



REPUBLIC OF KENYA
IN THE HIGH COURT OF KENYA AT NAIROBI
MILIMANI LAW COURTS
LAND AND ENVIRONMENTAL DIVISION
ELC CIVIL SUIT NO. 1348 OF 2013

THOMAS O. OPIYO & 127 OTHERSPLAINTIFFS/APPLICANTS

VERSUS

TELEPOSTA PENSION SCHEME

REGISTERD TRUSTEESDEFENDANT/RESPONDENT

RULING

The Plaintiffs filed a notice of motion application dated 7th November 2013 seeking a temporary injunction to restrain the Defendant whether by themselves, their servants, agents or otherwise howsoever from entering, trespassing and or interfering with the Plaintiffs' peaceful occupation of the property known as plot number Nairobi/Block 55/205, 206, 209, 210, 212, 214,216, 217, 218, 219, 221,222 ,223 ,225, 226, 227, 228, 230, 231, 232, 233, 234, 235, 236, 237,238, 239, 240, 241, 242, 243, 244, 245, 246, 247, 248, 249, 250, 251, 204, 208, 211, 213, 215, 220, 224, 229 and 175 pending the hearing and determination of this suit.

The application is premised on grounds listed on the face of the application and is supported by an affidavit sworn by **Thomas Ochieng Opiyo** on 7th November 2013. The Plaintiffs case is that they are occupants of several houses situate along Jogoo Road Staff Quarters on plot no. 209/12554 owned by Kenya Postal Corporation of Kenya through the Defendant herein. The Plaintiffs have alleged that plot no. 209/12554 was subdivided into 48 plots commonly known as 10 by 10 and registered as Nairobi/Block 55/205, 206, 209, 210, 212, 214,216, 217, 218, 219, 221,222 ,223 ,225, 226, 227, 228, 230, 231, 232, 233, 234, 235, 236, 237,238, 239, 240, 241, 242, 243, 244, 245, 246, 247, 248, 249, 250, 251, 204, 208, 211, 213, 215, 220, 224, 229 and 175(herein after referred to as the suit property).

The Plaintiffs have alleged that they were granted first priority to buy the plots by virtue of their employment with Telkom Kenya Ltd. They have contended that since they had been allocated the houses for occupation and possible purchase upon an intended sale, they made arrangements to secure appropriate financing for the purchase of the houses or plots in the conditions they were occupying. It is averred that on 10th October 2013, the Defendant published a notice in the Daily Nation Newspaper notifying the Plaintiffs and the public that the houses were not fit for human occupation having been condemned by the City Council of Nairobi on 14th August 2007.

Further, the Plaintiffs have averred that the Defendant had filed a suit against them in 2008 seeking to

evict them from the premises alleging the condemnation by the then City Council of Nairobi. The Plaintiffs have annexed as evidence an application dated 3rd March 2008 filed in HCCC No. 72 of 2008 as well as a ruling by **Hon. Lady Justice Angawa** delivered on 13th March 2008 and have averred that they are still in occupation of the suit premises. They have exhibited photographs of the alleged premises and have stated that they have properly maintained the houses and they aver they same are fit for occupation.

It is the Plaintiff's averment that there are other suits between the Defendant and its former and some current employees where the Defendant sought to evict them from the houses they had been allocated or had declined payment of the purchase price. According to the Plaintiffs, the purported condemnation of the houses is calculated at giving room to the Defendant to evict them and that unless the orders sought are granted, they stand to suffer irreparable loss and injury.

The Defendant opposed the motion through a replying affidavit sworn on 19th November 2013 by **Peter K. Rotich**, the administrator and secretary of Teleposta Pension Scheme. The Defendant has contended that ten by ten plots consists of the entire parcel known as **Nairobi/Block 55/205-251** which were as a result of subdivision of plot number **211/PT (B)** Jogoo Road Estate. The Defendant has avers that the subdivision was conducted in 2005 and separate title deeds were issued for each plot.

According to the Defendant, the houses that the Plaintiffs are occupying are not for sale since they were condemned and no market value could be attached to them. It is contended by the Defendant that the houses were allocated to the Plaintiffs for occupation while they were in employment by Telkom Kenya Ltd and Postal Corporation of Kenya respectively and that following the condemnation, the tenancy arrangements were cancelled in 2002.

It is contended that following the condemnation of the houses, Telkom Kenya Ltd and Postal Corporation of Kenya informed their respective employees to vacate the houses and began to pay their staff members including the Plaintiffs, a house allowance at the rate of 60% of their basic salary. It is the Defendant's case that despite receiving several notices, the Plaintiffs have declined to vacate the premises and were also not paying any rent to the Defendant.

