



**REPUBLIC OF KENYA**

**IN THE ENVIRONMENT AND LAND COURT**

**AT NAIROBI**

**E.L.C. Case No. 239 Of 2018**

**ALEXANDER ANTHONY WAHIU.....1<sup>ST</sup> PLAINTIFF**

**SAMUEL MWAL.....2<sup>ND</sup> PLAINTIFF**

**NICHOLAS MUIRURI.....3<sup>RD</sup> PLAINTIFF**

**VERSUS**

**JOSEPH KAHIRA WAHIU.....1<sup>ST</sup> DEFENDANT**

**THUMBI KAMAU.....2<sup>ND</sup> DEFENDANT**

**RULING**

Through the application dated 23/5/2018, the Plaintiffs seek an injunction to restrain the Defendants or their agents from evicting, alienating, transferring, selling, disposing, using, charging, developing, trespassing, entering upon or dealing in any manner with the Plaintiffs' quiet possession of L.R. No. 209/13291, Kileleshwa ("the Suit Property") pending hearing and determination of the suit or until further orders are given by the court. The Plaintiffs, who are brothers, are the sons of the 1<sup>st</sup> Defendant. The Plaintiffs mother died in December 2014. Before his wife's death, the 1<sup>st</sup> Defendant had sued her over the Suit Property. The Plaintiffs contend that their late sister Irene Njeri was allocated the Suit Property and that their late mother constructed the houses and flats on the suit land without the 1<sup>st</sup> Defendant's participation. The Plaintiffs claim that their father holds the Suit Property in trust for them and that he breached that trust when he fraudulently sold the Suit Property to the 2<sup>nd</sup> Defendant. The Plaintiffs claim that their late sister Irene Njeri who was allocated the Suit Property is survived by a daughter with special needs whom they take care of. They maintain that the Suit Property rightly belonged to their late sister and to them.

The Defendants opposed the application. The 2<sup>nd</sup> Defendant denied that a trust existed or that the 1<sup>st</sup> Defendant did not have capacity to sell the suit land. He relied on Section 66 (3) of the Land Registration Act in his preliminary objection to wit, that the proprietor is deemed to be the absolute proprietor and no person dealing with the suit land shall be deemed to have notice of the trust nor shall any breach of the trust create a right to indemnity. The 2<sup>nd</sup> Defendant filed a replying affidavit. He claimed to be a *bona fide* purchaser for value without notice, of the Suit Property from the 1<sup>st</sup> Defendant, vide an agreement dated 12/2/2018 at the agreed consideration of Kshs. 70 million. A transfer was executed by both parties and registered on 6/3/2018 at the lands registry. He states that he conducted due diligence which confirmed that the Suit Property was registered in the 1<sup>st</sup> Defendant's name. He claimed that the Suit Property was allocated to the 1<sup>st</sup> Defendant as a Senior Civil Servant and that he had occupied the house with his family since 1998. He deponed at paragraph 18 of his affidavit that the 1<sup>st</sup> Defendant informed him at the time of purchase that there were 10 rental houses which raised rental income of Kshs. 230,000/ per month. He stated in the affidavit that his attempts to serve a notice of eviction on the Plaintiffs or collect rent from the tenants on the Suit Property was met with violence and the Plaintiffs assaulted his agents.

He argued that the application does not disclose a prima facie case with any chance of success whatsoever. In addition, that the Plaintiffs have not demonstrated the damage they stand to suffer if the order is not granted; and that the balance of convenience tilted in his favor.

The 1<sup>st</sup> Defendant swore a replying affidavit which was filed in court on 25/6/2018. He claims that he was the registered absolute proprietor of the Suit Property for 99 years from 1/8/1996. He set out the process through which he acquired the Suit Property and denied holding it in trust for the Plaintiffs. He denied that the Suit Property was allocated to his late daughter. He averred that the Plaintiffs have been illegally collecting rent from the Suit Property since 2014. He annexed a copy of the ruling given by Kimaru J. on 22/4/2014 in which the judge directed that the rental income from the Suit Property would be shared between the 1<sup>st</sup> Defendant and his wife, who has since died.

The court notes that the Plaintiffs seek a declaration in the plaint that the registration of the Suit Property in the 1<sup>st</sup> Defendant's name was undertaken in trust for the Plaintiffs and that the 1<sup>st</sup> Defendant held the title to the Suit Property in trust for the Plaintiffs. They also seek a declaration that the sale and transfer of the Suit Property on 6/3/2018 by the 1<sup>st</sup> Defendant to the 2<sup>nd</sup> Defendant was undertaken fraudulently, illegally and in breach of the trust. They seek cancellation of the 2<sup>nd</sup> Defendant title.

It is not disputed that the Plaintiffs have been in possession of the suit land. The suit land has been the subject of various litigations between the 1<sup>st</sup> Defendant and his late wife. It is not clear what the outcome of those suits was. The Plaintiffs will suffer irreparable damage if they are evicted from the Suit Property before the suit is heard and determined. The 2<sup>nd</sup> Defendant who is now registered as proprietor of the Suit Property can be compensated by an award of damages for any loss he may suffer if the court were to ultimately find that the injunction ought not to have been issued.

The court has considered the application, the affidavits and the submissions of counsel and is satisfied on a balance of probabilities that the Plaintiffs have a *prima facie* case against the Defendants based on their claim that the 1<sup>st</sup> Defendant held the Suit Property in trust for them.

The court grants an injunction restraining the Defendants from dealing with the Suit Property pending hearing and determination of this suit. The parties are directed to comply with pre-trial requirements so that the suit can proceed for hearing expeditiously. The Plaintiffs are directed to give an undertaking as to damages within 7 days of the date of this ruling. The costs of the application shall be in the cause.

Dated and delivered at Nairobi this 27<sup>th</sup> day of November 2018.

**K. BOR**

**JUDGE**

**In the presence of: -**

Mr. S. Kingara for the Plaintiffs

Mr. Mikwa for the 2<sup>nd</sup> Defendant

Mr. V. Owuor- Court Assistant

No appearance for the 1<sup>st</sup> Defendant