



**REPUBLIC OF KENYA**

**IN THE ENVIRONMENT & LAND COURT IN MOMBASA**

**LAND CASE NO 226 OF 2015**

**FAIZA ABDULLAH SAID AL - AMRY**

**WARDA A. SAID AL - AMRY .....PLAINTIFFS**

**VERSUS**

**MOSES MBUGUA KEHTA .....DEFENDANT**

**RULING**

1. The Plaintiffs/Applicants moved this court under order 40 rule 1, 2 & 4 of the Civil Procedure Rules and sections 1A,1B and 3A of the Civil Procedure Act in their notice of motion application dated 14th September 2015. The applications sought the following orders:

**(1) Spent**

**(2) Spent**

**(3) That upon hearing and determination of this application inter parties, the court be pleased to grant a temporary injunction against the defendant to restrain the defendant whether by himself or through his servants, agents, officers, police officers or otherwise whatsoever or howsoever from entering, occupying, trespassing, harassing, evicting remaining on or in any other manner interfering with the plaintiffs' use, possession, occupation and quite possession of land known as L.R. Number 14414 [Original 11179/7] Section 1 Mainland North pending the hearing and determination of this suit.**

**(4) Spent**

**(5) That upon hearing of this application inter parties the court be pleased to grant a temporary interlocutory mandatory Order against the defendant whether by himself or through his servants or agents or otherwise to vacate from, leave and refrain from occupation of land and house on property known as L.R. Number 144414 [Original 11179/7] Section 1 Mainland North pending the determination of this suit.**

**(6) The costs of the application be provided for.**

2. The application is supported by the general grounds on its face and 3 affidavits sworn by the plaintiffs. In the supporting affidavit, the 1st plaintiff deposed that they are the registered owners of land L.R no 14414 section 1 Mainland North herein after referred is as the "suit land". They acquired the land through purchase made on 11th July 2014. He deposed that the property was unoccupied but the defendant would occasionally appear to claim the property still belonged to him.

3. The plaintiffs pleaded that they commenced repair work and through Kinyua Auctioneers removed the defendant's few pieces of furniture that were in the abandoned house on the suit property. However the defendant regained entry on 11.8.2015 forcefully by using armed police from Bamburi Police Station which raid breached their rights

4. In the further affidavit, the 1st plaintiff deposed that the defendant is not lawfully in possession as he violently evicted the plaintiffs from the suit land. The 1st Plaintiff deposed further that the defendant has no title to the property and he is thus a trespasser and that the defendant is seeking the court to sanction his illegal and unlawful occupation of the plaintiffs' property. Further that having acquired the title of the property, they did not require authority from anywhere to take possession of the property. They have denied that they evicted the defendant as he was not in possession in the first place.

5. Lastly the 1st plaintiff in the supplementary affidavit deposed that the notice of motion dated 7.1.2014 in **NBI ELC no 5 of 2014** filed by the defendant herein was withdrawn on 24.6.2015 therefore annexure **mm1** and **mm2** is misleading. He also deposed that the defendant has not served the amended plaint as ordered in that suit. He argued the court to grant the orders sought.

6. The application is opposed by the defendant/respondent through a replying affidavit sworn on 18.9.2015. The defendant deposed that he is in occupation of the suit land law fully and legally. He also deposed that the applicants do not hold a valid title to the suit property. The Respondent deposes that a prayer for a mandatory injunction to vacate and be evicted cannot be issued at this interlocutory stage as the suit premises is the subject matter in **NBI ELC no of 2014**.

7. The respondent avers that on 7th august 2015, the applicants moved the court in **misc app 166 of 2015** for an order to break in and enter his house to remove the proclaimed goods. According to the Respondent, this was a clear admission that the respondent was in occupation. The respondent further deposed that he challenged the break-in orders and even obtained warrants of arrest against the auctioneer for disobeying the court order and to return the goods.

8. The respondent invited the court to note the subversion of Justice played out by the plaintiffs and Fawzey and Faud by transferring the suit property to defeat the defendant's suit in **NBI ELC no. 5 of 2014**. In paragraph 26 of his affidavit he urged the court to order the Land Registrar, Mombasa to deposit the original title deed in court for purposes of scrutiny. He annexed copies of pleadings, proceedings and orders from the various suits filed in different courts that refer to the same subject matter by both parties herein.

9. The advocates on record then rendered oral submissions in support of and against the application. Mr. Asige for the applicants submitted that since the Applicants are the registered owners of the suit property, they have vested with rights under article 40 of the Constitution and section 24 of the Land Registration Act. Mr. Asige submitted that the plaintiffs took possession and use of the property because it had been abandoned.

