



REPUBLIC OF KENYA
IN THE HIGH COURT OF KENYA AT NAIROBI
CIVIL CASE NO. 272 OF 2013

PATRICK MWANGI KARIUKI1ST PLAINTIFF

AGNES NDUTA KARIUKI.....2ND PLAINTIFF

VERSUS

ZACHARIA NJOROGE GAKUNJU.....DEFENDANT

RULING

1. The application before this Court is the Notice of Motion dated 15th July 2013 brought under Order 51 rules 1, 2, 3 and Order 40 rule 1, 2 & 3 of the Civil Procedure rules 2010. The applicant seeks a temporary injunction against the respondent, restraining him from entering and interfering with the applicants/plaintiffs quiet possession, occupation use proprietary and legal ownership of stall no. 23 Kariobangi North Market pending the hearing and determination of this application and suit; that the O.C.S. Kariobangi Police post & city inspectorate officers be ordered to supervise the enforcement of the orders.
2. The application is premised on the grounds and the supporting affidavit of Mr. Patrick Mwangi Kariuki dated the 15/7/2013 The applicant avers that he bought the said stall no. 23 from Jecinta Njeri Thukia on 10th February 2010 and City Council duly transferred the ownership to him on 11th March 2011 vide minute proceedings of Social Services and Housing Committee and subsequently issued him with a rental market lease in July. After the said transfer he duly paid the transfer fees and stall rent on 23rd November 2011 and he gave the stall to the 2nd plaintiff his mother to manager; that on 10th February 2010 he was taken to the shop stall and introduced to the defendant Zachariah Njoroge Gakunju who was paying Kshs. 14,000/- who undertook to vacate so that the applicant could use the shop stall; that the defendant has refused to vacate the stall claiming that he bought it from a 3rd party one Joseph Githinji Mukere but bears no sale agreement with the original owner Jecinta Njeri nor the purported transfers approved and effected by the Land lord City Council of Nairobi in its register; that on 28th February 2013 the defendant was evicted by the City Council as he was an illegal tenant /occupant but on 3rd March 2013 he forcefully broke the City Council's padlock and re-entered the stall. This was reported at Kariobangi Police Post OB *No. OB 36/2/3/2013* but all efforts to resolve the dispute by City Council have failed and it is only a Court order to protect the applicant; that since 10th February 2010 the Respondent owes them mense profit of Kshs. 574,000/- and he should be ordered to pay and surrender vacant possession of the said stall forthwith.
3. The application was opposed and the respondent filed a replying affidavit sworn by Zacharia Njoroge Gakunju on 25th April 2014. He deponed that he was already in possession of the said

stall no. 23 Kariobangi North Market which is the subject matter in this suit, having bought the same from one Joseph Githinji Mukere on 27th May 2009; that upon the sale the seller vide a letter dated 27th May 2009 he wrote to the Council requesting it to transfer the same to him. On receipt of the plaintiff's demand notice dated 18th April 2012 to vacate the said stall he responded through a letter from his advocate vide a letter dated 18th April 2012; that he was surprised since he bought the stall from Mr. Githinji who was in possession and he took over possession from him.

The respondent also filed an affidavit filed by Mr. Joseph Githinji Mukere. He depones that he bought stall No. 23 Kariobangi North Market from Jacinta Njeri vide agreement dated 17/3/05 and later sold it to the defendant by an agreement dated 27/5/05; that he handed over the stall to the defendant together with a copy of ID card and a receipt dated 2/8/78 in the name of Jacinta Njeri which she had given her when he bought the stall.

4. Parties filed written submissions. The applicant in his submissions reiterated what is deposed in his affidavits and further submitted that it is trite law that a temporary injunction be issued in the interest of justice and fair play to protect the 1st plaintiff's legal ownership, possession, occupation and use of stall no.23 Kariobangi North Market.
5. The respondent in his submissions submitted that he bought the said stall on 27th May 2009 from Mr. Githinji who had bought from the resisted owner before the plaintiff bought it yet the applicant claims he bought the stall in February 2010; that he is the one is actual possession of the said stall; that the applicants have not put forward a prima facie case probable of success to warrant granting an injunction and that any loss suffered could be compensated by damages as the valuation of the stall can be established and the balance of convenience does not tilt in favor of the plaintiffs because they have not established a prima facie case and that the allegation that the police attempted to evict the defendant has not been proved.
6. I have read and considered the affidavits from the parties. In an application like this one am guided by the principles in the case of ***Giella V. Cassman Brown & Company Limited (1973) E.A 358***. The applicant must meet the following requirements that the applicant has a prima facie case with a probability of success at the trial; that an award of damages will not be adequate compensation if the injunction is not issued; and finally that the balance of convenience tilts in their favor.
7. The applicant claims he bought the stall in February 2010 and has annexed all the documents in his possession the agreement between him and Jacinta Njeri, the documents from city council showing the stall belongs to him plus receipts of payments to City Council showing what he paid for on buying the stall. The respondent has on the other hand has annexed a signed agreement between him and the purported seller one Mr. Githinji seeking to sell to the respondent the said stall for Kshs. 600,000/-. There is also a letter dated 27th May 2009 conveying the sale and seeking consent of the transfer from Mr. Githinji to the respondent, further there is a hand written agreement by one Jacinta Njeri dated 17th March 2005 which sought to transfer the said stall to one Mr. Joseph Githinji Mukere. None of the parties have an affidavit from Jacinta Njeri or an official from City Council of Nairobi.
8. The suit herein pertains to ownership of Stall no. 23 at Kariobangi North Market. The respondent is in possession of the said stall. What the applicant seeks to do is to eject the respondent already in possession from the said stall if the orders are granted, yet the matter has not been heard. On this am guided by the case of ***Assanad –vs- Petit (1989) KLR 241***, where it was held that; “*the object of temporary injunction is to keep things in status quo so that after a hearing the plaintiff obtains a judgment in his favor, the defendant will have been prevented from dealing in the meantime with the property in such a way.*” Thus pending the determination of this case I find that it is in the interest of justice to disallow the orders sought in order to maintain the status quo pending the determination of this suit. Parties to fix the matter for hearing once they comply with the provisions of order 11 of the Civil Procedure Rules. Costs shall be in the cause.

Orders accordingly

Dated, signed and delivered this **6th** Day of **October 2014**.

R.E. OUGO

JUDGE

In the Presence of:-

..... For the Plaintiffs/Applicants

.....For the Defendant /Respondent

.....Court Clerk