



**REPUBLIC OF KENYA**

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

**ELC NO. 200 OF 2008**

**DIPA PULLING..... PLAINTIFF**

**VERSUS**

**SUCHAN INVESTMENTS LIMITED.....1<sup>ST</sup> DEFENDANT**

**SANDEEP RAJNI DESAI.....2<sup>ND</sup> DEFENDANT**

**NIRANJAN JASHBHAI DESAI.....3<sup>RD</sup> DEFENDANT**

**KEVIT SUBASH DESAI.....4<sup>TH</sup> DEFENDANT**

**RULING**

By a written will dated 29<sup>th</sup> March 1991 Jashbhai Mutibhai Desai (hereinafter “the deceased”) bequeathed to the Plaintiff and the 2<sup>nd</sup>, 3<sup>rd</sup> and 4<sup>th</sup> Defendants all that parcel of land known as Land Reference No. 209/1916/6 (Original No. 209/1916/1/1) (hereinafter “the suit property”) to be held by them as tenants in common in undivided equal shares. The deceased died on 11<sup>th</sup> July, 1991 and Grant of Probate of his written Will was issued to Niranjani Jashbhai Desai and Rajni Jashbhai Desai, the joint executors of his estate in Nairobi High Court Succession Cause No. 1147 of 1991. By a deed of assent dated 27<sup>th</sup> October, 1995, the said executors of the deceased’s estate transferred to the Plaintiff and the 2<sup>nd</sup> to 4<sup>th</sup> Defendants the suit property together with the buildings and improvements thereon to hold as tenants in common in equal shares. The Deed of Assent was registered on 22<sup>nd</sup> June, 1999.

Sometimes in the year 2004, a dispute arose between the 2<sup>nd</sup>, 3<sup>rd</sup> and 4<sup>th</sup> Defendants over their respective interests in the suit property. The dispute was not resolved and the 3<sup>rd</sup> and 4<sup>th</sup> Defendants filed a suit against the 2<sup>nd</sup> Defendant in Nairobi HCCC No. 364 of 2004 seeking various reliefs among them, an order that the suit property be sold and the proceeds of sale less any liabilities incurred or to be incurred be shared equally among the registered proprietors. The Plaintiff was not made a party to that suit although she was one of the proprietors of the suit property. That suit was compromised through a consent which was recorded in court on 7<sup>th</sup> March, 2006. The consent provided in part as follows:-

- i. The 2<sup>nd</sup> Defendant agreed with the 3<sup>rd</sup> and 4<sup>th</sup> Defendants that the suit property be sold and the proceeds of sale less any liabilities incurred or to be incurred be shared out equally among the registered proprietors.
- ii. All disputes between the 2<sup>nd</sup> Defendant and the 3<sup>rd</sup> and 4<sup>th</sup> Defendants which gave rise to the suit were marked as settled.

Following this consent, the 3<sup>rd</sup> and 4<sup>th</sup> Defendants moved the court in Nairobi Succession Cause No. 1147 of 1991 aforesaid on 8<sup>th</sup> December 2006 seeking the courts approval of the said consent which was recorded on 7<sup>th</sup> March 2006 in Nairobi HCCC No. 384 of 2004. The Succession Court upon considering the 3<sup>rd</sup> and 4<sup>th</sup> Defendants application gave an order on 20<sup>th</sup> June 2007 approving the decision of the 2<sup>nd</sup>, 3<sup>rd</sup> and 4<sup>th</sup> Defendants to sell the suit property.

