



REPUBLIC OF KENYA

High Court at Nairobi (Nairobi Law Courts)

Environmental & Land Case 688 of 2012

FARIDUN SULEIMAN ABDALLA.....PLAINTIFF/APPLICANT

VERSUS

PREPS INTERNATIONAL LIMITED.....DEFENDANT/RESPONDENT

RULING

The Plaintiffs/Applicants herein Faridun Suleiman Abdalla has brought this application dated 9/10/2012 under ***Order 40 Rule 1 & 2 of the Civil Procedure Rules and Section 1a of the Civil Procedure Act***. The Applicant sought for various orders among them.

- a) The Defendant be ordered by the Honourable Court to remove its security guards from the entrance of the property known as L.R No. 3734/940 Jacaranda Avenue Nairobi and give the Plaintiff/Applicant unlimited access to the said property.
- b) A temporary injunction be granted restraining the Defendants/Respondents servant and or agent from interfering with the peaceful enjoyment and occupation by the Plaintiff's in his property known as L.R No. 3734/940 Jacaranda Avenue, Nairobi until the hearing and determination of this suit.
- c) That the respondent be ordered to give vacant possession to the Plaintiff of Plot No. 3734/94 and/or be evicted.
- d) That OCS Muthangari Police Station do provide security during the evictions.
- e) Cost of the application be provided for.

The application was supported by the sworn affidavit of Faridun Suleiman Abdalla and on the grounds set out on the face of the application. Among the grounds stated are that:-

1. The plaintiff is the registered owner of plot No. 3734/240 having purchased the same through a Public Auction.
2. That the Defendant/Respondent was a tenant of the previous owner.
3. That the Defendant/Respondent has been given notice to give vacant possession but he has refused/and/or ignored to move out.
4. That the plaintiff/Applicant wants to renovate the house and occupy the same as his residential home

with the family.

In his Affidavit, the Plaintiff/Applicant stated that he is worried that the Defendant does not intend to leave the premises and has instructed a Security Firm to guard the premises. That the said Security Firm has denied him access despite instructing them that he is now the new owner. That the continued occupation of the Defendant of the said premises is causing him a lot of suffering, loss and damage.

The Application came for hearing on 20/11/2012. It was not opposed. There was a **Return of Service** of show that the Notice of Motion was served on the Defendant herein.

Though the application is not opposed, is the same merited?

I have considered the instant application and the relevant law and I make the following findings.

The Applicant herein alleges that he is the registered owner of Plot No. L.R No. 3734/940 Jacaranda Avenue in Nairobi. He averred that he purchased the same through a Public Auction and has attached various annexures therein. He further alleges that Defendant has failed and or refused to move out of the suit premises. That Defendant has installed Security Guards to guard the premises and plaintiff cannot access the suit property.

Plaintiff further alleged that he intends to renovate the suit premises and moves in with his family as their residential home. He thus seeks for the orders.

What is clear is that the Plaintiff is seeking access to the suit premises, thus an Eviction Order . It is also very clear that Plaintiff has not been in occupation of the suit premises. He alleges that he bought the same through a Public Auction. Plaintiff has only stated that Defendant has refused to vacate the suit premises but has not alleged that Defendant intends to dispose of the property on alienate it.

The application is premised under Order 40 Rule 1 & II. Order 40 Rule 1 gives instance where temporary injunction may be granted: - when the property in dispute is danger of being **wasted, damaged** and **alienated** by any party to the suit **or** when the Defendants intends to remove or dispose of his property affording reasonable probability that the plaintiff may be obstructed or delayed in execution of any Decree that may be passed against the Defendant.

The Applicant therefore in bringing an application for temporary injunction must demonstrate that the suit property is in danger of being **wasted, damaged** and **alienated**. The Applicant herein has not alleged that the Defendant intends to waste, alienate or dispose off the property.

The Applicant in essence is seeking for final orders since removal of the guards and eviction of the Defendant would mean disposal of this matter.

The Plaintiff has not been in occupation of the suit premises and is not in danger of being rendered homeless if the application is not granted.

The cardinal principles applicable in an application of this nature was laid down in the case of **Giella vs. Cassman Brown & Co. Ltd Civil Appeal No. 51 of 1972**.

There are three tests to be applied.

1. That the Applicant has a *prima-facie* case with probability of success.
2. That the Applicant will suffer irreparable injury.
3. That if court in doubt, court will decide the application on a balance of convenience.

The applicant herein states that he is the registered owner of the suit premises which he bought through a

Public Auction. He attached annexures to support his case. The same were not disputed by the Defendant as Defendant did not enter appearance or file their Replying Affidavit.

What is evident is that Plaintiff has not been in occupation of the suit premises. He has sought orders which if granted would dispose of the matter. The Applicant then should have sought to have the matter heard and determined to conclusion.

The Applicant allegedly bought the suit premises through a Public Auction and Defendant has refused and/or failed to vacate the premises. If the matter is concluded and a Decree is given in favour of the Plaintiff, then whatever loss the Plaintiff would have incurred will be compensated through costs. The plaintiff has therefore not demonstrated that he will suffer irreparable loss if application not granted. He was not in occupation of the premises and he is not in danger of eviction. He may be adequately compensated by way of costs, if suit is determined and Decree issued in his favour.

I have considered the provisions of Section 1A of the Civil Procedure Act which states the overriding objective of the Act and the Rules under the Act is to facilitate the just, expeditious, proportionate and affordable resolution of civil disputes.

This is a civil dispute and it should be resolved in a just, and expeditious manner. As I stated earlier, the Applicant has sought for various orders.

In any considered opinion, I find that the Orders sought are drastic and when granted would automatically determine the suit. I find that these are Orders which should be granted after the hearing of the main suit.

The court declines to grant the interlocutory Orders sought as the Applicant has not met the threshold laid in the case of *Giella vs Cassman Brown & Co. Ltd* (Earlier quoted). However the Court orders that this suit should be heard expeditiously and therefore it should be set down for hearing on **priority** basis and that cost be in the cause.

- Application dated 9/10/2012 dismissed.
- Costs in the cause.
- Main suit be set drawn for hearing on priority basis.

Dated, signed and delivered this 17th day of January, 2013.

L.N. GACHERU
JUDGE

In the Presence of:

.....for the Plaintiff/Applicant

.....for the Defendant/Respondent

.....Court clerk