



**REPUBLIC OF KENYA**

**IN THE HIGH COURT OF KENYA**

**AT NYERI**

**Civil Case 4 of 2010**

1. **CHARLES KIAMA )..... 1<sup>ST</sup> PLAINTIFF**

2. **LUCY WANJIKU KIAMA )..... 2<sup>ND</sup> PLAINTIFF**

**VERSUS**

**PATRICK N.G.G. MWATHI..... 1<sup>ST</sup> DEFENDANT**

**RULING**

The subject matter of this Ruling is the Notice of motion dated 25<sup>th</sup> January 2010 taken out pursuant to section 3A of the Civil Procedure Act. In the aforesaid motion Charles Kiama and Lucy Wanjiku Kiama, the 1<sup>st</sup> and 2nd plaintiffs herein are praying for a mandatory order of injunction to issue against Patrick N.G.G. Mwathi, the Defendant/Respondent herein to give vacant possession of the parcel of land known as Tetu/Kiriti/639. The applicants have also asked for an order authorizing Muibau Agencies to carry out the eviction plus costs. The motion is supported by the affidavit of Charles Kiama sworn on 25<sup>th</sup> January 2010. The defendant opposed the motion by filing a replying affidavit he swore on 12<sup>th</sup> March 2010.

I have considered the grounds set out on the face of the motion and the facts deponed in the affidavits filed for and against the motion. I have further considered the oral submissions made by learned counsels from both sides. The plaintiffs aver that they purchased the parcel of land known as L.R. Tetu/Kiriti/639 in a public auction conducted by Messrs Garam Investment on 9<sup>th</sup> April 2009 at a price of Kshs.900,000/-. It is said that the suit property was sold on the instructions of Barclays Bank (K) Ltd in exercise of its statutory power of sale. Upon the aforesaid purchase, the plaintiffs aver that they followed all the required procedures before being issued with title documents. The plaintiffs aver that the defendant has refused to vacate the suit land despite having been given notice. They are now asking this court to issue the orders of eviction.

The defendant on his part has opposed the application on the basis that he was not aware that the property was disposed of by public auction on 9<sup>th</sup> April 2009. He said the public auction did not take place because the auctioneer merely called off the auction at 2.00p.m. for lack of bidders.

I have considered the grounds set out on the face of the motion plus the facts deponed in the supporting and opposing affidavits. I have also taken into account the oral submissions made by learned counsels from both sides. The main order sought by the plaintiffs is a mandatory order of injunction. The principles to be considered before granting an order of mandatory injunction are well settled.

11 as follows:-

***“The law as regards the principle to be applied when considering the two prayers is different from the principles set out in Giela’s case for the standard of approach when considering whether or not to grant mandatory injunction is higher than that in respect of prohibitory injunction. The case of LOCABAIL INTERNATIONAL FINANCE LTD =VS= AGRO-EXPORT AND ANOTHER [1986] 1 ALL E.R. 901 sets out the principles applicable in cases of mandatory injunction. It states as follows:-***

***A mandatory injunction ought not to be granted on an interlocutory application in the absence of special circumstances and then only in clear cases either where the court thought that the matter ought to be decided at once or where the injunction was directed at a simple and summary act which could easily be remedied or where the defendant had attempted to steal a march on the plaintiff. Moreover, before granting a mandatory injunction the court had to feel a high sense of assurance that at the trial it would appear that the injunction had rightly been granted, that being a different and higher standard than was required for a prohibitory injunction.”***

Having set out the applicable principles let me now apply the same to this case. The plaintiffs have expressly deponed in the affidavit of Charles Kiama that they attended a public auction held on 9/4/2009 in which they bid and were declared the highest bidders. They consequently purchased the parcel of land known as Tetu/Kiriti/639 at Kshs.900,000/-. The defendant is of the view that he attended the auction and heard the auctioneer cancel the sale because there were no bidders to purchase the property. I have perused the annexures attached to the affidavit of Charles Kiama and it is obvious that the plaintiffs have shown they attended the auction. In fact I am fortified in this holding by the certificate of sale issued on 16<sup>th</sup> April 2009. I am convinced that the property was sold by Garam Investments on the instructions of Barclays Bank (K) Ltd in exercise of its statutory power of sale under section 74 of the Registered Land Act. The plaintiffs have also been able to show that they followed the necessary procedures leading to them being issued with the title documents. It is evident that the defendant has not sought to challenge the process of sale. The defendant’s equity of redemption was extinguished at the fall of the hammer hence he no longer has any proprietary interest over L.R. No. Tetu/Kiriti/639. In any case the defendant had pledged the aforesaid title to secure financial accommodation from the Barclays Bank (K) Ltd. Upon default, the Bank was entitled to realize its securities. It is clear from my factual findings that the defendant was not candid when he deponed that no sale took place. He did not controvert the annexures attached to the supporting affidavit of Charles Kiama. I am convinced this is one of those clearest cases which this court should grant the orders of mandatory injunction. In the final analysis I hereby allow the motion dated 25<sup>th</sup> January 2010 as prayed.

***Dated and delivered this 7<sup>th</sup> day of May 2010.***

**J.K. SERGON**

**JUDGE**