



**IN THE HIGH COURT OF KENYA**

**AT NAKURU**

**CIVIL CASE NO.238 OF 2004**

**PENINAH WAMBUI**

**MUGO.....APPLICANT/PLAINTIFF**

**AND**

**MOSES NJARAMBA KAMAU.....1<sup>ST</sup>  
RESPONDENT/DEFENDANT**

**MARY MOTHONI NJARAMBA.....2<sup>ND</sup>  
RESPONDENT/DEFENDANT**

**RULING**

This is an interesting dispute brought by the applicant against the 1<sup>st</sup> respondent, the original owner of LR 6585/992 – NYAHURURU MUNICIPALITY BLOCK 6/506 who sold it to her and his wife the 2<sup>nd</sup> respondent. The latter is in occupation and has refused to give vacant possession claiming that it is a matrimonial property. The hearing has commenced and indeed the applicant has testified.

In the meantime she has brought the instant application praying specifically that the 2<sup>nd</sup> respondent, who is in possession be compelled to pay land rates in respect of the suit property. The applicant has deposed that since the property was transferred to her she has continuously been paying council rates even though no benefit is accruing to her from the property, that since the 2<sup>nd</sup> respondent is the one drawing the benefit by leasing the property, it is only fair and just that she pays the demanded rate now standing at Kshs.166,950/= (rates and penalties).

In reply, the 2<sup>nd</sup> respondent has stated that the orders sought are incapable of being granted as no corresponding relief has been sought in the main suit; that since the ownership of the suit property is yet to be determined, the question as to who should pay rates must await that determination; that the application is intended to delay the hearing and determination of the suit.

I have considered the application which is expressed to be brought under the inherent jurisdiction of this court enacted in **Sections 1A, 1B and 3A** of the **Civil Procedure Act**. It has been argued for the 2<sup>nd</sup> respondent that no interlocutory order can issue as prayed without a similar substantive prayer. No authority (decided cases or provision of the law) was cited for that proposition. It is only under **Order 40 rule 2** of the **Civil Procedure Rules** that an applicant in a suit for restraining the respondent from committing the acts enumerated under that rule can apply, after the commencement of the suit, and either before or after judgment, for a temporary injunction to restrain the respondent.

The application before me is not brought under the above provisions. Indeed from its language it is an injunction of a mandatory nature which can only be sought by invoking the inherent jurisdiction of this court. But it is also now settled that such an injunction may issue both at interlocutory stage and at the hearing and that it rarely issues at interlocutory stage unless the matter is clear and not controverted. The applicant has the title to the suit property having purchased the same from the 2<sup>nd</sup> respondent's husband, the 1<sup>st</sup> respondent. For the last eight years since she purchased it, she has not enjoyed proprietary interest because the 2<sup>nd</sup> respondent is also claiming its ownership. The applicant has shown without any evidence in rebuttal by the 2<sup>nd</sup> respondent that the rates have not been paid and are outstanding in the sum of Kshs.166,950/= and that the same have been demanded. The respondent's response to this is that whoever will be declared by the court to be the lawful owner shall pay the rates.

It is uncertain, as is always the case with civil litigation, when this dispute will be determined. The rates will continue to escalate and indeed the property may be disposed of by the council. Both the applicant and the 2<sup>nd</sup> respondent have laid a claim to the ownership of the suit property but it is the 2<sup>nd</sup> respondent who is benefitting from it. She has not denied the averment that she is in receipt of rent from it. Rates must be paid by the party drawing a benefit, namely, the 2<sup>nd</sup> respondent. She cannot have her cake and eat it. After all she will suffer no prejudice by paying for what she believes is hers.

In the exercise of my discretion under the cited provisions of the law, I order that the 2<sup>nd</sup> respondent will settle the outstanding/demanded rates and continued paying the subsequent rates during the pendency of this suit.

Costs to be in the cause.

**Dated, Delivered and Signed at Nakuru this 3<sup>rd</sup> day of June, 2011.**

**W. OUKO**

**JUDGE**