REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA

AT NAIROBI (NAIROBI LAW COURTS)

Civil Case 96 of 2010

ROSE KARUTHU IKUNYUA ……..PLAINTIFF
V E R S U S
CHARLES KIBITI IKUNYUA ……DEFENDANT
R U L I N G

There is a house on LR. No. Nairobi Block 72/1929 which belonged to the Government and which was sold as part of the Civil Servants Housing Scheme Fund. The letter of offer dated 3rd December, 2004 and exhibited as "CK1-4" by the Defendant in his replying affidavit shows the offer was to him. He was supposed to pay a deposit of KShs. 168,000/= and pay the balance of KShs. 1,512,000/= over a period of 8 years at the interest rate of 5% per annum on tenant purchase basis. The monthly loan payments were KShs. 19,142/=. The Defendant was asked to pay for stamp duty and other transfer charges, insurance on fire and other perils, life insurance to cover the principal loanee, land rents payable to the Commissioner of Lands and local authority rates in addition to the loan. The application form was annexed to the Plaintiff's supporting affidavit as "RK1-1". The Applicant therein is the Defendant and the Plaintiff is indicated as his spouse. The reality is that the Plaintiff and Defendant are sister and brother. It would appear each had separated from her/his spouse and they were now staying in this house, each with her/his children. "RK1-1" is in the hand of the Plaintiff. The Defendant states that he was then based in Embu and requested the Plaintiff to complete the form. He did not realize she had indicated in the form she was his spouse.

There is no dispute that the Plaintiff raised KShs. 70,000/= of the deposit and the Defendant paid the balance. The Plaintiff says that there was agreement that they were going to buy the house jointly and that is why she raised part of the deposit. The Defendant states that she only loaned him the KShs. 70,000/= which he subsequently refunded. His case is that he was buying the house alone.

The Defendant produced his statement of account "CK 1-3" to show he was repaying the loan monthly at the rate of KShs. 19,142/=. He subsequently made a final payment of KShs. 1,184,247/= on 25th May, 2007 from his retirement dues. The Plaintiff states that she was, as a civil servant, receiving KShs. 5,000/= monthly as house allowance which she was giving to the Defendant as her contribution towards the monthly loan repayments. The Defendant denies this.

The certificate of lease "RK 1-2" came out in the name of the Defendant. It was, however, produced in court by the Plaintiff who said the two agreed that she keeps it as part of the understanding that the two were joint owners. The Defendant states that the certificate had disappeared from the lands office and it was only when the Plaintiff filed the suit that he came to know she had the same. It was the Defendant who paid the additional charges.

The suit was filed on 22nd February, 2010 by the Plaintiff on basis that upon the purchase of the house by the two she occupied it but that Defendant had threatened to evict her. The Plaintiff sought the following prayers:-

" a) A temporary injunction to restrain the defendant from evicting the plaintiff or in any way from interfering with the quiet possession and occupation of the house on Title Number Nairobi Block 72/1929 in Langata Estate or in any way dealing with the property to the detriment of the Plaintiff until this matter is heard and determined."

Together with the plaint she filed an application under **Order 39 rule 1** of the **Civil Procedure Rules** and **section 3A** of the **Civil Procedure Act** for:-

"…….a temporary injunction to restrain the respondent from evicting the applicant or in any way from

interfering with the quiet possession and occupation of the house on Title Number Block 72/1929 in Langata Estate or in any way dealing with the property to the detriment of the Applicant is heard and determined."

The Defendant filed a defence and counterclaim. In the counterclaim he sought that the Plaintiff be compelled to vacate the house and to be permanently restrained from trespassing on the property. There was also request that she returns the title document.

The Defendant then made application under **Order 39 rule 1** and **Order 6 rule 13 (a)** and **(d)** of the **Civil Procedure Rules** seeking that the Plaintiff's suit be struck out for being bad in law, for disclosing no cause of action and for being an abuse of the process of the court. Pending the hearing of the counterclaim, the Defendant asked that the Plaintiff be ordered to vacate the house as he was the owner of the house and she was a trespasser.

An order against the Plaintiff to vacate the house is a final prayer which cannot be issued at this interlocutory stage. It cannot, in any case, be granted under **Order 39 rule 1**.

As to whether the plaint discloses a cause of action, it is clear that the Plaintiff is claiming to be a joint owner of the house and is complaining about the Defendant's threat to evict her. The Plaintiff has reason to complain. In **D. T. Dobie** and **Company (K) Ltd. – Vs- Joseph Mbaria Muchina & Another, Civil Appeal No. 37** of **1988**, the Court of Appeal held a **"reasonable cause of action"** to mean a cause of action with some chance of success when only the allegations in the plaint are considered. The court must see that the Plaintiff has no case at all, either as disclosed in the statement of claim, or in such affidavits as he may file. The court also notes that an application to strike out a pleading under **Order 6 rule 13** is a draconian one which should be resorted to as a last resort. This is because a court of justice should aim at sustaining a suit rather than terminating it by summary dismissal. Although the Plaintiff discloses a reasonable cause of action in the body of the plaint she only asks for an interim relief in the prayers. When this was pointed out to her advocate Mr. Kiriba, he asked that the court looks at the substance and not the form and prayed for amendment of the prayer by removing the word **"temporary"** before **"injunction".** That would not change the prayer as it is indicated that the injunction is to be granted pending the hearing and determination of the suit. There is no substantive prayer.

However, the parties are related. The Plaintiff alleges she contributed towards the purchase of the house. It is the desire of the court to hear the parties on the ownership of the house and therefore the Plaintiff is allowed 14 days to appropriately amend and serve the plaint to which the Defendant shall have 14 days to respond. The Defendant's application is dismissed but he will have costs of the same.

The Plaintiff application is for interlocutory injunction. The order sought was to operate until the application was heard and determined, and not until the determination of the case. Even assuming that is an appropriate order at this stage, the Defendant has by certificate of lease shown he is the registered owner of the suit property. Under **sections 27** and **28** of the **RegisteredLand Act (Cap 300)** he is the *prima facie* absolute owner of the property. Such an owner would not be easily injuncted at this stage of the case. In other words, the Plaintiff had not demonstrated a *prima facie* case in terms of **Giella –Vs- Cassman Brown & Co. Ltd [1973] 358.** As to whether she will suffer irreparable loss, it is notable that the house has known value as it was a commodity of sale. There is no evidence that the Defendant cannot pay her for the value of the house, or her contribution to the purchase. The balance of convenience will normally tilt in favour of the registered owner of the property. It is also notable that an interlocutory injunction will normally issue to an applicant who has in his prayer in the plaint sought a permanent injunction.

In conclusion, the Plaintiff's application for interlocutory injunction is hereby dismissed with costs.

DATED AND DELIVERED AT NAIROBI
THIS 5TH DAY OF OCTOBER 2010

A. O. MUCHELULE
J U D G E