While reiterating that the houses were merely allocated for occupation by employees of Telkom Kenya Ltd and Postal Corporation of Kenya, the Defendant has contended that subdivision into various plots had not been carried out. According to the Defendant, Telkom Kenya Ltd and Postal Corporation of Kenya were not the owners of the property at the time and therefore lacked capacity to give the Plaintiffs first priority to purchase the property. It is the Defendant's averment that the subject property was transferred to it in 1999 through legal notice number 154 published in Gazette Supplement Number 59 of 5th November 1999.

In respect to the suit filed by the Defendant in 2008, the Defendant has contended that the same has no bearing on this suit as the ruling was in respect of a mandatory interlocutory injunction sought. The Defendant while admitting that there are other suits in respect to its properties, has contended that they do not relate to Jogoo ten by ten plots. It is the Defendant's contention that they have never undertaken to repair and maintain the houses since following the condemnation of the houses, they caused subdivision of the parcel into sub plots for sale.

The Defendant has averred that in 2007, they advertised the suit properties for sale and after receiving bids, the scheme entered into sale agreements with successful bidders and received 10% deposit of the purchase price on all plots. Further, the Defendant has averred that the scheme has completed the sale of 30 out of the 46 subdivided plots and has effected transfers to respective purchasers who have been issued with title deeds.

According to the Defendant, some of the plots which have been fully sold and titles issued in the names of respective owners include Nairobi/Block 55/206, 211, 212, 213, 215, 216, 221, 223 ,224, 228, 229, 231, 233, 234, 235, 236, 237,238, 239, 241, 242, 248, 249, 250 and 251. It is the Defendant's contention that the scheme has refunded the purchase price to the buyers in respect to Nairobi/Block 55/205, 207,

208, 209, 210, 214, 219,245 and 247 for reasons that the scheme could not give vacant possession to the buyers and that their financiers could not access the property for valuation due to the Plaintiffs' continued occupation of the houses.

While reiterating that 30 out of the 46 plots were not available for sale, the Defendant has averred that the scheme will advertise the remaining plots for sale after demolishing the structures on the land, erecting beacons and conducting a valuation which could only be done after the Plaintiffs had vacated the premises. According to the Defendant, the Plaintiffs will be free to bid when the scheme will be ready to sell the plots.

Further, the Defendant stated that it was demolishing the houses since it was contractually bound to grant vacant possession to respective buyers. The Defendant exhibited a plaint filed in Nairobi **ELC no. 739 of 2012** and averred that some of the purchasers had sued it seeking vacant possession.

It is the Defendant's case that no evidence has been adduced to show that the Plaintiffs had been given any priority to purchase the suit properties and therefore, that no prima facie case has been established. Further, the Defendant has contended that the Plaintiffs had failed to make bids when the suit properties were advertised for sale and sold to third parties. According to the Defendant, the purchasers' right to occupy the suit properties superseded the Plaintiffs' claim to be given priority to purchase the houses which were not available for sale. The Defendant has contended that the Plaintiffs are trespassers and that an injunction would amount to rewarding trespassers.

While averring that the scheme would be prejudiced if an injunction issues, the Defendant has averred that the trustees face the danger of being prosecuted by the public health department of the county government for failing to heed to their notice. It is also alleged that the scheme continues to incur heavy expenses defending suits for vacant possession from respective purchasers. Further, the Defendant has averred that since no revenue is being collected from the plots, It may be unable to meet its pension obligations to its members as it is unable to generate income from the sale of the remaining plots.

In respect to damages, the Defendant has contended that the Plaintiffs have not demonstrated that they will incur loss which cannot be compensated by way of damages. It is the Defendant's contention that the balance of convenience tilts towards the denial of injunction for reasons that the dispute concerns plots which the Plaintiffs are only seeking priority to purchase. Further, it is contended that the Plaintiffs continue to enjoy their house allowance since 2002 and ought to have made arrangements for alternative accommodation and therefore, that there is no reason why an injunction should issue to stop the intended demolition.

The application was canvassed by way of written submissions and the Plaintiffs in submissions dated 26th March 2014 reiterated the facts of the case and argued that the sale of the 30 out of 46 plots and the subsequent issuance of titles thereof is questionable since vacant possession was not granted to the purchasers. It was submitted that vacant possession is an essential element of any land transaction where the right to occupy is granted to a third party.

