



**REPUBLIC OF KENYA**

**IN THE ENVIRONMENT AND LAND COURT OF KENYA**

**AT NAKURU**

**ELC NO.195 OF 2015**

**BETTY ODARI.....1<sup>ST</sup> PLAINTIFF**

**ZIPPORAH MIDEVA MFWOGO.....2<sup>ND</sup> PLAINTIFF**

**VERSUS**

**DOROTHY LAVUSA MFWOGO.....DEFENDANT**

**RULING**

***(Application for injunction; principles to be applied; applicants alleging that land owned by the respondent is held in trust; applicants arguing that the property was owned by their late father; respondent having asked the applicants to either pay rent or vacate the premises; no evidence tendered that the property was owned by the father of the plaintiffs; evidence indicating that the property was offered to the respondent for purchase way after their father had died; no prima facie case established; application dismissed)***

1. This suit was commenced by way of a plaint filed on 7 July 2015. The 2nd plaintiff is wife of one Edward Mfwogo Odari (deceased) whereas the 1st plaintiff is his daughter. The deceased is also the father of the defendant. The deceased died on 4 November 1994. It is pleaded that the deceased owned the property described as Kabachia House No. 3 (the suit land) having purchased it from the National Housing Corporation. It is averred that he was employed by the Municipal Council of Nakuru and was initially a tenant in this house. It is pleaded that when the deceased approached retirement, he transferred his interest in the suit property to the defendant, to hold in trust for his family, since the defendant was also an employee of the Nakuru Municipal Council and was the only member of the family who could be used to protect the family interest. It is stated that the family of the late Odari, contributed to pay the purchase price for the suit property. It is therefore contended that the defendant holds the suit property in trust for all the members of the family of the deceased. It is pleaded that in breach of trust, the defendant has started demanding rent from the family of the deceased and has threatened to evict them from the house. In the suit, the plaintiffs want a declaration that the defendant holds the suit property in trust for all the family members of the deceased and an order of permanent injunction restraining the defendant from interfering with their right to enjoy the property.

2. Together with the suit, the plaintiffs filed an application for injunction, seeking to restrain the defendant from the demanding rent, or evicting the plaintiffs from the suit property pending hearing and determination of this suit. The supporting affidavit is sworn by the 1st plaintiff. She has more or less repeated the averments in the plaint which I have already set out above. She has added that the defendant has appointed an agent and a firm of auctioneers to distress for rent claiming the sum of Kshs. 77,000/=.

She has also annexed some payment receipts to National Housing Corporation to support the position that they have been contributing towards purchase of the property. She has further exhibited receipts showing payments for water, sewerage and electricity.

3. The defendant has filed a replying affidavit to oppose the motion. She has deposed inter alia that on 14 January 2010, the National Housing Corporation gave her a letter of offer to purchase the suit property. Prior to that, the Municipal Council of Nakuru had issued her with a rent card. She has stated that she offered her sister, the 1st plaintiff, to stay in the house and pay her rent. When she asked for the rent, she refused to pay which prompted her to give the property to an agent to manage. She has averred that on 19 August 2011, she entered into an agreement with the National Housing Corporation to purchase the suit land, a copy of which she has exhibited. She has deposed that since then, she has been paying the purchase price to the Corporation. She has denied that the suit land is family property. She has stated that after the plaintiffs were issued with a notice by her agent, they started making payments to the National Housing Corporation without her consent so that it can appear that the family is paying. She has deposed that at times she has also been sending the 1st plaintiff to make payments to the National Housing Corporation on her behalf.

4. The 1st plaintiff swore a supplementary affidavit wherein she repeated that she has been making payments to the National Housing Corporation. She has deposed that the initial deposit of Kshs. 300,000/= was paid jointly by herself and the defendant and subsequently she has been paying the monthly instalments herself. She has pointed out that the utility bills are in the names of their late father and another one of her sisters by name of Mary Adisa. She has reiterated that the house belonged to their late father and that the respondent only came to be registered as trustee on behalf of the survivors of the deceased. She has also annexed some letters which she avers point to the conclusion that the defendant was only acting as trustee.

