



REPUBLIC OF KENYA
IN THE HIGH COURT OF KENYA AT KERUGOYA
ELC CASE NO. 286 OF 2013

AMINA SHABAN SALIM1ST PLAINTIFF

EMBU MUNICIPALITY MATAKARI MUSLIM GROUP.....2ND PLAINTIFF

VERSUS

MARIAM NYAKINYUA SALIM1ST DEFENDANT

JUMA SHABANI2ND DEFENDANT

IBRAHIM NJUKI IDDI3RD DEFENANT

RULING

This is in respect of the plaintiff/applicant's Notice of Motion dated 13th January 2013 seeking orders that the respondent be restrained through herself, her agents and servants from evicting any licencees dwelling on GATURI/GITHIMU/7732 pending the hearing and determination of this suit.

The application is premised on the grounds, inter alia, that the applicant was registered as a joint proprietor of the suit land i.e. GATURI/GITHIMU/7732 which was fraudulently transferred to the respondent who now want to evict some licencees living on it. The application is supported by the affidavit of HUSSEIN KUYEGA ONJIRI.

The application is opposed and in the replying affidavit of 1st respondent MARIAM NYAKINYUA SALIM, it is deponed, inter alia, that she is the proprietor of the suit property and has annexed thereto a copy of the register and Title Deed. She adds that she has orders from the Rent Restriction Tribunal to evict the licencees and take vacant possession and that this application is an abuse of the Court process as a similar application was dismissed on 28th March 2012.

Counsels for both parties appeared before me on 16th May 2013 and orally argued the application.

I have considered the application and the supporting documents as well as the reply. I have considered also the submissions by counsels.

Being an application for injunction, it has to be considered within the principles laid down in the **GIELLA VS CASSMAN BROWN & CO. LTD CASE 1973 E.A 358** and the first principle that the applicant has to show is that he has a prima facie case with a probability of success.

From the copy of register annexed to the affidavit of the 1st defendant/respondent, it is clear that the suit

property which was originally registered in the names of the plaintiff/applicant was transferred to the 2nd defendant who then transferred it to the 1st defendant/respondent in April 2011. So the 1st defendant/respondent is currently the registered owner of the land. It is alleged in the plaintiff's further amended plaint that the said transfer was fraudulently done. That is an issue for the trial Court. Prima facie, as matters stand now, the 1st defendant/respondent is the registered owner of the suit property and there is nothing in the pleadings to suggest that he is holding it in trust for any party although trust has been alleged against the 2nd defendant. In an earlier ruling dated 28th March 2012, Justice Ong'udi dismissed a similar application and this Court cannot be seen to be sitting on appeal from the decision of another Court of equal jurisdiction. It is also clear from the annexures herein that there is an order in Rent Restriction Case No. 61 of 2011 at Embu ordering that vacant possession of the suit property be given to the 1st defendant/respondent herein. It has not been demonstrated to this Court that the orders of the Tribunal have been set aside and this case is not the proper forum to question the orders of the Tribunal. On that basis, it cannot be said that the plaintiff/applicant has established a prima facie case to warrant the grant of the orders sought.

The applicant is also required to demonstrate that if an injunction is not granted, he will suffer irreparable loss that cannot otherwise be compensated by an award of damages. There is nothing in the supporting affidavit to suggest what damage, if any, the applicant will suffer which cannot be compensated in damages.

Ultimately, therefore, the plaintiff/applicant's Notice of Motion dated 13th January 2013 is dismissed.

Costs in the cause.

B.N. OLAO

JUDGE

8th July 2013

8th July 2013

Before B.N. OLAO – JUDGE

CC – Muriithi

Mr. Lethome for Applicant – absent

Mr. Rurigi for Mr. Okwaro for Respondent present

COURT: Ruling delivered this 8th day of July 2013 in open Court.

B.N. OLAO

JUDGE

8th July 2013