



REPUBLIC OF KENYA

IN THE HIGH COURT

AT NAIROBI

MILIMANI LAW COURTS

Civil Suit 712 of 2011

LIVINGSTONE WAHOME

MUGUTU.....PLAINTIFF

VERSUS

**RUMORS INVESTMENTS LIMITED.....1ST
DEFENDANT**

**AGRICULTURAL FINANCE CORPORATION.....2ND
DEFENDANT**

RULING

The Plaintiff’s application dated 13th December 2011 is seeking orders for an injunction to restrain the Defendants, their agents, servants jointly and/or severally from interfering, alienating, erecting structures or remaining on the suit premises namely NAIROBI/BLOCK 107/984 (hereinafter referred to as the suit premises), until the suit herein is heard and determined, and that the monthly rental income from the suit premises be deposited in court or into a joint interest earning account to be determined by the court pending the hearing and determination of this suit.

The grounds for the application are that the Defendants’ have denied the Plaintiff access to the suit premises, with the 1st Defendant unlawfully claiming ownership of part of the suit premises and the developments thereon. Further, that the 1st Defendant is collecting and appropriating the income generated from the suit premises to the Plaintiff’s exclusion, and the Plaintiff risks being rendered destitute unless the income is protected by an order of this Court. The Plaintiff states that the lack of access to and quiet enjoyment of the said premises is causing him his loss and prejudice, as he has expended a large amount of money towards purchasing the suit premises from the 2nd Defendant, and that he will suffer damage irreparably unless the Defendants’ are restrained from the said wrongful acts.

The Plaintiff details out the background to this application in his supporting affidavit sworn on the 11th December 2011 which in summary is as follows. The Plaintiff bought the suit premises in a public auction advertised in the daily newspapers on 11th April 2011, and he has attached copies of the said

advertisement, as well as a memorandum of sale and certificate of sale as evidence. The suit premises were being sold by the 2nd Defendant through public auction in exercise of its statutory power of sale. The Plaintiff has also attached a bundle of documents showing the payments made, the transfer and eventual registration of the suit premises in his name, including a certificate of lease that was issued to him on 27th September 2011.

The Plaintiff states that after the certificate of title to the suit premises was transferred into his name, he instructed his agents, Mamuka Valuers Limited, to instruct the tenants that the suit premises were under new management and to direct the tenants to start paying the monthly rent to the said agents. The said agents however received resistance from the 1st Defendant who claimed ownership of a plot known as Umoja II Plot No. 392 Zone 8, which is purported to be part of the suit premises as sold to the Plaintiff by the 2nd Defendant. The Plaintiff averred that all the documents that relate to the suit premises, at City Hall, Survey of Kenya and the official search at the land registry do not mention the 1st Defendant, and that he obtained a map from Survey of Kenya which he has annexed, which map clearly shows the boundaries to the suit premises and that the 1st Defendant has illegally encroached and/or trespassed on the premises.

The 2nd Defendant's response is in the replying affidavit sworn by its legal officer, Sheila Sanga, on 10th January 2012. The Deponent confirms that the suit premises were sold at a public auction, after being offered as security by one Patricia Lindi Tatua who defaulted in paying outstanding loan sums advanced to her by the 2nd Defendant. The Deponent has annexed as evidence copies of the loan offer to the said Patricia Lindi Tatua dated 21st May 2007; the notification of charge over the suit premises registered on 31st May 2007; the foreclosure notice to the said Patricia Lindi Tatua dated 27th January 2009; the advertisement on the public auction, and the transfer executed in the Plaintiff's favour by the 2nd Defendant's directors. The 2nd Defendant denied prevented the Plaintiff from securing his interest in the suit premises, and averred that this suit and application have been brought in bad faith since the 2nd Defendant has adhered to all requisite legal processes to facilitate the Plaintiff in securing his interest in the suit premises.

The 1st Defendant opposed the application and in the Replying Affidavit sworn on 27th December 2011 by Ruel Kamande, its Managing Director, stated that the application is frivolous and an abuse of the court process. Further, that the prayers sought are vexatious because the Plaintiff has not disclosed that there is another suit in the Chief Magistrates Court at the Milimani Commercial Courts at Nairobi namely **CMCC No. 2476 of 2010 – Rumors Investments Limited Vs. Livingstone Wahome Magutu & Mamuka Valuers (Management) Limited** touching on the subject matter of this suit and raising the same cause of action. The 1st Defendant also stated that the Plaintiff has not disclosed any justifiable cause of action as against the 1st Defendant since the 1st Defendant owns an entirely different property from the one claimed by the Plaintiff.

