



**REPUBLIC OF KENYA**

**IN THE ENVIRONMENT AND LAND COURT**

**AT NAIROBI**

**ELC CIVIL CASE NO. 458 OF 2017**

**MENELIK HOUSE LIMITED.....PLAINTIFF/APPLICANT**

**=VERSUS=**

**JOHN MBUGUA.....DEFENDANT/RESPONDENT**

**RULING**

1. This is the Notice of Motion dated 10<sup>th</sup> July 2017 brought under Section 68 (1) of the Land Registration Act, 2012, Section 1A, 1B, 63 (e) and 3A of the Civil Procedure Act, Cap 21, Laws of Kenya, and Order 40 and 51 of the Civil Procedure Rules, 2010.

2. It seeks order:-

**1. Spent**

**2. Spent**

**3. That this Honourable Court be pleased to issue an order of temporary injunction against the defendant either by himself, his servants, employees, agents, and/or any other persons working under his instructions from threatening, interfering and/or in any way interfering with the tenants quiet enjoyment of possession in the suit property being LR NO. 1/580/Nairobi, along Ngong Road Nairobi pending the hearing and determination of this suit.**

**4. That costs of this application be provided for.**

3. The grounds are on the face of the application and are set out in paragraphs a to g.

4. The application is supported by the affidavit of Jane Agoki, one of the directors of the plaintiff/applicant sworn on the 10<sup>th</sup> July 2017.

5. The application is opposed. There is a replying affidavit sworn by John Mbugua, the defendant/respondent on the 24<sup>th</sup> May 2018.

6. On the 2<sup>nd</sup> November 2017, the court directed that the application be canvassed by way of written submissions. It is the plaintiff's/applicant's submissions that it purchased the suit property being LR NO. 1/580 Nairobi, along Ngong Road Nairobi for Kshs 4,500,000/- which consideration was fully paid. That the defendant on 2<sup>nd</sup> June 2017, illegally and unlawfully sought to collect rent from the tenants on the suit property.

7. They have relied on the cases of **Giella vs Cassman Brown & Company Limited [1973] EA 358; Alex Wainaina t/a John Commercial Agencies vs Janson Mwangangi Wanjihia [2015] eKLR** and **Mrao Limited vs First American Bank of Kenya Limited & 2 Others [2003] KLR 125.**

8. The plaintiff/applicant has high chances of success at the trial as it is the proprietor of the suit property.

The issue of ownership of the suit property was dealt with in **ELC 292/2013, Menelik House Company Ltd vs Francis Odumbe Osodo** vide the ruling of 13<sup>th</sup> March 2013. The defendant /respondent's actions are illegal and unlawful. The loss occasioned upon the plaintiff/applicant in terms of loss of rent cannot be compensated by way of damages in future. The balance of convenience tilts in favour of the plaintiff/applicant who is the registered proprietor of the suit property. The plaintiff/applicant urges that the application be allowed.

9. It is the defendant's/respondent's submissions that he purchased the suit property in 2010 from the legal administrators of the Estate of Jerry Saphran Osodo for Kshs 15,000,000. The plaintiff is a tenant in the suit property vide a tenancy agreement dated 29<sup>th</sup> September 1999. He has also relied on the case of **Giella vs Cassman Brown & Company Limited; Mrao Limited vs First American Bank of Kenya Limited & 2 Others**.

The plaintiff/applicant has not demonstrated that it has a genuine and arguable case. It has not established that it has a right over the suit property which right has been infringed.

10. The plaintiff/applicant has failed to demonstrate that it would suffer irreparable loss that cannot be compensated by an award of damages if those orders are not granted. He has also put forward the cases of **Catherine Wangui Ngengi vs East African Building Society & Another** which referred to the Court of Appeal case of **Wairimu Mureithi vs City Council of Nairobi )CA at Nairobi, CIV Appeal No. 5 of 979**. The balance of convenience tilts in favour of the defendant/respondent who would suffer great inconvenience if these orders are granted. He prays that the application be dismissed with costs.

