

REPUBLIC OF KENYA
IN THE HIGH COURT OF KENYA
AT NAKURU
CIVIL SUIT 269 OF 2007

BILHA WANJIKU GICHANGI.....PLAINTIFF

VERSUS

RICHARD NJAMA GICHANGI.....1ST DEFENDANT

ROSE ALUVALA KHISAVALU.....2ND DEFENDANT

RULING

By a ruling delivered by this court on 18th day of April 2008, the plaintiffs' applicant's application for injunction was dismissed with costs to the 2nd defendant. The 2nd defendant filed an application by way of notice of motion under **order 35 rule 1, 6 rule 13(1) of the Civil Procedure Rules** seeking for orders that the defence by the 1st defendant be struck out and summary judgment be entered in favour of the 2nd defendant for the recovery of the suit premises from the plaintiff and 1st defendant. The applicant also sought for mesne profit from both the plaintiff and 1st defendant as sought in the counterclaim. The application is premised on the grounds stipulated on the body of the application and the supporting affidavit by the applicant.

Briefly stated, the applicant is the registered proprietor of the property known as Nakuru Municipality Block 12/271. The applicant purchased the suit premises from the 1st defendant for Kshs 1.8 million on 18th December 2006. The applicant duly completed the payment of the purchase price. The transfer of the lease was effected in her favour, and a certificate of registration of the lease was obtained on 16th November 2007. There are no overriding interests or encumbrances over the said title. The applicant made the final payment on 4th June 2007. She was entitled to vacant possession immediately but upon request by the 1st defendant she offered the premises on tenancy at a monthly rent of Kshs 17,000/= a month. She annexed a copy of the tenancy agreement signed between the 1st defendant and the applicant.

However the plaintiff who is the wife of the 1st defendant filed the present suit. They continued occupying the applicant's premises without the applicant's permission which occupation now constitutes an obvious act of trespass. The applicant filed a defence and counterclaim to which the 1st defendant defended denying liability.

According to the applicant there are no triable issues. The plaintiff has not filed any defence to the counterclaim. The 1st defendant had a duty to hand over vacant possession of the suit premises to the applicant according to the sale agreement. In any event the applicant is the absolute proprietor of the suit premises and should be entitled to possession of the same. The plaintiff filed a replying affidavit alleging that she made contribution to the acquisition of the suit premises thus the matter should proceed to full hearing. The 1st defendant similarly filed a replying affidavit denying that he is in possession of the suit premises, has no interest in the matter and does not wish to be visited with costs.

There is no dispute that the applicant purchased the suit premises from the 1st defendant. The property was duly transferred and the applicant owns the property as absolute owner and there are no

encumbrances noted on the title even by the plaintiff. The property belonged to the 1st defendant and upon transfer he entered into a lease agreement with the applicant to pay a sum of Kshs 17,000/= per month until he handed over vacant possession. The 1st defendant did not hand over vacant possession nor did he pay the agreed rental sum. The 1st defendant cannot sell the property, receive the purchase price and keep the premises.

I see no triable issues to warrant this matter going on trial. I allow the applicant's application, I strike out the 1st defendant's defence and enter summary judgment against the 1st defendant as prayed in the counterclaim, that is Kshs 17,000/= per month with effect from 30th November 2007, until vacant possession is granted. The applicant shall also have the costs of this application to be paid jointly and severally by the plaintiff and 1st defendant.

Ruling read and signed on 1st day of April 2009

M. KOOME

JUDGE