The 1st Defendant averred that it purchased Plot Number 392 Umoja II Zone 8 from the City Council of Nairobi, and duly paid all stand premiums and rates until the year 2011. Further, that the 1st Defendant developed the plot which now contains a 5-storey house already occupied by tenants. The Deponent annexed copies of the allotment letter by Nairobi City Council, receipts for payments to made to Nairobi City Council, a Beacon Certificate, an Occupation Certificate and pictures of the buildings on the said plot.

The 1st Defendant further stated that on 30th June, 2011, the Plaintiff delivered letters to tenants on the said plot demanding that they pay rent to him which letter has been annexed as evidence, and the 1st Defendant thereupon filed the aforesaid suit in the Chief Magistrates Court which court after hearing both parties granted an injunction pending the hearing of the suit. The Deponent annexed copies of the pleadings in the said suit, and stated that to her knowledge the Plaintiff has not lodged an appeal against the said decision, and that filing another suit in this court is an abuse of the court process with the Plaintiff trying to steal a match as against the 1st Defendant.

The Plaintiff responded to the Defendants' averments in a Further Affidavit dated 27th February 2012, wherein he stated that while the 2nd Defendant has not prevented the Plaintiff from securing the premises, they did not yield vacant possession of the same as was their obligation to do, and which property according to the advertisement placed in the newspapers, was described as "twin residential flats, one five-storey and one two-storey". The Plaintiff also stated that he had disclosed the existence of the suit in CMCC 2476 of 2010 in the Chief Magistrates Court in his Complaint, and that neither the parties nor the suit premises in this suit are the same as in CMCC 2476 of 2010. The Plaintiff denied trying to steal a match against anyone, and stated that he is a *bona fide* purchaser for value without notice and should be protected by the court.

The Plaintiff's and Defendants' Advocates filed written submissions in which the above facts were reiterated. The Plaintiff's Advocate in written submissions dated 27th January 2012 contended that the Plaintiff has demonstrated that he lawfully purchased the suit premises from the 2nd Defendant, and that it is not in dispute that the 1st Defendant has dispossessed him of part of the suit premises. The Advocate argued that an allotment letter is an invitation to treat and does not confer interest in land at all, and relied on **Gladys Wanjiru Ngacha vs Teresia Chepsaat & Others (2008) eKLR** in this regard. Further, that depositing the monthly rent income in court until the suit is finally determined will not be prejudicial to the Defendants, and that it is the Plaintiff who stands to suffer irreparable loss if it is not done as he has purchased the suit premises.

The 1st Defendant's Advocate in his written submissions dated 13th March 2012 argued that the orders sought are unenforceable as the 1st Defendant is already in possession, and because the suit property has already been subdivided as was held in **Alice Wambui Njoroge vs Jackson Kamau Ndegwa H.C.C.C No. 112 of 2008**. The 1st Defendant also submitted that the matter is *sub judice* and *res judicata* as there is another suit pending between the parties, and an application for injunction was heard and determined in the subordinate court with respect to the same property and same set of tenants. Further, that the Plaintiff participated in the proceedings in the subordinate court and had the opportunity to join the 2nd Defendant in the said proceedings.

Conversely, and in an apparent contradiction, the 2nd Defendant's Advocate in his submissions that the Plaintiff has not established a *prima facie* case, argued that there is no link between the Plaintiff's property and the 1st Defendant's property, as the Plaintiff's claim is for LR. No. Nairobi/Block 107/948 measuring 0.0294 hectares, and the 1st Defendant owns Plot Number 392 Umoja II Zone 8, measuring 0.015 hectares. The Advocate also argued that no *prima facie* case has been established because the Plaintiff had confirmed he had never had access to the suit premises, and was not disputing the authenticity of the 1st Defendant's allotment. Further, that the Plaintiff would not suffer irreparable damage as he can be refunded the purchase price by the 2nd Defendant.

The 2nd Defendant's Advocate filed written submissions dated 27th February 2012, wherein it was contended that the 2nd Defendant's obligation was to effect transfer to the Plaintiff after the public auction, which obligation they had discharged. The Plaintiff therefore had no cause of action against the 2nd Defendant, nor were the orders sought enforceable against it, as the 2nd Defendant's rights as chargee were extinguished at the point of sale and transfer by charge as required by law.

I have read and carefully considered the pleadings, evidence and submissions by the parties to this application. The first issue before the court is whether this application is *res judicata*. The conditions for a matter to be *res judicata* are clearly stated out in section 7 of the Civil Procedure Act (Cap 21), which are that no court shall try any suit or issue in which the matter directly and substantially in issue has been directly and substantially in issue in a former suit between the same parties, in a court competent to try such subsequent suit or the suit in which such issue has been subsequently raised, and has been heard and finally decided by such court.