5. I have considered the respective positions of the parties alongside the written submissions of both counsel for the applicants and the respondent. What is before me is an application for injunction and the principles upon which such application is determined were set out in the case of **Giella vs Cassman Brown (1973) EA 358**. For one to succeed, he/she has to set out a prima facie case with a probability of success; demonstrate that he/she stands to suffer irreparable loss unless the injunction is granted; and where the court is in doubt, it will decide the application on a balance of convenience. To assess whether a prima facie case has been established, one has to make a preliminary assessment of the case, based on the material tendered at that stage of the proceedings. Such finding is only preliminary, aimed at determining the application before the court, and is not conclusive. The court may very well arrive at a different finding after hearing the case on its merits. However, the findings at this stage, will determine how the suit property will be preserved, pending the hearing and determination of the case.

6. The case of the applicants is that the suit land is owned by the late Edward Mfwogo and that the defendant only holds the property in trust. The position of the respondent is that she is the owner of the suit land having purchased it from the National Housing Corporation and that she only allowed the plaintiffs to reside in the premises as tenants.

7. It does appear that at some point, the deceased actually used to live in this house as an employee of the Municipal Council of Nakuru. I have discerned from some letters annexed by the applicants, that the deceased moved out of this house to live in Elburgon with his second wife. He then left the plaintiffs and defendant residing in the suit property. From what I can see, it appears as if the family was required to pay rent to the Municipal Council of Nakuru. I have indeed seen a letter dated 23 March 1995, where the 2nd plaintiff (first wife of the deceased) wrote to the Municipal Council of Nakuru, stating that she shall continue paying rent at market rates to the Municipal. However, she had an issue, since it seems that the deceased, after vacating the property, left it in the name of the defendant (his daughter) as the resident/tenant. In the letter, the 2<sup>nd</sup> defendant was stating that she is the proper tenant and not Dorothy (the defendant) who is her daughter.

8. I have seen that the same property was offered to the respondent to purchase by the National Housing Corporation. I have seen the letter of offer dated 14 January 2010 written to the defendant, and stating

that the purchase price is Kshs. 1,500,000/=. The defendant was to pay the sum of Kshs. 300,000/= as deposit and pay the balance over a period of 10 years at the rate of Kshs. 17, 918/= per month. I have seen a letter of acceptance of the offer and a sale agreement between National Housing Corporation and the respondent. I have also seen payment receipts for the deposit of Kshs. 300,000/=, paid in two instalments of Kshs. 100,000 and Kshs. 200,000/= and some further payments made towards the purchase price. I have noted that the applicants state that they have contributed towards payment of the purchase price. They have annexed some receipts, but all appear to be in the name of the respondent. I have not seen any agreement or any understanding between the applicants and respondents, whereby the respondent has directed them to contribute towards payment of the purchase price. There may be credence in the position of the respondent, that the applicants have made payments to National Housing Corporation without her consent.

9. In as much as the applicants allege that the property was owned by the deceased, I have not seen any document to indicate that the deceased owned the suit property. What I can deduce is that the deceased was merely a tenant. I have not seen any offer made to the deceased to purchase the property or any acceptance. Indeed, the deceased died, more than 15 years back, before the offer to purchase the property was made to the respondent. It is difficult to see how it can be argued that the respondent was therefore holding the property in trust for the deceased or for his family.

10. From my above analysis, I am not persuaded that the applicants have made out a prima facie case with a probability of success. Not being in doubt, I need not consider the balance of convenience. I therefore dismiss this application with costs.

11. It is so ordered.

**Dated, signed and delivered in open court at Nakuru this 21<sup>st</sup> day of June 2017.**

**MUNYAO SILA**

**JUDGE**

**ENVIRONMENT & LAND COURT**

**AT NAKURU**

**In presence of:**

Mr. Kipkoech holding brief for Mr. Akang'o for the plaintiffs/applicants.

No appearance on the part of M/s Ochweri Ngamate & Company Advocates for the defendant/respondent.

Court Assistant: Nelima

**MUNYAO SILA**

**JUDGE**

**ENVIRONMENT & LAND COURT**

**AT NAKURU**