



REPUBLIC OF KENYA

IN THE ENVIRONMENT AND LAND COURT AT NAIROBI

ELC CASE NO. 1206 OF 2016

GRACE NJERI SAMUEL.....PLAINTIFF

VERSUS

SUSAN WAMBUI WANJIRU.....1ST DEFENDANT

SIMON GACHOYA WANJIRU.....2ND DEFENDANT

RULING

1. On 4/10/2016, the plaintiff brought this suit seeking to evict the defendants from a piece of land designated as **Phase I Plot Number E 1201A Dandora (the suit property)**. She contends that she is the “registered owner” of the suit property and she has developed rental houses thereon. She further contends that the defendants have “illegally” and “fraudulently” encroached on the suit property and are collecting rent from tenants on the suit property.

2. Subsequent to the filing of the suit, the plaintiff brought a Notice of Motion dated 13/3/2017 seeking interim injunctive orders restraining the defendants against collecting rental income from the suit property. She further sought an interim order requiring the defendants to deposit in court all collected rent pending the hearing and determination of this suit. The defendants have opposed the application. That application is the subject of this ruling.

3. Attached to the application is a supporting affidavit sworn by the applicant on 13/3/2017 in which she deposes that she owns the suit property on which she has erected rental houses. She deposes that she is 80 years old and she resides in Limuru. She deposes that she entrusted the management of the suit property to her late sister, Mary Wanjiru Gachoya, who owned a property in the same neighbourhood, Plot No. A59. She contends that since the demise of her late sister, the defendants who are strangers have assumed control of the suit property and have been collecting rent that is due to her. She states that the defendants contend to be children of the deceased yet her late sister was childless to the best of her knowledge. Attached to the supporting affidavit is a Plot Land Ownership Certificate from City Council of Nairobi and various receipts from the Housing Department of the now defunct Nairobi City Council. She has also annexed photographs of the permanent structures erected on the suit property.

4. In response to the application, the defendants filed a replying affidavit sworn on 19/4/2017 by the 1st defendant. Their case is that the plaintiff is trying to remove them from the suit property where their late mother, Mary Wanjiru Gachoya, lived and where they have lived all their lives. They further contend that the suit property is the subject of **Milimani CMCC NO. 8070 of 2013** between their deceased mother and the plaintiff. They add that the permanent structures on the suit property were erected by their deceased mother. They further depone that they have initiated succession proceedings with a view to taking over **Milimani CMCC 8070 of 2013**. They accuse the plaintiff of non-disclosure of the fact that **Milimani CMCC 8070 of 2013** exists.

5. I have considered the Notice of Motion dated 13/3/2017 together with the rival affidavits and submissions by the parties. I have also considered the guiding principles upon which jurisdiction to grant interim injunctive orders is exercised.

6. Without saying much, an injunctive order would issue upon the applicant satisfying the court that she has a prima facie case with a probability of success and she stands to suffer irreparable injury that cannot be compensated through an award of damages if the injunctive order is not granted. If the court is in doubt, the application is to be determined on a balance of convenience. See **GIELLA v CASSMAN BROWN (1973) EA 358**.

7. The suit property is unsurveyed and untitled. The plaintiff has presented documents from the defunct City Council of Nairobi showing that she is the beneficial owner of the suit property. She contends that her late sister, Mary Wanjiru Gachoya, owned a different property, Plot No. A59 in the same neighbourhood and was engaged by her to take care of the suit property on her behalf. She also contends that she developed the property.

8. The defendants have not presented any document to demonstrate that indeed the deceased owned the suit property as contended by them. Similarly, they have not presented any evidence to demonstrate that they are personal representatives of the late Mary Wanjiru Gachoya.

I would not say more at this point because doing so may expose the parties to prejudice at the substantive hearing. It suffices to note that the applicant has demonstrated that she is the *bona fide* documented owner of the suit property within the records at the Nairobi City County Government and she has an interest in the property which deserves to be protected. Whether or not that interest is held in trust for some other beneficiary is an issue to be determined conclusively at the substantive hearing of this suit.

9. The subject matter of this suit is real property. In my view, it is unlikely that damages would be an adequate remedy to a property owner who is dispossessed of property that is in her name, more so when those dispossessing her do not have evidence of any direct claim of title to the property or any evidence of *locus standi* to claim on behalf of some other person .

10. In light of the above reasons, the court is satisfied that the applicant has met the criteria for grant of interim injunctive orders. I will therefore issue the following two orders.

i. Pending the hearing and determination of this suit, the defendants are hereby restrained against collecting rent or otherwise interfering with the tenants in the plaintiff's houses located on Phase 1 Plot No. E1201A Dandora, Nairobi.

ii. The defendants shall within 30 days deposit in court all rental income collected by them todate together with accurate statements of accounts showing the month, name of tenants and amount paid by each tenant.

11. Lastly, I note that the chief magistrate court at Milimani has pecuniary jurisdiction over this dispute. Consequently, this suit shall be transferred to the Chief Magistrate Court at Milimani and shall, upon transfer, stand consolidated with Nairobi CMCC 8070 of 2013, if the latter suit still subsists.

DATED, SIGNED AND DELIVERED AT NAIROBI ON THIS 18TH DAY OF MAY 2018.

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B M EBOSO

JUDGE

In the presence of:-

Mr Mogikoyo holding brief for Mr Kanyi Advocate for the Plaintiff

N/A Advocate for the Defendant

Ms Kajuju Court clerk