The matters in issue in this application are an injunction and the deposit of the monthly rental income

with respect to the suit premises. The 1st Defendant who raised the argument of *res judicata* disputes that the suit premises in the two suits are the same, which is also the argument put forward by the Plaintiff. An examination of the the order produced in evidence by the 1st Defendant given by the subordinate court on 8th July 2011 shows that it was given with respect to Plot 392, Umoja II Zone 8. This court cannot make a finding that LR. No. Nairobi/Block 107/948 and Plot Number 392 Umoja II Zone 8 are the one and same property, unless or until the same is conclusively determined by expert evidence which has been subjected to examination. In addition, there is an additional party in this suit who was not a party in the suit in the subordinate court. It is not therefore my finding that this application at this point in time is neither *res judicata*, nor is it *sub judice* for the same reasons given in the foregoing.

The second issue is whether the Plaintiff is entitled to the prayers sought on the basis of the requirements stated in **Giella v Cassman Brown & Co Ltd, (1973) EA 358**. On the first requirement of establishment of a *prima facie* case, the Plaintiff's claim is that he is the registered owner of the suit premises, and has produced evidence of title, and of the processes leading to the issuance of the title. The 1st Defendant does not dispute the Plaintiff's title but disputes the location of the property, stating that the location as alleged by the Plaintiff is the 1st Defendant's property namely Plot 392, Umoja II Zone 8, and that the Plaintiff should locate his property which is elsewhere. It is therefore the finding of this Court that while the Plaintiff has established a *prima facie* case with regard to the property known as LR. No. Nairobi/Block 107/948, the exact location of the said property is in doubt, and needs to be established before definitive orders can be granted by this court.

In the premises, I will decide the prayers sought on the basis of a balance of convenience. With regard to the first prayer for an injunction I find that the balance tilts in favour of the 1st Defendant for two reasons. Firstly, the 1st Defendant is in possession of the suit premises and secondly, the said Defendant has already obtained an order for an injunction with respect to the said premises in the subordinate court. With regard to the second prayer for deposit for a monthly income from the suit premises, I find that the balance of convenience does tilt in favor of the Plaintiff as he has expended a considerable amount of money to purchase the LR. No. Nairobi/Block 107/948 which he alleges to be the suit premises, and the said purchase has not been disputed by the Defendants. It is thus necessary to preserve the *status quo* in terms of the returns from the said premises pending determination of the issue of ownership of the same.

Finally, I do agree with the 2nd Defendant's submissions that the orders sought in this application are not enforceable against it, as it is not in possession of the premises, and the issue of whether the Plaintiff has a cause of action or remedies as against the 2nd Defendant will have to be determined during the main trial.

In order to effectively resolve the dispute herein in light of the reasons given in the foregoing, and pursuant to the provisions of section 1A,1B and 3A of the Civil Procedure Act and Order 14 Rule 6(1) of the Civil Procedure Rules, I hereby order as follows:-

1. The Plaintiff either by himself or through his representatives, agents or servants shall not interfere with the 1st Defendant's possession and occupation of the land parcels identified as LR. No. Nairobi/Block 107/948 and/or Plot 392, Umoja II Zone 8 pending the hearing and determination of the suit filed herein, or until further orders.
2. Neither the Plaintiff nor the 1st Defendant shall sell, transfer, charge or otherwise alienate or dispose of the land parcels identified as LR. No. Nairobi/Block 107/948 and/or Plot 392, Umoja II Zone 8 pending the hearing and determination of the suit filed herein, or until further orders.
3. The 1st Defendant to file and serve the Plaintiff with a statement of the monthly rent collected from the rental premises on the land parcel identified as Plot 392, Umoja II Zone 8 within 14 days of the date of this ruling for further orders by this Court. In the event of default by the 1st Defendant, the Plaintiff is at liberty to apply for vacant possession of the said premises.

4. The Director of Surveys to survey and prepare a report on the location and particulars of the land parcels known as LR. No. Nairobi/Block 107/948 and Plot 392, Umoja II Zone 8, and to file and present the said report in Court. The Plaintiff and 1st Defendant to facilitate the said survey by providing the necessary documents, and to jointly meet the costs of the said survey and report.
5. The file for **CMCC No. 2476 of 2010 – Rumors Investments Limited Vs. Livingstone Wahome Magutu & Mamuka Valuers (Management) Limited** at the Chief Magistrates Court, Milimani Commercial Courts at Nairobi to be brought up before this Court for perusal and further directions.
6. The Plaintiff to serve these orders on the Director of Surveys and the Deputy Registrar of the High Court.
7. The costs of the application dated 13th December 2011 shall be in the cause.

Dated, signed and delivered in open court at Nairobi this ____21st ____ day of ____May____, 2012.

P. NYAMWEYA

JUDGE