



**REPUBLIC OF KENYA**

**IN THE ENVIRONMENT AND LAND COURT AT NAIROBI**

**ELC NO. 267 OF 2014**

**(CONSOLIDATED WITH ELC NO.313 OF 2014)**

**DIPTI FERNANDES.....APPLICANT**

**VERSES**

**SANDRA BERNADETTE ALLEN.....1<sup>ST</sup> RESPONDENT**

**JOSE DHANIA FERNANDES.....2<sup>ND</sup> RESPONDENT**

**RULING**

I have before me three (3) applications. The first application was brought by Dipti Fernandes, the Plaintiff in ELC No. 267 of 2014 (hereinafter referred to as “Dipti”) by way of Notice of Motion dated 4<sup>th</sup> March 2014. In the application, Dipti has sought a temporary injunction to restrain Sandra Bernadette Allen (hereinafter referred to as “Sandra”) who is the Plaintiff in ELC No. 313 of 2014 from trespassing on, disposing of, alienating, dealing with or interfering with her quiet possession of Apartment Number 7, Block B, Land Reference Number 1870/IV/198 (hereinafter “the suit property”) pending the hearing and determination of this suit.

The second application has been brought by Sandra though Notice of Motion dated 23<sup>rd</sup> February, 2014. In the application, Sandra has sought a temporary injunction to restrain Dipti and her former husband, Jose Dhanias Fernandes (hereinafter referred to as “Jose”) from disposing of, alienating, trespassing, accessing, occupying or continuing to occupy or in any other manner dealing with the suit property pending the hearing and determination of this suit. In the alternative, Sandra sought a mandatory injunction to compel Dipti and Jose to vacate and handover vacant possession of the suit property to Sandra. The third application has also been brought by Dipti. In the application which was brought by way of Notice of Motion dated 27<sup>th</sup> March, 2014, in ELC No. 313 of 2014 Dipti has sought an order that Sandra furnishes security for costs in the sum of Kshs.5,000,000/= in default of which her claim in ELC No. 313 of 2014 be dismissed.

On 17<sup>th</sup> June, 2015 the court directed that the three (3) applications be heard together. I wish to consider the application for security for costs first after which I will consider the two applications for injunction. In her claim against Jose and Dipti in ELC No. 313 of 2014, Sandra has sought vacant possession of the suit property and mesne profits. Sandra has contended that she purchased the suit property at kshs.5,850,000/= through Jose whom she had given a power of attorney to attend to the procedures relating to the transaction. Sandra has averred that upon purchasing the suit property, she allowed Jose and Dipti who were by then married to occupy the property as she made arrangements to get a tenant. Sandra averred that she learnt in the year 2008 that the Jose and Dipti were having marital problems and that they had laid a claim over the suit property. Sandra averred that she engaged Jose and Dipti in

discussion over the matter and eventually gave them notice to vacate the property. Sandra averred that Jose and Dipti refused to vacate the suit property or to compensate her for her investment by paying her rent. It is on account of the foregoing that Sandra brought the suit for vacant possession and mesne profits. Dipti entered appearance and filed the present application for security for costs. In the application, Dipti has contended that Sandra is resident out of the country and that in the event that Sandra's claim is dismissed, she would not be able to recover her costs. Dipti has contended that the suit property being claimed by Sandra is valued at over Kshs.20 million and that legal costs would be in the region of Kshs.5 million.

The application for security for costs was opposed by Sandra through grounds of opposition dated 1<sup>st</sup> April, 2014 and replying affidavit sworn on 29<sup>th</sup> June, 2014. In her grounds of opposition, Sandra termed Dipti's application baseless, devoid of any merit and only intended to defeat her rights. In her affidavit, Sandra contended that Dipti has not established a prima facie defence to her claim. Sandra contended further that the fact that she is resident out of the jurisdiction of the court is not *per se* a ground for making an order for security for costs. Sandra contended that the court has discretion in the matter which discretion must be exercised reasonably and judiciously having regard to all the circumstances.

The parties filed written submissions in support of their respective positions. I have considered the application and the grounds of opposition and replying affidavit filed in opposition thereto by Sandra. I have also considered the submissions of counsel and authorities which were cited in opposition thereto. The application was brought under Order 26 Rule 1, 5 and 6 of the Civil Procedure Rules. Order 26 Rule 1 provides as under;

*“In any suit the court may order that security for the whole or any part of the costs of any Defendant or third or subsequent party be given by any party.”*

I am in agreement with the submission by Sandra that the order is discretionary depending on the circumstances of each case and that the mere fact that the Plaintiff is resident abroad is not a sufficient ground to make the order. In my view which is supported by the decision in the case of Indemnity Insurance Company of North America & Others vs. Kenya Airfreight Handling Limited & Another (2001) eKLR, the determining factor for consideration in the application for security for costs is whether the defendant's recovery of its costs, if he is successful in litigation would be difficult and costly.

