



REPUBLIC OF KENYA
IN THE HIGH COURT OF KENYA

AT NYERI

CIVIL CASE NO. 21 OF 2008

PAUL NGOBIA NJOROGE, JAMES MAINA WERU AND FRANCIS GITONGA

**KIMERIA on behalf of 88 others – TENANTS AT
NANYUKI HOUSING**

SCHEME.....PLAINTIFF/APPLICANT

VERSUS

KENYA NATIONAL ASSURANCE COMPANY (2001)

LIMITED.....DEFENDANT/RESPONDENT

RULING

Pursuant to the provisions of *Order 40 rules 1, 2 and 3* of the Civil Procedure Rules and *Section 3A* of the Civil Procedure Act, **Paul Ngobia Njoroge and 87 others**, being tenants at Nanyuki Housing Scheme, hereinafter referred to as the Applicants, took out the Motion dated 10th March 2011, in which they applied for the following orders:

1. ***That this application be certified as urgent and service of this application be dispensed with in the first instance.***
2. ***That this Honourable Court be pleased to grant a temporary injunction restraining the respondent whether by itself, its agents and/or servants from selling the houses on L.R. No. NANYUKI MUNICIPALITY BLOCK 8/898 pending the hearing and determination of this application.***
3. ***That this Honourable court be pleased to grant an injunction restraining the respondent whether by itself, its agents and/or servants from selling the houses on L.R. NO. NANYUKI MUNICIPALITY BLOCK 8/898 pending a comprehensive valuation of the houses.***
4. ***The costs of this application be provided for.***
5. ***The Honourable Court be pleased to make such further or other orders as it may deem just and expedient in the circumstances of this case.***

The Motion is supported by the affidavit of Paul Ngobia Njoroge sworn on 10th march 2011. Kenya National Assurance Company (2001) Ltd., opposed the Motion by filing the replying affidavit of Tabitha Mwaniki sworn on 6th April 2011.

I have considered the material placed before this court plus the oral submissions tendered by learned counsels from both sides. Before dealing with the merits or otherwise of the motion, let me set out in brief the background of this dispute. The Applicants herein are tenants of the respondent in premises standing on **L.R. NO. NANYUKI MUNICIPALITY BLOCK VIII/898**. On 22nd February 2008, the respondent advertised in the print media a notice inviting interested parties to bid for the purchase of the 88, 2 bed-room residential houses. Those houses advertised for sale included those occupied by the Applicants popularly known as the Nanyuki Housing Scheme. The Applicants felt that the notice excluded them as possible purchasers hence they were prompted to file an action by way of the Plaint dated 5th March 2008 which was amended on 15th April 2008 whereof they prayed for an order of declaration to the effect that the Respondent is estopped from selling or otherwise disposing of the houses to any other person without giving the applicants the first option to purchase those houses. The Applicants also sought for an order of injunction to restrain the Respondent from selling the aforesaid houses pending the hearing and determination of this suit. The Applicants took out the summons dated 18th November 2008 in which they sought for the following orders:

- (i) ***Leave to withdraw the summons dated 05.03.2008.***
- (ii) ***An order for temporary injunction to restrain the Respondent from selling, offering for sale, disposing of, alienating the suit property pending the hearing and determination of the suit.***
- (iii) ***Costs of the Application.***

The aforesaid application was heard and dismissed by the Honourable Mr. Justice Makhandia on 23rd April 2009. The Applicants have annexed to the affidavit of Paul Ngobia Njoroge a copy of a consent order dated 22nd October 2010. The aforesaid order was duly executed by the parties herein. In the aforesaid agreement the manner and procedure of disposing of the Respondent's houses was clearly set out. In part, it stated *inter-alia* that the sitting tenants (Applicants herein) would only be given priority to purchase the houses otherwise the normal method of disposal would have been by way of advertisement in the print media. The consent order clearly states that the value of the houses would be solely determined by a Government valuer, whereby the open market value was to be used as the reserve price in determining the purchase price for each sub-unit. It would appear that pursuant to the consent order the respondent invited one Bernard M. Nzau, a registered government valuer to carry out the valuation of the suit property. Offers for sale were made to the Applicants based on the valuation report of the government Valuer. Upon receipt of the aforesaid offers the Applicants filed the current Motion.

In the Motion, the Applicants alleged that the Respondent has made offers for sale without taking into account the interests of the existing tenants. The Applicants further alleged that the Respondent has used an inflated valuation report which did not take into account the current state of the houses. It is also alleged that the Valuer did not take into account the improvements the Applicants had put into the property while in occupation. The Applicants went ahead to engage the services of another private Valuer. The Applicants averred that the overpriced offers are calculated to circumvent the consent orders and to pursue them out of the bidding process.

The Respondent on its part opposed the Motion. It is the Respondent's submission that it is bound by the valuation carried by the Government Valuer as a basis for determining the selling price of public assets. The Respondent was also able to show that it sent letters of offer to the Applicants hence they were given first priority in terms of the consent orders.

I have carefully considered the rival submissions. The principles for granting orders of injunctions are well settled. First, an applicant must show that he has a *prima facie* case with high chances of success. Secondly, an applicant must also show the irreparable loss he would suffer if the order is denied. Thirdly, where the court is in doubt it would decide the application on a balance of convenience. Let me begin by examining whether or not the applicant has established a *prima facie* case with a probability of success. The foundation of the applicant's application is the consent order recorded and or executed on 22nd October 2010. I have already stated the Applicants complaints. They allege that

the Respondent did not take into account their interests when valuing the property. They alleged that they had made improvements on the houses which were not taken into account by the Government Valuer. It is not in dispute that the parties agreed that the Government Valuer would undertake a valuation of the suit houses to be used to determine the reserve price. There is no clause in the consent order showing that the government Valuer would take into account the improvements made by the Applicants. Furthermore there is no provision giving leeway to the tenants to appoint a private valuer to value the property. I am of the considered view that the Respondent acted within the terms of the consent order. This court is enjoined to interpret the terms of the contract. The court is not allowed to redraw the agreement for the parties. It would appear the Applicants are indirectly asking this court to redraw the terms of their agreement to enable them introduce another valuation report other than that prepared by the Government Valuer. In the end, I am convinced that the Applicants have not shown that they have a prima facie case with any chance of success. The Applicants have also failed to show the irreparable damage they would suffer if they are denied the order for injunction. Since I am not in doubt in my mind, I will not belabour to consider the principle of convenience.

In the end I see no merit in the Motion dated 10th March 2011. The same is dismissed with costs to the Respondent.

Dated and delivered at Nyeri this 23rd day of September 2011.

J. K. SERGON
JUDGE

In open court in the presence of Mr. Macharia holding brief Wamahiu for the Plaintiff and Kimunya present for Defendants.