



**REPUBLIC OF KENYA**  
**IN THE HIGH COURT OF KENYA AT NAIROBI**

**CIVIL DIVISION**

**CIVIL SUIT NO. 291 OF 2012**

**JULIA ADHIAMBO OGUYA.....PLAINTIFF**

**VERSUS**

**ANDREW HORACE O. OMONDI.....DEFENDANT**

**RULING**

By Notice of Motion dated 14<sup>th</sup> June 2012 expressed to be brought under the provisions of Section 3A and 80 of the Civil Procedure Act, Cap 21, of the Laws of Kenya and Order 40 of the Civil Procedure Rules and all other enabling provisions of the law, the Plaintiff seeks the following orders:

1. **For reasons to be recorded, this application be certified urgent and service thereof be dispensed with in the first instance and the same be heard ex-parte.**
2. **The defendant by himself, his servants, agents, employees and otherwise however be restrained by an interim injunction from evicting tenants, collecting rent, renting out, leasing, entering upon, trespassing, charging, mortgaging, selling, transferring, transacting, disposing, alienating, taking possession or control dealing in any way whatsoever with flat Number MF 41/G, Madaraka Estate, the suit property herein pending the hearing and determination of the application and/or until further orders are issued by the Honourable Court.**
3. **The Defendant by himself, his servants, agents employees and otherwise however be restrained by an interim injunction from evicting tenants, collecting rent, renting, leasing, entering upon, trespassing, charging mortgaging, selling, transferring, transacting, disposing alienating, taking possession or control dealing in any way whatsoever with property flat Number mF 41/G, Madaraka Estate pending the hearing and determination of this suit.**
4. **Pending hearing hereof the status quo be maintained.**
5. **The costs of this application be provided for.**

The application is based on the grounds on the face of the application and is supported by an affidavit sworn by **Julia Adhiambo**, the plaintiff herein on 14<sup>th</sup> June 2012. According to the plaintiff in 1984 she took up residence in Flat Number MF 41/G (hereinafter referred to as the suit property) then under the name of one **William Olotch** a friend to the plaintiff's brother in law. However, as the house was not in her name, her employer was unable to pay her "owner occupier" allowances hence she agreed with the said **William Olotch** for change of ownership. However due to complications at the City Hall the transfer was not possible though a lease was issued. It was therefore agreed that she would pay the requisite rents for a period of 30 years after which the property would be transferred to her by the Council. However, her sister, **Susan Omondi** together with her husband **Arthur Omondi**, colluded with a **Mr Waweru** and had the house changed into the name of their son, **Andrew Horace O. Omondi**, the defendant herein, then a

student in India who is also a nephew to the plaintiff. The said transfer was, in the deponent's view, not procedural and the plaintiff was assured of peaceful and unlimited stay in the house by the said Susan and Arthur and all documents were surrendered to her together with a copy of the defendant's ID Card and the plaintiff continued paying rents and outgoings in respect thereto until 1998 when the management thereof was taken over by the National Housing Corporation. When the Corporation put the property on sale, the plaintiff was assured by her said sister as well as the husband and the defendant that they had no interest in the property and pursuant to the said assurance, she proceeded to pay for the same in the name of the defendant with a view to eventual transfer to her with the defendant being a co-signee to the transaction. However in 2009 when she attempted to mortgage the same the same was rejected by the mortgagee, Savings and Loan, on the ground that the house was not in her name. Although initially the defendant agreed to sign affidavit to facilitate the transfer to the plaintiff, the defendant later disappeared and swore to sell the property. Instead the defendant offered to refund the plaintiff the payments made to the Corporation claiming that the plaintiff was his tenant on the strength of another card despite the existence of a prior one. According to the plaintiff she has been in possession of the suit premises since 1984 while the defendant has never lived there and could not acquire interest therein as he was 13 years at the time of the acquisition. On 28<sup>th</sup> March 2012, the defendant instructed auctioneers to levy distress for rent against the plaintiff in purported recovery of Kshs. 480,000.00. In her view the court ought to grant the orders sought despite the existence of another matter in the Chief Magistrate's Court over the same subject matter between the same parties.

