff. He further disposed that the plaintiff had been in occupation of the suit property and had tenants therein. He further added that the defendant was masquerading as proprietor of the suit property and was harassing their tenants, actions that he contended amounted to a violation of Article 40 of the Constitution. He urged the court to grant the interlocutory reliefs. He exhibited a copy of an official search.

5. The defendant opposed the application through her replying affidavit sworn on 20/7/2020. She deposed that she was the proprietor of the suit property by virtue of being the administrator of the estate of her late husband, **John Mwangangi** (hereinafter simply referred to as "**Mwangangi**"). Her case was that Mwangangi bought the suit property from Esther Njoki Peter Muigai Kenyatta in September 1975 at Kshs 79,000 through a sale agreement dated 27/9/1975. Together with her late husband, they took possession of the suit property in September 1975 and developed thereon rental shops, offices and a garage. Esther subsequently died in 1980 before transferring the suit property to her deceased husband. Upon the death of Esther, the administrators of her estate refused to transfer the property to her husband. Further, the administrators of Esther's estate filed **Nairobi HCCC No 1385 of 2005** seeking eviction orders against her late husband's estate. The said suit was subsequently dismissed for want of prosecution, leaving only the estate's counter-claim which is still pending hearing and determination in the High Court at Nairobi. Lastly, she deposed that they had been in possession of the suit property since 1975 when her deceased husband purchased it. She urged the court to reject the plea for injunction against her.

6. The application was canvassed orally in a virtual court session on 1/10/2020. Mr Kago, counsel for the plaintiff, submitted that the plaintiff did not exhibit a copy of the title to the suit property because it was out of his reach at the time of swearing the affidavit. He added that as a registered proprietor, the plaintiff was protected under the Land Registration Act. Counsel added that the transgression against the plaintiff's right to property had been on since the plaintiff purchased the suit property. Counsel stated that the plaintiff had never gained possession of the suit property since they purchased it. He urged the court to grant the interlocutory injunctive reliefs.

7. In response, Mr Nzamba Kitonga SC (now deceased), reiterated the defendant's case as summarized above and argued that the purported sale and transfer of the suit property to the plaintiff was a fraud because the suit property was sold and vacant possession given to the late John Mwangangi in 1975. He urged the court to dismiss the application.

8. I have considered the application, the response thereto, the parties' respective submissions, and the law on interlocutory injunctive reliefs. The single issue falling for determination in this application is whether the applicant has satisfied the criteria upon which our courts exercise jurisdiction to grant interlocutory injunctive relief.

9. The said criteria was spelt out in **Cassman Brown (1973) EA 358**. First the applicant is required to demonstrate a *prima facie* case with a probability of success. Secondly, the applicant is required to demonstrate that unless an interlocutory injunctive relief is granted, the applicant would stand to suffer irreparable damage for which he may not be adequately indemnified through an award of damages. Thirdly, in the event there is doubt on both or either of the above two requirements, the court is required to determine the application on a balance of convenience.

10. At this interlocutory stage of proceedings, the court does not make conclusive or definitive findings on the substantive issues in the suit. Conclusive and definitive findings are reserved for judgment after trial of the suit.

11. In the present suit, the plaintiff came to court waving a copy of an official search. They contended that the defendant had trespassed onto the suit property and were interfering with the tenants thereon. However, during submissions in the virtual court session, counsel for the plaintiff submitted that the plaintiff had never had possession of the suit property since they were registered as proprietors of the property.

12. Secondly, what emerges from the evidential materials placed before the court at this interlocutory stage is that the late Esther sold and gave vacant possession of the suit property to the late Mwangangi. The late Mwangangi and his estate have had possession of the suit property since 1975. The late Mwangangi developed the suit property and rented the developments thereon.