The Plaintiff was aggrieved with the order that was made in Nairobi Succession Cause No. 1147 of 1991 aforesaid and moved the Succession Court on 17<sup>th</sup> August 2007 to set aside the same on the ground that she was not served with the application which gave rise to the same. The Plaintiff's application was allowed on 29<sup>th</sup> July 2008 and the court order which was made on 20<sup>th</sup> June 2007 in favour of the 2<sup>nd</sup> to 4<sup>th</sup> Defendants authorizing them to sell the suit property was set aside. While the Plaintiff application seeking to set aside the order which was made in Nairobi Succession Cause No. 1147 of 1991 on 20<sup>th</sup> June 2007 aforesaid was still pending, the 3<sup>rd</sup> and 4<sup>th</sup> Defendants entered into an agreement and supplementary agreement with the 1<sup>st</sup> Defendant on 14<sup>th</sup> February 2008 and 18<sup>th</sup> February, 2008 respectively for the sale of the 3<sup>rd</sup> and 4<sup>th</sup> Defendants ½ share in the suit property on terms and conditions which were set out in the said agreement. The agreement between the 3<sup>rd</sup> and 4<sup>th</sup> Defendants and, the 1<sup>st</sup> Defendant was completed successfully and the 3<sup>rd</sup> and 4<sup>th</sup> defendants ½ undivided share in the suit property was registered in the name of the 1<sup>st</sup> Defendant on 31<sup>st</sup> March, 2008.

On 29<sup>th</sup> April 2008 the Plaintiff brought this suit seeking, a permanent injunction restraining the 1<sup>st</sup> Defendant from accessing the suit property for the purposes of destroying and/or demolishing the buildings thereon or any of them, a declaration that the Plaintiff is entitled to the quiet enjoyment of the suit property and, a declaration that the suit property being a National Monument cannot be destroyed. In her plaint dated 29<sup>th</sup> April 2008, the Plaintiff averred that she owned the suit property together with the 2<sup>nd</sup> to 4<sup>th</sup> defendants as tenants in common in equal shares and that the 3<sup>rd</sup> and 4<sup>th</sup> defendants had unilaterally sold their shares in the suit property to the 1<sup>st</sup> Defendant who had threatened to invade the suit property and destroy the buildings standing thereon which had been gazetted as a National Monument. The Plaintiff averred that in furtherance of its threats, the 1<sup>st</sup> Defendant's director had visited the suit property on a number of occasions with armed policemen in an attempt to gain access to the property and on 18<sup>th</sup> April, 2008, the 1<sup>st</sup> Defendant entered the suit property and deposited building materials thereon.

Together with the Plaint, the Plaintiff filed an application by way of Chamber Summons dated 29<sup>th</sup> April 2008 seeking a temporary injunction to restrain the 1<sup>st</sup> Defendant from interfering with her quiet enjoyment of the suit property and from entering the suit property for the purposes of carrying out construction thereon pending the hearing and determination of this suit. The Plaintiff's application which was brought under certificate of urgency was heard *ex parte* on 29<sup>th</sup> April, 2008 when interim orders were granted restraining the 1<sup>st</sup> Defendant from interfering with the Plaintiff's quiet possession of the suit property pending the hearing of the application *inter partes*. The said order was extended from time to time. On 7<sup>th</sup> October 2008, the said order was extended by Osiero J. until the hearing and determination of the application. From the record, the Plaintiff's said application for injunction is still pending hearing and determination.

On 21<sup>st</sup> May 2008, the 2<sup>nd</sup> Defendant herein was added to the suit as 2<sup>nd</sup> Plaintiff on application by the 1<sup>st</sup> Defendant. On 29<sup>th</sup> May 2008, the 1<sup>st</sup> Defendant filed its statement of defence and counter-claim against the two Plaintiffs. On 25<sup>th</sup> February, 2009, the 1<sup>st</sup> Defendant amended its defence and counter-claim through which amendments, the Sandeep Rajni Desai who was previously the 2<sup>nd</sup> Plaintiff in the suit was struck out as a Plaintiff and made the 2<sup>nd</sup> defendant. Through the same amendments, 3<sup>rd</sup> and 4<sup>th</sup> Defendants were added as defendants to the suit. In its defence and counterclaim, the 1<sup>st</sup> Defendant averred that it purchased the 3<sup>rd</sup> and 4<sup>th</sup> Defendants shares in the suit property pursuant to the orders which were made in Nairobi HCCC No. 384 of 2004 and Nairobi Succession Cause No. 1147 of 1991 mentioned herein earlier.