11. I have considered the notice of motion, the affidavit in support and the annexures. I have considered the replying affidavit together with the annexures. I have also considered the written submissions of counsel and the authorities cited. The issues for determination are:-

**i. Whether the plaintiff's/applicant's application meets the threshold for grant of temporary injunction.**

**ii. Who should bear costs?**

12. At this juncture it is necessary to briefly examine the legal principles governing the applications of this nature. In an application for interlocutory injunction the onus is on the application to satisfy the court that it should grant an injunction. The principles were set out in the precedent setting case of **Giella vs Cassman Brown & Company Limited [1973] EA 358**. In the case of **Mrao Limited vs First American Bank of Kenya Limited & 2 Others [2003] KLR 125** the Court of Appeal set out what amount to a prima facie case.

13. It is the plaintiff's/applicants' case that it is the registered proprietor of the suit property. It has annexed a copy of certificate of conveyance dated 17<sup>th</sup> February 2009. It is annexed and marked "JA-2". I have also gone through the ruling of Honourable Lady Justice L. Gacheru in ELC 292/2013 dated 13<sup>th</sup> March 2013. The plaintiff/applicant herein had sued Francis Odumbe Asodo from whom the defendant/respondent herein alleges to have bought the suit property. It was the Honourable Lady Justice L Gacheru's view that from the conveyance documents the plaintiff/applicant was the registered proprietor of LR 1/580. The defendant (Francis O. Osodo) gave his consent to have the property conveyed to the plaintiff/applicant herein.

14. The defendant/respondent on the other hand relies on a sale agreement dated 3<sup>rd</sup> September 2010, 20<sup>th</sup> September 2010 and Addendum agreement dated 26<sup>th</sup> March 2016. He claims to have purchased the suit property from the legal administrators Sella Osodo and Francis Odumbe Osodo at a consideration of Kshs 15,000,000.

It is clear from the above that the defendant/respondent purchased the suit property much later than the plaintiff/applicant. I am of the view that the issue of the genuineness of the signature of Sella Osodo, will come out during the trial.

15. In the case of **Njenga vs Njenga [1991] KLR 401**. Bosire J (as he then was) held that:

**"an injunction being a discretionary remedy is granted on the basis of evidence and sound legal principles.**

I am persuaded by the facts presented by the plaintiff/applicant that there is need to preserve the status quo prevailing pending the hearing and determination of this suit.

16. In the case of **Kenleb Cons Limited vs New Gatitu Service Station Limited & Another [1990] KLR 557** Bosire J (as he then was) held that:

**"To succeed in an application for injunction an applicant must not only make a full and frank disclosure of all relevant facts to the just determination of the application but must show he has a right, legal or equitable, which requires protection by injunction".**

17. I am satisfied that the plaintiff/applicant deserves this kind of protection. I find that it has established a prima facie case with a probability of success at the trial.

18. I also find that the plaintiff/applicant has demonstrated that it will suffer irreparable loss that cannot be compensated by an award of damages if these orders are not granted. The plaintiff/applicant risks losing the rent due from the tenants. I am guided by the Case of **Oloo vs Barclays Bank of Kenya Limited [2002] KLR 394**.

19. I am also of the view that the balance of convenience tilts in favour of the plaintiff/applicant who is the registered proprietor of the suit property. It is necessary to preserve the suit property pending the hearing and determination of the suit herein.

20. In conclusion, I find that this application is merited and I grant the orders sought namely:-

**a. That an order of temporary injunction do hereby issue restraining the defendant either by himself, his servants,**

employees, agents and/or any other persons working under his instructions from threatening, interfering and/or any way interfering with the tenants' quiet enjoyment of possession in the suit property being LR No 1/580 Nairobi, along Ngong Road Nairobi, pending the hearing and determination of this suit.

b. That costs of this application do abide the outcome of the main suit.

It is so ordered.

Dated, signed and delivered in Nairobi on this 18TH day of DECEMBER 2018.

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**L. KOMINGOI**

**JUDGE**

**In the presence of:-**

.....Advocate for the Plaintiff

.....Advocate for the Defendant

.....Court Assistant