



**IN THE HIGH COURT OF KENYA**

**AT NAKURU**

**CIVIL SUIT NO. 61 OF 2009**

**DAVID WARUIRU NGOTHO.....PLAINTIFF/  
RESPONDENT**

**VERSUS**

**BETTY ABONYO OYUGI.....1<sup>ST</sup>  
DEFENDANT/RESPONDENT**

**DAVID OGOT OYUGI.....2<sup>ND</sup>  
DEFENDANT/RESPONDENT**

**DOREEN ARIBETA OYUGI..... 3<sup>RD</sup>  
DEFENDANT/RESPONDENT**

**BEATRICE AKINYI AMENYA.....4<sup>TH</sup>  
DEFENDANT/RESPONDENT**

**SAMUEL AYODO OGANGO.....5<sup>TH</sup>  
DEFENDANT/RESPONDENT**

**CHRISTOPHER ONYANGO AYODO.....6<sup>TH</sup>  
DEFENDANT/RESPONDENT**

**ARTHUR ODUOR OYUGI.....7<sup>TH</sup>  
DEFENDANT/RESPONDENT**

**DOUGLAS OYUGI..... 8<sup>TH</sup>  
DEFENDANT/RESPONDENT**

**JOSHUA ONYANGO OYUGI.....9<sup>TH</sup>  
DEFENDANT/RESPONDENT**

**JOB OKUNA OYUGI..... 10<sup>TH</sup>  
DEFENDANT/RESPONDENT**

**MARY OKUMU OYUGI..... 11<sup>TH</sup>  
DEFENDANT/RESPONDENT**

**RULING**

David Waruiru Ngotho is the plaintiff in this suit. He has sued **Betty Abonyo Oyugi, David Ogot Oyugi, Doreen Aribeta Oyugi, Beatrice Akinyi Amenya, Samuel Ayodo Ogango, Christopher Onyango Ayodo, Arthur Oduor Oyugi, Douglas Oyugi, Joshua Onyango Oyugi, Job Okuna Oyugi and Mary Okumu Oyugi**, the eleven defendants herein, seeking judgment against the defendants for

Kshs.20,000,000/- being refund of full purchase price of houses 3, 4, 5 and 6 on land I.R. No. 40276 L.R. 209/3092 and a further sum of Kshs.2,000,000/- being the 10% of the purchase price on account of penalty, for breach of contract and costs of the suit. On 13/7/05 the plaintiff entered into an agreement with the 1<sup>st</sup> defendant, widow of the late Hezekiah Oyugi for the sale of House No. 5 and 6 on land IR. No. 40276, L.R. No. 209/3092 situate at Kileleshwa Nairobi for Kshs.10,000,000/-. According to her, the sale was sanctioned by all the other defendants, who are beneficiaries of Hezekiah Oyugi's estate. On 20/6/05, the plaintiff again entered into a sale agreement with the 3<sup>rd</sup> defendant for the sale of House No 3 and 4 for Kshs.10,000,000/- and the plaintiff fully paid for them. That all the defendants who are beneficiaries of the late Hezekiah Oyugi's estate agreed to the sale. The plaintiff took possession of the premises but in 2008 the defendants came together and forcibly evicted the plaintiff and his tenants from the premises for reasons that the seller lacked the capacity to sell the property to the defendants. Having been evicted from the premises the plaintiffs' only remedy was to claim back the purchase price and interest.

On 24/5/2010 the plaintiff filed the Chamber Summons of the same date seeking an order that, pending the hearing and determination of the suit, the defendants, their servants or agents be temporarily enjoined from levying distress, claiming or demanding any rent or any other payments of whatsoever nature from the plaintiff's tenants and occupants or in any manner whatsoever, from interfering with the peaceful and quiet possession and occupation of the plaintiffs' tenants on Plot No. IR 40276 L.R. 209/3092, Houses Nos. 3, 4, 5 and 6. The application is based on grounds found on the face of the application, and the supporting affidavit of the plaintiff. Mr. Karanja Mbugua advocate represented the plaintiff.

The application was opposed and the 7<sup>th</sup> defendant Arthur Oduor Oyugi swore a replying affidavit dated 4/7/2010 and was represented by Mr. Ochieng advocate. Job Okuna Oyugi, the 10<sup>th</sup> defendant also filed a replying affidavit dated 25/6/2010 and was represented by Ms Sewe.

