REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA

MILIMANI LAW COURTS

ENVIRONMENTAL & LAND DIVISION

ELC NO. 998 OF 2014

BEATRICE KANZAYIRE

EDDY NTIRAMPEBA...PLAINTIFFS

(SUING IN THEIR PERSONAL CAPACITY AS

THE ADMINISTRATRIX AND ADMINISTRATOR

RESPECTIVELY OF THE ESTATE OF THE LATE

LAURETN NTIRAMPEBA (DECEASAED)

-VERSUS-

ADAM GASONGO...DEFENDANT

RULING

1. The Plaintiffs/Applicants seek an interlocutory injunction against the Defendant/Respondent to restrain the Defendant whether by himself, his agents or servants or otherwise howsoever from obtaining, residing in managing and/or interfering with Land Reference Number 14605 Nairobi ("the suit property") until the hearing of the suit. The application is supported by the affidavit of the 1st Applicant sworn on 30th October, 2013.

2. Briefly, the 1st Applicant states that she is the widow of one Laurent Ntirampemba (Deceased) who until his demise was the registered proprietor of the suit property. The Applicants were duly appointed the Administrators of the estate of the Deceased through a Grant of letters of administration Intestate issued by the High Court in Succession Cause No. 423 of 2004 at Nairobi on 4th August, 2005. The Grant was confirmed by the court on 18th April, 2007 and a certificate to like effect duly issued. The Applicants say that the Respondent who is the brother of the Deceased has inter-meddled with the estate and has taken possession of the suit property. Paragraph 6 of the Supporting Affidavit runs as follows:

   "6. That the Respondent being the brother to the deceased has entered upon the deceased suit property, taken possession of the same and has further taken it upon himself to manage and collect monthly rent from the tenants of the deceased suit property without

(the Applicants) consent as the administrators of the said estate"

3. It is not clear when the alleged intermeddling began. It is also not clear when the Respondent took possession of the suit property. The plaint however gives some indication at paragraph 7 whereat the year 2004 is referred to as the year the Respondent began inter meddling and entered the suit premises. The same averment is repeated at paragraph 8 of the 1st Plaintiff's written witness statement filed on 15th August, 2013.

4. Despite being served with the application the Respondent did not file any Replying Affidavit, neither did the Respondent file any grounds of objection pursuant to the provisions of Order 51 Rule 14 of the Civil Procedure Rules. Further, despite being granted time by the court to file written submissions on the application the Respondent failed or neglected to do so. Consequently, the application is deemed to have been urged exparte. The Respondent though had filed a Defence statement as 10th September, 2013.

5. I have read the written submissions filed on behalf of the Applicant. I have also perused carefully the supporting affidavit as well as the annextures thereto. I have also read the Defence Statement. I note though that the Respondent did not file any witness statement or list and bundle of documents to support the contentions in the Defence statement. I have considered the written submissions of the Applicants as well as the authorities relied upon by the Applicants.

6. Even though the application had been urged exparte, it was still incumbent on the Applicants to satisfy the conditions necessary for the issuance by the court of an interlocutory injunction as laid out in the case of **Giella –v- Cassman Brown & Co. Ltd [1973] EA 358**. More so, as there is no controversy on the fact that the Respondent is on possession, the orders sought are akin to a mandatory injunction in so far as they seek that the Respondent be restrained from "residing in" the suit property. An applicant has in such a case an obligation to satisfy the court that the interlocutory mandatory injunction is warranted. Indeed the Applicant must not only satisfy the principles in **Giella –v- Cassman Brown** *(supra)* but must also show that there are special circumstances above the mere establishment of prima facie case and further that it is a clear case which ought to be decided at once.

