



REPUBLIC OF KENYA

INTHE HIGH COURT OF KENYA AT

NAIROBI(MILIMANI LAW COURT)

Petition 220 of 2012

ESTHER ACHIENG

JUMA.....PETITIONER

AND

**CO-OPERATIVE BANK OF KENYA LTD.....1ST
RESPONDENT**

**PETER OMOLLOH OPADOR T/A
MAENDESIA AGENCIES.....2ND
RESPONDENT**

**THE ATTORNEY GENERAL.....3RD
RESPONDENT**

RULING

1. The petitioner in this case commenced these proceedings by a petition dated 24th May 2012. She moved the court for orders that:

a) *A declaration do issue that the intended sale of LR Number Nairobi/Block 82/815 situate at Nairobi by the 1st respondent violated and or infringes the petitioner’s right to access adequate housing as providing for in the constitution.*

b) *A declaration do issue that the 1st respondent’s intended sale of L R Number Nairobi/Block 82/815 situated at Nairobi violate the best interest of the petitioner’s minor children who reside in the suit premises.*

c) *In the alternative a declaration do issue that the government must resettle the petitioner and her family once the suit premises is sold by the 1st respondent pursuant to the petitioner’s right to housing by the Constitution.*

2. Together with the application she filed a Notice of Motion dated 24th May 2012 in which she sought orders restraining the Cooperative Bank of Kenya from auctioning the suit property on 25th May 2012.

3. The grounds of the petition and the application are that the property is matrimonial home where she lives with her children. If the bank, which holds as security over the property, sells it she will be

rendered destitute together with her children. In this respect therefore, her right and those of her children to access to housing will be violated as well as the best interests of the children contrary to **Articles 43(1)(a)** and **53(2)**.

4. On 25th May 2012, I granted the injunction pending further orders of the court and the further extended on 29th May 2012 pending hearing and determination of the petition.

5. On 29th August 2012, the 1st respondent filed replying affidavit sworn by its Chief Legal Officer, Ms Regina Anyika, in which she alluded to the fact that the petitioner's husband, Kanut Odongo Oketch had filed on a suit against the bank on 24th May 2012, the same day the petitioner moved the court, a suit and an application for injunction seeking to restrain the sale of the suit property. The suit was **Milimani CMCC No. 2759 of 2012**. On that date, the subordinate court granted an injunction restraining the sale by public auction.

6. In light of the existence of the two suits, I directed the petitioner to show cause why this suit should not be dismissed as an abuse of the court process.

7. Mr Nyaribo, counsel for the 1st respondent, noted that there were two suits in respect of the same matter and filed at the same time purposefully to stop the sale of the suit property. As such counsel contended this was an abuse of the court process.

8. Ms Omwenga, on the other hand, argued that this was a different cause of action by the wife of the plaintiff in the subordinate who was asserting her constitutional rights as she was entitled to under the provisions of **Article 22** and **23** of the Constitution and in the circumstances she was entitled to move the court.

9. In the supplementary affidavit sworn on 16th October 2012, the petitioner depones that the registered owner of the suit property is her lawful husband who deserted the matrimonial home. She depones that she was not aware of the decision by her husband to lodge **CMCC No. 2759 of 2012**. In the circumstances, she should not be punished by striking out the suit.

10. I have considered the facts of the suit and although there may be suspicion that there was collusion in filing the two suits, I agree with counsel for the petitioner that this matter constitutes a separate cause of action. It seeks to enforce fundamental rights and freedoms which can only be agitated in the High Court. In the circumstances I shall not strike out the suit and it shall now proceed for hearing.

DATED and **DELIVERED** at **NAIROBI** this 17th day of October 2012

D.S. MAJANJA

JUDGE

Ms Omwenga instructed by Moerwa Omwoyo and Company Advocates for the petitioner.

Mr J. Nyaribo instructed by Muthaura Mugambi Ayugi and Njonjo Advocates

Mr Opondo, Litigation Counsel, instructed by the State Law Office, for the 3rd respondent.