



**REPUBLIC OF KENYA**  
**IN THE HIGH COURT OF KENYA AT NAIROBI**  
**MILIMANI LAW COURTS**  
**ENVIRONMENTAL & LAND DIVISION**  
**ELC CIVIL SUIT NO. 59 OF 2011**

**BEATRICE IMBWEYA ALUMASI.....PLAINTIFF**

**-VERSUS-**

**GERALD ALUMASI.....1<sup>ST</sup> DEFENDANT**

**CHARLES NGIRUBIU.....2<sup>ND</sup> DEFENDANT**

**ESTHER WAITHERA KARANJA.....3<sup>RD</sup> DEFENDANT**

**RULING**

The 2<sup>nd</sup> and 3<sup>rd</sup> Defendants application dated 27<sup>th</sup> July, 2012 inter alia seeks orders that:-

1. A temporary injunction, do issue restraining the plaintiff her servants and/or agents from collecting rental income from the extension units on the suit premises known as Nairobi/Block 73/328 pending the hearing and determination of this suit.
2. That Messrs Crystal Valuers Ltd be authorised to collect the rental income from the extensions built on the suit premises being Nairobi/Block 73/328 Buru Buru Phase 1 House Number 328 and deposit the same in the Defendants mortgage account No. M. 6000009723 held at Housing Finance Co. (K) Ltd pending the hearing and determination of this suit.
3. That each party do bear their own costs of this application and of the suit.

The application is supported by the affidavit sworn by the 3<sup>rd</sup> Defendant on 27<sup>th</sup> July, 2012 and the grounds appearing on face of the application.

The 1<sup>st</sup> Defendant has sworn a replying affidavit dated 7<sup>th</sup> August, 2012 in opposition to the 2<sup>nd</sup> and 3<sup>rd</sup> Defendants application and it is his contention that the 2<sup>nd</sup> and 3<sup>rd</sup> Defendants have not honoured their obligations under the agreement for sale and cannot therefore be entitled to the orders they seek. The 1<sup>st</sup> Defendant contends the applicants are not entitled to possession of the suit premises. The plaintiff has not filed any response to the application. The applicants have filed written submissions and urge the court to grant the orders sought.

It is a matter of regret that the parties to the instant suit have chosen to engage in filing a multiplicity of interlocutory applications rather than focusing in having the main suit heard and determined to put to rest

the issues to the parties in the suit have.

I have seen the ruling by the Hon. Lady Justice Okwengu delivered on 22<sup>nd</sup> July, 2011 dismissing the plaintiff's application for injunction.

I have equally seen the 2 rulings delivered by my sister Hon. Justice P. Nyamweya dated 16<sup>th</sup> February, 2012 declining the 2<sup>nd</sup> and 3<sup>rd</sup> Defendants application for summary judgment and for mandatory injunction against the plaintiff and the is a further ruling by Hon. Lady Justice Nyamweya delivered on 19<sup>th</sup> July, 2012 where she echoed the sentiments that this suit was suited for full trial when she, observed thus:-

***“The above findings notwithstanding, I reiterate my opinion that the appropriate course of action in the present case would be for the, parties to prove their respective claims at a full trial, and in the ruling given by the court on 16<sup>th</sup> February, 2012, the plaintiff was given the opportunity to present her case, and should proceed to do so without further delay. Pursuant to the provision of Section 1A, 1B, 3A and Order 11 of the Civil Procedure, rules, I hereby direct the plaintiff to set the suit she has filed for hearing within 60 days of the date of this ruling, failing which the plaintiff's suit shall stand dismissed and the 2<sup>nd</sup> and 3<sup>rd</sup> Defendants counterclaim shall be allowed”.***

From the court record it appear that on 30<sup>th</sup> August 2012 a date was taken for the hearing of the case on 3<sup>rd</sup> December, 2012 but apparently nothing appears to have happened in this matter on the date the matter was scheduled for hearing.

I have reviewed this matter and it is clear that he 2<sup>nd</sup> and 3<sup>rd</sup> Defendants are the registered owners of the suit property that they have charged to HFCK and are servicing a mortgage. The registered owners have paid the previous owner part of the purchase price and the balance of Kshs. 2,800,000/= of the purchase price is held by the firm of Mamicha & Company Advocates to be released to the vendor against the grant of vacant possession. The plaintiff has refused to yield possession to the applicants on the basis that she had an interest in the suit property and the sale and transfer by the 1<sup>st</sup> Defendant to the applicants was without her approval and/or consent and therefore was ineffectual to convey a valid title.

The 1<sup>st</sup> Defendant in his filed affidavit in response to the initial application for injunction by the plaintiff contended he sold the suit property to avert a foreclosure by Kenya National Assurance Company 2001 Ltd to whom he had charged the property. Prima facie the 2<sup>nd</sup> and 3<sup>rd</sup> Defendants were innocent buyers for value of the suit property and they are entitled to obtain a return on their by the chargee investment. The 2<sup>nd</sup> and 3<sup>rd</sup> Defendants are indeed servicing a mortgage on the property to the knowledge of the plaintiff and the 1<sup>st</sup> Defendant and it is inequitable for the plaintiff to sit on the property and collect rent from the tenants who occupy the outbuildings and expect the applicants to nonetheless continue to service the mortgage to forestall realisation. The plaintiff has not filed a response to the applicant's instant application and the opposition to the application by the 1<sup>st</sup> Defendant has no merit as it is the 1<sup>st</sup> Defendant who has failed to ensure vacant possession of the property is granted to the applicants in completion of the transaction. From the evidence availed the balance of the purchase price was payable against delivery of vacant possession.

In the premises I find and hold that he 2<sup>nd</sup> and 3<sup>rd</sup> Defendants application dated 27<sup>th</sup> July, 2012 has merit and I grant Orders in terms of prayer Nos. 3 and 4 of the Notice of Motion dated 27<sup>th</sup> July, 2012 pending he hearing and determination of the suit.

I would once more wish to direct the plaintiff to have this suit ready for trial by ensuring compliance with Order 11 of the Civil Procedure Rules. I consequently direct that this suit be fixed for a pre-trial conference on 29<sup>th</sup> July, 2013 when all parties shall have complied with order 11 and directions as to the disposal of the suit will be given by the court.

Each party shall bear their own costs of the application.

Orders accordingly.

**DATED, SIGNED AND DELIVERED AT NAIROBI THIS 24<sup>TH</sup> DAY OF JUNE 2013.**

**J. M. MUTUNGI**

**JUDGE**

**In the presence of:**

..... **for the Plaintiff**

..... **for the Defendants**