7. The court in such cases must be made to feel a higher degree of assurance that at the trial a similar injunction would probably be granted: See **Kenya Breweries Ltd & another –vs- Washington Okeyo [2000] 1 EA 109; London Brough of Hounslow –v- Twickenham Garden Developments Ltd [1970] 3All ER 326; Channel Tunnel Group Ltd –v- Balfour Beatty Construction Ltd [1992] 2 All ER 609**. The standard is certainly higher and perhaps the following statement by Megarry J in the case of **Shepherd House Ltd vs. Sandham [1972] Ch 340** at page 351 captured it all;

   > *"Third, on motion as contrasted with at trial, the court is far more reluctant to grant a mandatory injunction than it would be to grant a comparable prohibitory injunction. In a normal case the court must, inter alia, feel a high degree of assurance that at trial it will appear that the injunction was rightly granted and this is a higher standard than is required for a prohibitory injunction"*

   Lord Megary's statement was to be cited with approval in the later Court of Appeal case of **Locabail International Finance Ltd –v- Agro export, the sea Hawk [1986] 1 WLR 657** at page 665 by Lord Mustil. I would also adopt it for the circumstances of this case even though the application and prayers are couched in prohibitory terms yet in reality it is a mandatory or positive order being sought.

8. I hasten to add too that an injunction being a discretionary remedy underOrder 40 Rule 1 of Civil Procedure, I must also consider all factors relevant to the application including but not limited to the defence filed by the Respondent even in the absence of a Replying affidavit.

9. The Applicants have shown that they are the proprietors of the suit property by reason of the Certificate of confirmation of Grant of letters of Administration. They are reflected against the title as the properties. The suit property was vested in them jointly when the Grant was issued. The Respondent also claims to have been issued with a Grant of letters of administration. He says he is the genuine and bona fide administrator of the estate of the Deceased. There are however no documents exhibited to support the allegation by the Respondent. It is evident that the Respondent has no shred of proprietary interest in the suit property. I have no doubt from the documents before the court that the Applicants are exclusively entitled to be registered as proprietors in trust for other beneficiaries of the suit property. From the Certificate of confirmation of grant, the Respondent does not appear to be one of the beneficiaries. It is evident therefore that the Respondent has no interest in the suit property recognized in law.

10. The Applicants have alleged intrusion by the Respondent. The Respondent does not deny this but insists that he has no obligation to vacate and hand over the property. This can be revealed by the averment in the Defence Statement. I have determined that the Respondent has no interest in the property, either proprietary or possessory recognized by the law. Certainly, the Respondent cannot justify the intrusion as the apparent proprietors who are entitled to possession have not permitted him to enter or continue staying in possession.

11. The fact of an admitted actual intrusion without consent of the recognized proprietor is good evidence that the Applicants have shown a prima facie case. I now need to answer the question as to whether the Respondent needs to be ordered to not only cease the continuing trespass but also cease the current occupation or residence. As previously indicated any injunction granted along the lines sought by the Applicants would equate a mandatory injunction. There must therefore be special circumstances proven before the court acts.

12. I hold that view that the circumstances of this case are special and if the orders are made now there will be little doubt at trial that they were correctly and rightly made.

13. The Applicants are administrators. They are to hold or already hold the suit property as trustees for themselves and no less than four other beneficiaries. They are empowered by the law to preserve the suit property. They were also on 18th April, 2007 enjoined by the court to cause the sale of the property. That was in succession cause No. 423 of 2004. The Respondent in taking possession of the suit property is actually intermeddling with the estate contrary to the provisions of Section 45 of the Law of Succession Act (Cap 160). It is actually a quasi-criminal offence to so act. The circumstances are indeed special. This is not a case of ordinary trespass. The penalty will not be founded in damages but in proceedings of a criminal character.

14. In the meantime as the trespass continues the Applicants are being led to fail in their duty not only as administrators but also as trustees. It would be appropriate to make the order sought in the Notice of Motion to ensure an end to the breach of the court's order and of the law. In vacant possession, the Applicants will be able to dispose of the property as directed by the court. Absent the Respondent, it will even be easier.

15. I am inclined to allow the application dated 30th October, 2013 which I hereby do with costs to the Applicants.

16. Orders accordingly.

Dated, signed and delivered at Nairobi this 28th day of November, 2014.

J. L. ONGUTO

JUDGE

In the presence of:-

.... for the Applicant

.... for the Respondent