



REPUBLIC OF KENYA
IN THE ENVIRONMENT AND LAND COURT AT THIKA
THIKA LAW COURTS
ELC.NO.134 OF 2017

DAVID NGUGI KAMAU..... 1ST PLAINTIFF/APPLICANT

JANE WAMAITHA KINYUA..... 2ND PLAINTIFF/APPLICANT

-VERSUS-

CHARITY NJERI MURIMI.....1ST DEFENDANT/RESPONDENT

THOMAS NICHOLAS NDUNGU MURIMI...2ND DEFENDANT/RESPONDENT

ROSE WANJIRU MURIMI.....3RD DEFENDANT/RESPONDENT

JOHN MACHARIA MURIMI.....4TH DEFENDANT/RESPONDENT

ANTONY MACHARIA MURIMI..... 5TH DEFENDANT/RESPONDENT

AND

ALICE WAMBUA MURIMI..... 1ST INTERESTED PARTY

CHARLES NJUGUNA MURIMI..... 2ND INTERESTED PARTY

RULING

The matter for determination is the Plaintiffs/Applicants' *Notice of Motion* application dated *9th February 2017*, which has sought for the following orders:-

1) *Spent.*

2) *Spent.*

3) *That a temporary injunction be issued restraining the Defendants either acting by themselves or through their agents, servants or any other persons acting for/or on their behalf from transferring, selling, charging, alienating or otherwise howsoever dealing with the property registered as Thika Municipality Block II/247 and to further stop any interference with tenants in occupation thereof pending the hearing and determination of the suit.*

4) That costs of this application be provided.

The application is premised on the grounds stated on the face of the application and on the **Supporting affidavit** of **David Ngugi Kamau**. These grounds are:-

- a) The Plaintiffs as man and wife are the joint owners of the property registered as Thika Municipality Block II/247, which they purchased from the 1st Defendant on 14th February 2014.**
- b) The Plaintiffs were put in possession of the said property on 14th February 2014 after execution of the sale agreement and also took over the tenancies that existed with effect from 1st March 2014.**
- c) Currently the suit property is occupied by nine tenants who pay rent to the Plaintiffs.**
- d) The Plaintiffs have substantially developed the suit premises since purchasing it from the 1st Defendant in order to add value and retain tenants.**
- e) The 1st Defendant in collusion with the other Defendants have failed, neglected or refused to transfer the said property to the Plaintiffs and lately from the month of January 2017 the Defendants have been trespassing into the said properties, taking photographs and interfering with the tenants in occupation without the consent or permission of the Plaintiffs.**
- f) The Plaintiffs are apprehensive that the Defendants are hatching a plan of repossessing the said property by use of force and/or are planning with the tenants in occupation in a manner likely to cause a breach of peace.**
- g) The Plaintiffs stand to suffer irreparable loss and damage unless a temporary injunctive order is made to restrain the Defendants from carrying out the threatened actions and/or to maintain the status quo prevailing pending the hearing and determination of the suit.**
- h) This application is made in the interest of justice.**

In his Supporting Affidavit, the 1st Plaintiff reiterated the contents of the grounds in support of the application and further averred that as purchasers, they have paid **Kshs.1,590,000/=** to the 1st Defendant as part of the agreed purchase price leaving a small balance of **Kshs.230,000/=** which they are ready and willing to pay upon transfer of the property to them.

It was his contention that at the time of purchase of the suit property, the 1st Defendant disclosed to them that the property was registered in the name of her late husband, **Peter Murimi Kagwura** and further that there was an on-going Succession Cause in which she was a co-administrator with two other persons (1st and 2nd Interested Parties). That the 1st Defendant assured them that the property would be vested and transferred to her by the administrators after the Succession case was finalized. Further that the 1st Defendant promised to transfer the suit property to the Plaintiffs once the Succession Cause was determined. He contended that as a demonstration of her commitment, she agreed to surrender possession of the plot to them upon the signing of the agreement. That she also surrendered the original certificate of lease.

The deponent further contended that after taking over possession, the 1st Defendant handed over the tenants on the suit property to them with effect from **1st March 2014**. It was his allegation that they have been collecting rent since then and have entered into tenancy agreements with nine tenants who occupy the property. He also contended that they embarked on the process of renovating the suit premises to the tune of **Kshs.189,980/=**. They have also been paying income tax for rental income that they earn from the property. However, after the Succession Cause, he realized that the suit property was transferred to the 1st Defendant on her own behalf and on behalf of her house. She could therefore not transfer the same to the

Plaintiffs as she is holding the same in trust for her family. Further that the Applicants advised the 1st Defendant to seek for rectification of the grant but she adamantly refused.

