



REPUBLIC OF KENYA
IN THE HIGH COURT OF KENYA AT NAIROBI
MILIMANI LAW COURTS
ENVIRONMENT AND LAND COURT
ELC NO. 1237 OF 2013

MOSES MWANGI KIHUNGA.....1ST PLAINTIFF

SPECKS COMPLEX LIMITED.....2ND PLAINTIFF

=VERSUS=

GRACE WANJIRU MBUGUA alias

GRACE WANJIRU KIARIE.....1ST DEFENDANT

SATYA INVESTMENT LIMITED.....2ND DEFENDANT

RULING.

The matter coming up for determination is the Notice of Motion dated 14th October 2013, brought by the Plaintiffs/Applicants herein against the Defendants/Respondents, seeking for various orders: The Orders sought are:-

1. *Spent*
2. *Spent*
3. *That the honourable Court be pleased to order an immediate survey of L R No. 1870 /1X/116 to determine its boundary with LR No. 1870/1X/54 (now LR No. 209/12132.*
4. *That this honourable court be pleased to issue an order of temporary injunction directed to the Defendants by themselves, agents, servants and/or employees from evicting, ejecting and or in any other way interfering with the Plaintiffs quiet occupation, control and enjoyment of the suit premises located on LR NO. 1870/1X/116, pending the hearing and determination of this suit.*
5. *That costs of this application be provided for.*

The application was supported by the grounds on the face of the application and by the annexed affidavit of **Moses Mwangi Kihuga**. These grounds are:-

That the Plaintiffs are the lawful and legal tenants of the 1st Defendant and who have sublet the premises to over 50 sub tenants;- that the 2nd Defendant has given the Plaintiffs Notices to vacate the premises forthwith claiming that a Court Judgment has been ruled in its favour in respect of *LR No. 1870/1X/54* (now *LR No. 209/12132*); that the parcel of land for which the 2nd Defendant has obtained Judgment is distinctively different from the premises that the Plaintiffs have leased from the 1st Defendant and are occupied by tenants; that there is imminent danger of the Plaintiffs together with the subtenants being evicted from the suit premises; further , it is in the interest of justice that the orders sought herein be granted .

In his Supporting Affidavit, **Moses Mwangi Kihuga**, averred that he is a Director of 2nd Plaintiff and that the Plaintiffs herein have entered into a lease agreement with the 1st Defendant for the property better known as ***LR No. 1870/1X/116, Woodvale Groove***, as evidenced by the annexure **MMK1**; Further that the suit property is adjacent to the property better known as ***LR No. 1870/1X/54*** now registered as **LR .No. 209/12132**, which has been a subject of litigation in Civil Case No. 164 of 2004 between the Defendants. That ***LR NO. 1870/1X/54*** now **LR No.209/12132** and ***LR No. 1870/1X/116*** are two different and distinct properties which share a common boundary. He further averred that the 2nd Defendant has served them with the Judgment of the court of Appeal No. 164 of 2004 and a copy of Notice of Eviction, marked MMK6 and MMK7 respectively. It was his contention that the 2nd Defendant has now taken advantage of the judgment of the Court to evict the Plaintiffs and sub tenants from **LR No. 1870/1X/116** which is different from the property referred in the Judgment . It was his fear that unless the Court intervenes, the 2nd Defendant would make good his threat and evict the Plaintiffs thereby causing them irreparable loss and damage.

The application is vehemently opposed by the 2nd Defendant but supported by the 1st Defendant herein .

The 2nd Defendant filed grounds of opposition and averred that the application is frivolous and an abuse of the courts process. Further , that the Plaintiffs have no locus standi to bring the suit and the applicant is only trying to circumvent the Judgment of the Court of Appeal delivered on 24th June, 2013. In his Replying Affidavit, **Dipak Anand** , the Director of the 2nd Defendant averred that 2nd Defendant is the registered and indefeasible proprietor of all that property being Land Reference **No.209/12132**(formerly Land Reference No. 1870/1X/54 as per annexure “**DA1**”. He further averred that he is not encroaching on **LR NO. 1870/1X/116** as alleged by the Plaintiffs and it is very clear that **LR NO. 1870/1X/116** is distinct and clearly marked. He further contended that the Court of Appeal, effectively determined the rights of the 2nd Defendant in relation to **LR No. 1870/1X/54** and he is not the owner of **LR NO. 1870/1X/116** and does not have any interest thereon at all. The 2nd Respondent deponed that he has only moved to evict the occupants of his parcel of land in accordance with the decision of the Court of Appeal. It was his contention that the Plaintiffs have not made a prima facie case and are not entitled to the injunction sought. He urged the court to dismiss the Plaintiffs application.

On her part, the 1st Defendant, **Grace Wanjiku Mbugua**, admitted that she leased her property **No. LR No 1870/1X/116** which is adjacent to the property known as **LR No. 1870/1X/54** also known as **LR NO. 209/12132** to the Plaintiffs. She also confirmed that the 2nd Defendant was granted Orders by the Court to evict the occupants of **LR NO.209/12132** and that **Keysian Auctioneers** have served Eviction Notices upon the tenants in both **LR No. 209/12132** and the adjacent **LR No. 1870/1X/116**. It was also her admission that the ownership of **LR .No.1870/1X/116** was not subject of the stated Suit but it would be unlawful for 2nd Defendant and/or the auctioneers to interfere with the lawful occupation of **LR No. 1870/1X/116** by the applicants.

The parties herein filed their written submissions which I have now carefully considered. I have also considered the dispositions herein and the annexures thereto.

