



REPUBLIC OF KENYA
N THE HIGH COURT OF KENYA
AT NAIROBI
ELC CIVIL SUIT NO. 127 OF 2014

NANCY WANJIKU MAINA.....APPLICANT

VERSUS

JANE WAIRIMU MWANGI.....1ST RESPONDENT

JOHN NJUGUNA NJOROGE.....2ND RESPONDENT

BERNARD NGETHA KIHAGI.....3RD RESPONDENT

LAND REGISTRAR NAIROBI.....4TH RESPONDENT

RULING

The application before this court for determination is the Notice of Motion dated **4th February 2014**, brought under **Order 40 Rules 1,2 and 3 (3) of the Civil Procedure Rules and section 1A,1B,3A and 63 (e) of the Civil Procedure Act** seeking for orders that;

- i. ***The respondents herein either by themselves, their agents, servants, employees, personal representatives or assigns ,or any other persons authorized to act for them or their own behalf be restrained forthwith by a temporary injunction from evicting the plaintiff and her siblings, trespassing on to, or dealing in any other way whatsoever and or interfering with the property known as Nairobi/Block/ 119/603 situate at Githurai Estate Nairobi pending inter parties hearing and determination of this suit.***
- ii. ***That cost of this application be provided for.***

This application is premised on the grounds stated on the face of the application and the applicants supporting affidavit. In her Affidavit, applicant stated stating that her mother **Njoki Maina** died intestate in **1979**, leaving her siblings as the beneficiaries of her estate. She further averred that her late mother was a shareholder and allottee of that parcel number **Nairobi/Block/ 119/603**, {suit property} and that the beneficiaries have extensively developed the suit property with permanent homes and rental houses and have lived therein for 39 years. She averred that **James Mwangi**, her brother, together with the 1st defendant illegally and fraudulently transferred the suit property into their names without obtaining confirmed letters of administration. To safeguard their interest, the applicant placed a caveat on the register of the suit property and also placed warning notices on the suit property but the 4th Respondent removed the caveat from the register despite several reminders to maintain the caveat in the register. The

2nd and 3rd Respondents are purporting to have purchased the suit property from the 1st Respondent without due diligence and have now threatened to evict them from the suit property. She states that if evicted, they will be rendered destitute and without a home hence the orders sought.

This application is opposed. The 2nd and 3rd Respondents filed a joint Replying Affidavit on **15th May 2014** where they confirmed that they got into a sale agreement with **James Mwangi Maina** in **February 2010**, for the sale of the suit property at a consideration of **Ksh 2,000,000/=**. That at the time of getting into the sale agreement the suit property was in the name of **James Mwangi Maina**. They averred that **James Mwangi Maina** was killed and therefore they had to enter into further agreement with his wife **Jane Wairimu Maina** and **Joel Maina Mwangi** so as to be able to finalize the sale agreement after she was issued with a grant by the court. They further averred that they could not lodge the transfer for the reasons that there was a caution registered on **14th May 2002**, by the plaintiff and her sisters which forced them to issue a Notice for Removal of the caution as required by the law which was removed. The transfer was registered and a lease in favour of the **2nd and 3rd Respondent** was issued. They stated that if the suit property had been fraudulently registered in the names of **James Mwangi Maina**, the party that would be answerable to the allegation is **Githurai Ting'ang'a Co. Limited** which had the property transferred in favor of **James Mwangi Maina**, yet the same party has not been made a party to this suit. Therefore, the plaintiff has no claim over the suit property as it is clear that **James Mwangi Maina**, is the proprietor of the suit property and that the Plaintiff and her sisters were not residing on the suit property as at the time of the purchase.

The 1st Respondent the widow of **James Mwangi Maina**, filed her Replying Affidavit on **15th May 2014**, and stated that that the suit property belonged to her late husband after it was transferred to him by **Ting'ang'a Limited in 1993**. She confirmed that the property was sold to the **2nd and 3rd Respondents** by her late husband and she later completed the transfer after the death of her husband. She also confirmed that the plaintiff and her sisters are residing on the suit premises.

Parties filed their written submissions which this court has taken consideration. I have carefully considered the application, supporting affidavit and the relevant affidavit. The conditions for granting an interlocutory injunction were stated by the Court of Appeal in **Giella -vs- Cassman Brown Limited [1973] EA 338** where the court held that :-

“First an applicant must show a prima facie case with a probability of success, secondly an interlocutory injunction will not be granted unless the applicant might otherwise suffer irreparable injury which could not be compensated by an award of damages, thirdly if the court is in doubt, it will decide as application on the balance of convenience”

I have considered the affidavits of the parties herein and find that the plaintiff is in occupation of the suit property a fact that has been confirmed by the 1st Respondent, while the suit property is registered in the 2nd and 3rd Respondents, having been transferred to them by the 1st Respondent. The 2nd and 3rd Respondents have rights that cannot be defeated unless it is proved that they acquired title through fraud or the suit property was held in trust for the plaintiff and her sisters by their deceased's brother. Since the plaintiff and her sisters are in occupation this application will be determined on a balance of convenience which requires that the suit property be preserved pending the hearing and determination of the suit. Having been admitted that the Plaintiff and her sisters are residing on the suit property, they should not move nor be evicted from the suit property and the 1st 2nd and 3rd Respondent should not deal with the suit property in any way pending the hearing and determination of the suit.

Costs shall be in the cause.

It is so ordered.

Dated, Signed and delivered this **11th day of May 2015**.

L. GACHERU

JUDGE

Court:

Ruling read in open Court in the presence of

None attendance for the Plaintiff

None attendance for the Defendant

Hilda : Court Clerk

L. GACHERU

JUDGE

11/5/2015