The plaintiff's case is that since he purchased the suit premises in 2005, he has been in possession and his tenants have been paying rents to him and there is no basis for the defendants demanding rent; That he has judgment against the 3<sup>rd</sup> defendant and that it is only fair that the status quo be maintained pending the hearing of the suit where the plaintiffs claim and the 7<sup>th</sup> defendants claim of a set off will be decided. He claims to have tenants Catherine Kasavuli and Apostle Martin Ssauna who have paid rents upto 21/5/2010 as evidenced by receipts, annexure, DWN IV(b); That the 7<sup>th</sup> defendant instructed a firm of auctioneers to levy distress against the tenants as per copy of proclamation, DWN(V). The plaintiff contends the issue as to whether or not the plaintiff lawfully bought the suit premises is yet to be determined and there is no basis for the defendants making any claim to the premises after 6 years of possession by the plaintiff purport to distress for rent from his clients. He urged that it is unfair for the defendants to receive Kshs.22,000,000/- and in addition collect the rents. He said he has a prima facie case and the balance of convenience also tilts in his favour.

In opposing the application, the 7<sup>th</sup> defendant, deponed that the plaintiff had failed to demonstrate that he paid Kshs.22,000,000/-. He depones that the defendants had no capacity to sell the suit property since the defendants were not the representatives of the deceased's estate and that the allegation that the plaintiff is a landlord of the premises contradicts paragraph 17 of the plaint where the plaintiff pleads that he was evicted from the premises. He further deponed that the tenants had filed a suit seeking to restrain the defendants from collecting rents but the court found that there was no valid tenancy (CMCC No. 7532/08). That although distress was levied, it was not done on the plaintiff's tenants as he had no title to pass. He concluded that the plaintiff's pleadings are contradictory. He also accused the plaintiff of committing perjury by exhibiting a false grant of letters of administration to the affidavit dated 24/5/2010. It was urged that the plaintiff has not come to court with clean hands as he claims Kshs.22,000,000/- and also collects rents which he does not want to account for. It was also urged that the plaintiff's claim is quantifiable, damages are an adequate remedy. Reliance was made on **IBRAHIM V SHEIKH BROS CA 43/1972** and **MUREITHI V CITY COUNCIL OF NAIROBI CA 5/1979, (1981 KLR 532)**. It is also submitted that there is no prayer of injunction in the main suit and the court cannot act in vain. In **HCC (ELC) 231/2010 FRANCIS KALOKI V STRATEGIC PROPERTY MANAGEMENT CO. LTD**, the court held that the prayer for injunction was not anchored on the plaint

and could not be granted. Ms Sewe, on behalf of other defendants relied on the affidavit of Job Okuna Oyugi where it was deponed that the plaintiff's application is an abuse of the court process as there is pending, High Court No. 1518/1992 with an application dated 19/10/06 seeking injunctive orders. That the plaintiff seeks refund of the purchase price not specific performance and the issues before the court have nothing to do with property interests or rights. He urged that the balance of convenience tilts in preserving of the deceased's estate. The defendants also contend that the plaintiff is guilty of material non disclosure in that he failed to disclose the existence of the Succession cause, the case in Milimani court and the fact that the tenants were evicted in 2007.

After hearing the rival arguments in this matter, considering the affidavits, it is common ground that the suit premises that were allegedly sold to the plaintiff – IR 40276 LR 209/3092 are still registered in the name of Hezekiah Nelson Oyugi. From the pleadings before the court, the said suit land seems to be the subject in the Succession Cause No. 1518/1992 which is yet to be determined by the court. It is also clear from the plaint that the plaintiff herein does not lay any claim to the suit land. His claim is for refund of the purchase price following the forcible eviction of the plaintiff's tenants from the said premises and following the allegation that the sellers had no title to pass to the plaintiff.

The plaint was filed in February 2009. Then, the plaintiff did not seek any interlocutory orders. He now seeks an interim injunction to restrain the defendants from levying distress, demanding rents or interfering with his tenants. For the order to issue, the plaintiff has to establish the grounds upon which an interlocutory injunction can be granted as was stated in the case of **GIELLA V CASSMAN BROWN & CO. LTD (1973) EA 358**.