The 1<sup>st</sup> Defendant averred that following that sale, the 1<sup>st</sup> Defendant was registered as the proprietor of the suit property together with the Plaintiff and the 2<sup>nd</sup> Defendant as tenants in common in undivided shares with the 1<sup>st</sup> Defendant holding two (2) shares and the Plaintiff and the 2<sup>nd</sup> Defendant one (1) share each. The 1<sup>st</sup> Defendant averred that although the 1<sup>st</sup> Defendant is the owner of two (2) shares in the suit property, the Plaintiff and 2<sup>nd</sup> Defendant had wrongfully restrained it from accessing the property. The 1<sup>st</sup> Defendant counter-claimed against the Plaintiff and the 2<sup>nd</sup> Defendant for among others, an order directing a registered surveyor to be appointed by the court or by agreement of the parties to partition the suit property, an order physically allocating the suit property to the Plaintiff and the 1<sup>st</sup> and 2<sup>nd</sup> Defendants in accordance with their respective shares and an order granting the 1<sup>st</sup> Defendant access to its portion of the suit property. From the record, the 2<sup>nd</sup> Defendant filed a Notice of Appointment of Advocates through the firm of Archer & Wilcock Advocates on 7<sup>th</sup> October, 2008 while the 3<sup>rd</sup> and 4<sup>th</sup> Defendants filed a Notice of Appointment of Advocates on 17<sup>th</sup> March, 2009 through the firm of Nelson Harun and Company Advocates. There is no evidence on record that the 2<sup>nd</sup>, 3<sup>rd</sup> and 4<sup>th</sup> Defendants filed their statements of defence to the Plaintiff's claim and the 1<sup>st</sup> Defendant's counter-claim.

What is now before me is the 2<sup>nd</sup> Defendant's application by way of Notice of Motion dated 23<sup>rd</sup> March, 2016 in which the 2<sup>nd</sup> Defendant has sought a temporary injunction to restrain the 1<sup>st</sup> Defendant from entering, demolishing or in any other way whatsoever interfering with the 2<sup>nd</sup> Defendant's quiet enjoyment and/or possession of L.R No. 209/1916/6 (the suit property) pending the hearing and final determination of this suit. The application was brought on the grounds that the 1<sup>st</sup> Defendant who is the owner of a disputed undivided share in the suit property entered the suit property through its agents without a court order on 18<sup>th</sup> March 2016 and damaged the buildings thereon, stole and caused mayhem. The 2<sup>nd</sup> Defendant contended that between 18<sup>th</sup> March 2016 and 20<sup>th</sup> March 2016, the 1<sup>st</sup> Defendant's director a Mr. Kamal Shah accompanied by a group of about thirty (30) men armed with crude weapons broke padlocks to access the suit property and cut down the fence facing the main road, brought a *bull dozer* and trenching machine and started digging trenches and putting up a wall fence around the suit property. The 2<sup>nd</sup> Defendant stated that the 1<sup>st</sup> Defendant had placed security guards on the suit property and that the 1<sup>st</sup> Defendant's activities aforesaid caused him and his mother who is 70 years old great trauma and fear for their safety.

