



REPUBLIC OF KENYA

IN THE ENVIRONMENT AND LAND COURT

AT NAIROBI

ELC CASE NO 725 OF 2016

HABIBA NYAMBURA ABDULLAHI.....PLAINTIFF/RESPONDENT

VERSUS

SHEIKH ABDULLAHI MOHAMED.....DEFENDANT/RESPONDENT

MELIHUN HASSEN WORSEME.....INTENDED INTERESTED PARTY

RULING

1. This is the Notice of Motion dated 8th October 2019 brought under order 1, rules 10(2) and order 40, rules 1, 2 and 3 of the Civil Procedure Rules, Section 1A, 1B, 3A of the Civil Procedure Act and all enabling provisions of the Law.

2. It seeks orders: -

(1) Spent.

(2) Spent.

(3) Spent.

(4) That this honourable court do issue a temporary injunction restraining the Interested Party whether by herself, agents, servants, or any other person claiming interest through her from trespassing, causing any form of nuisance, harassing, intimidating, evicting or interfering with the intended interested party's tenants' occupation and or interfering with the intended interested party's suit property, LR No. 209/7260/38, IR No. 135663 Section 3, Eastleigh, Nairobi, pending the hearing and determination of the main suit.

(5) That this honourable court do issue an order of stay of execution of the orders granted on 22nd January, 2019 and issued on 11th March 2019.

(6) That pending the hearing and determination of prayer 2 above and pending the hearing and determination of this application, that this hourable court do issue an order of stay of execution of the orders granted on 22nd January, 2019 and issued on 11th March 2019 pending the hearing and determination of the main suit.

(7) That this honourable court do grant an order of setting aside, vacate and or discharge the order granted on 22nd January 2019 and issued on 11th March, 2019 and the ex-parte judgment entered herein pending the hearing and determination of the main suit.

(8) That the costs of this application be provided for.

3. The grounds are on the face of the application and are set out in paragraphs (a) to (u).

4. The application is supported by the affidavit of Melihun Hassen Worsame, the Interested Party/Applicant sworn on the 8th October 2019.

5. The application is opposed. There is a replying affidavit sworn by Habiba Nyambura Abdullahi, the Plaintiff/Respondent sworn on the 27th December 2020.

6. On the 30th January 2020, the court with the consent of the parties directed that the notice of motion be canvassed by way of written submissions.

7. I note that the Interested Party/Applicant filed submissions dated 21/9/2020. It appears the Plaintiff/respondent did not file her written submissions. I will however rely on the comprehensive replying affidavit and the annexures.

8. It is the Interested Party'/Applicant's case that she is the registered owner of LR No. 209/7260/38 IR 135663 situated in Section 3 Eastleigh. That she bought the same from Sheikh Abdullahi Mohammed and the same was transferred to her on 2nd March 2016.

9. It is further the Interested Party's/Applicant's submission that she has established a prima facie as she is the registered owner and bonafide purchaser of the suit property. That she has erected a six (6) storey building with thirty (30) residential flats which are leased out to tenants. That she is likely to suffer irreparable harm if the tenants are evicted. Further that the loss that will be occasioned cannot be adequately compensated by an award of damages. She has put forward the cases of **Waithaka vs Industrial & Commercial Development Corporation (2001) KLR page 381**; **Joseph Siro Mosioma vs HFCK & 3 Others NBI HCCC No. 265 of 2007**.

10. She further submitted that the balance of convenience tilts in her favour as she is in possession of the suit property. She has put forward the case of **Alice Awino Okello vs Trust Bank Ltd & another LLR No.625 (CCK)**, which was quoted in the case of **Kisimani Holdings Ltd & Another vs Fidelity Bank (2013) eKLR**. The Interested Party purchased the suit property before ELC 725 of 2016 was instituted. The doctrine of *lis pendens* does not apply. She prays that the application be allowed.