The applicants have sought for injunctive relief. These are equitable remedies which are granted at

the discretion of the court. However, such discretion must be exercised judicially. See the case of **Hasmukh Khetsi Shah Vs Tinga Tranders Ltd, Civil Appeal No. 326 of 2002 (2002) KLR 4628** where the court held that;

“It must be stated at the outset that the granting of the interim Injunction is an exercise of judicial discretion”.

In deciding whether to grant or not to grant the injunctive orders, I will be guided by the laid down principles in the case of **Giella Vs Cassman Brown & Co. Ltd (1973) EA 358** and later repeated in other judicial pronouncements. In the case of **Kibutiri Vs Kenya Shell, Nairobi, High Court , Civil Case No. 3398/1980 (1981) LR 390** the court held that:-

“ The conditions for granting of a temporary injunction in East Africa are well known and these are; First an applicant must show prima facie case with a probability of success. Secondly an interlocutory injunction will not normally be granted unless the applicant might otherwise suffer irreparable injury which would not adequately be compensated by an award of damages. Thirdly, if the court is in doubt, it will decide an application on the balance of convenience”.

Have the applicants herein established the above stated conditions to warrant this court grant them the orders sought?.

The applicants needed first to establish that they have a prima face case with probability of success. In the case of **Mrao Ltd Vs First American Bank of Kenya and 2 others (2003) KLR 125,** The Court of Appeal described prima-facie case as:-

“A Prima facie case in a civil application includes but not confined to a genuine and arguable case. It is a case which on the material presented to the court, a tribunal properly directing itself will conclude there exists a right which has apparently been infringed by the opposite party as to call for an explanation or rebuttal from the later”.

Have the applicants herein established that they have a prima facie case with probability of success?

The applicants herein did aver that they are tenants in **LR No. 1870/1X/116**, which has been sublets to other forty tenants . The applicants have leased this property from one, *Grace Wanjiku Mbugua*, the 1st Defendant herein. The 1st Defendant in her Replying Affidavit did admit that she has leased the said suit land to the Plaintiffs herein. There is also no doubt that the 1st and 2nd Defendants have been embroiled in a protracted Court Case which culminated in Civil Appeal No. 164 of 2004 which was decided on 22nd March 2013 in favour of the 2nd Defendant herein. The 1st Defendant was ordered to vacate the suit property which was referred as **LR No. 1870/1X/54** now **LR No. 2009/12132**.

Further, failure to do so, the 2nd Defendant was at liberty to evict the 1st Defendant. There is also no doubt from the Certificate of Title attached to the Notice of Motion, that the 2nd Defendant is the registered owner of **LR No. 209/12132**. Following the Court Order issued on 22/3/2013, **Keysian Auctioneers** on instructions of the 2nd Defendant gave Notice of Eviction to occupants of **Plot No. LR No.209/12132** . The Notice of eviction MMK 7 does not indicate that the eviction would also effect plot **No. LR No.1870/1X/116** as alluded by the applicants. The applicants have attached MMK7 which is handwritten that it was received on 14/10/2013 by **Moses Mwangi** . However, the said Notice does not show that it was has extended the said Notice to **LR No. 1870/1X/116** .

The applicants said there are 40 other sub-tenants. There is no evidence that the other 40 sub tenants were issued with the eviction Notice. The 2nd Defendant has averred that he has no interest in **LR No. 1870/1X/116** and that it does not intend to evict anyone from the said suit land.

Though the 1st Defendant averred that indeed 2nd Defendant intends to evict the tenants in **LR 1870/1X/116** who were not party to Civil case No. 164/2004 , there was no evidence of such Notices to

the other tenants in **LR .1870/1X/116** to confirm that indeed there is danger of such eviction.

Having considered the pleadings generally and the annexure thereto, I find that the applicants fear is unfounded as there is no evidence of any danger of their eviction from **LR No. 1870/1X/116**. There is no relationship between the outcome of Civil Case No. 164 of 2004 in connection to plot **No.LR 1870/1X/54** with the suit land herein. The applicants have not demonstrated that they face any danger of eviction to warrant this court grant an order for **Status Quo**. In the case of the **Official Receiver ex-eparte, Paul Rotich Cheor Vs Barclays Bank of Kenya, Kisumu High Court Civil Case No.17 of 2004**; the court held that;

“ The purpose of the injunction is in most cases to keep things in Status Quo pending trial and it is therefore necessary for the applicant to show that he has a prima facie case for the relief he seeks or he has a fair question to raise as to the existence of her right”.

The applicants herein have not established that they have a prima facie case with probability of success and there is no need of issuing any interim injunction.

Having found that the applicants have not demonstrated that there is imminent danger of eviction from LR NO.1870/1X/116 which was not a subject matter in Civil Appeal No. 164 of 2004, I find that there is no evidence that applicants will suffer irreparable damage which cannot be compensated by way of damages .

On the balances of convenience , I find that the 2nd Respondent is a Decree Holder in Civil Case court case No. 164 of 2004. He is entitled to the fruits of that Judgment and can satisfy the same by carrying out eviction of occupants of **LR.No.209/12132** as per the Judgment. The balance of convenience tilts in favour of 2nd Respondent.

The upshot of the foregoing is that the applicants Notice of Motion dated 14th October, 2013 is not merited. The same is dismissed entirely with costs to the 2nd Defendant/Respondent.

It is so ordered.

Dated, Signed and delivered this 11th day of July, 2014

L. GACHERU

JUDGE

In the Presence of:-

None attendance for Plaintiffs/Applicants

M/s Malesi holding brief Nyawore for 2nd Defendant/Respondent

Kamau: Court Clerk

L. GACHERU

JUDGE