



REPUBLIC OF KENYA
IN THE HIGH COURT OF KENYA AT NAIROBI
COMMERCIAL & TAX DIVISION – MILIMANI

CIVIL CASE NO. 46 OF 2010

DAVID NGUGI

MBUTHIA.....PLAINTIFF

VERSUS

AMITY TRADERS LTD.....1ST
DEFENDANT

TRUST BANK LTD.....2ND
DEFENDANT

**JESSE M. GITAU t/a GALLANT AUCTIONEERS
STANDARD CHARTERED BANK**

LTD.....3RD DEFENDANT

JUDGMENT

The Plaintiff filed this suit seeking against the Defendants, inter alia, an order of permanent injunction restraining the Defendants jointly and severally from entering into any sale agreement, selling, transferring, and disposing of, pledging, leasing, charging or in any other manner however alienating or dealing with **ALL THAT** piece of land originally known as L.R. No 7785/188; effecting any change whatsoever in the state, condition, ownership or occupation of the said suit property or any part hereof; and interfering in any manner whatsoever with the Plaintiff’s interest in the said property including the plaintiff’s right of occupation and enjoyment of the suit property.

In its defence and counterclaim dated and filed in court on 3rd March, 2010, the 1st Defendant pleaded that it bought the suit property from an auction and had it properly registered in it’s name. The 1st Defendant therefore sought the following orders against the Plaintiff –

- (1) That the Plaintiff’s suit be dismissed with costs and Judgment be entered against the Plaintiff as prayed for in the counterclaim;**

- (2) That the Plaintiff do vacate and give vacant possession of the property known as L.R. No.**

7785/188 (Original No. 7785/10/184) forthwith.

(3) That judgment be entered against the Plaintiff for the sum of Kshs 3,300,000/-

(4) Costs of the counterclaim.

(5) Interest on (c) and (d) above at court rate.

(6) Any other or further relief that this Honorable court may deem just and expedient.

After being served with the defence and counterclaim, the Plaintiff did not file any reply to the defence and/or a defence to the counterclaim. The 1st Defendant thereupon applied for and obtained judgment in default after which the counterclaim was set down for formal proof.

Testifying for the Plaintiff, Inderjit Singh Sagoo (PW 1), the duly appointed agent for the 1st Defendant, told the court that on 20th April, 2007, the suit property was advertised for sale by Baseline Auctioneers, on instructions from the 2nd Defendant under a Statutory Power of Sale. He produced a copy of the advertisement as Plaintiff's Exhibit No. 2. On behalf of the 1st Defendant he bid at the auction for kshs 14, 500, 00 and his bid was accepted. He produced a copy of the certificate of sale by the Auctioneers as Plaintiff's Exhibit No. 3. Consequently, the Company's Advocate completed the registration formality and the property was transferred into the name of the 1st Defendant. He produced a copy of a transfer as Plaintiff's Exhibit No. 4.

The witness continued to tell the court that the previous owner, Mr David Ngugi Mbutia, who is the Plaintiff in this case, was still occupying the house. The Company Advocate wrote to him to inform him that the 1st Defendants were the new owners of the property and requested him to vacate the property. He also said that the 1st Defendant claims mesne profits of Kshs 100,000/- per month from 20th April, 2004. He further told the court that the Plaintiff's advocate wrote to the 1st Defendant saying that their client was undergoing treatment in South Africa and that he would vacate the property from January, 2010 and also pay the mesne profits. However, the Plaintiff did not vacate the premises. Instead, he filed an injunction application which was dismissed. It is for these reasons that the 1st Defendant claims an eviction order, mesne profits and costs of the suit.

Jesse Mburu Gitau testified as the Plaintiff's 2nd witness. He told the court that he was an auctioneer trading as Gallant Auctioneers. He recalled that on 10th November, 2009, Mr Anil Joshi, the Plaintiff's Advocate, instructed him to go to Runda to house on L.R. No 7785/188 to deliver a letter addressed to Mr David Ngugi Mbutia, the Plaintiff herein. He took the letter but on reaching there did not find Mr Mbutia. However, he found a lady who introduced herself as Mr Mbutia's wife. She said that her husband was ailing and had gone to South Africa but she accepted the letter and told the witness that she would deliver it to her husband and to the family advocate. Thereafter, she delivered a letter to the witness from D K Masudi & Co., Advocates, addressed to Mr Joshi. He delivered the letter to Mr Joshi and the lady came once and asked whether there had a response from Mr Joshi. He told her that there had been none. He never saw her again but he produced copies of the letters that he spoke about.

Although the witness was the 3rd Defendant in the suit, he said that he was not served with summons. However, he was given information about this suit by Mr Joshi and instructed him to file a defence on his behalf. As an auctioneer, he said that he knew that the rent payable in that area varied from house to house, but that it ranged from Kshs 100,000/- to Kshs 300,000/- per month. He therefore claimed his costs of the suit.

In a brief address to the court, Mr Joshi said that he was applying for orders as prayed. His client bought the property and asked the Plaintiff to vacate, but the Plaintiff declined to do so. His client was suffering as it bought the property and was not enjoying the fruits of that property. He therefore urged the court to give orders for the eviction of the Plaintiff from the premises and, if possible, make use of police.

Although the witnesses were not subjected to cross-examination, they impressed the court as witnesses of truth and the court believed their testimony. Against that background, I find that the 1st Defendant has established its case on a balance of probability by proving that the suit property was the subject of an auction sale at which the 1st Defendant bought it in good faith and for valuable consideration. For those reasons, I hereby make the following orders –

- a) That the Plaintiff's suit be and is hereby dismissed with costs to the Defendants.**
- b) That judgment be and is hereby entered for the 1st Defendant in terms of the counterclaim.**
- c) The Plaintiff do vacate and give vacant possession of the property known as L.R. No. 7785/188 (Original No. 7785/10/184) forthwith.**
- d) The Plaintiff to pay the 1st Defendant mesne profits at the rate of Kshs 100,000/- per month with effect from 20th April, 2007, till 31st January, 2010, with interest at court rates.**

Orders accordingly.

DATED and DELIVERED at NAIROBI this 26th day of November 2010.

L NJAGI

JUDGE