In opposition to the application, the defendant filed a replying affidavit sworn on 27<sup>th</sup> June 2012. According to him, this suit is an abuse of the process of the court due to the pendency of Milimani CMCC No. 1713 of 2012. In his view the applicant's suit does not disclose a cause of action but is dishonest and based on unsubstantiated allegations. According to him the plaintiff has admitted that she does not own the suit property. While admitting that the property was at one time occupied by **Mr William Olotch**, the defendant deposes that the said occupation was by permission from the defendant's father while the property remained the defendant's father's. In 1996, while the defendant was in India the said **Mr Olotch** surrendered the possession of the suit premises to the defendant's father who transferred the ownership to the defendant. On his return from India he resided together with the respondent (sic) on the suit property from 1999 to 2001. Thereafter the plaintiff was allowed by the defendant's father to reside therein while the property remained the defendant's and hence it is not correct that the property was transferred to the plaintiff. When the Corporation placed the house on sale in the sum of Kshs. 2,100,000.00 in 2006, the plaintiff requested the defendant's father not to let go off the house and the defendant paid to the Corporation the said sum of Kshs 2,100,000.00 by a first down payment of Kshs 200,000.00. According to him, the plaintiff was then advised to cease making payments in respect thereof after which the defendants commenced the process of having the property transferred as a result of which a lease was duly registered after confirmation of receipt of the purchase price and the release of the completion documents. According to the defendant, he is the duly registered owner of the suit property and hence the plaintiff has no colour of right over the same. As a mark of good faith, the defendant, however, offered to reimburse the plaintiff what the plaintiff had spent in respect of the property while offsetting the outstanding rents an offer which the plaintiff declined. Consequently, the defendant commenced the process of distress for rent. According to him, an injunction cannot issue against a registered owner of a property hence the conditions for the grant of injunction have not been satisfied. Further, it is his view that the balance of convenience tilts in his favour and in any event any damages apprehended by the plaintiff may be compensated by way of damages. It is the defendant's view that the present application is bad in law and ought to be struck out.

The application was prosecuted by way of written submissions. While reiterating the contents of the supporting affidavit, the plaintiff submits that the plaintiff has been a legal tenant of the suit property with full knowledge of the landlord and that title to the suit property never vested in any one individual until the plaintiff became purchaser for value. Whereas documentation may bear the defendant's name, due to the reasons explained in the affidavit, it is submitted that the same cannot be used as proof of any allegation or proof of transfer of the property since the property was at all times vested in the Council and the Corporation at the time it was sold to the plaintiff and the plaintiff will, at the opportune moment seek the investigation of the documents relied upon by the defendant. Since the plaintiff has not dwelt on the property for the last 30 years, has never made any payment towards the suit property, it is submitted that

he has not satisfied the requirements for the purchase of the property. The defendant, it is contended, is relying on the payments made by the plaintiff in the defendant's name to claim the property. In the plaintiff's view, since the defendant threatens to sell the property, the plaintiff stands to suffer irreparable damage since the property will then be irrecoverable. In the plaintiff's view, the defendant's claim amounts to unjust enrichment since he was a toddler when the process began. Relying on **Muhuddin Mohamed Muhiddin vs. C F C Bank Limited & 2 Others [2011] eKLR**, it is submitted that the Court must give effect to the policy that the law is not to be used as subterfuge, or pure technicality, to validate unjust gains by a party. It is further submitted that the doctrine of unjust enrichment postulates that no man shall reap where he has not sown; and if he does so, he should restore it to its rightful beneficiary. Relying on **Central London Property Trust vs. High Trees House Limited [1947] 1 KB 130**, it is submitted that the defendant is estopped by conduct from claiming the suit property. That the defendant offered to refund the Plaintiff's money is, in the plaintiff's view, an admission that the plaintiff is the rightful owner of the property. To ensure that the property is preserved and to avoid exponentially multiplied litigation, it is submitted that the orders sought ought to be granted. The threatened eviction of the applicant, the plaintiff contends will lead to both physical and emotional torment taking into account the fact that the plaintiff has been in possession of the suit property for 30 years. Unless the injunction is granted, the plaintiff fears becoming a homeless destitute. Since the plaintiff has been in occupation of the premises for a long period of time, it is contended that the balance of convenience tilts in her favour. Citing **Peter Ngari Nyaga vs. Nyaga Njagi & 2 Others [2007] eKLR**, it is submitted that temporary injunctions can be issued against registered owners of property especially where fraud, unjust enrichment and misrepresentation are in issue. According to the plaintiff possession is the cornerstone of injunctive orders.

