



REPUBLIC OF KENYA

IN THE ENVIRONMENT AND LAND COURT AT NAIROBI

ELC SUIT NO.607 OF 2016

**PATRICK NDOLI SAKWA (Suing as an administrator of
the estate of Hosea SakwaSilunya.....PLAINTIFF**

VERSUS

1. EDWARD NDEGE

2. FRANCIS NYAGA NJERU.....DEFENDANTS

RULING

The plaintiff is the administrator of the estate of HOSEA SAKWA SILUNYA, deceased (hereinafter referred to as “the deceased”). The deceased died on 1st February, 2006. The deceased was at all material times registered as the owner of all that parcel of land known as L.R No.36/VII/157(hereinafter referred to as “the suit property”). The plaintiff brought this suit against the defendants seeking a permanent injunction restraining the defendants from trespassing on, wasting, damaging, alienating, developing and/or adversely interfering with the suit property. In his plaint dated 7th June, 2016, the plaintiff averred as follows. The deceased was and is still registered as the owner of the suit property. The suit property was developed with three single storey blocks of single rooms. The main housing block had 14 single rooms while the two auxiliary blocks had a total of 10 single rooms. The suit property accommodated 29 tenants. The administrators of the estate of the deceased have since the death of the deceased administered the suit property. They have been collecting rent from tenants and paying land rates to the Nairobi City County pending the distribution of the estate. The administrators of the deceased have not sold the suit property to any of the defendants or anyone else. There has also been no claim lodged with them by any person in respect of the suit property.

The plaintiff averred further that on 27th May 2006, the defendants invaded the suit property with hired goons armed with crude weapons without notice and destroyed the front section of the building erected on the suit property which is occupied by tenants in a bid to evict the occupants of the building and forcefully take over the possession of the suit property. The plaintiff averred that the said acts by the defendants amounted to trespass since the suit property is registered in the name of the deceased and the estate of the deceased is not privy to any interest or claim the defendants or any of them have on the suit property. The plaintiff averred that the defendants have threatened to demolish the entire building on the suit property and would proceed to do so unless restrained by the court.

Together with the plaint, the plaintiff filed an application by way of Notice of Motion dated 7th June, 2016 seeking a temporary injunction to restrain the defendants from alienating, trespassing on, wasting, damaging, developing and/or in any other manner dealing adversely with the suit property pending the hearing and determination of this suit. The application was supported by an affidavit and further affidavit

sworn by the plaintiff on 7th June, 2016 and 13th July, 2016 respectively. In the two affidavits, the plaintiff reiterated the contents of the plaint which I have highlighted above. I do not intend to reproduce the contents of the two affidavits here. The plaintiff annexed to the two affidavits among others, a copy of the Grant of Letters of Administration in respect of the estate of the deceased dated 9th April, 2008 issued to the plaintiff and three others, a copy of the title for the suit property, a copy of a certificate of postal search on the title of the suit property, copies of photographs of the suit property showing the damage that is said to have been caused to it by the defendants, copies of property rates payment requests by the City Council of Nairobi and Nairobi City County in respect of the suit property, a copy of a letter dated 10th June 2016 from Nairobi City County to the effect that the letter of authority on the strength of which the defendants had demolished the building on the suit property did not emanate from the Nairobi City County and was a forgery and copies of receipts issued to tenants for rent paid. The plaintiff denied that the 1st defendant had purchased the suit property from the deceased in 1998 as he had claimed. The plaintiff averred that if indeed the 1st defendant had purchased the suit property in 1998, the defendant could not have waited for over 18 years to take possession of the suit property. The plaintiff averred further that the 1st defendant did not place before the court any evidence showing the payment of the alleged purchase price of Kshs.20,000,000/-.

The application was opposed by the defendants through a replying affidavit sworn by the 1st defendant on 21st June, 2016. The defendants denied that they had entered the suit property and demolished part of a building erected thereon. The 1st defendant stated that he purchased the suit property from the deceased at a consideration of Kshs.20,000,000/- and that the deceased transferred the property to him through a conveyance dated 20th January, 1998. The 1st defendant stated that the suit property was transferred to him on 30th January, 1998 after he had paid the Stamp Duty. The 1st defendant stated that after the property was registered in his name, the Nairobi City County started demanding land rates from him which he has been paying since then. The 1st defendant stated that on 1st April, 2016, he entered into an agreement for sale of the suit property to the 2nd defendant at a consideration of Kshs.20,000,000/-. The 1st defendant stated that under the said agreement, the 2nd defendant was to pay the purchase price in installments after which the property was to be transferred to him. The 1st defendant stated that by a conveyance dated 1st April, 2016, he transferred his interest in the suit property to the 2nd defendant. The 1st defendant stated that the administrators of the estate of the deceased have no interest in the suit property because the same was transferred to him by the deceased during his life time. The 1st defendant stated that the plaintiff did not have an arguable case to warrant the grant of the orders sought. The 1st defendant annexed to his affidavit among others, a copy of consent to transfer dated 15th January, 1998, a copy of conveyance dated 20th January, 1998, a copy of certificate of stamp duty dated 23rd January, 1998, a copy of a bill for clearance certificate dated 20th April, 2016 and a copy of agreement for sale dated 1st April, 2016 between the 1st and 2nd defendants.

