



REPUBLIC OF KENYA

IN THE ENVIRONMENT AND LAND COURT AT NAIROBI

ELC SUIT NO. 251 OF 2018

FRANCIS AMULIOTO HOSEA SAKWA.....1ST PLAINTIFF

CHARLES TEMBA SAKWA.....2ND PLAINTIFF

PATRICK NDOLI SAKWA.....3RD PLAINTIFF

WARREN OMONGWO SAKWA.....4TH PLAINTIFF

(All suing as the legal representatives and administrators

of the estate of HOSEA SAKWA SILUNYA)

=VERSUS=

MUKTAR ABSHIR.....1ST DEFENDANT

HIBO GROUP LIMITED.....2ND DEFENDANT

DOMINIC OCHIENG aliasDOMO.....3RD DEFENDANT

SALIM AHMED aliasSALIM OBIERO (LALA).....4TH DEFENDANT

ZACHARIA alias ZACK AHMED BARE.....5TH DEFENDANT

CHIEF LAND REGISTRAR (NAIROBI).....6TH DEFENDANT

RULING

The plaintiffs are the legal representatives of the estate of Hosea Sakwa Silunya, deceased (hereinafter referred to only as “the deceased”). At all material times the deceased was the registered proprietor of all that parcel of land known as L.R No. 36/VII/157 (hereinafter referred to only as “the suit property”). The plaintiffs brought this suit seeking an order restraining the defendants from interfering with the suit property, the revocation and/or nullification of the title held by the 2nd defendant in respect of the suit property and general damages.

In their plaint dated 30th May, 2018, the plaintiffs averred that they had since their appointment as administrators of the estate of the deceased managed the suit property faithfully by paying land rates to the Nairobi City County and collecting rent from the tenants in occupation of the same. The plaintiffs averred that they had not sold, leased or charged the suit property to any of the defendants or any other third party. The plaintiffs averred that on 28th May, 2018, the defendants by themselves or through their agents invaded the suit property and destroyed buildings thereon and a fence that was erected around the property in an attempt to evict the occupants and forcefully take possession of the property. The plaintiffs averred that the defendants were trespassers on the suit property. The plaintiffs averred that unless restrained by the court the defendants would proceed to flatten the buildings erected on the suit property and proceed to take possession of the property to the detriment of the plaintiffs.

Together with the plaint, the plaintiffs brought an application by way of Notice of Motion dated 30th May, 2018 seeking the following main orders:

1. A temporary injunction restraining the defendants from trespassing on, erecting and/or constructing illegal structures on or alienating, demolishing, disposing of or otherwise interfering with the plaintiffs’ buildings, ownership, quiet and peaceful occupation

and enjoyment of the suit property pending the hearing and determination of this suit.

2. An order stopping any construction on the suit property pending the hearing and determination of this suit.
3. An order compelling the defendants to remove notices and demolish any illegal structures which they have erected on or around the suit property.
4. A declaration that the encroachment, fencing and construction of illegal structures on the suit property are illegal, null and void and that the plaintiffs are the lawful owners and occupants of the suit property.
5. An order summoning the 6th defendant to appear in court and explain the circumstances under which the title in respect of the suit property changed hands and an order for audit to be carried out on how the title of the suit property was acquired or obtained by the defendants.
6. An order revoking and/or nullifying any title deed issued if any to the defendants or any other person in respect of the suit property.
7. That the orders if granted be enforced by the O.C.S Shauri Moyo Police Station and Deputy County Commissioner, Starehe.

The application was supported by the affidavit of the 1st plaintiff, Francis Amulioto Hosea Sakwa in which he reiterated the contents of the plaint. He stated that since their appointment as the administrators of the estate of the deceased on 9th April, 2018, they had diligently carried out their mandate in respect of the suit property until 28th May, 2018 when the defendants encroached on the suit property and demolished the building and other structures standing thereon and claimed ownership of the same. He stated that neither the deceased nor the administrators of the estate of the deceased had sold the suit property to the defendants.

He stated that the said acts of trespass by defendants on the suit property had caused the estate of the deceased substantial loss and that the defendants had refused to produce documents of title if any which they held in respect of the suit property. He stated further that the defendants had demolished the remaining portion of the building that was standing on the suit property and had taken possession of the same and that it would serve the interest of justice if an order of injunction would issue restraining the defendants from interfering with the suit property. He stated that he had reported the incident at Shauri Moyo Police Station but the police were reluctant to assist without an order of the court. He stated that the estate of the deceased stood to suffer substantial loss if the application was not allowed.