On the part of the defendant, it is submitted, while reiterating the contents of the replying affidavit, that the defendant has exhibited documents showing that he is the registered owner of the suit property. Relying on **Kenya Commercial Finance Company Limited vs. Afraha Education Society [2001] 1 EA**, it is submitted that an order of injunction cannot be granted to the plaintiff who has no registered interest in the property and that without such registered interest there is no demonstration of a *prima facie* case. Since the sequence of granting an interlocutory injunction is firstly, that the Applicant must show a *prima facie* case with probability of success, secondly, irreparable injury and thirdly when the court is in doubt a balance of convenience, since the conditions are sequential the second condition can only be addressed if the first one is fulfilled and the defendant relies on Kenya Commercial Finance Company Limited case (supra). Nevertheless since the suit property is capable of being assigned a monetary value, the applicant can be compensated by way of damages should the applicant succeed. It is further submitted that since the defendant is the registered proprietor of the suit premises the balance of convenience tilts in favour of the defendant. However, should the Court be inclined to grant the temporary injunction, it is submitted that the plaintiff ought to be compelled to furnish rent as security from 2009 till the date of filing the suit. In the defendant's view the application ought to be dismissed with costs.

The principles guiding the grant of interlocutory injunctions are well settled. Firstly, an applicant must show a *prima facie* case with a probability of success. Secondly, an interlocutory injunction will not normally be granted unless the applicant might otherwise suffer irreparable injury, which would not adequately be compensated by an award of damages. Thirdly, if the court is in doubt, it will decide an application on the balance of convenience. See **East African Industries vs. Trufoods [1972] EA 420; Giella vs. Cassman Brown & Co. Ltd [1973] EA 358.**

In an interlocutory application, however, the Court is not required to make any conclusive or definitive findings of fact or law, on the basis of contradictory affidavit evidence or disputed propositions of law though it is properly entitled to express a *prima facie* view of the matter and to consider what else the deponent to the supporting affidavit has stated on oath which is not true. A *prima facie* case 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 to call for an explanation or rebuttal from the latter. See **Mrao Ltd vs. First American Bank of Kenya Ltd & 2 Others [2003] KLR 125.**

It is now well recognised that in exercising its discretion under the Civil Procedure Act or in determining

whether or not to grant the injunction sought the Court is enjoined to consider what has become known as the principle of proportionality under the overriding objective which objective the Court is enjoined to give effect to in the exercise of its powers under the Act or the interpretation of any of its provisions. In **Suleiman vs. Amboseli Resort Limited [2004] 2 KLR 589** Ojwang, AJ (as he then was) expressed himself as follows:

**“It is the business of the court, so far as possible, to secure that any transitional motions before the Court do not render nugatory that ultimate end of justice...The argument that the law governing the grant of injunctive relief is cast in stone is not correct, for the law has always kept growing to greater levels of refinement, as it expands, to cover new situations not exactly foreseen before. Traditionally, on the basis of the well-accepted principles, the Court has had to consider the following questions before granting injunctive relief: (i) is there a prima facie case with a probability of success? (ii) does the applicant stand to suffer irreparable harm, if relief is denied? (iii) on which side does the balance of convenience lie? Even as those must remain the basic tests, it is worth adopting a further, albeit rather special and more intrinsic test which is now in the nature of general principle. The Court, in responding to prayers for interlocutory injunctive relief, should always opt for the lower rather than the higher risk of injustice...Although the court is unable at this stage to say that the applicant has a prima facie case with a probability of success, the Court is quite convinced that it will cause the applicant irreparable harm if his prayers for injunctive relief are not granted; and in these circumstances, the balance of convenience lies in favour of the applicant rather than the respondent. There would be a much larger risk of injustice if the court found in favour of the defendant, than if it determined this application in favour of the applicant”.**