Counsel for the Plaintiff submitted that the Defendant ought to have conducted a proper eviction procedure under section 4(4) of the Business Premises and Rent Tribunal (CAP 301) which provides that a 2 months notice should be given before an eviction. The court was referred to the case of **Omega Enterprises(Kenya)Ltd -vs- K.T.D.C and 2 others CA No. 59 of 1993** and it was submitted that the Plaintiffs were not notified to vacate the suit properties since they were in negotiations with the Defendant and were making arrangements on how to purchase the properties.

The Plaintiffs argued that the suit filed by the Defendant seeking to evict them was dismissed and that they had been in occupation of the premises since then. While submitting that the Defendant is intent on ensuring that they are left homeless and destitute, the Plaintiffs stated that there were various issues which could only be canvassed in the main hearing. It is the Plaintiffs submission that if the injunction sought is not granted, there will be nothing to litigate on at the hearing of the main suit since the Defendant have stated that they wish to demolish the houses.

In further submission, Counsel contended that section 3A preserves the inherent powers of the court to make orders necessary to further the ends of justice. For this submission, the Plaintiffs relied on the case of **Patel -vs- East African Cargo Handling Services Ltd (1974) EA 75** and **Shah -vs- Mbogo(1967)EA 116**. The Plaintiffs submitted that they stand to suffer great loss if the demolition is carried out since they have undertaken repairs of the houses over the years and had sought financial arrangements for the purchase in addition to huge amounts of money spent fighting for their rights in courts.

Counsel contended that the conditions enunciated in the case of **Giella -vs- Cassman Brown (1973)EA 358** had been met. Lastly, it was submitted that it is a constitutional requirement under Article 39 and 40 that an individual cannot be deprived of his abode without an alternative.

The Defendant filed submissions dated 6th May 2014 where reference was made to the conditions for grant of injunction as laid down in the case of **Giella -vs- Cassman Brown (1973)EA 358**. Counsel submitted that the Defendant has not demonstrated a prima facie as defined in the case of prima facie as defined in the case of **Mrao Ltd -vs- First American Bank & 2 others** (2003) KLR 125 stated that **“a prima facie in civil cases it is a case in which on the material presented to the court a tribunal properly directing itself will conclude that there exists a right which has apparently been infringed by the opposite party as to call for an explanation or rebuttal from the latter”**. It was argued in the present case that for the Plaintiffs to establish a prima facie case, they have to establish that there exists a right which the Defendant has infringed. Counsel for the Defendant submitted that the plaint does not disclose a reasonable cause of action since the suit was based on a nonexistent right since no evidence had been tendered to show that the Defendant had undertaken to give the Plaintiffs first priority in the purchase of the suit plots.

Further, it was submitted that the Plaintiffs were notified that the property in dispute was a redevelopment site and that the Defendant never collected rent from the houses since they had been condemned. Counsel argued that since the Plaintiffs never bid for the properties, they were precluded from claiming priority to purchase the property. It was also argued that no evidence had been adduced to show that the Defendant had issued allotment letters to the Plaintiffs.

While submitting that 30 out of the 46 available plots had been sold, the Defendant contended that the prayers sought cannot be granted since judgement cannot issue against the purchasers who were not parties to this suit. It is the Defendant's submission that the Plaintiffs did not deserve the court's protection since evidence had been tendered that since 2002, they had been receiving house allowance equivalent to 60% of their basic salary while they were spending nothing on housing.

Counsel submitted that the Plaintiffs had not demonstrated that they would suffer loss that cannot be compensated by way of damages. It is submitted that the purchasers who had been kept off the properties were the ones suffering and the Defendant who was spending money to defend suits on vacant possession. The Defendant argued that it was financially capable of compensating the Plaintiffs for any loss they may suffer.

In respect to where the balance of convenience tilted, it was submitted that the same was in favour of disallowing the application. Counsel submitted that evidence had been adduced to show that some of the purchasers had sued the Defendant for vacant possession. Counsel submitted that the Defendant which was a pension scheme relies on income generated from the properties to pay pension to its over 13,000 pensioners and that members of the scheme were highly prejudiced since huge sums of monies were being spent to defend suits for vacant possession.

Lastly, it was submitted that the Defendant risked prosecution since the houses were not fit for occupation where the Plaintiffs who had nothing to lose continued to use the property to the exclusion of the scheme and the purchasers.

