



REPUBLIC OF KENYA

IN THE HIGH COURT

AT NAIROBI

MILIMANI LAW COURTS

Environmental & Land Case 92 of 2011

JOSEPH MAWEU MATHEKA.....PLAINTIFF

- VERSUS -

MUSIKIE LIMITED1ST DEFENDANT

BEDAN M. CHEGEH

t/a BEDANS AUCTIONEERING SERVICES2ND DEFENDANT

RULING

1. I have before me the plaintiff's notice of motion dated 26th October 2011. The plaintiff prays for a prohibitive and a mandatory injunction to compel the defendants to put him back into possession of house number 128, Nairobi/Block 61/614 Kibera, Nairobi. There are two affidavits in support sworn by the plaintiff on 26th October 2011 and 16th February 2012. The motion is expressed to be brought under order 40 of the Civil Procedure Rules 2010 and sections 1A, 1B, 3A and 63 of the Civil Procedure Act.

2. The plaintiff's case, in a synopsis, is that he purchased the suit property in 1982 from National Housing Corporation. He has been in occupation, use and possession of the house since that time. On 1st March 2011, the 2nd defendant, on instructions of the 1st defendant, forcefully evicted the plaintiff. The plaintiff avers that the eviction was illegal and fraudulent. Apparently, the eviction proceeded on the basis of an order obtained in Nairobi Chief magistrate's Court Miscellaneous Application 57 of 2011 Bedan Chege T/a Bedans Auctioneering Services and another Vs Joseph Maweu Matheka. From the affidavit of Bedan Chege, it was represented to that court that the defendant, who is the plaintiff here, was a tenant of Musikie Limited, the 1st defendant herein. It was alleged there were arrears of rent of Kshs 45,000 and that the tenant had blocked execution of proclamation. An order was issued directed at the officer in charge Kilimani police station to supervise the attachment by the auctioneer. The plaintiff says he was not a tenant, and even assuming he was, he was not given a proclamation notice. Furthermore, he avers that in

the process or guise of distress, he was unlawfully and forcefully evicted from the suit premises. The 2nd defendant auctioneer denies carrying out the eviction.

3. A short history would place the matter in perspective. On or about 1975 one Henry Mutinda had purchased the suit house as per annexure “**JMM 1**”. The plaintiff and Mutinda were paying the installments on the purchase price until 1977 when Mutinda defaulted. The plaintiff avers that he continued to pay the purchase installments to National Housing Corporation. In 1982, Mutinda vacated the premises leaving the plaintiff in possession. It would appear that Mutinda filed a suit in Nairobi, Milimani CMCC No 12665 of 2003 against the plaintiff herein. That suit proceeded *ex parte*. A declaration was obtained in favour of Mutinda as a joint owner with the plaintiff herein. The house was sold to one Elizabeth Mungai as per annexure “**JMM 9**”. It culminated in eviction of the plaintiff on 1st March 2011. That is why the plaintiff prays for a mandatory injunction.

4. The motion is contested. There are filed grounds of opposition dated 7th November 2011. The objection is three pronged: that the plaintiff cannot independently maintain the suit; that this suit offends section 6 of the Civil Procedure Act; and, that there is no cause of action against the present defendants. The application is also attacked for laches. The suit itself is said to be defective for want of summons to enter appearance as per rule 1(6) of order 5 of the Civil Procedure Rules 2010.

5. There are also filed two replying affidavits by Bedan Chege and Elizabeth Wanjiku Muigai sworn on 24th November 2011 and 13th December 2011. Bedan Chege is an auctioneer. He states he was instructed by Elizabeth Wanjiku Muigai, a director of the 1st defendant to levy distress against the plaintiff. He avers that he served a proclamation on the 1st plaintiff on 11th January 2011. Due to difficulties of distraining the goods, he applied for an order for assistance by the police. This was done in the Chief magistrate’s miscellaneous cause 57 of 2011 mentioned earlier. However, before he could get police assistance, the plaintiff was evicted by Elizabeth Muigai. He denies that he or his staff participated in the eviction.

6. Elizabeth Muigai depones that she is a director of Musikie Limited, the 1st defendant. She avers that it is a “letting company”. She has annexed a copy of the title to the suit land marked “**EWM 1**”. She avers she was an innocent purchaser at a public auction. She depones that she has let out the property to a tenant and that accordingly, the mandatory injunction sought would be highly prejudicial. Lastly, she averred that there has been inordinate delay in bringing the application.

