



REPUBLIC OF KENYA

IN THE ENVIRONMENT AND LAND COURT

AT MOMBASA

ELC NO. 375 OF 2017

ALI DHIDHA MOHAMED.....1ST PLAINTIFF

CHIWAYA KAMANZA.....2ND PLAINTIFF

-VERSUS-

MOHAMED OMAR KHAMIS.....1ST DEFENDANT

KILIMANJARO AUCTIONEERS.....2ND DEFENDANT

RULING

1. The application under consideration is the Notice of Motion dated 13th October 2017 in which the Plaintiffs/Applicants are seeking the following orders:

1. Spent

2. Spent

3. That this Honourable court be pleased to issue temporary injunction against the Defendants or whatsoever acting on their behalf restraining them from selling and/or disposing and/or transferring to third parties the plaintiffs houses and/or portion of the land where the houses stand on Plot No. 96 Sec. 11/MN MISHOROMONI/KISAUNI pending the hearing and determination of the suit.

4. That costs of this Application be provided for.

2. The application is based on the grounds on the face of the Motion and supported by the affidavits of Chiwaya Kamanza Bedzame and Ali Dhidha Mohamed both sworn on 13th October 2017. The 1st plaintiff avers that he is the owner of the house and/or portions of land where the house stands on Plot No. 96/11/MN MISHOMORONI-MOMBASA. That the 1st Defendant purported to be the registered owner of the suit plot and instructed the 2nd defendant to attach the plaintiffs houses standing on the said plot and sell them by way of public auction to recover purported arrears of ground rent under the distress for Rent Act. Relying on legal advice, the 2nd plaintiff avers that the 1st defendant's action is unlawful as it would amount to obtaining two remedies without orders of the court. The 2nd plaintiff believes that the 1st defendant is not the registered owner of the plots and thus his instructions are null and void.

3. The 1st plaintiff avers that he resides in a house on the suit plot which he bought from one Madara Barisa Madiribu for Kshs. 550,000/= and that the current search of the plot shows that it belongs to one Ali Rashid Ali. The 1st plaintiff further avers that he has been paying ground rent on the said property. He states that on 29th May 2007, the court in *SRMCC No. 1746 of 2004, Rukia Ali Rashid-vs- Madara Barisa Madiribu & Another* held that the plaintiff had no locus standi to file that suit against the defendants and that the plaintiff was to prove not only that she is the owner or administrator of the suit (sic) but also the existence of a tenancy agreement. That they have received a notice from the auctioneers that on 21st October 2017, the 1st plaintiff's house would be auctioned following an advertisement in the Star Newspaper of 1st August 2017. It is the plaintiff's contention that the said notice is illegal since the court process was not followed in the face of the determination of the case. The plaintiffs aver that they stand to suffer irreparably if their houses are sold.

4. The application is opposed by the defendants with the 1st defendant filing a replying affidavit sworn by himself on 6th November 2017. The 1st defendant deposes that together with Rukiya Ali Rashid (deceased) they are the administrators of the estate of the late Ali Rashid Ali and have a certificate of confirmation of grant therefore have the legal capacity to collect rent on behalf of the estate. He avers that they were

