



REPUBLIC OF KENYA
IN THE HIGH COURT OF KENYA

AT NAIROBI

CIVIL CASE NUMBER 77 OF 2011

ESTHER GELIZA KANYANGA.....PLAINTIFF

VERSUS

ROSE NYAROKA RAMICHI.....1st DEFENDANT

DUNCAN MUGAMBI MUTUNGI t/a WRIGHT AUCTIONEERS.....2ND DEFENDANT

RULING

Before me is a Chamber Summons dated 7th March 2011 filed on behalf of the plaintiff. The application was brought under Order 40 rule 1 and 4 of the Civil Procedure Rules and Section 3A of the Civil Procedure Act (Cap 21 of the Laws of Kenya).

The prayers in the application are as follows: -

- 1. That the honourable court may be pleased to issue a temporary injunction restraining the defendants by themselves, their servants and/or agents from distraining of moveable properties, disposing off, alienating and/or selling the plaintiff's household goods pending the hearing and determination of this application herein.***
- 2. That the honourable court may be pleased to issue a temporary injunction restraining the defendants by themselves, their servants and/or agents from distraining of moveable properties, disposing off, alienating and/or selling the plaintiff's household goods pending hearing and determination of this application herein and pending hearing determination of the suit.***
- 3. That the attachment by the 2nd defendant be deemed to be unlawful and the household goods unlawfully attached be returned to the plaintiff.***
- 4. That the orders given by the honourable magistrate on 17th February, 2011 in Miscellaneous case No. 91 of 2011 be declared null and void.***
- 5. That costs of the application be provided for.***

It will be observed from the above prayers that prayer 1 has already been spent. The prayers that are still alive are prayers 2, 3, 4 and 5.

The application has grounds on the face of the Chamber Summons. The grounds are that there was no proclamation served by the 2nd defendant on the plaintiff as required by law; that the plaintiff's household goods were unlawfully attached; that the order issued on 17th February, 2011 for police to supervise the auction of proclaimed goods was not relevant as there was no auction at the premises nor had such an order been sought; that the defendants used the order issued on 17th February, 2011 to attach the plaintiff's household goods and attempted to evict the plaintiff from the premises; that the 2nd defendant should return all household goods taken; that the interests of justice dictated that the order issued on 17th February, 2011 in Misc. Case Number 91 of 2011 be declared null and void; and that title to the suit premises was revoked by the Ndungu Report and the house had been marked for demolition.

The application was filed with a supporting affidavit sworn by the plaintiff on 7th March, 2011. Several documents were annexed to the affidavit including copies of documents filed in Misc. Application No. 91 of 2011 in the Chief Magistrate's Court Milimani.

It was deponed in the supporting affidavit, inter alia, that the 1st defendant was no longer the registered owner of the said property and the title had been revoked by the Government. It was deponed further that the plaintiff did not owe the 1st defendant any rent as alleged. It was also deponed that when the advocates for the 1st defendant in July, 2010 instructed auctioneers to distress for rent, the plaintiff instructed her advocates to write to the auctioneers and inform them that the 1st defendant was not the registered owner of the property and could not, therefore, levy distress for rent owing. It was further deponed that police supervised an unlawful attachment and eviction but the plaintiff was not shown or served with a court order for the attachment and eviction. It was deponed that on 28th February, 2011 the plaintiff's advocate went to Milimani Commercial Court and was able to trace the file by which the 2nd defendant obtained ex-parte orders on 17th February, 2011. It was further deponed that the 2nd defendant had been dishonest and misled the court by deponing that he had proclaimed the goods so as to get an order of the court for the police to supervise an auction at the premises.

The plaintiff filed a supplementary affidavit sworn by herself on 24th March, 2011. This affidavit was said to be a response to the 1st defendant's replying affidavit sworn on 11th March, 2011. It was deponed that the plaintiff did not file CMCC No. 12659 of 2006 Milimani to seek an injunction to stop the 1st defendant from levying distress but that the suit was to stop her from evicting her. It was deponed that the reason for filing that case was in the subordinate court that the notice to vacate the suit premises was too short and the plaintiff was recuperating at Aga Khan Hospital. It was also deponed that the plaintiff appealed against the ruling in the High Court in Civil Appeal of 906 of 2006 and never made any promise to vacate the suit premises. It was also deponed that the 1st defendant levied distress for rent again sometimes in September, 2009 claiming arrears of Ksh.825,000 plus Ksh.60,000/- for curtains. It was deponed that the house did not exist in 1997 and that the plaintiff only became a tenant in June, 2000. That the 1st defendant continued demanding rent from 1997 and the plaintiff, therefore, decided not to pay her any rent. It was deponed that the present application was not res judicata as every action of distress for rent was a new cause of action.