It was also contended that the Applicants have been informed by their caretaker that the 1st Defendant has been going to the suit property in company of her children and have been taking photographs of the property. It was his further contention that it is mischievous, unfair, inequitable and in bad faith for the 1st Defendant in collusion with her children being 2nd and 4th Defendants to claim back ownership of the suit property after over three years of their possession and after the Applicants have substantially developed the same at great expense. It was his contention that the 1st Defendant and her family would not suffer any prejudice if orders sought are granted since they had already surrendered possession of the property to the Applicants since **14th February 2014**. He urged the Court to grant the orders sought as it is only fair and just to do so and maintain status quo pending the hearing and determination of the suit.

The application is vehemently opposed by the Defendants and the two Interested Parties.

John Mburu Murimi, the 4th Defendant swore a **Replying Affidavit** on **28th March 2017**, on his behalf and on behalf of the Co-defendants in opposition to the instant **Notice of Motion**. He averred that the 2nd to 5th Defendants are beneficiaries of the estate of **Peter D. Murimi** (deceased) entitled to the land parcel **No.Thika Municipality/Block II/247**, a fact which was well known to the Plaintiffs. However, that the said beneficiaries were not parties to the agreement for sale and even not aware of the sale transaction and in any event, the property was registered in the name of the deceased person. Therefore the whole sale and transaction was fraudulent, null and void. He also contended that it was not the intention of 2nd-5th Defendants to sell the subject property inherited from their deceased father. That upon realizing that the property was sold fraudulently to the Plaintiffs, they have tried to make restitution but the Plaintiffs have been uncooperative. He therefore urged the Court to dismiss the Plaintiffs application.

The interested parties filed their opposition through **Charles Njuguna Murimi**, the 2nd Interested Party who swore his **Replying Affidavit** on **6th March 2017**, and averred that the interested parties are indeed co-administrators together with 1st Defendant to the estate of **Peter Murimi Kagwura *alias* Peter D. Murimi** in **Succession Cause No.1399 of 2009**. Further that the Applicants entered into the sale agreement on **14th February 2014**, knowing that the suit property was registered in the name of **Peter D. Murimi**, and that the estate was undergoing Succession. That being co-administrators, they were not aware of the transaction herein and they would call it a fraudulent sale.

He also averred that after learning of the fraudulent sale, he advised his advocate to lodge a restriction on the suit property and the same was done and a restriction was placed on the suit property to the effect that there should be **no** dealing until the **Succession Cause No.1399 of 2009** was determined. That the property was never transferred to the Applicants as it is still in the name of **Peter D, Murimi** (deceased).

He contended that though the Applicants knew that the Interested Parties were administrators of the estate, they did not seek to have audience with them. Therefore the Plaintiffs should not have taken possession of property of deceased person before the Succession Cause was over. He urged the Court to dismiss the Plaintiffs instant application.

David Ngugi Kamau filed a **Supplementary Affidavit** and reiterated most of the contents of his supporting affidavit and further averred that the Applicants consider themselves as joint owners as purchasers who have been in possession and use of the property even despite the pending transfer of the property to their names. He further averred that the suit property was sold to them by the 1st Defendant for the benefit of herself and also the benefit of the 2nd, 3rd, 4th and 5th Defendants as part of the proceeds of sale was used by the 1st Defendant to develop another property allocated to her at **Thome Estate**. He urged the Court to allow their application.

The application was canvassed by way of written submissions. The Plaintiffs through **Mwangi**

Wambugu & Co. Advocates filed their written submissions on **6th June 2017**, and urged the Court to allow their application since they are in possession of the suit property and have also paid substantial consideration. They relied on the case of **Jan Bolden Nielsen...Vs...Herman Philip Sley (2012) eKLR**, where the Court quoted the findings of **Justice Hoffman** in the English Case of **Films Rover Internationale (1986) 3ALL ER 772**, who stated as follows:-

“ A fundamental principle ofthat the court should take whichever course appears o carry the lower risk of injustices if it should turn out to have been wrong....”

The Interested Parties also filed their written submissions through **Njenga Mbugua & Nyanjua Advocates** on **12th July 2017**, and urged the Court to dismiss the instant application. They submitted that it is trite that a beneficial owner is not a legal owner as the legal owner is the person whose name appears on the title document and is the one entitled to deal with the said property in any manner. Therefore the 1st Defendant as a beneficial owner was only entitled to use the land but not dispose or alienate the same. He relied on various decided cases among them the case of **Njenga...Vs...**

Njenga (1991) KLR 40, where the Court held that:-

“An injunction being a discretionary remedy, is granted on the basis of evidence and sound legal principles”.

The Defendants filed their written submissions on **10th October 2017** through the **Law Firm of Macharia & Co. Advocates**, and submitted that the Plaintiffs application is unmerited and should be dismissed entirely. They relied on various provisions of the **Law of Succession Act Cap 160** Laws of Kenya and various decided cases. The Defendants relied on the case of **Esther Macatha.....Vs....Timothy Gitura (2015) eKLR**, where the Court stated that:-

“The administrators exceeded their statutory powers as administrators in their sale of the plots before the conclusion of the succession cause”.

