



**REPUBLIC OF KENYA**

**IN THE ENVIRONMENT AND LAND COURT**

**AT MOMBASA**

**ELC. NO. 186 OF 2018**

**1. SAID BIN SEIF PROPERTIES (2016) LIMITED**

**2. SHARIFA AHMED BUSAIDY.....PLAINTIFFS**

**VERSUS**

**ABDI GEDI AMIN.....DEFENDANT**

**RULING**

1. By a Notice of Motion dated 16<sup>th</sup> August, 2018 and brought under Article 40 of the constitution, Section 1A, 1B and 3A of the Civil procedure Act and Order 40 Rule 1(a), 2, 4(1) of the Civil Procedure Rules, the Plaintiffs/Applicants seek the following orders:

**1. Spent**

**2. Spent**

**3. Spent**

**4. That pending the hearing of the suit herein and injunction be issued against the defendant restraining the defendant either by himself, servant or agent otherwise howsoever from occupying, letting out or in any way interfere with structure he has caused to be erected on the suit property known as PLOT NO.MOMBASA/BLOCK XLV/246.**

2. The application is premised on the grounds on the face of the motion and supported by the affidavit sworn by Saif Said Saif Al-Busaidy on 16<sup>th</sup> August 2018 together with the annexures thereto. The Applicants' case is that they are the registered owners of the suit property on which the Respondent was a tenant and an owner of a house without land which he purchased from the previous owner in or about July 2009. That upon purchase of the said house without land, the respondent continued paying ground rent of kshs.1,000.00. The applicants aver that in or about August 2016 they wrote to the respondent to purchase the suit plot and informing him that ground rent had been increased to Kshs.37,500.00 with effect from 1<sup>st</sup> October, 2016 if the respondent opted to continue being a tenant on the empty space. That the respondent demolished the house without land and is hurriedly putting up shops on the affected grounds without the applicants' knowledge or consent prompting the applicants to file this application and suit.

3. In opposing the application, the respondent filed a replying affidavit sworn on 24<sup>th</sup> September 2018. The respondent avers that he was not consulted when the rent was increased from Kshs.1,000.00 to Kshs.37,500.00 per month and therefore declined to pay the new rent. He states that he has been consulting and negotiating with the applicants over the same and indeed over the value of the property. The respondent admits demolishing the building on the suit property though he states that part of the house was damaged by heavy rains and he had to renovate it and put a boundary wall. The respondent denies that he intends to put up a storey building on the suit property.

4. The application was canvassed by way of written submissions which were duly filed by the advocates for both parties. I have considered the application, the affidavits in support and against as well as the rival submissions and the authorities cited. The applicants' application seeks temporary injunction restraining the defendant and or his servants from any further development on the suit property known as PLOT NO. MOMBASA/BLOCK XLV/246 pending the hearing and determination of this suit. The principles for grant of temporary injunction are well settled. In the celebrated case of **Giella -v- Cassman Brown Co. Ltd (1973) EA 358** it was held that the applicant must show a prima facie case with a probability of success; secondly an interlocutory injunction will not normally be granted unless the applicant might otherwise suffer irreparable damage that cannot be compensated by an award of damages; and thirdly, if the court is in doubt, it will decide the application on the balance of convenience.

5. The applicants have placed before the court a certificate of title in respect of the suit property, facts which have been conceded by the

respondent. The respondent's interest was on the house without land which the respondent has admitted he has demolished. In my view, the respondent cannot purport to carry out new constructions on the suit property including putting up a boundary wall, without the consent of the applicants. The respondent states that he is ready and willing to purchase the suit property at a reasonable amount, not exaggerated and/or exorbitant amount and admits that negotiations are still on going and no agreement has been reached between the parties. In my view, the respondent can only restrict his actions to the house without land which he acquired but not to carry out any new and further developments which may alter the status of the suit property unless and until permitted by the applicants.

6. From the evidence on record, I find that the applicants have established a prima facie case with a probability of success against the respondent. Secondly, the applicants have shown that they stand to suffer irreparable injury not compensable in damages as the defendant's actions may greatly alter the status of the property. The balance of convenience, if I had doubt in the matter, would tilt in favour of the applicants to safeguard the current status of the subject matter of the suit pending hearing and determination.

7. Arising from all the above, I find merit in the application. Accordingly, I grant the order for temporary injunction against the respondent restraining him from any further development and or constructions on the suit property pending hearing and determination of the suit. The defendant is already in occupation pursuant to the interest of the house without land which he purchased from the previous owner subject to payment of ground rent. Granting an order restraining him from occupying the suit property will amount to a mandatory injunction or eviction which can only be determined at the main trial. Therefore the issue of occupation will have to await the outcome or earlier determination of the suit.

Costs of the application shall in in the cause. It is ordered.

**DATED, SIGNED and DELIVERED at MOMBASA this 13<sup>th</sup> day of November, 2019.**

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**C.K. YANO**

**JUDGE**

**IN THE PRESENCE OF:**

Ms. Nabwana holding brief for Plaintiff

Ms. Kimuli holding brief for Omwenga for Defendant/respondent

Yumna Court Assistant

**C.K. YANO**

**JUDGE**