He stated that an attempt had been made earlier in 2016 to take over the suit property with the assistance of hired goons which led to the filing of a suit namely, Milimani ELC No. 607 of 2016 which was still pending. He stated that in the said suit, the court gave an order on 6th October, 2017 restraining the defendants in the suit from interfering with the suit property. He stated that soon after that order was given, the court file went missing. He stated that it was the same group who attempted to take over the suit property in 2016 and who were restrained by the court on 6th October, 2016 in Milimani ELC No. 608 of 2016 who were using different people this time round for the same purpose.

The plaintiffs' application which was brought under certificate of urgency was placed before the Duty Judge on 31st May, 2018 who directed that the application be served for mention before this court on 18th June, 2018. The plaintiffs served the application upon the defendants as had been directed by the court. When the application came up for mention before this court on 18th June, 2018, the 1st and 2nd defendants appeared through an advocate while the 3rd to 6th defendants did not attend court.

At the request of the advocates for the 1st and 2nd defendants, the application was adjourned to 5th December, 2018 for hearing to give the 1st and 2nd defendants time to respond to the same. In the meantime, an order was made for the maintenance of status quo in relation to the suit property which prohibited further development on the suit property pending further orders by the court. The court made a further order that the O.C.S, Shauri Moyo Police Station does ensure compliance with the order.

The 1st and 2nd defendants filed a replying affidavit on 27th August, 2018 in response to the plaintiffs' application. The affidavit was sworn by the 1st defendant who described himself as a director of the 2nd defendant. The 1st defendant averred that the 2nd defendant purchased the suit property on or about October, 2017 and that as at that date, the suit property was undeveloped save for a perimeter wall. The 1st defendant averred that the 2nd defendant purchased the suit property through a law firm. He stated that the said law firm conducted due diligence and confirmed that the property was owned by one, Francis Nyaga. He stated that the said law firm confirmed further that the title held by the said Francis Nyaga was clean before the 2nd defendant entered into an agreement with him to purchase the suit property at KShs. 48,000,000/=. The 1st defendant averred that the said agreement was completed on 18th December, 2017 when the suit property was transferred to the 2nd defendant and the 2nd defendant put in possession thereof by the said Francis Nyaga.

The 1st defendant averred that the 2nd defendant had peaceful and quiet possession of the suit property until 14th February, 2018 when unknown people invaded the suit property and stated demolishing part of the perimeter wall around the property and carrying away blocks. The 1st defendant averred that the incident was reported to Shauri Moyo Police Station where they learnt that the invaders were agents of the plaintiffs. The 1st defendant averred that it was at the said Police Station that they learnt of the existence of ELC No. 607 of 2016 and the order that had been made therein. The 1st defendant averred that the plaintiffs should have registered the said order that was issued in ELC No. 607 of 2016 against the title of the suit property to put the public on notice of its existence and the defect in the title held by Francis Nyaga.

The 1st defendant averred that the 2nd defendant had since filed a suit against Francis Nyaga namely, Nairobi ELC No. 356 of 2018, Hibo

Group Ltd. v Francis Nyaga Njeru for fraudulent misrepresentation and material non-disclosure in the transaction relating to the sale of the suit property to the 2nd defendant. The 1st defendant averred that the 2nd defendant stood to suffer huge losses if the orders sought by the plaintiff were granted. The 1st defendant averred that the 2nd defendant was an innocent purchaser of the suit property for value without notice of the defect if any in the title that was held by Francis Nyaga and as such its title enjoyed the protection of the law. The 1st defendant urged the court to dismiss the plaintiffs' application as disclosing no cause of action against the 2nd defendant.

On 25th September, 2018, the 1st and 2nd defendants filed an application by way of Notice of Motion dated 21st September, 2018 seeking the setting aside or variation of the order of status quo that was made by the court on 18th June, 2018. The application was brought on the grounds that the said order was issued on the basis of false averments in the plaint and the affidavit of the 1st plaintiff. The 1st and 2nd defendants averred that the court was misled into granting the said order and that the plaintiffs failed to disclose to the court the fact that 1st and 2nd defendants had been in possession of the suit property since December, 2017. The 1st and 2nd defendants averred that they were suffering losses and damage as a result of the said order which prevented the 2nd defendant from developing the suit property. The 1st and 2nd defendants averred that they were willing to provide security as a condition for granting the order sought.

The 1st and 2nd defendants' application was opposed by the plaintiffs through a replying affidavit sworn by the 1st plaintiff on 12th November, 2018. The 1st plaintiff averred that the issues raised in the application should have been raised at the inter partes hearing of the plaintiffs' application dated 30th May, 2018. The 1st plaintiff denied that he misled the court in his affidavit sworn on 30th May, 2018. The 1st plaintiff reiterated that the 1st and 2nd defendants had invaded the suit property using hired goons and chased away the plaintiffs' security guards who were guarding the property and in the process ended up destroying the perimeter wall that remained standing after the first demolition exercise that was the subject of the earlier case.