This Court has now carefully considered the instant **Notice of Motion** application and the pleadings in general. The Court has also carefully read and considered the written submissions, the cited authorities and the relevant provisions of law and makes the following findings:-

There is no doubt that the suit property herein **Thika Municipality Block II/247** is in the name of **Peter D. Murimi** (deceased) which was a subject of **Succession Cause No.1399 of 2009**. There is also no doubt that this suit property was sold to the Plaintiffs by **Charity Njeri Murimi**, the 1st Defendant for a consideration of **Kshs.1,800,000/=** vide a sale agreement dated **14th February 2014**. There is also no doubt that after the payment of the initial deposit towards the purchase of the suit property, the Plaintiffs/Applicants were granted possession of the suit property by the 1st Defendant. The Plaintiffs/Applicants are therefore in possession of the suit property and have even rented out the premises on the suit property to different tenants as is evident from the various Tenancy Agreements attached to the affidavit in support of the application.

There is also no doubt that Certificate of Confirmation of Grant over the estate of **Peter D. Murimi Kagwura** (deceased) was issued on **11th October 2016** and this property **Thika Municipality Block II/247**, was issued to **Charity Njeri Murimi** to hold it on her behalf and in trust for her house. Therefore the 1st Defendant is not the **absolute owner** of the suit property but is holding the same in trust for her family.

The Plaintiffs have alleged that the 1st Defendant sold the suit property to them during the pendency of **Succession Cause No.1399 of 2009** with an assurance that she would transfer the same to them after the succession cause. However, the 1st Defendant is now holding the same in trust for the family and has refused to transfer the same to the Plaintiffs. There is no doubt that the suit property though in possession

of the Plaintiffs is not yet transferred to their names and thus this suit.

The Plaintiffs have come to Court seeking for injunctive orders which are equitable reliefs granted at the discretion of the court. However the Court must exercise that discretion judicially. See the case of **David Kamau Gakuru..Vs...National Industrial Credit Bank Limited, Civil Appeal No.84 of 2001** where the Court held that:-

“It is trite that the granting of interim injunction is an exercise of judicial discretion and an Appellate Court will not interfere unless it is shown that the discretion has not been exercised judicially”.

Further, the Court will also take into account that at this juncture, the Court will not delve into substantive issues raised by the parties and give concluded views of the dispute in issue. See the case of **Agip (K) Ltd...Vs...Maheshchandra Himatlal Vora & Others, Civil Appeal No.213 of 1999**, where the Court held that:-

“In an application for injunction, the Court should not delve into substantive issues and make finally concluded views of the dispute before hearing oral evidence”.

All that the court is required to do is to determine whether the Applicants are deserving of the orders of injunction bases on the usual criteria. See the case of **Edwin Kamau Muriu...Vs...Barclays Bank of Kenya Ltd Nairobi HCCC No. 1118 of 2002**, where the court held that:

“In an Interlocutory application, the Court is not required to determine the very issues which will be canvassed at the trial with finality. All the Court is entitled at that stage is whether the Applicant is entitled to an Injunction sought based on the usual criteria---“

The usual criteria to be considered is the one laid down in the case of **Giella**

...Vs....Cassman Brown & Company Ltd 1973 E.A 358. These criterias are:-

- a) ***The Applicant must establish that he has a prima facie case with probability of success.***
- b) ***That the Applicant will suffer irreparable loss which cannot be adequately compensated in any way or by an award of damages.***
- c) ***When the Court is in doubt, to decide the case on a balance of convenience.***

Therefore this Court will consider the available evidence and juxtapose it with the relevant provisions of law and the cited authorities and determine whether the Applicants are deserving of the orders sought.

First, the Applicants must establish that they have a *prima-facie* case with probability of success at the trial. In the case of **Mr Rao Ltd....Vs...First American Bank Ltd & 2 others (2003) eKLR 125** *prima-facie* case was described as:-:

“so what is a prima facie case----- In civil cases it is a case which on the material presented to the Court or a tribunal properly directing itself will conclude that there exist a right which has apparently been infringed by the opposite party as to call for a explanation on rebuttal from the latter”

From the above description of *prima-facie* case, it is clear that it means more than an arguable case. The available evidence must point to an infringement of a right and probability of success at the trial.

So have the Applicants established that they have a *prima-facie* case herein with probability of success?