The application was opposed by the 1<sup>st</sup> Defendant through a replying affidavit sworn by its director Kamal Chandulal Shah on 1<sup>st</sup> April 2016. The 1<sup>st</sup> Defendant averred that it was the owner of 50% and/or half portion of the suit property while the 2<sup>nd</sup> Defendant owns 25% of the same. The 1<sup>st</sup> Defendant averred that the 2<sup>nd</sup> Defendant occupies the main houses which are situated on half of the suit property. The 1<sup>st</sup> Defendant contended that although half of the suit property was transferred to it on 31<sup>st</sup> March 2008, the Plaintiff and the 2<sup>nd</sup> Defendant had prevented it from accessing its portion of the suit property. The 1<sup>st</sup> Defendant averred that for the last 8 years after it had acquired 50% of the suit property, the 2<sup>nd</sup> Defendant collected rent from the suit property and did not remit any portion thereof to the 1<sup>st</sup> Defendant. The 1<sup>st</sup> Defendant averred that the 2<sup>nd</sup> Defendant has all along treated the suit property as his own and that it contrived to have the same declared a National Monument by the Ministry of National Heritage and Culture. The 1<sup>st</sup> defendant stated that the decision by the Ministry of National Heritage and Culture to declare the suit property a National Monument was quashed by the Court of Appeal following a challenge by the 1<sup>st</sup> Defendant. The 1<sup>st</sup> Defendant contended that the 2<sup>nd</sup> Defendant had continued to occupy the whole of the suit property and to collect rent from the three (3) flats thereon which he had converted to his own use. The 1<sup>st</sup> Defendant averred that it had not derived any benefit from the portion of the suit property which it acquired from the 3<sup>rd</sup> and 4<sup>th</sup> Defendants. The 1<sup>st</sup> Defendant averred that following the decision of the Court of Appeal which declared that the suit property was not a National Monument, it instructed its agents to excise the unused portion of the suit property for the 1<sup>st</sup> Defendant. The 1<sup>st</sup> Defendant contended that following the said instructions, its agents took possession of the unused 50% portion of the suit property around which the 1<sup>st</sup> Defendant has erected a perimeter fence. The 1<sup>st</sup>

Defendant contended that there was no court order restraining it from taking possession of the suit property. The 1<sup>st</sup> Defendant stated that it had effectively taken possession of its portion of the suit property and had a separate access gate to the same. The 1<sup>st</sup> Defendant denied that it broke into the suit property forcibly and caused damage and mayhem therein. Allegations of theft were also denied. The 1<sup>st</sup> Defendant contended that the court order issued herein was served upon it after it had already taken possession of its portion of the suit property. The 1<sup>st</sup> Defendant contended that it could not be barred from acts which had already taken place. The 1<sup>st</sup> Defendant contended that the 2<sup>nd</sup> Defendant's application fell short of threshold set out in the case of Giella –vs- Cassman Brown & Co. Ltd. (1973) E. A. 358. The 1<sup>st</sup> Defendant contended that the 2<sup>nd</sup> Defendant had not lodged any claim against it and as such his injunction application had no basis.

At the hearing of the 2<sup>nd</sup> Defendant's application, the 2<sup>nd</sup> Defendant and the 1<sup>st</sup> Defendant's director, Kamal Chandulal Shah were cross-examined on their affidavits which were filed in support of and in opposition to the application after which the advocates who appeared for the two parties told the Court that they wished to rely on the material on record in support of their respective cases.

I have considered the 2<sup>nd</sup> Defendant's application together with the affidavit filed in support thereof. I have also considered the evidence that was tendered by the 2<sup>nd</sup> Defendant during his cross-examination. Similarly, I have considered the 1<sup>st</sup> defendant's affidavit in opposition to the application and the evidence that was tendered by the 1<sup>st</sup> Defendant's director during his cross-examination. The principles upon which this court exercises its discretion in application of this nature are well settled. An applicant for a temporary injunction must establish a prima facie case with a probability of success against the respondent and must also demonstrate that unless the injunction is granted, he will suffer irreparable harm which cannot be compensated in damages. See, Giellavs. Cassman Brown and Co. Ltd. (supra). Under Order 40 of the Civil Procedure Rules, the court has power to grant a temporary injunction to a Plaintiff as well as a Defendant provided the conditions for such order are met. See, the case of Njoroge Kironyo and others vs. Kironyo Njoroge (1976) KLR 109. The onus is on the party seeking injunction to show the court that he has a prima facie case against the respondent and that he will suffer irreparable harm which cannot be compensated in damages if the injunction is not granted. In the case 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.”*