not party to the transaction stated by the 2nd plaintiff and added that Rukiya Rashid Ali (deceased) and who was one of the administrators leased where the subject property stands on the portion of land to one Mandara Barsa Badiribu with a stipulation that he would be paying monthly ground rent which would be revised based on the amount of rates payable. It is the 1st defendant's contention that upon the 1st applicant purchasing the house without land, the obligation to pay ground rent was then transferred from Mandara Barsa Badiribu to 1st applicant. The 1st defendant avers that the 1st applicant had been offered an opportunity to purchase the portion of the suit premises that he occupies but his failure to pay ground rent and/or failure to respond to the letter of offer to purchase informed the decision to levy distress against the 1st applicant. It is the 1st defendant's contention that RMCC No. 1746 of 2004 was dismissed due to lack of capacity in the form of letters of administration. The 1st defendant denies that the notice for distress was illegal and being the administrator of the estate of the late Ali Rashid Ali he had the legal authority to instruct the 2nd defendant to levy distress against the 1st applicant who had failed, refused and/or neglected to pay rent which ground rent arrears now stands at Kshs.163,200/=. Relying on legal advice the 1st defendant states that the 1st applicant who is seeking an equitable remedy has come to court with unclean hands as he has not been paying any ground rent and the estate of the deceased has been greatly prejudiced because it does not receive any income from the 1st applicant who is utilizing a portion of the suit property. The 1st defendant has deponed that if the court were inclined to grant the orders sought herein, then the same should be granted on condition that the defendant deposits ground rent arrears of Kshs.163,200/= into a joint account in the name of the advocates on record and that the 1st applicant to continue to pay ground rent on or before the 5th every month.

5. In his supplementary affidavit dated 6th December 2017, the 1st plaintiff states that the agreement marked "ADM-1" was executed on 14th March, 2002 while the grant was issued on 5th November 2012. He states that he is the owner of the house and not a tenant and therefore the estate cannot claim rent from him.

6. On his part, 2nd plaintiff in his supplementary affidavit depones that he was informed not to do any transaction with the 1st defendant as he was just inherited son and not the bona fide owner. He states that the title documents are riddled with squabbles amongst grandchildren who are naïve with the agreement made by their parents. He avers that CMCC No. 2052 of 2007 was directed to this court and the issues are not res judicata. He disputes the claim of Kshs. 203,850/= since the amount due is Kshs.63,900/= and an option to purchase which can only be accepted if the figures are not exaggerated.

7. The parties filed written submissions which I have read and I need not reproduce their contents herein. The submissions were also highlighted by the advocates for both the plaintiffs and the defendants. The principles to be applied when considering application for temporary injunction are well settled. In the famous case of *Giella -vs- Cassman Brown & Co. [1973] EA 358*, it was held that the plaintiff must show that he has a prima facie case with a probability of success, that he stands to suffer irreparable damage, and if the court is in doubt, it will decide the matter on balance of convenience.

8. From the material before me, it is clear that the suit property is registered in the name of Ali Rashid Ali (deceased) as representative of Salima Binti Salim Mohamed (deceased). The 1st defendant is one of the administrators of the estate of Ali Rashid Ali and therefore is by law entitled to administer the estate of the deceased. I note however, that the 1st plaintiff alleges that he resides on a portion he bought from Mandara Barisa Badibu. The said Barisa Badiribu is not the registered owner of the suit property and it is not clear how he acquired the portion he allegedly sold to the 1st plaintiff. It is also not clear whether the interest sold by the said Mandara B. Badiribu to the 1st plaintiff included the land or only the house without land as submitted by the 1st defendant. However, the issue of ownership would have to await determination at the full trial. The application basically seeks to restraint the defendants from selling and/or disposing and/or transferring the suit property. Having considered the plaintiffs' application, I am not satisfied that the plaintiffs' have established a prima facie case against the defendants with a probability of success. In any event the plaintiffs have not shown that damages will not adequately compensate them in the event of their case succeeding in the end. I am also of the view that the balance of convenience tilts in favour of the 1st defendant who is discharging his mandate as an administrator of the estate of the deceased. However, in order to maintain the status quo pending the determination of the main issues at the trial of the case, I am inclined to grant the injunction on terms that the defendants pay any outstanding rent arrears and continue to pay ground rent when due until hearing and determination of the main suit.

Each party to bear their own costs.

9. I have also considered the value of the subject matter herein. The 1st plaintiff has stated that he acquired it for consideration of Ksh.550,000/=. I am of the view that this is a matter that falls within the jurisdiction of the magistrate's court. Accordingly, I suo moto transfer this matter forthwith to the chief magistrate's court, Mombasa for trial and determination.

Delivered signed and dated at Mombasa this 9th day of May 2018.

C.YANO

JUDGE