



REPUBLIC OF KENYA

IN THE ENVIRONMENT AND LAND COURT AT NAIROBI

ELC CASE NO. 3 OF 2016

ELIZABETH NJUGUNA 1ST PLAINTIFF

JULIAN NJUGUNA 2ND PLAINTIFF

VERSUS

STEPHEN NJUGUNA KAMAU DEFENDANT

RULING

1. The dispute in this suit relates to Land Title Number **Ngong/Ngong/2939** which is currently registered in the name of Stephen Njuguna Kamau (the **defendant**) and his late wife, Lucy Ruguru Njuguna. The plaintiffs are adult daughters of the defendant. They brought this suit through a plaint dated 31/12/2015 contending that their father was intent on permanently dispossessing them of their right to what they described as “family land”. They sought an order reinstating their property rights by unconditionally allowing them access and peaceful stay in the suit property.

2. Together with the plaint, they brought a notice of motion dated 31/12/2015 seeking the following interim injunctive orders:

1. That the respondent does allow unconditional access and peaceful stay of the applicants in their family property until the determination of this application.

2. That the respondent does allow unconditional access and peaceful stay of the applicants in their family property until the determination of this suit.

3. This particular application was for unknown reasons not prosecuted.

4. On 8/11/2016, the plaintiffs brought another notice of motion dated 2/11/2016 seeking the following injunctive orders:

1. That the honourable court be pleased to grant an order reinstating the applicant’s property rights until the determination of this application.

2. That the respondent does allow unconditional access and peaceful stay of the applicants in their family property until the determination of this application.

5. The motion dated 2/11/2016, like the previous one, was supported by an affidavit sworn by the applicants’ advocate, Joshua Kiptoo. He contended that the mother to the applicants died and their father invited his second wife to the family property. Upon arrival of the second wife, she orchestrated the unlawful eviction of the applicants from what counsel called family home.

6. The defendant opposed the application through a replying affidavit sworn on 3/2/2017. He deposed that the applicants are his daughters then aged 43 and 40 years respectively. Both of them are married adults with children and grandchildren. In 2010, they visited the home to participate in their mother’s funeral arrangements. After the funeral they refused to go back to their matrimonial homes and instead occupied his matrimonial house with their husbands, children and grandchildren, rendering him homeless. In 2014, he moved back into his property and he is peacefully living there.

7. The said notice of motion dated 2/11/2016 was canvassed through written submissions. Respective advocates were granted the opportunity to make oral highlights of the parties’ key points.

8. Ms Saina, counsel for the applicants submitted that the suit property is co-owned by the defendant and his deceased wife, Lucy Ruguru Njuguna. She argued that by dint of being children of the two co-owners, they are entitled to access to the property because that is their family home. She noted that succession proceedings have not been taken in the estate of the deceased.

9. In response, Dr Gichuki Njaramba first challenged the admissibility of the depositions made in the supporting affidavit sworn by counsel. He contended that counsel is not a competent witness. Secondly, he argued that the applicants do not have a justiciable claim against the respondent. He added that the applicants do not have proprietary rights to be reinstated.

10. Dr Njaramba further submitted that the ownership of the suit property is a joint tenancy and under the doctrine of survivorship, the property vests in the surviving joint proprietor. He added that the reason why the property is not in the defendant's sole name is that the applicants lodged a caution against the title. He further submitted that the title is not subject to succession because it now belongs to the defendant alone. He added that the applicants who are now aged 41 and 44 years respectively were harassing the respondent who is an old citizen aged 85 years. He contended that the respondent by dint of his age is under Article 57 of the Constitution entitled to live in dignity and respect and be free from abuse, with the right to pursue personal development. He urged the court to dismiss the application.

11. I have considered the notice of motion dated 2/11/2016 together with the response thereto and the parties' rival submissions. I have also considered the legal framework and the jurisprudence which guide this court's jurisdiction to grant injunctive orders.

12. What the applicants are seeking is a mandatory injunctive order granting them unconditional access to the suit property to stay therein. The single issue in this application therefore is whether the applicants have satisfied the criteria for grant of a mandatory interim injunctive order. That criteria was spelt out in the English case of **Local bail International Finance Limited v Agro-Export and Another (1986) 1 All ER 901** as follows:

"A mandatory injunction ought not to be granted on an interlocutory application in the absence of special circumstances and then only in clear cases either where the court thought that the matter ought to be decided at once or where the injunction was directed at a simple and summary act which could easily be remedied or where the defendant had attempted to steal a march on the plaintiff. Moreover, before granting a mandatory injunction the court had to feel a high sense of assurance that at the trial it would appear that the injunction had rightly been granted, that being a different and higher standard than was required for a prohibitory injunction."

13. The above criteria has been consistently applied by Kenyan courts in a line of cases, among them **Kamau Mucuha v the Ripples Limited (Civil Application Number Nai 186 of 1992)**; **Jaj Super power cash and carry Limited v Nairobi City Council and two others**; and **Shariff Abdi Hassan v Nadhif Jama Adan (2006) eKLR**.

14. In the suit before court, the proprietorship section of the parcel register of the suit property reads that Stephen Njuguna Kamau and Lucy Ruguru Njuguna are joint proprietors of the suit property (see **the consideration and remarks column**). Secondly, it is common ground that the two joint proprietors were husband and wife. The wife, Lucy Ruguru Njuguna, passed on.

15. Section 91(4) of the Land Registration Act contains the following legal framework on joint tenancy:

91(4) If land is occupied jointly, no tenant is entitled to any separate share in the land and consequently-

a) Dispositions may be made only by all the joint tenants;

b) On the death of a joint tenant, the tenant's interest shall vest in the surviving tenant or tenants jointly; and

c) Each joint tenant may transfer their interest inter vivos to all the other tenants but to no other person, and any attempt to so transfer an interest to any other person shall be void

16. Without saying much at this point, it is evident from the parcel register and from the Land Registration Act that this being a joint tenancy, and one joint tenant having died, the interest of the deceased joint tenant vests in the surviving joint tenant. The deceased joint tenant is Lucy Ruguru Njuguna and the surviving joint tenant is Stephen Njuguna Kamau. The suit property therefore wholly vests in Stephen Njuguna Kamau and does not form part of the Estate of Lucy Ruguru Njuguna.

17. The applicants in the present suit are adults aged over 40 years. In my view, they have no right to interfere with their father's property. Together with their spouses, they should be working hard to acquire their own property instead of harassing the defendant.

18. Even if the doctrine of survivorship did not exist in the present suit, I would not have granted the applicants the orders they seek because there is no competent affidavit in support of the application. In my view, counsel is not a competent witness to make depositions in a dispute of this nature. His affidavit has no probative evidential value in a dispute of this nature.

19. In light of the foregoing, it is my finding that the plaintiffs have not satisfied the criteria for grant of a mandatory interim injunctive order or any other injunctive order. Consequently, the Notice of Motion dated 2/11/2016 is dismissed. The applicants shall pay costs of the application.

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

B M EBOSO

JUDGE

In the presence of:-

Mr Makori P holding brief for Ms Saina advocate for the 1st and 2nd applicant

Ms Kyalo for Dr Njaramba advocate for the respondent

June Nafula - Court Clerk