



REPUBLIC OF KENYA
IN THE HIGH COURT OF KENYA AT MOMBASA
(Coram: Ojwang, J.)

CIVIL SUIT NO. 118 OF 2010

SAMSON MARICO

OTWEYO.....PLAINTIFF/APPLICANT

-VERSUS-

1. MARIAMU FADHILI
2. SOUD HAFIDH RASHID.....DEFENDANTS/
RESPONDENTS
3. RUKIYA SOUD ALI BASHIR
4. HAIDER SOUD

RULING

The plaintiff's Chamber Summons application of *21st April, 2010* carries one substantive prayer: ***“THAT this Court be pleased to issue an order of injunction restraining the defendants by themselves and/or agents or any person claiming under them from interfering with, harassing or in any manner trespassing on the plaintiff's house on the parcel of land known as Plot No. 2003/VI/MN pending the hearing of the suit”.***

General grounds in support of the application, are thus stated: the plaintiff owns a house on land parcel No. 2003/VI/M.N.; the defendants are interfering with the plaintiff's occupation and peaceful enjoyment of the house; the plaintiff, in consequence, stands to suffer irreparably; the plaintiff has a *prima facie* case against the defendants.

The plaintiff swore an affidavit providing detail in support of the prayer and the grounds stated. He says he is the owner of a house which, however, is situate in land belonging to 2nd, 3rd and 4th defendants, and that he pays **ground rent** to these three defendants in respect of Plot No. 2003/VI/M.N. The plaintiff's said house has tenants, who pay rent to the plaintiff.

The plaintiff learned from his tenants, in the course of **July, 2009** that the defendants had written to these tenants stating that the house they occupy belongs to someone other than the plaintiff. The said letter, dated **22nd July, 2009** had come from M/s. Ojode Onjoro & Co. Advocates, and it thus stated

“Take notice that the above-mentioned property was sold vide public auction in recovery of ground rent arrears from the previous landlord, one Samson Marico Otweyo.....

“Also take note that the new landlord, one Mariamu Mwalimu Fadhili demandsvacant possession

on or before 30th September, 2009 [failing]....which you shall be forcefully evicted without further reference to yourself”.

The plaintiff, in response, caused his advocates to write to his tenants, on **31st July, 2009**, as follows:

“We act for your landlord who has seen a copy of a letter asking you to pay your landlord.

“Kindly ignore the letter as no such sale or at all has taken place. Any monies paid to strangers shall not be considered.”

It was deponed that while it is true there had at an earlier stage been a dispute regarding ground rent (payable by the plaintiff) the matter had been taken up in a separate suit and, on the basis of that suit the Court had made appropriate orders: a temporary injunction had been issued (on **1st July, 2005**) against the defendants. Thereafter, the defendants caused criminal proceedings to be commenced against some of the tenants; but these proceedings have been stayed by orders of the High Court (in Constitutional Review Petition No. 1 of 2010) of **10th March, 2010**.

The defendants responded by filing grounds of opposition dated **6th May, 2010**. These grounds are as follows:

(i) that the application lacks merit and is mischievous, frivolous, vexatious, and an abuse of Court process;

(ii) that the application is based “on wrong premises, ill-conceived, misplaced and unwarranted”.

Learned counsel, **Mr. Magolo** submitted that the defendants were engaged in attempts to deprive the plaintiff of his house – on claims that the house has been sold to 1st defendant; that the defendant has recently obtained orders from the Subordinate Court to take possession of the said house; and even though the said orders were set aside by the High Court, there was still a determination on the part of 1st defendant to gain ownership of the said house; this has led to the plaintiff’s suit herein. Counsel noted that the relevant facts as given by the plaintiff, had not been denied by the defendants who filed only grounds of opposition to the instant application. Counsel submitted that the factual situation is that which is set out in the plaintiff’s affidavit: and it shows that the plaintiff runs the risk of losing his property to the defendants.

Learned counsel urged that the basic requirement for the plaintiff to file the instant application, is that specified in Order **XXXIX** of the Civil Procedure Rules: the fact of having filed suit to stop the commission of an unlawful act. Counsel urged that the defendants were intent on committing an unlawful act, and so, by virtue of ss. 1A and 3A of the Civil Procedure Act (Cap. 21, Laws of Kenya), the Court may make such orders as will meet the ends of justice.

Learned counsel submitted that the plaintiff had made a **prima facie** case, and had also filed an undertaking to pay damages if it turned out that he should not have been awarded injunctive orders.

Counsel urged that the respondent’s case lacked cogency, as “they simply claim that the application is mischievous, frivolous and vexatious, without elaboration and without the benefit of an affidavit”. Counsel endorsed what could well have been a malapropism in the formulation of the respondents’ response of **6th May, 2010**: “THAT, the prayers sought [by the plaintiff] are proper, reasonable and applicable in the instant case”. Counsel urged that allowing the application would cause no prejudice to the defendants “whether as purported buyers or sellers”. Counsel for the defendants, without any foundation in evidence, stated:

“The Court will note that the suit house was sold to the 1st defendant and that the 1st defendant is in occupation of the house”.

Obviously, such a claim from the Bar, on a point going to the root of the main cause, must await ascertainment at the full hearing of the case.

From the foregoing point, it becomes manifest that this application must turn against the respondents, notably because the inappropriate factual representation aforesaid is the primary reason for opposing the application for injunctive orders. Counsel for the defendants thus submits:

“It cannot be gainsaid that injunction at this stage cannot issue, as there is no evidence of immediate danger to property, as the same has already been sold to 1st defendant who is in occupation.”

The factual claim from the Bar is, in this case, proffered as the reason why a prayer for injunctive orders does not lie; and counsel has several times restated the inadmissible fact-claim:

“.....we wish to submit that the essence of [an] application of this nature is.....preservation of [the] status quo. The status quo at this stage is that the 1st defendant is in occupation [of] the house [which has] been sold by auction to her”.

This Court’s conclusion is, firstly, that the application has clear merits, whereas the opposition thereto is devoid of the same. Not only is the applicant’s case supported by detailed evidence showing *bona fides*, but he has gone further in demonstrating good faith, by executing an undertaking to pay any assessed damages to the defendants, were it to turn out that injunctive orders were improperly given in his favour. I hereby allow the main prayer (No. 2) in the applicant’s Chamber Summons of **21st April, 2010**: I grant an order of injunction restraining the defendants, whether by themselves, or by their agents, or through anyone claiming under them, from interfering with, harassing or in any manner trespassing upon the plaintiff’s house which is situate on land known as Plot No. 2003/Section VI/Mainland North, pending the hearing and determination of the suit filed on **21st April, 2010**.

The costs of this application shall be borne in any event by the defendants herein.

Orders accordingly.

DATED and DELIVERED at MOMBASA this 22nd day of October, 2010.

J. B. OJWANG

JUDGE

Coram: ***Ojwang, J***

Court Clerk: ***Ibrahim***

For the Plaintiff/Applicant:

For the Defendants/Respondents: