



**REPUBLIC OF KENYA
IN HIGH COURT OF KENYA
AT NAIROBI
CIVIL SUIT 49 OF 2007**

MARGARET AUMA OCHANDAPLAINTIFF

VERSUS

ROSEMARY TAMUSANGE.....DEFENDANT

RULING

1. The Plaintiff herein **Margaret Auma Ochanda** commenced suit by filing the plaint dated 22/01/2007. The Plaintiff prays for judgment against the Defendant for:

- (a) *An order that the Defendant should transfer to the Plaintiff all the piece of land the Plaintiff is occupying and has constructed on upon payment to the Defendant of its full value at market rates.*
- (b) *Costs*
- (c) *Interest at commercial rates.*
- (d) *Such other relief as shall be fair in the eyes of the court.*

2. There are two applications for consideration by the court. The first application is the Defendants Notice of Motion dated 5/08/2009 by which the Defendant seeks **ORDERS:-**

1. **THAT** *this Honourable Court be pleased to certify the application herein as urgent and fit for hearing on priority basis and service thereof be dispensed with at the first instance.*
2. **THAT** *a restraining order be issued against the Plaintiff whether by herself, servants or agents, and/or otherwise whomsoever from entering and/or from destroying or otherwise causing any damage, destruction or any interference to the Defendant's suit premises known as Thome 5 Plot L.R. 13330/255, Thika Road, Nairobi until the hearing of this application interparte.*
3. **THAT** *a temporary injunction do issue against the Plaintiff whether by herself, servants or agents, and/or otherwise whomsoever from trespassing or otherwise interfering with the Defendant's quiet enjoyment and possession of the suit premises as Thome 5 Plot L.R. 13330/255, Thika Road, Nairobi until the hearing of this application inter parte.*
4. **THAT** *a restraining Order be issued against the Plaintiff whether by herself servants or agents, and/or otherwise whomsoever from entering and/or from destroying or otherwise causing any damage, destruction or any interference to the Defendant's suit premises known as Thome 5 Plot L.R. 13330/255, Thika Road, Nairobi until the hearing and determination of this suit.*
5. **THAT** *a temporary injunction do issue against the Plaintiff whether by herself servants or agents and/or otherwise whomsoever from trespassing or otherwise interfering with the Defendant's quiet enjoyment and possession of the suit premises known as Thome 5 Plot L.R. 13330/255, Thika Road until the hearing and final determination of this suit.*
6. **THAT** *a mandatory injunction do issue against the Plaintiff to render vacant possession of the suit premises known as Thome 5 Plot L.R 13330/255, Thika Road.*

7. *THAT this Honourable Court do give any other or further orders as is just and expedient in the circumstances.*
8. *THAT cost of this suit be provided for. (sic)*
3. The application is premised on grounds that are on its face, inter alia, that the Defendant is the registered owner of Thome 5 Plot LR 13330/255 Thika Road (the suit premises) and that the Plaintiff without the Defendant's consent has caused massive destruction to the suit premises resulting in colossal loss to the Defendant and making the suit premises uninhabitable. The Defendant avers that since causing the destruction, the Plaintiff has been on the run, and that unless restrained as prayed, the Plaintiff is likely to cause more damage that will result in irreparable and great financial loss, stress, psychological trauma and inconvenience to the Defendant.
4. That application is also supported by the sworn affidavit of **Rosemary Tamusange** dated 5/08/2009. The deponent says that after the Plaintiff moved out of the suit premises she (Plaintiff) planted an agent into the suit premises, and that despite notices to the Plaintiff's agent to vacate the suit premises, the agent has refused to do so, and continues to cause massive destruction of the suit premises.
5. The Defendant's application is opposed. The Replying Affidavit is dated 20/08/2009. The Plaintiff also relies on the affidavit in support of her application dated 6/08/2009 (to be considered later in this ruling) to the effect that she constructed a residential apartment on the suit premises at the Defendant's behest, express consent and permission, but says that after the construction, the Defendant became hostile to her and subjected her to verbal and physical abuse. That eventually the Defendant threw the Plaintiff out of the suit premises and destroyed part of the Plaintiff's apartment. The Plaintiff denies any massive destruction of the suit premises as alleged or at all and avers that the Defendant's actions have caused the Plaintiff great loss, damage, psychological trauma and turned her into a destitute. The Plaintiff also denies being on the run as alleged by the Defendant or at all. The Plaintiff prays that the Defendants application dated 15/08/2009 be dismissed with costs.
6. The second application is the Plaintiff's chamber summons dated 6/08/2009. The Plaintiff prays for **ORDERS:-**
 1. *THAT this application be CERTIFIED urgent and heard EXPARTE in the first instance.*
 2. *THAT owing to the urgency of this matter, the same be heard during the High Court Vacation.*
 3. *THAT the Defendant by herself, her servants and/or agents be restrained by temporary injunction from entering, occupying, demolishing, destroying, using, letting for rent or hire, selling, alienating, disposing off or in any manner howsoever interfering with the Plaintiff's and her tenants' property, access to,*

occupation and quiet enjoyment of the Plaintiff's apartment Block or flat erected on a third of all that property comprised in title No. L.R. 13330/255 in THOME ESTATE, Nairobi pending the hearing and determination of this suit or until further orders.

4. *THAT a mandatory injunction do issue directing the Defendant to return and restore the Plaintiff, her tenants, servants and assistants to the full use and occupation of the Plaintiff's apartment block erected on LR No.13330/255 and in particular to hand over and restore unrestricted vacant possession of the said apartment to the Plaintiff pending hearing and determination of this suit.*

5. *THAT the Defendant do pay the costs of this application at any event.(sic)*

7. This second application is based on grounds that the Defendant has violently, lawlessly and with the aid of numerous hired strangers entered upon the Plaintiffs apartment block and wrecked destruction and maliciously caused much damage to the premises and the Plaintiff's household goods by throwing the goods out of the house and the compound. The application is also supported by the sworn affidavit of Margaret Auma Ochanda dated 6/08/2009. The deponent says that she has a prima facie case with preponderate chances of success and that unless the orders sought are granted, she stands to suffer irreparable loss and injury. The deponent also says that she fears for her life following the invasion of her apartment on the 29/07/2009 by the Defendant and her (Defendant's) son Allan who were accompanied by rough and mean looking strangers. The deponent also avers that she has reliable information from her tenants that the Defendant has been subjecting the said tenants to great annoyance and threatening them with personal violence or unlawful removal from the suit premises.

8. Counsel appearing argued the two applications before me on 14/01/2010. The parties also filed written submissions. Mr. Kiage for the Plaintiff submitted that the Defendant's application dated 5/08/2009 is fatally defective and an abuse of the due process of court. Mr. Kiage asked the court to dismiss the Defendant's application with costs and to allow the Plaintiff's application dated 6/08/2009. In the first place, Mr. Kiage argued that the Defendant having come to court under Order 39 of the Civil Procedure Rules, the application should have come by way of chamber summons and not by way of a notice of motion. Under rule 9 of Order 39, any application brought under rules 1 and 2 of Order 39 **shall** be by summons in chambers. It is indeed true that the Defendant's application dated 5/08/2009 is expressed to be brought inter alia, Order 39 rules 1, 2, 3 and 9 of the Civil Procedure Rules. It is also clear that by citing rule 9 of Order 39, the Defendant was

saying that her application was a chamber summons and not a notice of motion.

9. On this particular issue, counsel for the Defendant, urged the court to find that any technical defect in the Defendant's application is curable under the provisions of Order 50 of the Civil Procedure Rules and further that since the application is also made under other provisions of the law in addition to Order 39, then the Defendant was entitled to bring her application by way of a notice of motion.
10. In response, Mr. Kiage argued that Order 39 clearly provides under Rule 9 thereof that applications premised on rules 1 and 3 of the Order must be brought by way of chamber summons and that Order 50 rule 1 expressly excludes applications for which there is an express provision as to how such applications ought to be brought to court.
11. It is the considered view of the court that the position held by Mr. Kiage on the above point is the correct position. The Defendant herein wants to derive a benefit from her own breach of procedure and the court will not assist her in doing so. The court has of course looked at the provisions of Order 6 Rule 12 and Order 50 Rule 12 of the Civil Procedure Rules and Section 1A of the Civil Procedure Act, Cap 21 Laws of Kenya, but in the circumstances of this case, the ends of justice would not be met by bending these provisions in favour of the Defendant.
12. Secondly, counsel for the Plaintiff contended that the Defendant's application is a blatant abuse of court process. This argument is premised on the ground that the Defendant cannot hope to gain from an illegality perpetrated by herself when she violently ejected the Plaintiff from the suit premises on the 29/07/2009. Mr. Kiage referred the court to annexure number 6 to the Plaintiff's supporting affidavit in which the Plaintiff protested vehemently against the Defendant's unbecoming and destructive behavior. Counsel for the Plaintiff also submitted that the Defendant's actions were not accidental.
13. In response to the allegations of abuse of court process by the Plaintiff, counsel for the Defendant, Mr. Wachira submitted that the Plaintiff's counsel's submissions are not of a civil but criminal nature. The court's own considered view on this matter is that even as a landlord, one must follow the law when dealing with tenants. It is also trite law that a landlord who tries to steal a match on the tenant should not be allowed to enjoy a benefit from such conduct. The documents on record in this case show clearly that the Defendant was trying to steal a match on the Plaintiff. For this reason, the Defendant has not come to court with clean hands and must therefore take responsibility for her own illegal actions.
14. In support of the Plaintiff's application, counsel for the Plaintiff submitted that the Defendant has not offered any answers to the Plaintiff's allegations. This contention is based on the argument that the Defendant's Replying Affidavit does not bear the Defendant's known signature. Counsel for the Defendant argued that the Defendant could be having two different signatures. I have looked at the signature on the Defendant's Replying Affidavit dated and filed in court on 15/12/2009 and note that the signature differs greatly from the signature that appears

on all the Defendants other documents that are on the file. Could this have been a mistake, or is it that the Defendant has two different signatures or is it that the said Replying Affidavit was signed by somebody else on the Defendant's behalf? And why would the Defendant choose to append a different signature on this very important document in support of her claims against the Plaintiff? It is my considered view, without in any way purporting to be an expert on handwriting matters that the signature which appears on the Defendant's Replying Affidavit dated 15/12/2009 is not the Defendant's. In the circumstances, I agree with Plaintiff's counsel that there is no reply to the facts alleged by the Plaintiff against the Defendant in the Plaintiff's application dated 6/08/2009 since the Replying Affidavit by the Defendant is not properly signed. It could thus be very true that the Defendant's affidavit dated 15/12/2009 is a forgery. I leave that issue to the Plaintiff to pursue with the relevant authorities.

15. Secondly, regarding the Plaintiff's application dated 6/08/2009, counsel for the Plaintiff submitted that the Plaintiff has satisfied all the conditions for the granting of an injunction as set out in **Giella –vs- Cassman Brown & Co. Ltd. [1973] EA 358**, namely that:-
 - (a) *an applicant for injunction must show that he has a prima facie case with a probability of success;*
 - (b) *an injunction will not normally be granted unless the applicant might otherwise suffer irreparable injury*
 - (c) *when the court is in doubt, it will decide the application on the balance of convenience.*
16. Mr. Kiage for the Plaintiff submitted that this was a classic case for the granting of an injunction on grounds that the Plaintiff has shown that she has a case with a high probability of success and particularly so because of the violence, hooliganism and illegality employed by the Defendant in ejecting the Plaintiff out of the suit premises.
17. Counsel for the Defendant responded by saying that the Plaintiff is not entitled to an order of injunction because she has made no such prayer in the plaint. The Plaintiff's plaint, dated 22/01/2007 and filed in court on the same date asks for prayers that have already been set out in paragraph 1 of this ruling. As rightly pointed out by counsel for the Defendant, none of the reliefs sought by the Plaintiff is for an injunction. It is for this reason that Defendant's counsel submitted that the Plaintiff's application is fatally defective because of the omission to include a prayer for injunction in the plaint.
18. In answer to the Defendant's contention that the orders of injunction cannot be granted for failure to include similar prayers in the plaint, Mr. Kiage tried to flee from this predicament by saying that the matters complained of in the Plaintiff's application arose on 29/07/2009 while the plaint was filed on 22/01/2007. I do not think that this is a good excuse. The Plaintiff could and should have amended her plaint. Indeed it is trite law that where there is a variance

between the reliefs sought in the plaint and the application, then the application which is premised on the plaint is fatally defective. See **Winstone –vs- Winstone [1959] 3 All ER 580**. The Defendant’s argument that the Plaintiff’s application is fatally defective on that basis is correct and I uphold the same.

19. In light of the above findings I find and hold that neither the Plaintiff’s nor the Defendant’s application succeeds. Accordingly, the Plaintiff’s application dated 6/08/2009 and the Defendant’s application dated 5/08/2009 be and are hereby dismissed. As for costs, I order that each party bear its own costs.

20. Orders accordingly.

Dated and delivered at Nairobi this 23rd day of April, 2010.

R.N. SITATI

JUDGE

Delivered in the presence of:

Mrs. Kippingor for Kiagie (present) for the Plaintiff

Mr. Muturi for Njoroge Wachira (present) for the Defendant

Weche - court clerk