The plaintiff through her advocate M. Korongo & Co. Advocates filed written submissions on 4th May 2011. In the submissions, the contents of the affidavits were relied upon. It was contended that the plaintiff was a tenant of the 1st defendant from 2000 till June, 2004 when the Government revoked the 1st defendant's title. This was done through the Ndung'u Report. It was contended that a search had been filed which showed that Nairobi/Block 60/493 Langata had its title revoked as the same was reserved for

a children's playground. The 1st defendant, however, continued collecting rent from the plaintiff till October, 2009. Sometime in September, 2009 the said 1st defendant levied distress. It was submitted that there was no house in existed in 1997 and the plaintiff only became a tenant in June 2000. Therefore, no rent could be charged from 1997. It was contended that no rent was owed to the 1st defendant as alleged especially because the title was revoked. However, in 2010 the 1st defendant through auctioneers levied distress. The auctioneers proceeded with the action in spite of the fact that they knew that the 1st defendant was not the title owner of the subject property.

In addition, the 2nd defendant as auctioneers filed Misc. Application No. 91 of 2011 in the Chief Magistrate's Court at Milimani and obtained orders for supervision by the police of an auction on alleged proclaimed goods. Ex-parte orders were given in the said application on 17th February, 2011.

It was contended that 2nd defendant acted maliciously and unlawfully. They were aware that the 1st defendant was not the registered owner of the premises. They also did not proclaim the goods as required by the law.

It was contended that this application was not res judicata, as each proclamation was a cause of action. It was contended that the issues herein related to an attachment of the plaintiff goods on 25th February, 2011,

It was contended that the 1st defendant's replying affidavit did not address the issues raised by the plaintiff. The court was urged to declare the order issued on 17th February, 2011 in Misc. Case No.91 of 2011 as null and void.

The application is opposed. The 1st defendant filed a replying affidavit sworn by herself on 11th March 2010. It was deponed in the said affidavit that there was a lease disagreement on the subject property between the 1st defendant and the plaintiff. The rent payable is Khs.25,000/- per month. It was deponed that the plaintiff had persistently defaulted in the payment of rent. It was deponed that the plaintiff filed CMCC No. 12659 of 2006 Milimani seeking an injunction to stop the 1st defendant from levying distress on that property. That application was subsequently dismissed with costs. The plaintiff subsequently filed a Civil Appeal No. 906 of 2006. The plaintiff in the meantime offered to vacate the premises, but she did not keep the promise and started blocking the 1st defendant from access to the suit premises by locking it all the time. It was deponed that the plaintiff had not paid rent for 3 years and had generally been an irregularly payer of rent. It was deponed that the 1st defendant was suffering serious financial embarrassment due the the actions of the plaintiff.

The 1st defendant through her advocate filed grounds of opposition on 11th March 2011. The grounds are as follows: -

- 1. The application is frivolous, misconceived and thus an abuse of this honourable court process.**
- 2. The issues raised in the application are res judicata.**
- 3. The plaintiff has not come to this honourable court with clean hands.**

4. There are no sufficient grounds to warrant the grant of the orders sought.

The 1st defendant also through her advocates filed written submissions on 25th May 2011. It was contended that the main suit herein was bad in law and also an abuse of the process of the court. It was contended that there was in fact in force a written lease agreement wherein the plaintiff was required to pay monthly rent of Ksh.25,000/- from 1st June, 2000. It was contended that the plaintiff had defaulted in making rent payment. It was contended that though the plaintiff says that she owes no rent she has not attached payment receipts. It was contended also that there is no evidence that the 1st defendant was not the registered owner of the subject premises. It was contended that the order in Misc. Civil application 91 of 2011 issued on 17th February 2011 was a valid order and could not be said to be unlawful, null and void. There was no evidence that the title to the suit premises had been transferred to a third party from the 1st defendant.

On the proclamation, it was contended that a proclamation dated 28th January, 2011 had been exhibited in court. It was contended that the decision in CMCC No. 12569 of 2006 and that was subject to an appeal in High Court Civil Appeal 906 of 2006 and that both the case and the appeal were still pending. The allegations made in the case before the Chief Magistrate and the application therein, are the same as were being made in this court.

It was contended that the provisions of Section 3(3) of the Distress for Rent Act, (Cap 293) were complied with. It was emphasized that the evidence on record showed that the plaintiff owed the 1st defendant huge amounts of rent which continue to accrue.

It was also contended that the plaintiff had not satisfied the threshold for the grant of injunctive orders. She had not demonstrated a prima facie case with probability of success. She had not demonstrated that she stood to suffer irreparable loss if the injunction is not granted. In any case, a remedy of award of damages would be adequate compensation.

