



REPUBLIC OF KENYA

IN THE ENVIRONMENT AND LAND COURT

AT MOMBASA

ELC NO. 182 OF 2018

VENASIO MURIUKI KANYANA.....PLAINTIFF

VERSUS

TABITHA WARUGURU NDUNYU.....1ST DEFENDANT

MARTIN MITHAMO NDUNYU.....2ND DEFENDANT

LYDIAH KABUCHI NDUNYU.....3RD DEFENDANT

RULING

1. By a Notice of Motion dated 2nd August, 2018 brought under Order 40 Rule 1 (a), Order 51 Rule 1 of the Civil Procedure Rules and Sections 3A of the Civil Procedure Rules and all enabling provisions of the law, the Plaintiff/Applicant is seeking the following orders:

1. That this Application be certified as urgent and the same be heard ex-parte in the first instance.
2. That this Honourable Court do urgently issue orders against the 1st Respondent prohibiting her and her agents from accessing the property on PLOT NUMBER 281/1/MN pending determination of this suit;
3. That this Honourable court do urgently prohibit the Respondents from jointly/severally by themselves or their agents from dealing in the premises or its tenants pending the final determination of this suit.
4. That the costs of this Application be provided for.

2. The Application is premised on the following grounds:

i. That while the Applicant is the beneficial owner of the property known as PLOT NUMBER 281/1/MN in Bombolulu within Mombasa County having purchased a license from the late Gabriel Mithamo Ndunyu and signing a transfer of licence on 5th December 2006, the Respondents have unlawfully trespassed on the Applicant's property and the 1st Respondent is currently illegally occupying commercial unit number 6 while jointly with other Respondents sending notice to the Applicant's Tenants demanding payment of rent into a different account without the authority of the Applicant or his agent.

ii. That the joint and several acts of the (sic) are causing the continued interference and trespass on the Applicant's property without any lawful cause of justification and further posing a great threat and risk to the Applicant's undivided right to

property and its use and control while depriving him of the peaceful occupation of his lawful property.

iii. That this Application is in the interest of justice and has been brought without any undue delay and if the same is not allowed the Applicant stands to and continues to suffer immense prejudice and great financial loss.

3. The Application is supported by the affidavit of Venasio Muriuki Kanyana sworn on 2nd August, 2018. Briefly, it is the Applicant's case that he is the beneficial owner of the Suit Property which is 'house without title' having purchased and had transfer done in his favour from the previous owner, the Applicant's late nephew Gabriel Mithamo Ndunyu for value in 2006. The Applicant has attached the transfer dated 5th December 2006. That upon execution of the transfer, the transferor vacated the premises and the Applicant entered therein and has since been paying ground rent to the legal custodian of the Suit Property. The Applicant states that he insured the Suit Premises and appointed one Richard Nguru Ndunyu as his agent to maintain the property and collect rent therefrom on behalf of the Applicant.

4. The Applicant avers that from 5th December 2006 until 20th February, 2017 when Gabriel Mithamo Ndunyu passed on, there was no dispute as to ownership of the Suit Property including from the Respondents who are the widow and children of the deceased. That since the demise of the deceased, the Respondents have taken it upon themselves and started harassing the Applicant's tenants and have taken control of the running of the commercial units and demanding that rent should be paid to them. That despite having been severally asked to desist from interfering with the Suit Property, the Respondents have persisted in their trespass even going as far as illegally taking possession of the commercial unit 6 without paying rent as from June 2018. It is the Applicant's contention that as a consequence of the acts of the Respondent, she stands to be prejudiced and lose use, control and actual possession of the Suit Property. The Applicant further contends that he stands to suffer great harm, irreparable loss and damage unless the Application is allowed.

5. The Application is opposed by the Respondents through a Replying Affidavit sworn by Tabitha Waruguru Ndunyu, the 1st Respondent on 18th January, 2019. She depones *inter alia*, that the property in dispute belongs to her late husband and that the Applicant is not the owner of the Suit Property and was only a holder of a Power of Attorney given to him by the deceased. That it is the deceased who appointed Richard Ndunyu as caretaker and Bretty Logistics as agent of the Suit Property to collect rent on his behalf. It is the Respondents' contention that the Power of Attorney from the deceased to the Applicant ceased to be in force upon the demise of the deceased and therefore the Applicant has no authority to deal with the Suit Property as alleged in the supporting affidavit. The Respondents allege that the transfer document presented by the Applicant is not legitimate. The Respondents state that after the demise of the deceased, the Applicant's attitude towards them changed and before then the Respondents had no reason to dispute with the Applicant in relation to ownership of the Suit Property. The Respondents further state that Bretty Logistics has always been the deceased's property agent and that they only got involved with tenants when they directed them where to pay rent upon realization that rent had been directed to the 1st Respondent's sister-in-laws account. The Respondents aver that the Applicant has no interest in the property and the tenants still pay rent to Bretty Logistics and therefore the Applicant does not stand to suffer any irreparable loss or damage. They deny that the Applicant has paid ground rent to the legal custodian of the Suit Property. The Respondents aver that the Applicant wants to disinherit them and that the claim herein is a retaliation because of complaints filed including **Succession Cause No.718 of 2007** at High Court Milimani and **Criminal Case No.1016 of 2018** at Shanzu Law Courts. The Respondents urged the court to dismiss the Application with costs.

6. The advocates for both parties agreed to dispose of the Application by way of Written Submissions and filed their respective submissions in which they outlined the facts as contained in their pleadings. The Applicant added that he has established a *prima facie* case with a probability of success as he has shown that he has a valid claim over the Suit Property. The Applicant further submits that he is bound to suffer irreparable damage as he had put a lot of investment in purchasing and maintaining the property for about 16 years. The Applicant further submitted that in the event the court finds that the Applicant might not suffer irreparable loss, the court should issue an order as to deposit of security or such other orders that the court will find suitable in maintaining the Suit Property till determination of the matter. The Applicant submits that the balance of convenience is in his favour having been in control and possession of the entire premises since the same was transferred to him by the deceased in 2002.

7. On their part, the Respondents submit that the Applicant has not met the threshold set to qualify for prohibitory and injunctive orders as prayed.

8. I have considered the Application herein. This being an Application for grant of interlocutory injunction, the Plaintiff must satisfy the conditions laid down in the case of **Giella – v – Cassman Brown**. The Plaintiff must show that he has a *prima facie* case with probability of success; that he stands to suffer irreparable damage and that in the event of doubt, that the balance of

convenience lies in his favour.

9. The Plaintiff has exhibited documentary evidence on how he acquired the Suit Property, including a transfer signed by the previous owner who is now deceased. The Respondents have denied that the Applicant is the owner of the Suit Property. The Respondents aver that the Applicant was only a holder of a Power of Attorney given to him by the previous owner who is now deceased. The Plaintiff has stated that there was no dispute over ownership until after the demise of the deceased when the defendants begun interfering with his ownership. On the other hand, the defendants allege that the Applicant was only a holder of a Power of Attorney which ceased to be in force upon the demise of the deceased. The dispute over ownership has to await determination after full hearing.

10. Having looked at the facts that have emerged in this case and the evidence adduced by way of affidavits, it is clear that the Plaintiff has established a prima facie case with a probability of success against the defendants. Besides the transfer produced by the Plaintiff (which is however disputed by the defendants), the defendants have produced a Power of Attorney that was given by the deceased to the Applicant in respect of the suit property.

11. In the case of **Mrao Ltd –v- First American Bank of Kenya Ltd (2003)eKLR**, the Court of Appeal held that:

“..... Prima facie case is more than arguable case. It is not sufficient to raise issues. The evidence must show an infringement of a right and the probability of the Applicant’s case upon trial.....It is a case 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 from the latter.....”

12. In my view, it is clear that the Plaintiff has shown his right over the Suit Property and which right the Defendants have infringed. As regards irreparable damage, I take the view that the Defendants’ unlawful actions on the Suit Property which have not been denied such as interference with the Plaintiff’s control and occupation may result in a loss that might not be quantified in damages. The defendants did not deny that the plaintiff gained control and occupation lawfully from the deceased, whether as alleged by the plaintiff or by power of Attorney as alleged by the Defendants. It was wrong for the defendants to interfere with such control and possession without following the due process. The balance of convenience if I had doubt, tilts in favour of the Plaintiff who has been in control and occupation since 2002 so that the *status quo* is not changed through the defendants’ actions pending hearing and determination of the suit.

13. Arising from all the above reasons, I find that the Plaintiff has satisfied the threshold for grant of interlocutory injunction. I therefore allow the Application. Considering the relationship of the parties herein, I order that each party bear their own costs.

It is so ordered.

DATED, SIGNED and DELIVERED at MOMBASA this 19th day of March 2019.

C.K. YANO

JUDGE

IN THE PRESENCE OF:

Rathu holding brief for Khaminwa for Defendants/Respondent

Ms. Nabwana for plaintiff

Yumna Court Assistant

C.K. YANO

JUDGE



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