7. I have heard the rival arguments. I accept the plaintiff’s evidence that in the year 1975 Henry Mutinda and the plaintiff became joint owners of house number 128. There were installments of the purchase price paid to National Housing Company. From 1977, Mutinda defaulted in those payments but the plaintiff continued to pay the vendor. Mutinda vacated the house in 1982 leaving the plaintiff in possession until 1st March 2011 when he was evicted by the 1st defendant or Elizabeth Muigai. Those facts are not controverted. The turning point would seem to be the decision in Nairobi CMCC 12665 of 2003 Henry Mutinda Kyatha Vs Joseph Maweu Matheka. The defendant in that case is the plaintiff in this suit. He was represented by an advocate and entered appearance and defence. The plaintiff says the matter proceeded *ex parte* on 21st January 2008. He does not clearly come out why that was so or whether any blame should be assigned. Suffice it to say that on 12th February 2008, the court decreed that the suit property was jointly owned by the plaintiff here and Mutinda. The property was ordered to be sold and that the proceeds be shared equally. That was the genesis of the auction at which the 1st defendant obtained the title to the suit premises. There was a temporary stay of execution granted on 3rd September 2009 in High court appeal 456 B of 2009 that was to subsist until 17th September 2009. From annexure “**JMM 9**”, by the time Legacy Auctioneers advertised the sale on June 2nd 2009 for sale on 19th June 2009, there would seem to have been no stay. The 1st defendant claims to have bought the property on 3rd September 2009 the day the High court was issuing the stay order. Considering that the original decree had been issued way back on 12th February 2008, the plaintiff was indolent in securing its rights.

8. That brings me to the matter of duplicity. The present suit offends section 6 of the Civil Procedure Act. That section forbids the court from dealing with a matter that is directly or substantially in issue in a

previous suit. I have stated that the plaintiff and Mutinda were parties over the same subject matter in Nairobi CMCC 12665 of 2003. That is the subject of an appeal in High court appeal 456 B of 2009 Joseph Maweu Matheka Vs Henry Mutinda. But there is also another suit being High court case No 619 of 2009 between the same parties or their representatives over the same subject matter. In the current suit, the plaintiff had first approached the court by a chamber summons dated 4th March 2011. It was withdrawn on 6th July 2011 nearly 4 months later. The present motion was not presented to court until 26th October 2011. I find the conduct of the plaintiff dilatory. The multiplicity of actions does not augur well for an applicant of a discretionary remedy. The plaintiff is pursuing an equitable remedy of mandatory injunction. A mandatory injunction should be granted in exceptional and clearest of cases. Mucuha Vs Ripples Limited [1990 – 94] E.A. 388 Kenya Railways Corporation Vs Thomas M. Nguti Civil Appeal No 210 of 2004 (unreported).

9. In granting such an order, the court must be completely clear in its mind that the plaintiff is nearly guaranteed the same prayers at the trial. Authorities in this area abound and they hold, primarily that a mandatory interlocutory injunction ought not to be granted save only in special circumstances and in the clearest of cases. It cannot be better said than in the decision of Locabail International Finance Limited Vs Agro Export et al [1986] 1 ALL E.R. 901 where their lordships held;

“A mandatory injunction ought not to be granted on an interlocutory application in the absence of special circumstances and then only in clear cases either where the Court thought that the matter ought to be decided at once or where the injunction was directed at a simple and summary act which could be easily remedied or where the Defendant had attempted to steal a march on the plaintiff. Moreover before granting a mandatory injunction the Court had to feel a high degree of assurance that at the trial it would appear that the injunction had rightly been granted, that being on a different and higher standard than was required for a prohibitory injunction”.

See also the decision in Technomatic Limited T/A Promopack Company Vs Kenya Wine Agencies Limited Nairobi HCCC 398 of 2005 (unreported). That position has been stated clearly in Halsbury’s Laws of England 4th Edition Volume 24 paragraph 848.

10. The plaintiff here has also prayed for an interlocutory prohibitive

injunction. When the plaintiff approaches the court for injunction, he must rise to the threshold for grant of interlocutory relief set out clearly in Giella Vs Cassman Brown and Company Limited [1973] E.A 358. Those principles are first, that the applicant must show a *prima facie* case with a probability of success; secondly that she stands to suffer irreparable harm not compensable in damages; and thirdly, if in doubt, the court must assess the balance of convenience. Being a discretionary remedy, there is also ample authority that a party, who has misconducted herself in a manner not acceptable to a court of equity, will be denied the remedy. See Kenya Hotels Limited Vs Kenya Commercial Bank and another [2004] 1 KLR.

