



**REPUBLIC OF KENYA**

**High Court at Nairobi (Nairobi Law Courts)**

**Civil Suit 416 of 2012**

**LUCY KIMATHI.....PLAINTIFF/APPLICANT**

**VERSUS**

**MEENAXBEN GOPAL PATEL..... DEFENDANT/RESPONDENT**

**RULING**

By an amended application brought by way of Notice of Motion dated 4<sup>th</sup> September 2012 and expressed to be brought under the provisions of sections 1A and 3A of the Civil Procedure Act, Order 40 rule 2(1) and 4(1) of the Civil Procedure Rules and all other enabling provisions of the law, the plaintiff/applicant seeks the following orders:

- 1) THAT the Applicant be allowed to access her house namely maisonette number 4 LR No. 1/759.**
- 2) THAT pending the hearing and determination of the Application, the Honourable Court do grant an order restoring the Applicant back to the suit premises.**
- 3) THAT pending the hearing and determination of this suit, the Honourable court do grant an order restoring the Applicant back to the suit premises.**
- 4) THAT this Honourable court do find and declare that the Respondent is a trespasser in the suit premises.**
- 5) THAT this Honourable court do grant an order to compel the Respondent to vacate the suit premises.**
- 6) THAT the costs of this Application be provided for.**

The application is purportedly supported by the affidavit sworn by **Lucy Kimathi**, the Plaintiff/applicant herein and filed on 4<sup>th</sup> September 2012. I say purportedly because the said affidavit, if one can call it one, is only one page which does not have the *jurat*. It is accordingly neither executed nor sworn before a Commissioner for oaths. It is in effect not an affidavit as known to law. In effect the application is not supported by any evidentiary material.

Apart from the foregoing the said document is not drawn in the first person as mandated under Order 19 rule 5 of the Civil Procedure Rules. Most of the paragraphs of the said document start with “The Applicant” rather than “I”.

Whereas the plaintiff contends that she entered into an agreement for purchase of the suit house with the deceased, a copy of the said document is not exhibited at all. Section 2(3) of the Law of Contract Act Cap provides:

***No suit shall be brought upon a contract for the disposition of an interest in land unless—***

***(a) the contract upon which the suit is founded—***

***(i) is in writing;***

***(ii) is signed by all the parties thereto; and***

***(b) the signature of each party signing has been attested by a witness who is present when the contract was signed by such party:***

***Provided that this subsection shall not apply to a contract made in the course of a public auction by an auctioneer within the meaning of the Auctioneers Act, nor shall anything in it affect the creation of a resulting, implied or constructive trust.***

***(4) Subsection (3) shall not apply to a contract made in the course of a public auction nor shall anything in that subsection affect the creation or operation of a resulting, implied or a constructive trust.***

Without any document exhibited, it is impossible for the Court to find that there is a valid contract for disposition of interest in the suit property.

As if the foregoing is not enough this suit was filed in flagrant breach of the mandatory provisions of Order 3 rule 2(2) which require that suits be accompanied by a list of witnesses to be called at the trial; written statements signed by the witnesses excluding expert witnesses; and copies of documents to be relied on at the trial including a demand letter before action.

It is also clear that the affidavit which form part of the court record, documents which are clearly evidential made on oath that the applicant seems to be oscillating from one version to another. For example in one affidavit the plaintiff claims that the defendant is a girlfriend to the deceased while in another it is claimed that she is a wife to the deceased. Again in one document the purchase price is mentioned as Kshs. 500,000.00 while in another the sum is Kshs. 5,500,000.00.

Whereas any one of the foregoing errors and omissions may taken alone be capable of being cured under the provisions of Article 159(2)(d) of the Constitution, the several errors disclosed in the application and the suit itself constitute a comedy of errors and omissions which without any explanation being offered cannot be excused. The decision whether or not to excuse an error is an exercise of discretion and like any other discretion must be exercised upon reason and must not be capriciously done or done on the whims. In my view the best option in the circumstances is to strike out the application. See **Masefield Trading (K) Ltd. Vs. Francis M Kibui Nairobi (Milimani)HCCC No. 1796 of 2000 [2001] 2 EA 431.**

In the premises the application brought by way of Notice of Motion filed herein on 4<sup>th</sup> September 2012 is struck out but with no order as to costs.

Dated at Nairobi this 20<sup>th</sup> day of November 2012

**G V ODUNGA**  
**JUDGE**

Delivered in the presence of the Plaintiff in person