



REPUBLIC OF KENYA
IN THE HIGH COURT OF KENYA

AT MOMBASA

ELC NO. 270 OF 2014 (O. S)

KENNETH KIARU NGUGI and PETER KENNETH

WAITITU suing as Administrator of the Estate of

SALOME WAMBUI WAITITU.....APPLICANTS

-VERSUS-

HAWA NUR

HUSSEIN.....RESPONDENT

RULING

1. The applicants filed this suit by taking out the originating summons. Together with the O.S., they filed a notice of motion application dated 29th October 2014. The motion is premised on Section 1A, 1B and 3A of the Civil Procedure Act and Order 40 rule 2(1) and (12) of the Civil Procedure Rules seeking the following orders :-

1. Spent

2. Spent

3. That this Court be pleased to issue orders restraining the respondent either by herself, agents, servants and or employees from denying the applicants access and from making any further developments to land parcel Kwale/Diani Complex/1085 illegally occupied by the Respondent pending pending the hearing and determination of this summons.

4. That the costs of this application be provided for.

2. The application is supported by the grounds listed on the face of it and the supporting affidavit of Keneth Kiarui Ngugi. The grounds include inter alia that the Respondent failed to honour the terms of the sale agreement entered into between the late Salome Wambui Waititu and herself. The Respondent illegally took possession from April 2008 to date. Further that the agreement has terminated by effluxion of time. The applicants aver that they are suffering great economic and financial loss arising from denied access to the property and other benefits that would otherwise accrue to them.

3. The application is opposed by an affidavit that was filed late on 15th September 2015 after the applicants had filed their submissions. In the replying affidavit the Respondent admits she is in possession but not illegally as the agreement permitted her. She deposes that she has paid Kshs 1,850,000 and did not complete the sale due to the deceased poor health and subsequent death. The Respondent deposes further that all the existing developments on the property were initiated and carried out by her. She continued that she could not deal with the applicants because they did not have letters of administrators of the deceased estate. Lastly she raised the issue that both the application and the Originating Summons are incompetent and should be struck out with costs..
4. In determining the motion, I will begin by disregarding the issue of incompetence of the pleadings filed as raised by the Respondent. I do so because the replying affidavit was filed late and therefore the applicants did not have opportunity to defend the issue of incompetence.
5. On the merits of the application, I have considered both the pleadings and the submissions filed and on record. The applicants admit the Respondent took possession in April 2008 albeit illegally. In clause 4 of the agreement, the vendor was to avail vacant possession to the purchaser after full payment of the purchase price. The vendor died on 9th December 2009 more than a year after the Respondent took possession although the purchase price was not full paid. It is therefore not clear on what terms the Respondent took possession but she got into possession during the life time of the vendor.
6. Can the orders of injunction be granted in the circumstance of this case ? The purpose of an injunctive relief is to prevent the wasting, damaging, alienation, sale, removal or disposition of property until the disposition of property until the disposal of the suit or until further orders. The applicants have not explained any recent undertakings by the Respondent on the suit land. In fact no time is specified of any activities on the land by the Respondent other than she got into occupation in April 2008.
7. The applicants did not pray for mandatory orders of injunction. The Court cannot therefore give an order to prevent an action which has already taken place. In the case law of **Alice Njambi Waitiki and Another vs John Kamari Muchai & 3 others (2015) e KLR and Murtahar Ahmed Dahan & Another vs Athuman Sudi (2013) e KLR** cited by the applicant, the orders sought were granted after the cases were heard on merit and not at an interlocutory stage. The applicants may have established a prima facie case but the orders sought if granted would amount to determining this suit at an interlocutory stage without giving the parties opportunity to present their case.
8. The applicants have not pleaded that if the orders sought are not granted they will suffer irreparable loss. As rightly submitted by the Respondent that the loss if any suffered by the applicants is quantifiable. The applicants have on their own annexed a valuation report setting out their claim in terms of the current value of the suit land and mesne profits accruing to them from the time the Respondent took possession of the suit property. The loss they have suffered and or continue to suffer is thus quantifiable.
9. In conclusion, I find the application dated 29.10.14 is without merit and dismiss it with an order that each party to bear their respective costs.

Ruling dated and delivered in Mombasa this 27th day of November 2015

A. OMOLLO

JUDGE