The issue for determination is whether the Plaintiffs have fulfilled the conditions for grant of an interlocutory injunction as laid down in the case of **Giella -vs- Cassman Brown Ltd (1973) EA 358**.

The Plaintiffs have maintained that they have not been served with any eviction notices and that due process has not been followed by the Defendants to procure their eviction. The Defendant has averred that since 2002, several notices to vacate the houses have been issued to the Plaintiffs who have declined to vacate. The Plaintiffs annexure marked “**JO03**” is a notice published by the Defendant in the Daily Nation Newspaper giving the Plaintiffs 30 days to vacate or face imminent demolition of the houses upon lapse of the notice period.

In my view, a 30 day notice for persons who have lived in the suit property for more than a decade is inadequate and insufficient. In the case of **Ibrahim Sangor Osman -vs- Minister of State for Provincial Administration & Internal Security & 3 others (2011) eKLR**, the court found a 21 days’ notice for people who had lived on a parcel land since the 1940s to have been insufficient and unreasonable. I suppose the same can be said of the plaintiffs in the instant suit.

In my view, the Plaintiffs have shown they have been occupying the suit premises over a long period of time and prima facie and have demonstrated that their right to adequate housing as provided for under Article 43 of the Constitution is threatened. In the event the plaintiffs houses or places of abode are demolished as threatened by the Defendant the plaintiffs may be exposed to undue hardship as their right to access to reasonable housing may be infringed. The issue whether the Defendant has observed procedural protections which should be applied in relation to forced evictions can only be determined after trial. See **Susan Waihera Kariuki and others -vs- Town Clerk, Nairobi City Council and others Nairobi Petition No. 66 of 2010**, and **Satrose Ayuma & 11 others v Registered Trustees of the Kenya Railways Staff Retirement Benefits Scheme & 3 others Nairobi Petition No. 65 of 2010**. **In the Satrose Ayuma case, the court adopted** General Comment No.7 of the UN Commission on Human Rights and stated that:-

"State Parties are obliged to use all appropriate means to protect the rights recognised in ICSECR and it recognises that forced evictions are *prima facie* violations of the right to adequate housing, and that States should be strictly prohibited in all cases, from intentionally making a person or community homeless following an eviction, whether forced or lawful. Paragraph 15 of General Comment No.7 also elaborates on appropriate procedural protection and due process to be put in place to ensure that human rights are not violated in connection with forced evictions.

The Court has jurisdiction under Article 23(3) of the Constitution to grant conservatory orders where a dispute involving the violation or infringement of, or threat to, a right or fundamental freedom in the Bill of Rights has been brought before the court.

The plaintiffs in the plaint have inter alia sought a declaration that they are entitled to first priority to purchase the houses erected in **L.R.NO.209/12554** which has since been subdivided into various plots. I understand the plaintiffs to assert that in the event the houses they occupy are for sale they ought to be given the first priority to purchase having regard to the many years they have lived and occupied the houses as tenants. Fair play would dictate that if the houses are for sale and the plaintiffs who are the occupiers have the means to purchase the same on the terms that are acceptable to the Defendant, then they should be given the opportunity to purchase.

On the material before the court it is not clear on what terms the houses were or are to be sold and/or disposed off and both the plaintiffs and the Defendant take differing positions on the issue. On evaluation of all the material and evidence and the circumstances it is my view that the strict application of the principles/conditions for the grant of interlocutory injunction as established in the case of **GIELLA –VS- CASSMAN BROWN & CO. LTD (1973) EA 358** would be inappropriate in the circumstances of this matter. Rather the court would having considered the attendant circumstances and the balance of convenience is of the view that this is a matter where the subject matter of the suit ought to be preserved pending the determination of the suit. The parties for their part should fast track the hearing and determination of the suit on merits so that the party who ultimately is decreed as entitled to the suit property can get redress in a timeous manner.

In the premises I therefore make an order direct that the parties do maintain and observe the obtaining status where the plaintiffs shall be entitled to remain in possession and occupation of the suit premises until the suit is heard and determined.

I further direct that the parties with a view to fast tracking the hearing and final determination of the suit do comply with order 11 of the Civil Procedure Rules within the next 60 days. I further fix the matter for a pretrial conference on 25th January 2015 for purposes of taking pretrial directions.

I make no order for costs in regard to the application and each party will bear their own costs.

Ruling dated, signed and delivered this...**28th**...day of...**October**....2014.

J. M. MUTUNGI

JUDGE

In presence of:

Mr. Nthiwa..... for the Plaintiff

Mr. Sang for Bundotich..... for the Defendants.