



REPUBLIC OF KENYA
IN THE HIGH COURT OF KENYA
CIVIL APPEAL NO. 128 OF 2008

MICHAEL NTHENGE NZIOKI APPELLANT ORIGINAL DEFENDANT

VERSUS

PETERSON MUNENE GATHERU RESPONDENT/ORIGINAL PLAINTIFF

AND

LUCY M GATHERU INTERESTED PARTY

(Being an appeal from the Ruling of the Principal Magistrate Court Nairobi Hon. Ongeri Esq delivered on the 27th November 2007 in CMCC No. 7806 of 2007 at Milimani Commercial Courts)

JUDGMENT

I. BACKGROUND

1. The subordinate court case file concerns land. According to the plaint filed on 6th September 2007 by Peterson Munene Gatheru, that he had been allocated a house by the City Council of Nairobi being Nairobi Umoja Block 109/37 Umoja I House No. 68. All the dues for the said house had been paid by him.
2. Sometime in June 2007 he was summoned to the police and was being harassed to be evicted from the house.
3. The original plaintiff Peterson Munene Gatheru filed suit and sought for permanent orders of injunction to restrain the respondent from interfering with his possession and occupation of the said property.
4. Interim orders were issued to him on 6th September 2007 till the determination of the application dated 5th September 2008.
5. An interested party one Lucy M Gatheru claim to be wife to the original plaintiff. She was granted leave by the court to be enjoined to the matter.
6. Inter parties hearing was heard on 21st November 2007.

7. The respondent original plaintiff argued that he was the original owner of the suit properly and injunctive orders should issue for any attempt to have been raised.
8. The interested party claim that she sold the house to the defendant. She had acquired title and sold the same.
9. The defendant claims he entered into a sale agreement transferred title to himself and obtained a lease.
10. In the ruling of 27th November 2007, the Hon. Magistrate found merit in the application and granted orders of injunction.
11. The appellant original respondent appealed to this High Court on 12th March 2008.
12. Leave to file appeal out of time was granted by Waweru J on 12th March 2008 in Miscellaneous Application No. 16 of 2008.

II APPEAL

13. The prayers sought was that the orders of 27th November 2007 be set aside.
14. That the Hon. Court do vary the lower court's decision and dismiss the respondent's chamber summons dated 5th September 2007 with costs to the appellant.
15. The trial magistrate erred in giving the orders as the appellant holds title. This cannot be challenged.
16. The interested party supported this argument.
17. The respondent original plaintiff and his advocate did not appear to court.

III FINDINGS

18. The orders of 5th September 2007 was for an injunction restraining the appellant original defendant from interfering with the plaintiff possession of the suit premises.
19. It was therefore that upon the orders being so granted it was so given only up to the determination of the main suit. It was not a final order.
20. The appellant is required to set down the main suit for hearing. He requires to have the matter heard to determine the real question that is in issue.
21. The respondent/original plaintiff seems to have discovered new matters, namely the possibility of the lease not being granted. Maybe question on issue of fraud. This may necessitate the amendment of the plaint.
22. There would be irreparable loss if the injunction had not been granted.
23. The decision of the trial magistrate is upheld. The appeal is hereby dismissed with no orders as to costs as the respondent/original plaintiff failed to attend court at the hearing of this appeal nor filed a declaration that he would not attend.

Dated this 4th Day of October 2011

M. A. ANG'AWA
JUDGE

Advocates:

- 1) *D.N. Nyaga instructed by M/s Njeru Nyaga & Co Advocates for the appellant/original defendant*
- 2) *A.L. Kairu instructed by M/s Andrew Kairu & Co Advocates for interested party*