17. A matter that worries my mind is the brutal and perhaps illegal manner in which the eviction of the plaintiff took place. Although the 2nd defendant auctioneer had approached the subordinate court for an order of enforcement in miscellaneous cause 57 of 2011, he deponed that he did not carry out the eviction. He depones at paragraphs 8 and 9 as follows;

“8. THAT before I could secure Police Officers, I learned that the plaintiff had been evicted from the house by Elizabeth W. Muigai and her staff using the copies of the documents I had given her.

9. THAT I and my staff were not part of the said eviction and I only learned that she used the copy which I gave her for her records to carry the said eviction when I was served with the documents of this matter”.

18. Elizabeth Muigai, the director of the 1st defendant does not deny it. She confirms at paragraphs 9 and 10 of her affidavit sworn on 24th November 2011 that the plaintiff was evicted on 1st March 2011 and that

she has put a new tenant in the premises. The 1st defendant is currently the registered owner of the suit premises. But that ownership is being contested in this suit and a prayer sought in the plaint for a declaration that the sale was fraudulent. By conducting an eviction herself using over 40 goons, as the plaintiff says, in the guise of levying distress for rent was highly irregular and illegal. As the auctioneer was not involved, the entire conduct flew in the face of the Auctioneers Rules under the Auctioneers Act. The mere fact that the 1st defendant has put a tenant in the premises cannot jettison the plaintiff's superior claim of ownership. The first defendant has not shown evidence that it had an eviction order or an order to recover possession from the plaintiff.

19. I would agree with learned counsel for the defendants that summons to enter appearance have not been collected or served as required by order 5 rule 1 (6) of the Civil Procedure Rules 2010. That may abate the suit. But I am alive to the fact that the Civil Procedure Rules are subsidiary legislation under section 81 of the Civil Procedure Act. Those rules are handmaidens of justice. They certainly cannot override the provisions of sections 1 A and 1B of the Civil Procedure Act. This court is now enjoined by articles 50 and 159 of the constitution to do substantial justice to the parties without undue regard to technicalities. The dictates of justice in this case point me away from a narrow interpretation of order 5 rule 1 (6). To do otherwise would occasion a miscarriage of justice.

20. The plaintiff was not a tenant of the suit premises. He was claiming ownership for good consideration to the Vendor National Housing Corporation. True, he was a co-owner with Henry Mutinda Kyatha. Ideally, and as proposed by counsel for the defendants, he should bring this suit in conjunction with Mutinda. But Mutinda is now his adversary. He filed the suit in the subordinate court that led to the sale of the plaintiff's house. Mutinda had stopped paying the purchase installments back in 1977. There is no mention of the whereabouts of the purchase price monies that they were meant to share with the plaintiff. I am doubtful that the subordinate court could make the declaration over title or even order the sale. The 1st defendant evicted the plaintiff irregularly using brute force under the guise of levying distress for rent. There was no order for repossession of the premises. And no court bailiff was used but the 1st defendant and its hirelings. I am unable to countenance that state of affairs. There, I am well guided by the decision in Gusii Mwalimu Investment Co Ltd and others Vs M/s Mwalimu Hotel Kisii Limited Civil Appeal No 160 of 1995, Court of Appeal, Nairobi, (unreported).

21. Granted the law, the guiding authorities and the evidence at this stage I am inclined to grant an interlocutory mandatory injunction. I will also grant an interlocutory prohibitive injunction to restore the *status quo ante*. In the result, I order as follows;

1. **THAT** an injunction do issue restraining the defendants whether by themselves, their agents, servants or employees or howsoever from selling, charging alienating or disposing the property known as House No 128, Nairobi Block 61/614 Kibera Phase V, Olympic Estate, Nairobi until the hearing and determination of this suit.
2. **THAT** pending the hearing and determination of the suit, a mandatory injunction is issued compelling the defendants jointly or severally to forthwith and unconditionally put the plaintiff back into possession of the property known as House No 128, Nairobi Block 61/614 Kibera Phase V, Olympic Estate, Nairobi.
3. **THAT** costs of this application are awarded to the plaintiff in any event.
4. **THAT** the plaintiff shall file and serve a suitable undertaking as to damages.
5. **THAT** the main suit be determined within one year in default of which the orders of injunction shall lapse.

It is so ordered.

DATED and **DELIVERED** at **NAIROBI** this 14th day of June 2012.

G.K. KIMONDO
JUDGE

Ruling read in open court in the presence of

Mr. Kamwendia for the Plaintiff.

Mr. Kariuki for Mr. Nyanga'u for the 1st Defendant

No appearance for the 2nd Defendant.