13. Thirdly, what further emerges from the evidential materials placed before the court at this interlocutory stage is that, in 2005, administrators of the estate of Esther sued administrators of the estate of Mwangangi in **Nairobi HCCCC No 1385 of 2005** seeking to recover the suit property in terms of the following verbatim orders:

i. The defendants by themselves, their agents, assigns, workers servants and/or employees be evicted from the suit property and any illegal structures erected by them thereon be demolished and removed therefrom.

ii. The defendants do pay all costs expenses and charges fro and in respect of or related to the actions or matters mentioned in (a) (i) above.

iii. The defendants do pay mesne profits arising from their illegal occupation and use of the suit property

iv. The defendants pay the costs of the suit

14. The estate of Mwangangi contested the above claim and made a counter-claim for the following verbatim orders:

a) A declaration that the suit premises known as L R No 209/8313 in Industrial Area Nairobi belongs to JOHN MWANGANGI MUSYOKA (deceased) and it be transferred to and be registered in the names of the administrators of his estate PETER MUNUVE MWANGAGI and PAULINA NGOMI MWANGANGI.

b) Orders that the plaintiffs herein surrender the title to the suit premises known as LR No 209/8313 Industrial Area Nairobi to

the 1st and 2nd defendants and execute a transfer in respect thereof in favour of the said 1st and 2nd defendants PETER MUNUVE MWANGANGI and PAULINE NGOMI MWANGANGI and failing which the Deputy Registrar of this honourable court be and is hereby empowered to execute such transfer.

c) Costs of this suit

d) Any other relief this honourable court may deem just to grant.

15. It does also emerge from the evidential materials placed before court at this interlocutory stage that the suit by the administrators of the estate of Esther was dismissed for want of prosecution. The counter-claim by the estate of Mwangangi is pending hearing and determination in the High Court. It is, however, not clear why the said suit has not been transferred to the Environment and Land Court which is the court currently seized of jurisdiction to deal with land disputes.

16. From the above interlocutory evidence, it does appear that the suit property has been in the possession of the estate of John Mwangangi for quite some time. It does also appear that the defendant may not be an outright trespasser or masquerader as projected by the plaintiff. The estate of John Mwangangi claims to have equitable interest in the suit property, having purchased it in 1975 from Esther. The defendant is one of the administrators of Mwangangi's estate. Whether or not the transfer of ½ share of the suit property to the plaintiff in 2015 was valid will be determined after trial. Similarly, whether or not the plaintiff is entitled to possession of the suit property will be determined after trial.

17. At this point, based on the above interlocutory evidence before court, the court is not satisfied that the plaintiff has made out a case to warrant what would amount to a mandatory injunctive order evicting the defendant from a suit property she claims Esther sold and handed to her late husband, John Mwangangi, forty five years ago and they have developed it and had possession thereof since then. I will nonetheless, preserve the suit property within the framework of Order 40 of the Civil Procedure Rules and fast track disposal of the main suit.

18. For complete and effectual adjudication of the dispute in this suit, there is need to join all the administrators of the two estates involved in this dispute because they are necessary parties.

Disposal Orders

19. In light of the above findings, I make the following disposal orders in relation to the notice of motion dated 2/6/2020:

a) The plaintiff's application for an injunctive order against the defendant is rejected for lack of merit

b) The plaintiff shall amend their plaint within 15 days to bring on board both administrators of the estates of John Mwangangi

c) Further, the plaintiff shall bring on board the administrators of the estate of Esther Njoki Peter Muigai Kenyatta either as defendants or as interested parties.

d) Pending hearing and determination of this suit, the status quo as at the time of registration of ½ share of LR No 209/8313 in the name of the plaintiff and as at the time of filing this suit shall be maintained, meaning that:

i. The estate of the late John Mwangangi shall continue to have possession of the ½ share of LR No 209/8313 but shall not dispose it or develop it further

ii. The suit property shall neither be disposed nor charged by the plaintiff.

e) Costs of the application shall be in the cause.

DATED, SIGNED AND DELIVERED AT NAIROBI ON THIS 30TH DAY OF OCTOBER 2020.

B M EBOSO

JUDGE

In the Presence of: -

Mr Okello for the Defendant

Court Clerk - Halima

Note

This Ruling was supposed to be delivered on 27/10/2020. This was not possible because I was assigned duties outside the Station.

B M EBOSO

JUDGE