The 1st plaintiff averred that after the injunction order that was issued in ELC No. 607 of 2016, the plaintiffs took possession of the suit property and remained in possession until 28th May, 2018 when the premises were invaded by the 1st and 2nd defendants. The 1st plaintiff averred that the title deed held by Francis Nyaga was tainted by fraud and that the 1st and 2nd defendants did not carry out sufficient due diligence before purchasing the suit property from Francis Nyaga who had been barred by the court from selling the property. The 1st plaintiff averred that the 1st and 2nd defendants' remedy was against Francis Nyaga.

On 5th December, 2018 the court ordered that the plaintiffs' and the 1st and 2nd defendants' applications be heard together by way of written submissions. The plaintiffs file their submissions on 21st February, 2019 while the 1st and 2nd defendants' filed their submissions on 5th April, 2019.

Determination:

I have considered the two (2) applications before me one, by the plaintiffs and the other by 1st and 2nd defendants. In my view, the 1st and 2nd defendants' application was a response to the plaintiffs' application. Whereas the plaintiffs sought a temporary injunction and other orders restraining the defendants from interfering with the suit property, the 1st and 2nd defendants sought as against the plaintiffs, the discharge and setting aside of the temporary order for maintenance of status quo which barred them from continuing with development on the suit property pending the hearing of the plaintiffs' application.

I have set out at the beginning of this ruling the orders sought by the plaintiffs' in their application. In summary, the plaintiffs have sought, a temporary injunction to restrain the defendants from having any dealing of whatsoever nature with the suit property, a mandatory injunction compelling the defendants to remove the notices they had placed on the suit property and demolish any structures they had erected on the property, a declaration that the defendants' acts of trespass on the suit property were illegal, a declaration that the plaintiffs are the lawful owners and occupants of the suit property, an order summoning the Chief Land Registrar to appear in court and explain the circumstances under which the suit property changed hands and an order directing the Chief Land Registrar to revoke the title held by the defendants in respect of the suit property.

With regard to the prayers for temporary prohibitory and mandatory injunctions, the principles are settled. For a temporary prohibitory injunction, the applicant has to establish a prima facie case with a probability of success and must also demonstrate that he stands to suffer irreparable harm if the order is not granted. See, *Giella v Cassman Brown & Company Ltd.* [1973] E.A 358. For an order of a temporary mandatory injunction to issue, the applicant must establish a very strong case and the order will only be given in exceptional circumstances.

It is not disputed that the 2nd defendant acquired the suit property from Francis Nyaga Njeru. It is also not disputed that as at 1st December, 2017 when Francis Nyaga Njeru entered into an agreement to sell the suit property to the 2nd defendant, there was a court order in force issued by this court in ELC No. 607 of 2016 restraining Francis Nyaga Njeru from selling the suit property. The order that was made on 6th October, 2016 provided in part as follows: -

“That a temporary injunction is issued restraining the defendant/respondents together with their agents, servants and/or employees from alienating, trespassing on, wasting, damaging, developing and/or in any other manner dealing adversely with the land parcel known as L.R No. 36/VII/157 situated at Eastleigh within Nairobi City County pending the hearing of the substantive suit.”

Francis Nyaga Njeru was the 2nd defendant in ELC No. 607 of 2016 and was represented in that case by an advocate. He was amongst the persons who were restrained by the court from selling the suit property. Francis Nyaga Njeru's act of selling the suit property to the 2nd defendant while there was in force an order from this court prohibiting such sale was an act of contempt of court. In ELC No. 607 of 2016, the court was satisfied that the suit property was and had at all material times been registered in the name of Hosea Sakwa Silunya (the

deceased) and that, Francis Nyaga Njeru and his co-defendant in that suit had not demonstrated their interest in the suit property. In the case of Clarke and others v Chadburn & others [1985] 1 ALL ER (PC) 211 it was held that:

“An act done in willful disobedience of an injunction or court order is not only a contempt of court but also an illegal and invalid act which could not therefore effect any change in the rights and liabilities of others.”

It follows therefore that if the agreement for sale between the 2nd defendant and Francis Nyaga Njeru was entered into in violation of an order of injunction, it was illegal, null and void. Can the court enforce an illegal contract? Authorities are abounding. It is a principle of public policy that no court shall lend its aid to a man who founds his cause of action upon an immoral or an illegal act. In the case of Scott v Brown, Doering, Mc Nab & Co. Ltd. (3) (1892) 2 QB 724 at 728 the court stated that:

“No court ought to enforce an illegal contract or allow itself to be made an instrument of enforcing obligations alleged to arise out of a contract or transactions which is illegal if the illegality is duly brought to the notice of court...”