The 2nd respondent, auctioneer, responded by filing a replying affidavit sworn on 17th June 2011. It was deponed, inter alia, that on 28th January, 2011 the auctioneer proceeded to proclaim L.R. No. Nairobi/Block 60/493 – Otiende Estate Langata. After the proclamation, the tenant did not pay the rent arrears. That all efforts to levy distress were not successful as the tenant always locked the house. That, therefore, the deponent was surprised that the plaintiff was claiming that she had gone to court to advance falsehoods. It was deponed that this affidavit was in support of the 1st defendant's replying affidavit and written submissions.

On the hearing date, Ms. Omwakwe for the plaintiff highlighted the submissions in support of her client's application. Mr. Nduati for the 1st defendant highlighted the submissions in opposition to the application. The plaintiff's counsel relied on the case of **Kenya Commercial Finance Ltd versus Afraha Education Society [2001] EA 86 (CAK)**. Counsel for the 1st defendant also relied on the same case as well as the case of **Mobil Kitale Service Station Versus Mobil Oil Kenya Ltd & another HCCC No. 205 of 1999**, and the case of **Haithar Haji Abdi Versus Middle East Bank Kenya Ltd – HCCC No. 5484 of 1991**.

I have considered the application, documents filed, and the submissions both written and oral, the authorities cited and the law. This application is an application for temporary injunction pending determination of the suit herein as well as an application to declare attachment of goods by the 2nd defendant as unlawful and return of attached goods, and also an application for orders that the orders

given by the Magistrate of 17th February, 2011 in Miscellaneous Case No. 91 of 2011 be declared null and void.

For an applicant to succeed in an application for interlocutory injunctive orders, such applicant has to satisfy the requirements set out in the now famous case of **Geilla Versus Cassman Brown & Co. Ltd (1973) EA 358**. An applicant has to demonstrate a prima facie case with probability of success. Secondly, he has to demonstrate that that he will suffer irreparable loss or damage if the interlocutory injunctive orders are not granted, that is that an award of damages will not be adequate compensation in the circumstances of the case. Thirdly, if the court is in doubt, it will decide the application on the balance of convenience.

This matter relates to an alleged landlord tenant relationship between the plaintiff and the 1st defendant. The plaintiff being the tenant and the 1st defendant being the landlady. The plaintiff herself states that there was a lease agreement between herself and the 1st defendant with effect from the year 2000. She says that she was in fact paying rent, but stopped paying rent because the title of the defendant was cancelled through the Ndung'u Report on irregularly acquired land.

In my view, the Ndung'u Report was just a recommendation. In any event, the search certificate annexed to the applicant's application herein, shows that the said property Block/60/493 was by the 4th March 2011 registered in the name of Rose Nyaroka Ramichu who is the 1st defendant.

The only thing that has happened is that a restriction was registered and the reason for the restriction was given in the register that it was public land. On the face of it, therefore, the applicant has not demonstrated that the title has been cancelled. In my view, from the facts disclosed in the application, I cannot say that the applicant has demonstrated or shown a prima facie case with probability of success. The apparent owner of the land appears to be the 1st defendant. The applicant has not bothered to join the Attorney General as a party to come and explain what interest the Government has in the plot. I cannot speculate for the Government. The applicant cannot claim to be talking on behalf of the Government. If the Government has an interest, they should have come to court as parties herein and demonstrate that interest. That will dispose of the prayers for injunctive orders. The applicant not having demonstrated a prima facie case with probability of success cannot be granted injunctive orders.

On the prayers that the 2nd defendant's attachment of goods be deemed unlawful and household goods unlawfully attached to be returned to the plaintiff, and that orders given by the Magistrate on 17th February 2011 in Miscellaneous case No. 91 of 2011 be declared null and void, I note that these are prayers (C) and (d) respectively of the plaint filed in the main suit. If those prayers are granted, they will have the effect of permanently and ultimately determining the main prayers in the proceedings filed herein by plaintiff. In my view, substantive prayers cannot be granted at an interlocutory stage. The court will have to hear the evidence of the parties and determine substantively whether the plaintiff is entitled to such prayers. That has to be done in the main suit and not at an interlocutory application. Therefore, in my view, these prayers cannot be granted. They are premature and are not grantable.

The plaintiff not having established any legal basis for the grant of the prayers in the application, the application has to fail. It will be dismissed.

Consequently, and for the above reasons, the application is dismissed. Costs of the application are granted

to the 1st defendant, as the 2nd defendant merely relied on submissions and contentions of the 1st defendant. It is so ordered.

Dated and delivered at Nairobi this 25th day of July, 2011.

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GEORGE DULU

JUDGE

In the presence of

Ms Omwakwe for plaintiff/applicant

No appearance for 1st defendant

No appearance for 2nd defendant

C Muendo – court clerk