This position also finds support in the case of Tasmac Limited vs. Roberto Macri & 4 others (2014) eKLR where the court cited the English case of Barkely Administration Inc. vs. Mc.Clerllard (1990) 1 ALLER 972 where the court stated that;

*“As I have stressed, residence abroad only confers jurisdiction. The court must then consider when in all circumstances it would be just to make an order. The English authorities make it plain that residence abroad is not per se a ground for making an order. As to the current practice it is, I accept, common for orders to be made on little, if anything, more than fact of residence outside the jurisdiction, but this is because, it is also commonly the case that it is obvious from the pleadings that enforcement of any judgment for costs in the event of the Plaintiff's action being dismissed would be difficult and costly to enforce.”*

It is common ground that Sandra resides in the United Kingdom. It is also not contested that apart from the suit property which is being claimed by both Sandra and Dipti, Sandra has no other known asset within the jurisdiction of the court. There is no doubt therefore that in the event that Sandra loses her claim against Dipti, and is ordered to pay costs, Dipti will have to look abroad for her costs. In her affidavit in opposition to the application, Sandra has not disclosed her assets in the United Kingdom and where they are located. This means that if execution has to be levied on her assets abroad, a search would have to be conducted to ascertain the same. This will no doubt pose some difficulty for Dipti.

As I have stated earlier, the order is discretionary. Sandra has invited the court to consider the parties' respective cases and to find that the Dipti has no defence to Sandra's claim which finding should sway the court to decline the order. I am in agreement with the submission by Sandra that whether or not the

defendant has a bona fide defence is a factor which the court should take into account when exercising its discretion in application for security. See, the case of, Shah vs. Shah (1982) KLR 95. At this stage, the court cannot make conclusive findings on the parties respective cases. As will be seen later in this ruling, most of the issues raised in the case cannot be determined at this interlocutory stage. The same will have to await trial. I am of the view however that the defence put forward by Dipti is not a sham.

Apart from her claim that Dipti has no defence to her claim; Sandra has not given any other reason why the court should not exercise its discretion infavour of Dipti. There is no evidence that the application has been brought in bad faith with a view to oppress Sandra or to stifle her claim. Sandra had referred the court to the decision of Ombija J. in ELC No. 302 of 2014. I have carefully considered the same. I am in agreement with Dipti that the decision is distinguishable. In the final analysis, I am persuaded that Dipti has made out a case for the orders sought. I am however not convinced that the sum of Kshs.5 million claimed as security for costs is reasonable. Taking all factors into account including the fact that Dipti also has a claim against Sandra which Sandra has a right to defend, I will order security of costs in the sum of Kshs.750,000/= which shall be deposited in an interest earning bank account in the names of the advocates on record for the parties within 120 days from the date hereof in default of which Sandra's suit namely, ELC No. 313 of 2014 shall stand dismissed.

Having disposed of that application, I now move to the two applications for injunction one, made in ELC No. 267 of 2014 by Dipti and the other in ELC No. 313 of 2014 by Sandra. In the case of Giella vs. Cassman Brown and Co. Ltd. [1973] E.A 358, it was held that an applicant for a temporary injunction must establish:-

- (i) A prima facie case with a probability of success
- (ii) That if the injunction is not granted, he will suffer irreparable injury that cannot be compensated by an award of damages and;
- (iv) If in doubt, the court shall determine the application on a balance of convenience.

In the of Mrao Limited vs. First American Bank Limited & 2 Others (2003) KLR 125, the court defined a prima facie case as;

*“a case in which on the material presented to the court a tribunal properly directing itself will conclude that there exists a right which has apparently been infringed by the opposite party as to call for an explanation or rebuttal from the latter.”*

In the case of Nguruman Limited vs. Jan Bonde Nielsen & 2 others [2014] eKLR, the court stated that;-

*“The party on whom the burden of proving a prima facie case lies must show a clear and unmistakable right to be protected which is directly threatened by an act sought to be restrained, the invasion of the right has to be material and substantive and there must be an urgent necessity to prevent the irreparable damage that may result from the invasion.”*