The application was argued by way of written submissions. The plaintiff filed his submissions on 10th November, 2016 while the defendants filed their submissions in reply on 23rd January 2017. I have considered the plaintiff's application together with the affidavits filed in support thereof. I have also considered the replying affidavit by the defendants. The principles upon which this court exercises its discretion in applications for a temporary injunction are now well settled. As was stated in the case of Giella vs. Cassman Brown & Co. Ltd (1973) EA 358, an applicant for an interlocutory injunction must show a prima facie case with a probability of success and such injunction will not normally be granted unless the applicant might otherwise suffer irreparable injury which would not be adequately compensated by award of damages. It was held further that if the court is in doubt as to the foregoing, the application would be determined on a balance of convenience. In the case of Nguruman Limited vs. Jan Bonde Nielsen & 2 Others (2014) eKLR the Court of Appeal adopted the definition of a prima facie case that was given in the case of Mrao Limited vs. First American Bank of Kenya Limited & 2 Others (2003) KLR 125 which was cited by the defendants in their submissions and went further to state as follows:-

“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. ...All that the court is to see is that on the face of it the person applying for an injunction has a right which has been threatened with violation...The applicant need not establish title it is enough if he can show that he has a fair and bonafide question to raise as to the existence of the right which he alleges. The standard of proof of that prima facie case is on a balance or, as otherwise put on a preponderance of probabilities. This means no more than that the court takes the view that on the face of it, the applicant's case is more likely than not to ultimately succeed."

On the material before the court, I am satisfied that the plaintiff has met the threshold for granting the orders sought. The plaintiff has demonstrated that the deceased is and was at all material times the registered owner of the suit property. The plaintiff annexed to his affidavit, a certified copy of the indenture dated 6th December 1967 pursuant to which the deceased acquired the suit property and a copy of a postal search dated 14th November 2008 which showed that as at that date, the deceased was the owner of the suit property. The plaintiff has also placed before the court sufficient material showing that the estate of the deceased was in possession of the suit property when the same was invaded by the defendants on 27th May, 2016.

The 1st defendant has contended that he purchased the suit property from the deceased in 1998 at a consideration of Kshs. 20,000,000/-. The 1st defendant did not place any evidence before the court of payment of the said sum of Kshs.20,000,000/- to the deceased. The 1st defendant did not also place before the court convincing evidence showing that the suit property was at any time registered in his name at the land registry. The 1st defendant did not produce a certified copy of the indenture or certificate of postal search in support of his claim. The 1st defendant did not place any evidence before the court that he had paid land rates to the City Council of Nairobi and subsequently to the Nairobi City County between 1998 and 2016. I have also noted that although the 1st defendant claimed to have purchased the suit property at Kshs. 20,000,000/-, the conveyance dated 20th January 1998 shows that the purchase price for the property was Kshs.2,000,000/-.I have also noted that the 1st defendant sold the suit property to the 2nd defendant at Kshs. 20,000,000/- in the year 2016 which is the same amount the 1st defendant is said to have purchased the suit property 18 years earlier. The 2nd defendant whom the 1st defendant claimed to be the new owner of the suit property did not place any evidence before the court in proof of his claim over the property.

I am satisfied on the evidence before me that the plaintiff has established a prima facie case with a probability of success against the defendants. The plaintiff has established on a prima facie basis that the suit property form part of the estate of the deceased. The plaintiff has also established that there was an attempt to forcefully take over possession of the suit property. Although the defendants have denied any involvement in the invasion of the suit property, I am satisfied on the material before me that they had a hand in the same. Since the suit property was owned by the deceased, the defendants had no right to enter thereon without the consent of the administrators of the deceased. The defendants' entry and attempt to evict the estate of the deceased from the suit property amounted to trespass. I am of the view that even if the suit property was owned by the defendants, they had no right to forcefully take possession of the same. They had to follow the due process in taking possession of the suit property from the estate of the deceased.

I am also satisfied that the plaintiff would suffer irreparable harm which cannot be compensated by award of damages. There is evidence that the plaintiff is threatened with eviction from the suit property. The loss that the plaintiff would suffer as a result of forceful eviction from the suit property cannot be compensated in damages. In any event, I am of the view that the defendants cannot be allowed to carry out unlawful eviction because they can pay damages.

The upshot of the foregoing is that the Plaintiff's application dated 7th June 2016 is well founded. The same is allowed in terms of prayers 3 and 4 thereof. The plaintiff shall have the costs of the application.

Delivered and Signed at Nairobi this 6th day of October 2017

S. OKONG'O

JUDGE

Ruling read in open court in the presence of:

Ms. Wanyonyi h/b for Osundwa for the Plaintiff

Mr. Owang and Ms. Nyang for the Defendants

Catherine Court Assistant