

REPUBLIC OF KENYA
IN THE HIGH COURT OF KENYA AT NAIROBI
ELC. NO. 447 OF 2010

WASHINGTON NDERITUPLAINTIFF/APPLICANT

V E R S U S

STANLEY THUODEFENDANT/RESPONDENT

R U L I N G

From the material placed before the court, there was a matrimonial dispute between the defendant and one A.W.T in **H.C. Divorce Cause No. 106 of 1996 at Nairobi** in which an order was made on 24th October 2003 directing the sale by public auction of the Defendant's House No. 10, Bendor Estate on L.R. No. 4953/1022 in satisfaction of the arrears of maintenance that had been awarded to the said Alice. "WN – 1" is the Ruling. Subsequent to that, the property was sold by public auction following advertisement. "WN-2" and "WN-3" refer. The Plaintiff was the successful bidder who paid KShs. 2,570,00/=. On 21st April 2005 the court declared the sale absolute and certificate issued to the Plaintiff by order issued on 29th April 2005 "WN-4". The Plaintiff has since been issued with a Provisional Certificate of Title ("WN-6") under section 71 of the Registration of Titles Act (Cap. 286). He is now the registered proprietor of the suit property.

The Defendant states that he has appealed against the decision and orders of this court and annexed a Notice of Appeal ("ST-A"). He also annexed an order of the Court of Appeal in **Civil Application No. NAI 223 of 2004 (109/04 UR)** at **Nakuru** in which on 24th September 2004 the court stayed the auction that was scheduled for that day until the application filed by him against Alice Wangeci Thuo had been heard. The order is ("ST-C). The stay was granted:

"if it has not taken place"

There is no dispute that the auction took place on that date ("WN-3") and that has not been questioned here or in the Court of Appeal. The Defendant has not indicated what became of the application. The appeal has not been filed as the Defendant states he is still waiting for proceedings of the High Court.

The Defendant has refused to give up vacant possession of the suit premises to the Plaintiff despite various requests. He says he is a retired man and lives on the suit property with his family and seeks to be allowed to pursue the appeal. The Plaintiff has brought the suit for permanent injunction to restrain the Defendant from trespassing upon the property or in any other manner interfering with the same. He also sought general and special damages, *mesne* profits and costs. In the present motion under section 3A of the Civil Procedure Act he sought a mandatory injunction to compel the Defendant and all those acting under him to vacate the property. In the alternative, he sought an order for eviction.

The plaint did not seek either a mandatory injunction or eviction in its prayers. At this interlocutory stage the sought orders cannot therefore issue. The prayers in the application are at variance with those in the plaint.

There is no dispute that the suit property now absolutely belongs to the Plaintiff who is, by virtue of the registration, entitled to possession, occupation and quiet enjoyment. He will, however, have to amend his pleadings to reflect the kind of prayers that will enable him realize his right to the property. In the

meantime, the present application is dismissed. Costs will abide the main suit.

DATED AND DELIVERED AT NAIROBI

THIS 16TH DAY OF MARCH 2011

A. O. MUCHELULE
J U D G E