As I have mentioned earlier in this ruling, this suit was brought by the Plaintiff against the 1<sup>st</sup> Defendant as the only Defendant. On application by the 1<sup>st</sup> Defendant, the 2<sup>nd</sup> Defendant was joined in the suit initially as the 2<sup>nd</sup> Plaintiff and subsequently as 2<sup>nd</sup> Defendant. The order striking out the 2<sup>nd</sup> Defendant as 2<sup>nd</sup> Plaintiff in the suit and joining him as a 2<sup>nd</sup> Defendant in the suit was made on 22<sup>nd</sup> March 2010. In the order, the 2<sup>nd</sup> Defendant was granted leave to file “relevant pleadings” within 14 days from the date of service of the amended defence and counter-claim. As I have already observed, there is no evidence on record that the 2<sup>nd</sup> Defendant filed any pleadings in response to the Plaintiff's claim or the 1<sup>st</sup> Defendant's defence and counter-claim. As a Defendant, the 2<sup>nd</sup> defendant had a right to file a statement of admission or a defence or both to the Plaintiff's claim. The 2<sup>nd</sup> Defendant also had a similar right in respect of the 1<sup>st</sup> Defendant's counter-claim against him and the Plaintiff. The 2<sup>nd</sup> Defendant could also make a claim against either the plaintiff or any of the co-defendants including the

1<sup>st</sup> Defendant. As things stand now, the 2<sup>nd</sup> Defendant chose not to file any pleading. As rightly pointed out by the 1<sup>st</sup> Defendant, the 2<sup>nd</sup> Defendant has not put forward any claim against the 1<sup>st</sup> defendant. The 2<sup>nd</sup> defendant has also not put forward any defence to the 1<sup>st</sup> defendant's claim. In the circumstances, the court is unable to ascertain the issues which would arise for determination as between the 1<sup>st</sup> Defendant and the 2<sup>nd</sup> Defendant at the trial.

The Plaintiff's case against the 1<sup>st</sup>, 3<sup>rd</sup> and 4<sup>th</sup> Defendants is that the 3<sup>rd</sup> and 4<sup>th</sup> Defendants unilaterally sold their shares in the suit property to the 1<sup>st</sup> Defendant without seeking and obtaining her consent. The Plaintiff has contended that the sale of the 3<sup>rd</sup> and 4<sup>th</sup> Defendant's shares in the suit property to the 1<sup>st</sup> Defendant was wrongful. I have noted from the decree that was issued on 3<sup>rd</sup> April 2006 in Nairobi HCCC No. 364 of 2004 which I have referred to earlier in this ruling that the 2<sup>nd</sup> Defendant herein had consented to the sale of the suit property. The 2<sup>nd</sup> Defendant having agreed to the sale of the suit property as aforesaid, it is not clear from the record and the affidavit in support of the 2<sup>nd</sup> Defendant's current application whether or not the 2<sup>nd</sup> Defendant is challenging the sale of the 3<sup>rd</sup> and 4<sup>th</sup> Defendants shares in the suit property to the 1<sup>st</sup> Defendant. Due to the foregoing, I am doubtful of the merit of 2<sup>nd</sup> Defendant's case against the 1<sup>st</sup> Defendant. The case if any has neither been pleaded nor established on a prima facie basis.

Having expressed doubts on the 2<sup>nd</sup> Defendant's case against the 1<sup>st</sup> Defendant, the chances of the 2<sup>nd</sup> Defendant suffering irreparable harm if the injunction sought is not granted is equally doubtful. Due to the foregoing, the 2<sup>nd</sup> Defendant's application falls for consideration on a balance of convenience. Having considered the circumstances of this case as a whole, I am of the view that justice would be served if the status quo prevailing as of the date hereof is maintained. The 2<sup>nd</sup> Defendant has 25% share in the suit property and as such he is entitled to occupy the same. On the other hand, the 1<sup>st</sup> Defendant has 50% share in the suit property. Until the acquisition by the 1<sup>st</sup> Defendant of the 3<sup>rd</sup> and 4<sup>th</sup> Defendant's 50% share in the suit property is declared illegal, null and void, the 1<sup>st</sup> Defendant remains the owner of the said shares and is entitled to enjoy the rights associated with such ownership provided that the rights of the Plaintiff and the 2<sup>nd</sup> Defendant who owns the remaining 50% share in the suit property is respected.