Contrary to the averments in the plaint that the plaintiff had been evicted from the suit premises and hence why he seeks a refund of the purchase price, the plaintiff now depones in his affidavit in support of the Chamber Summons dated 24/5/2010, that he is the lawful owner of the suit premises following a sale agreement (Paragraph 1 of the affidavit). In his plaint, the plaintiff is not claiming the suit premises and I find his pleadings to be inconsistent and at variance. He does not seek orders to be declared the owner of the suit premises or specific performance.

Further to the above, in his plaint, the plaintiff has pleaded that he has been evicted from the suit premises. That is the basis for filing the plaint. Contrary to that pleading, he now claims that the tenants are still in the premises and he has been collecting rents since 2006 to date, and that the tenants had paid him rent to the date of bringing the application. I have seen the receipts exhibited as evidence of payment of rent DWN(IVa) and the latest receipts were for May 2010. Reigman Consult, the company that allegedly manages the said properties wrote a note to the effect that they manage the houses on behalf of the plaintiff DWN(IVb). Having pleaded that he had been evicted from the suit premises, it is not understandable how the plaintiff can now come back with evidence that his tenants are still in possession and that they still pay him and that there are threats to evict them. Every party is bound by his own pleadings. The plaint clearly indicates that the plaintiff has been evicted from the suit premises and the pleadings therefore offend **Order 6 Rule 6** of the **Civil Procedure Rules**. That provision prohibits any party from departing from his pleadings. It reads as follows:-

***“6(6) No party may in any pleadings make an allegation of fact, or raise any new ground of claim, inconsistent with a previous pleading of his in the same suit.***

***Subrule (1) shall not prejudice the right of a party to amend or apply for leave to amend, his previous pleadings as to plead the allegations or claims in the alternative.”***

The plaintiff by this application has departed from his pleadings in the plaint. He can only depart therefrom if he amends his pleadings.

The respondents urged that an order of injunction cannot issue because the same is not anchored in the plaint. I do agree with the finding of the court in **JOHN KUBAI M'ERINGA V FREDRICK NJUNGA M'ERINGA HCC NO. 55/09** where J. Emukule considered the words of **WINSTONE V WINSTONE (1959)3 ALL ER 580** where Winn J said:-

***“In my view these words are to be construed and understood as limited to the granting of an injunction ancillary to and comprised within the scope of the substantive relief sought in the proceedings in which the application for injunction is made.”***

The plaintiff is not claiming any interest in the suit premises and there is no relationship between the prayer for injunction and the prayer in the plaint. An order of injunction cannot be granted.

The plaintiff’s claim is for a specific sum and therefore quantifiable. He has not demonstrated that he will suffer irreparable loss if the order of injunction is not granted. The plaintiff’s claim flows from an alleged breach of contract or a contract that was void for lack of capacity by the sellers to pass title and that does not entitle the plaintiff to an order of injunction. In **IBRAHIM V SHEIKH BROS INVESTMENT LTD** the East African Court of Appeal said:-

***“Where damages would be an adequate remedy the fact that the breach of contract is uncontroverted is not normally ground for the grant of an injunction.”***

An injunction is an equitable remedy and he who comes to equity must come with clean hands. The plaintiff claims Kshs.22,000,000/- for breach of contract. The question is, having been evicted sometime in 2009 when he filed the plaint herein, would he be entitled to continue collecting rents from the suit premises?

In conclusion, I find that the plaintiff has not demonstrated that he has a prima facie case or that he will suffer irreparable loss if the order of injunction is not granted. He already has judgment against the 3<sup>rd</sup> defendant. Even on a balance of convenience it seems to tilt in favour of preservation of Hezekiah Oyugi’s estate to which the disputed property belongs. For all the above reasons, I find that the Chamber Summons dated 24/5/2010 has no merit. It is accordingly dismissed. Costs to be in the cause.

**DATED and DELIVERED this 25<sup>th</sup> day of February, 2011.**

**R.P.V. WENDOH**

**JUDGE**

**PRESENT:**

Mr. Karanja Mbugua for the plaintiff.

Ms Ateya holding brief for Mr. Odiambo for 7<sup>th</sup> and 11<sup>th</sup> defendants. Also holding brief for Sewe for 8<sup>th</sup>, 9<sup>th</sup> and 10<sup>th</sup> defendants.

Kennedy – Court Clerk.