Dipti's claim against Sandra is set out in her Originating Summons dated 4<sup>th</sup> March 2014. In summary, Dipti has sought a declaration that she has acquired the suit property by adverse possession and that she should be registered as the proprietor of the said property. Dipti has contended that Jose and she purchased the suit property in the year 2001 through funds which they held in their joint account in the United Kingdom which account was being managed by Sandra on their behalf. Dipti has contended that having purchased the property, they took possession of the same on 5<sup>th</sup> December 2001 and she has since remained in occupation of the same. Dipti has contended that the agreement for sale and transfer of the property was put in the name of Sandra for convenience purposes only. Dipti has contended that all along, Sandra was aware that the suit property belonged to her and Jose and that she has over the years been paying land rent and rates for the property. Dipti has averred that Jose moved out of the suit property in the year 2008 and left her in occupation which occupation she has maintained to date. Dipti has contended that she has for the entire duration exercised openly, continuously and peacefully the rights of

an owner over the suit property. Dipti has claimed that after she divorced Jose on 1<sup>st</sup> March 2012, Jose who has a cordial relationship with Sandra has instigated her to evict Dipti from the suit property and that Sandra has threatened her with eviction a threat which Sandra may carry out unless restrained by the court.

I have set out earlier in this ruling Sandra's case Against Dipti and Jose as pleaded in ELC No. 313 of 2014. It is not necessary for me to reproduce the same here. In summary, Sandra's case is that she is the registered owner of the suit property which she purchased in the year 2001. Sandra has contended that Dipti and Jose were occupying the suit property with her permission until sometimes in the year 2008 when they started laying ownership claims over the same which prompted her to demand vacant possession from them. Sandra has contended that Dipti and Jose declined to deliver vacant possession of the property and have continued to occupy the property unlawfully. Sandra has contended that Dipti and Jose did not make any payment for the suit property and that unless the reliefs sought in her application dated 23<sup>rd</sup> February, 2014 are granted she would suffer irreparable harm.

The two applications were argued by way of written submissions. I have considered the applications and the affidavits filed in support of and in opposition thereto. I have also considered the submissions of counsel. On the material before me, I am unable to determine the lawful owner of the suit property as between Sandra who is registered as the owner of the property and Dipti who has occupied the property continuously without paying rent from the year 2001 to date. The circumstances under which the suit property was purchased are contentious. Sandra and Jose in their affidavits have contended that the property was purchased by Sandra and that Jose was her attorney and thereafter a caretaker of the property which was supposed to be rented out. On the other hand, Dipti has contended that the property was purchased by Jose and her and that the same was registered in Sandra's name for convenience only. Both parties have backed their claims with documentary evidence. The court is unable to determine on affidavit evidence before it the parties various contentions. The court has no reason to believe one affidavit against the other. I am of the view that the issues raised by the parties are better left for plenary hearing.

Since I have doubt on the cases put forward by both parties, I would determine the two applications before me on a balance of convenience. In the circumstances of this case, I am of the view that justice would be better served by maintaining the status quo in the case of, Ougo & Another vs. Otieno (1987) KLR 364, it was held that;

*“The general principle is that where there are serious conflicts of facts, the trial court should maintain the status quo until the dispute has been determined at the trial.”*

It is not in dispute that the suit property is registered in the name of Sandra. It is also not in dispute that Dipti has been in occupation of the property for over 16 years without paying any rent. This court will have to determine whether the suit property is owned by Dipti and Jose or Sandra and if it is owned by Sandra, whether Dipti has acquired the same by adverse possession. Until these issues are determined, I am of the view that the balance of convenience would favour Dipti remaining on the suit property but not alienating or disposing of the same. Sandra who is the registered owner of the property should also not dispose of or alienate the same.

In conclusion, I decline to grant the orders sought in Dipti's application dated 4<sup>th</sup> March, 2014 and Sandra's application dated 23<sup>rd</sup> February, 2014. In place thereof, I hereby order that pending the hearing and determination of the consolidated suit or further orders by the court, the status quo prevailing as of the date hereof relating to title, use and occupation of the property known as Royal Residency Flat B7 situated on L.R No. 1870/IV/198, Rhapsa Road, Nairobi shall be maintained. Dipti's Notice of Motion application dated 27<sup>th</sup> March 2014 for security for costs is allowed on the terms stated herein earlier. The costs of three applications shall be in the cause.

**Delivered and Signed at Nairobi this 31<sup>st</sup> day of March, 2017**

**S. OKONG'O**

**JUDGE**

**In the presence of**

N/A for the Applicant

Mr. Dulu h/b for Kithi for the 1<sup>st</sup> Respondent

Mr. Mwangi for the 2<sup>nd</sup> Respondent

Kajuju Court Assistant