11. I have considered the Notice of Motion and the affidavit in support and the annexures. I have considered the affidavits in response together with the annexures, the written submissions and the authorities cited. The issues for determination are:-

(i) Whether the Interested Party's/applicant's application meets the threshold for grant of temporary injunction.

(ii) Who should bear costs?

12. At this juncture it is necessary to briefly examine the legal principles governing the applications of this nature. In an application for interlocutory injunction the onus is on the applicants to satisfy the court that it should grant an injunction. The principles were set out in the precedent setting case of **Giella vs Cassman Brown & Co. Ltd [1973]EA 358**. In the case of **Mrao Ltd vs First American Bank of Kenya Ltd & 2 Others [2003] KLR 125** the Court of Appeal set out what amounts to prima facie case.

13. It is the Interested Party's/Applicant's case that she is the registered owner of the suit property being LR No. 209/7260/38. She stated that she bought it from Sheikh Abdulahi Mohammed and the same was transferred to her on 2nd March 2016.

14. It should be noted that Sheikh Badullahi Mohammed was the Plaintiff in ELC 725 of 2016 while the Plaintiff herein was the Interested Party. The Interested Party/applicant has annexed a copy of title in the name of Sheikh Abdullahi Mohammed showing that the same was transferred to her on 2nd March 2016 for Kshs.6 million. Nothing has been attached to show how the said Sheikh Abdullahi Mohammed acquired the said property in the first place.

15. The Interested Party/Applicant has also annexed a National Environment Management Authority Licence dated 17th March 2016 and an approval from National Construction Authority dated 16th March 2016. The developer is said to be Sheikh Abdullahi Mohammed. This contradicts the Interested Party's/applicant's case who states that the suit property was transferred to her on 2nd March 2016. The said Sheikh Mohammed swore a replying affidavit but did not bother to explain how he acquired the suit property.

16. The Plaintiff/Respondent on the other hand has attached a letter of allotment dated 18th December 1996 from the then Nairobi City Council. It is signed by the town clerk. There is also a Deed Plan No 209012 dated 9th October 1996. It shows the Plaintiff/Respondent was allocated LR No 209/7260/38 Eastleigh. There is a receipt for payment of stand premium and ground rent dated 17th April 2001 in the Plaintiff's name. There is a lease dated 5th June 2001 between the Plaintiff and the Nairobi City Council. The same is executed by the Town Clerk and Mayor on behalf of the Nairobi City Council. There is a ruling in ELC 63 of 2010 which the Plaintiff had sued one Abdi Hassan.

17. I have gone to these lengths to demonstrate that the Plaintiff's/Respondent's interest in the suit property can be traced to a letter of allotment dated 8th December 1996. The Plaintiff/Respondent obtained judgment in ELC 725 of 2016 against Sheikh Abdullahi Mohamed.

18. I find that the Interested Party/Applicant has not established a prima facie case with a probability of success at the trial.

19. In the Case of **Kenleb Cons Ltd vs New Gatitu Services Station Ltd & Another [1990] KLR 557 Bosire J (as he then was) stated that: -**

“to succeed in an application for injunction an applicant must not only make a frank and full disclosure of all relevant facts to the just determination of the application but must also show that he has a right, legal or equitable, which requires protection by injunction.”

I am not satisfied that the Interested Party/applicant deserves this kind of protection.

20. I also find that the Interested Party/applicant has failed to demonstrate that she will suffer irreparable loss that cannot be compensated by

an award of damages, if these orders are not granted. I am guided by the case of **Oloo vs Barclays Bank of Kenya Limited [2002] KLR 394**.

21. All in all, I find no merit in this application and the same is dismissed with costs to the Plaintiff/Respondent.

It is so ordered.

Dated, signed and delivered in Nairobi on this 16th day of December 2020.

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L. KOMINGOI

JUDGE

In the presence of:-

No appearance for the Interested Party/Applicant

No appearance for the Defendant

Mr. Ongengu for the Plaintiff/Respondent

Kajuju - Court Clerk