From the material before me, I have noted that the 1<sup>st</sup> Defendant entered the suit property in March 2016 and fenced a portion thereof. The 1<sup>st</sup> Defendant has contended that the fenced portion of the suit property is its 50% share of the suit property. There is no evidence that the suit property has been formally partitioned amongst the registered owners thereof. I do not think that it was open to the 1<sup>st</sup> Defendant to unilaterally excise a portion of the suit property for itself more particularly when he had filed a counter-claim herein seeking an order for partition. Although the 1<sup>st</sup> Defendant has denied it, the evidence before me shows that the entry of the 1<sup>st</sup> Defendant onto the suit property was forceful. A court of law would not entertain this kind of conduct. Solving of land disputes through the use of hired bunch of hooligans has no place in Kenya of today. This trend which is gaining root must stop. I have not been called upon to order the demolition of the 1<sup>st</sup> Defendant's wall which it put up on the suit property forcefully by use of thugs for hire and for his eviction therefrom. I would not have hesitated in making such order.

In the case of Kamau Mucuha-vs- The Ripples Ltd. (Civil Application No. Nai. 186 of 1992) Justice Cockar, JA stated that, "A party, as far as possible ought not to be allowed to retain a position of advantage that it obtained through a planned and blatant unlawful act....". In the case of Jaj Superpower Cash and Carry Ltd. -vs- Nairobi City Council & 2 others, Court of Appeal at Nairobi, Civil Appeal No.111 of 2002, the Court stated that, ".....a wrong doer cannot keep what he has taken because he can pay for it."

On the state of the pleadings currently before me, I will only make an order which will ensure that there shall be no further interference with the 2<sup>nd</sup> Defendant's occupation of the suit property saves as may be

ordered by the court.

In the final analysis and for the foregoing reasons, I hereby make the following orders in respect of the 2<sup>nd</sup> Defendant's Notice of Motion application dated 23<sup>rd</sup> March, 2016:-

1. Pending the hearing and determination of this suit or further orders by the court, the 1<sup>st</sup> Defendant is restrained from demolishing buildings and/or structures on L.R No. 209/1916/6(suit property) and from in any way interfering with the 2<sup>nd</sup> Defendant's possession and enjoyment of the portion of the suit property in the possession of the 2<sup>nd</sup> Defendant as of the date hereof.
2. Pending the hearing and final determination of this suit or further orders by the court, the 1<sup>st</sup> Defendant is restrained from carrying out any other or further construction or development of any nature on L.R No. 209/1916/6 or any portion thereof.
3. All rent if any being collected from the suit property shall with effect from 1<sup>st</sup> April 2017 be deposited in an interest earning joint bank account in the names of the advocates on record for the Plaintiff and 1<sup>st</sup> and 2<sup>nd</sup> Defendants.
4. The orders granted herein shall last for a period of eight(8) months only from the date hereof within which the parties must prepare and set down this old case for hearing and final determination.
5. The costs of the application shall be in the cause.

**Delivered and Signed at Nairobi this 28<sup>th</sup> day of March, 2017**

**S. OKONG'O**

**JUDGE**

**In the Presence of**

Mr. Muthee h/b for Wangui Shaw for the Plaintiff

Mr. Kamau for the 1<sup>st</sup> Defendant

Ms. Manyaga for the 2<sup>nd</sup> Defendant

N/A for the 3<sup>rd</sup> and 4<sup>th</sup> Defendant

Kajuju Court Assistant