As the Court pointed earlier, it is evident that the 1st Defendant sold the suit property to the Plaintiffs

herein vide a sale agreement dated **14th February 2014**. The Plaintiffs have alleged that out of that sale agreement, they took possession of the suit property, renovated the same and even rented out the premises thereon to different tenants. Indeed Tenancy Agreements were attached. The Defendants have alleged that the said sale was fraudulent as it was sold by one of the beneficiaries, **Charity Njeri Murimi**, without the blessings or knowledge of the other administrators of the estate or beneficiaries. However, the Plaintiffs have alleged that all the administrators were aware of the transaction and even their subsequent taking of possession of the suit property. The issue of whether the sale of the suit property to the Plaintiffs/Applicants herein was done fraudulently or in a cradestine manner is a matter to be determined at the main trial after calling evidence. It is not a matter to be decided through affidavits evidence and without the benefit of evidence from the witnesses.

However, what is clear is that the Plaintiffs took possession of the suit property after execution of the sale agreement. They have alleged that the 1st Defendant and her family have severally visited the suit property and have taken several photographs. They are apprehensive that the Defendants might dispose off the suit property to other persons now that 1st Defendant has failed to transfer the same to the Plaintiffs and is holding the same in trust for the family. It is trite that the purpose of injunction is to

preserve the *status quo*. See the case of **Noormohammed Janmohammed...Vs...Kassam Ali Virji Madham (1953) 20 LRK 8**, where the Court held that:-

“The purpose of temporary injunction is to preserve the status quo.”

As the Court has pointed out, the Plaintiffs are in possession. The 1st Defendant was supposed to transfer the suit property to the Plaintiffs after the Succession Cause. She has not done so and the Plaintiffs are apprehensive that the Defendants might sell or alienate the suit property to 3rd parties before the suit is heard and determined on merit. For the above reasons, the Court finds that the Plaintiffs have established that they have a prima-facie case with probability of success at the trial.

On the 2nd limb, the Applicants must establish that they will suffer irreparable loss which might not be adequately compensated by an award of damages.

There is no doubt that the Plaintiffs are in possession and they have further alleged that they renovated the suit property using substantial amount of money. If the suit property is transferred to 3rd parties, they stand to lose the property and their loss of expectation of owning the property cannot be quantified and compensated by way of damages. But it is clear that by the time the Plaintiffs entered into the sale agreement with 1st Defendant, they had legitimate expectation of owning the suit property. This Court finds that no amount of money would compensate that thwarted expectation. See the case of **Joseph Siro Mosioma...Vs...Housing Finance Corporation of Kenya & 3 Others, Nairobi HCCC No.265 of 2007 (4R)**, where the Court held that:-

“On my part let me restate that damages is not automatic remedy when deciding whether to grant an injunction or not. Damages is not and cannot be substituted for the loss which is occasioned by a clear breach of the law. In any case, the financial strength of a party is not always a factor to refuse an injunction more so a party cannot be condemned to take damages in lieu of his crystallized right which can be protected by an order of injunction”.

The Court finds that damages herein are not sufficient remedy.

On the 3rd limb of when the court is in doubt to decide on a balance of convenience, the Court finds that the balance of convenience herein tilts in favour of maintaining the *status quo*. The status quo that is to be maintained is the one pertaining now that is the Plaintiffs are in possession. See the case of **Agnes Adhiambo Ojwang...Vs...Wycliffe Odhiambo Ojijo, Kisumu HCCC No.205 o 2000**, where the Court held that:-

“the purpose of injunction is to preserve the status quo and the status quo to be preserved is the

one that existed before the wrongful act”.

Further, the Defendants have not been in possession from 2014 but the Plaintiffs have been in possession. As the Court awaits the determination of whether the said sale was fraudulent or not, the Court finds that the lower risk of injustice herein is in allowing the Plaintiffs to remain in possession, use and control of the suit property until the suit is

heard and determined. See the case of ***Films Rover Internationale (supra)***,

“ A fundamental principle ofthat the court should take whichever course appears o carry the lower risk of injustices if it should turn out to have been wrong....”

Having now carefully considered the instant ***Notice of Motion*** dated ***9th February 2017***, the Court finds it merited and it is allowed entirely in terms of prayer no.3 with costs being in the cause.

Further, the parties to expeditiously prepare the suit for hearing. The Plaintiffs/Applicants to extract the Summons within the next 7 days from the date of this Ruling and serve upon the Defendants and/or Interested Parties so that they can file their Defences and/or Counter-claims and thereafter comply with Order 11 and set the suit down for hearing.

It is so ordered.

Dated, Signed and Delivered at Thika this 9th day of February 2018.

L. GACHERU

JUDGE

In the presence of

Mr. Nyamweya holding brief for Mr. Gachimu for Plaintiffs/Applicants

Mr. Machaira for Defendants/Respondents

No appearance for Interested Parties/Respondents

Lucy - Court clerk.

Court – Ruling read in open court in the presence of the above stated advocates.

L. GACHERU

JUDGE

9/2/2018