10. He continued that the defendant illegally evicted the plaintiffs on 11.9.2015 therefore it is the duty of this Court to enforce the obligations the defendant has towards the plaintiffs not to interfere with their quite use and possession of the property. The plaintiffs submit that the mandatory orders are grantable because the defendant has no right over the suit property. In support of their submission, the plaintiffs relied on the following cases:

*(1) Everlyn Design College vs A.G (2013) eLKR.*

*(2) Sergio Lieman vs Tonica Investments & another (2009) eKLR*

*(3) Michael Mugo Vs Nelson Nthiga (2015) eKLR*

*(4) Katsuri Ltd Vs Nyeri wholesalers (2014) eKLR*

11. Mr. Wachira advocate for the defendant submitted that they have set out the particulars of fraud of the purported public auction in their pleadings and that the defendant filed **ELC no 5 of 2014** when he discovered the fraud. He submitted that the applicants claim to have bought the property on 11th July 2014 yet the application for break- in was done by Fawzy Abdalla should raise questions. The defendant submits that the people who bought the property knew about the case in Nairobi and cannot claim to be purchasers for value without notice. Further that no sale agreement or evidence of payment has been annexed to the current pleadings. He also questioned the applicants claim that the suit premises were abandoned yet there were goods proclaimed from the said premises.

12. Mr. Wachira submitted that the order of 8.7.2015 did not include eviction orders. The auctioneer was ordered to return the goods hence warrants of arrest were issued. He submitted that prayer 3 does not lie as the defendant has always been in physical occupation of the suit property. He continued that mandatory injunctions are grantable only in very clear cases. He distinguished the case law cited by the Applicants and stated that the **Sergio Lieman** case supports them. He urged the court to dismiss the application.

13. From the pleadings and the submissions, it is not in doubt that the defendant is the one currently in physical possession of the suit property. It is also clear that the applicants are the current registered owners of the suit property as per documents exhibited. The only issue for me to determine is who should remain in possession between the plaintiffs and defendant pending the determination of the suit.

14. The applicants submitted that when they took possession of the suit property, it was abandoned. They then commenced repairs immediately they took possession. The defendant challenged this position. He supported this argument by posing the question, whose goods were proclaimed and removed away from the suit premises by the auctioneer? The applicants submit they are entitled to possession by virtue of being the registered owners and therefore the defendant's presence in the property amounts to trespass.

15. Going through the annexed court proceedings filled by the parties herein, I find them both guilty of abusing the court's process because of filing duplicity suits seeking orders to suit their particular circumstances and without making full disclosures.

16. On 10.7.2015, Faiza Abdalla who sold the property to the applicants herein instructed Kinyua & co. auctioneers to distress for rent against the defendant. The amount given as outstanding in rent arrears was Kshs 500,000. The said auctioneers while carrying out that instruction sought and obtained a break - in order on 8th July 2015 in Mombasa **CMCC 166 of 2015**. Later the defendant in the same case obtained a return order for the goods carted away. There were also proceedings over the same property in **CMCC 150 of 2014** between Fuad Abdalla & another and the defendant herein and in which the present plaintiffs were claiming mesne profits from the defendant because the defendant had remained in possession yet he was now not the registered owner.

17. The copies of pleadings in the chief magistrate's court annexed confirm that the defendant was in possession of the suit property thus the order of the court allowing for break-in to distress for rent. That break-in order was not an eviction order. The applicants have not explained to me how they were put in possession in the first instance. Although they are the registered owners of the suit property, they were under obligation to follow due process of the law in obtaining vacant possession. In the case of **Katsuri supra** they relied on, the relationship was that of landlord/tenant unlike the instant case. Further this was a decision reached in a final judgment not delivered on an interlocutory application.

18. Similarly, the **Everlyn college** case *supra* was a final judgment. The **Sergio Lieman** case, the decision was made in favour of the respondent and is therefore of no use to the Applicants claim. In the **Michael Mugo** case, the injunction was refused on the basis that it amounted to evicting the plaintiff/respondent from the suit land. All the cases referred do not support the prayers sought at this stage of these proceedings. Since the substantive prayers sought in the plaint are mandatory orders of injunction and eviction of the defendant from the suit premises, granting the prayers sought the present application will result in the suit being determined by an interlocutory application. Consequently I find no merit in the motion and I decline to grant the orders sought therein.

19. Although the Applicants claim is that they are the registered owners of the suit property hence vested with rights under article 40 of the constitution, it is prudent that they gain access in a lawful manner in the application as it will render this suit going for full trial a mere academic exercise. The orders sought are denied and each party to bear their costs of the application.

**Ruling Dated & Delivered this 12th day of February 2016**

**A. OMOLLO**

**JUDGE**