With the uncontroverted evidence that the suit property was sold to the 2nd defendant by Francis Nyaga Njeru in defiance of an express order of the court, I am satisfied that the plaintiffs have established prima facie case with a probability of success against the defendants. In ELC No. 607 of 2016 in which the order barring Francis Nyaga Njeru from selling the suit property was made, the court had made a finding that the plaintiff in that case had established on a prima facie basis that the suit property belonged to the deceased. There is no new material placed before this court that can persuade me to depart from that finding in ELC No. 607 of 2016 that was not appealed by Francis Nyaga Njeru.

The 1st and 2nd defendants put forward a very strong case that the 2nd defendant was an innocent purchaser of the suit property for value without notice. That may be so. However, if the court finds at the trial that Francis Nyaga Njeru held a fraudulent and illegal title over the suit property, the 2nd defendant's title would have to give way to that of the deceased whose estate also claims to hold a legal title over the suit property. In the case of Alberta Mae Gacie v Attorney General & 4 Others (2006) eKLR the court stated that:

“Cursed should be the day when any crook in the streets of Nairobi or any town in this jurisdiction using forgery, deceit or any kind of fraud, would acquire a legal and valid title deceitfully snatched from a legal registered innocent proprietor. Indeed, cursed would be the day when such crook would have the legal capability or competence to pass to a third party, innocent or otherwise, a land interest that he does not have even if it were for valuable consideration.”

See, also the decision of the Court of Appeal in Arthi Highway Developers Ltd. v West End Butchery Ltd. & 6 Others, Civil Appeal No. 246 of 2013, [2015] eKLR where the court held that the doctrine of bona fide purchaser for value without notice cannot enable a purchaser to take land free from legal rights. It follows therefore that even if the 2nd defendant establishes at the trial that it was a bona fide purchaser of the suit property for value, its title would be subject to that of the deceased if the plaintiffs establish that the deceased still held a legal title over the suit property and that what Francis Nyaga Njeru held was a fraudulent title.

I am also persuaded that the plaintiffs would suffer irreparable harm which cannot be compensated by an award of damages. The plaintiffs have therefore satisfied the conditions for granting an order of a temporary injunction. As I mentioned at the begging of this ruling, the plaintiffs had sought other prayers in addition to the temporary injunction. I am of the view that most of those prayers cannot be granted at an interlocutory stage of the proceedings. The court cannot at this stage make declaratory orders on rights of the parties or summon witnesses to give evidence. The prayers for police assistance can be granted. However, the court is reluctant to involve the police in civil cases unless it is very necessary. There is no evidence that the orders sought herein if granted would be disobeyed by the defendants. A case has therefore not been made out for police assistance in the enforcement of any order that would be given herein.

The disposal of the plaintiffs' application takes me to the 1st and 2nd defendants' application dated 21st September, 2018. As I have mentioned earlier, this application was a response to the plaintiffs' application. It was seeking the setting aside and/or discharge of the interim order that was made by the court on 18th June, 2018. The application as I have mentioned earlier, was brought on the grounds that the said interim order was made by the court as a result of misrepresentation and non-disclosure of material facts by the plaintiffs.

I have perused the authorities that were cited by the 1st and 2nd defendants in support of this application. It is my finding that the same are distinguishable. The order sought to be set aside by the 1st and 2nd defendants was not made ex-parte. The order was made in the presence of both parties and the court was not swayed one way or the other by the plaintiffs' alleged misrepresentation or non-disclosure of material facts into granting the same. It is also not correct that the court granted an injunction to the plaintiffs. The order was for the maintenance of status quo pending the hearing of the present application. The order was to lapse after the determination of the plaintiffs' application the subject of this ruling. It is not correct therefore to say that the plaintiffs came to court ex-parte and misled the court or withheld material facts to the court so as to obtain an ex-parte injunction. The court having heard the plaintiffs' application inter-partes, the order of 18th June, 2018 would be spent upon the court rendering its ruling on the plaintiffs' application. The court having made a finding that the plaintiffs have satisfied the conditions for granting a temporary injunction, the orders sought in the 1st and 2nd defendants' application are not for granting.

The upshot of the foregoing is that the plaintiffs' application dated 30th May, 2018 succeeds in part while the 1st and 2nd defendants' application dated 21st September, 2018 fails wholly. The plaintiffs' application is allowed in terms of prayer 2 thereof pending the hearing and determination of the suit save for the limb thereof seeking police assistance. The 1st and 2nd defendants' application dated 21st September, 2018 is dismissed. The costs of the two applications shall be in the cause.

Delivered and Dated at Nairobi this 21st day of November 2019

S. OKONG'O

JUDGE

Ruling delivered in open court in the presence of:

Ms. Nyang for the Plaintiffs

Ms. Asli for the 1st and 2nd Defendants

C. Nyokabi-Court Assistant