It is clear from the foregoing and more so on consideration of the provisions of section 1A(2) that the court is required in mandatory terms in the exercise of its powers under the Civil Procedure Act or the interpretation of any of its provisions, which provisions include the grant of interlocutory injunctions under Order 40, to seek to give effect to the overriding objective specified in subsection (1) of the section. The said overriding objective under subsection (1) on the other hand seeks to facilitate the just, expeditious, proportionate and affordable resolution of the civil disputes governed by the Act.

Therefore whereas the traditional considerations in applications for injunctions will remain relevant, the Court must develop the law in such a way as to meet the emerging trends in tandem with the ever changing circumstances.

The first issue for consideration is the effect of the earlier suit filed in the Chief Magistrate’s Court. It is conceded by the plaintiff that the said suit is in respect of the same subject matter and is between the same parties in this suit. That the said suit is pending is similarly conceded. In the said suit, it appears from a copy of the order annexed to the supporting affidavit that the plaintiff herein is the plaintiff in the said **CMCC No. 1713 of 2012** whereas the defendants are the defendant herein and **Simon Kibue T/A Resorers Consult**. By an order issued on 10<sup>th</sup> April 2012, the Court enjoined the defendants from levying distress and/or evicting the plaintiff pending the determination of an application filed therein. Why it became necessary to institute these proceedings and the present application in particular is not explained to the Court. As can be clearly seen the orders sought herein are substantially the same or similar to the orders sought in the application in the said case. Injunction is an equitable remedy and a party who comes to court for such orders must display good faith and must not show a disposition towards abuse of the process of the Court. Where such disposition is revealed the Court will not be amenable to the grant of the remedies sought.

As already stated above the Court is now enjoined to take into account the overriding objective in deciding whether or not to grant any orders under the Civil Procedure Act and the Rules thereunder. Dealing with the issue, the Court of Appeal in **Hunker Trading Company Limited vs. Elf Oil Kenya Limited Civil Application No. Nai. 6 of 2010** the Court of Appeal stated *inter alia* as follows:

**“the applicant cannot be allowed to invoke the “O2 principle” and at the same time abuse it**

**at will...All provisions and rules in the relevant Acts must be “O2” compliant because they exist for no other purpose. The “O2 principle” poses a great challenge to the courts in both the exercise of powers conferred on them by the two Acts and rules and in interpreting them in a manner that best promotes good management practices in all the processes of the delivery of justice. In the court’s view this challenge may involve the use of an appropriate summary procedure where it was not previously provided for in the rules but the circumstances of the case call for it so that the ends of justice are met. It may also entail redesigning approaches to the management of court processes so that finality and justice are attained and decisions that ought to be made today are not postponed to another day. If improperly invoked, the “O2 principle” could easily become an unruly horse and therefore while the enactment of the “double O” principle is a reflection of the central importance the court must attach to case management in the administration of justice, in exercising the power to give effect to the principle, it must do so judicially and with proper and explicable factual foundation. The overriding principle will no doubt serve us well but it is important to point out that it is not going to be a panacea for all ills and in every situation. A foundation for its application must be properly laid and the benefits of its application judicially ascertained”.**

To apply for an injunction before two courts and fail to fully disclose the position of the former application for injunction while applying for the later in my respectful view smacks of material non-disclosure of material facts.

Accordingly, this Court cannot determine the present application when it is kept in the dark on the status of the pending matter before the lower Court. In the premises the order that commends itself to me is not to consider the merits of the application dated 14<sup>th</sup> June 2012.

In the result the Notice of Motion dated 14<sup>th</sup> June 2012 is hereby struck out with costs to the defendant.

**Dated at Nairobi this 29<sup>th</sup> day of January 2013**

**G V ODUNGA**

**JUDGE**

Delivered in the presence of:

Mr Kamande for Mr Murithi for the Plaintiff

Mr Njoroge for Mr Kivuva for the Defendant