



**REPUBLIC OF KENYA
IN THE HIGH COURT OF KENYA
AT MOMBASA**

Civil Suit 95 of 2008

ISKER ADHIAMBO NGODE PLAINTIFF

VERSUS

SADIQ GHALIA1ST DEFENDANT

YVES DUGERDIL2ND DEFENDANT

JOE J. LEICHUM3RD DEFENDANT

JUDITH A. LEICHUM4TH DEFENDANT

WILLIAM KAMAU MUCHENDU5TH DEFENDANT

RULING

Before court is the plaintiff/applicant application dated 28.4.08 which application as stated by Mr.Khatib for the plaintiff seeks seven substantive prayers as follows:-

1. That this Application be certified as urgent and be heard ex-parte in the first instance.
2. That a Temporary Mandatory Order of injunction do hereby issue compelling the 3rd, 4th and 5th Defendants to reinstate the plaintiff/applicant into the premises on Plot no. 487 Sec. III M.N. Mtwapa pending the hearing of this Application inter-partes.
3. That Temporary Mandatory Order of injunction do hereby issue compelling the 3rd, 4th and 5th defendants to return all the Plaintiff's personal property including beds, clothes, jewellery, personal documents, and other personal effects pending the hearing of this application inter-partes.
4. That a Temporary Mandatory Order of injunction do hereby issue compelling the 3rd, 4th and 5th defendants to reinstate the plaintiff/applicants into the premises on Plot no. 487 Sec. III .M.N. Mtwapa pending the hearing and determination of this suit.
5. That a Temporary injunction do hereby issue restraining the 3rd, 4th and 5th defendants from interfering with premises on Plot No. 487 Sec. III M.N. Mtwapa and from selling, advertising or in other manner whatsoever from dealing with the goods removed pursuant to the illegal distress carried out on the 25th April 2008.
6. That the OCPD Kilifi to provide security to the plaintiff/applicant and to ensure compliance with

the orders issued herein.

7. That the costs of this application be provided for.

Mr. Khatib for the plaintiff did concede that prayers (1) and (2) had already been considered. He therefore limited his submission to prayers (3) to (7) of the application.

The subject-property of this suit is the premises known as Plot No 487 Sec. III M.N. Mtwapa. The chronology of events relating to this disputed piece of land is as follows:-

The premises originally belonged to and was registered to one Francis MacConnel an elderly gentleman of about 70 years (hereafter he will be referred to as the deceased). Francis McConnel was the plaintiffs' husband. The couple resided on the said premises. On 16/1/1992 the deceased sold the subject premises to one Sadiq Ghalia who is the 1st defendant for a sum of Kshs. 1.0 million. However 1st defendant did agree to allow the deceased to continue to live on the premises for the rest of his natural life. Later on in 2006 upon the request of the deceased the 1st defendant sold the suit premises to one Yves Dugerdil (who is the 2nd defendant) for a sum of Kshs. 1.0 million. The 1st defendant acceded to this request and sold and transferred the suit property to the 2nd defendant on 27th April 2007. The deceased passed away in Mombasa. Meanwhile the 2nd defendant proceeded to sell the same property for a sum of Kshs. 10 million to Joe J. Leichum (the 3rd defendant and Judith A Leichum (the 4th defendant) as joint tenants. A transfer was effected to reflect this change in ownership. All this time the plaintiff who was still residing on the suit premises claims to have been totally unaware of any change in ownership and indeed denies that any sale of the property took place as alleged by 1st, 2nd, 3rd and 4th defendants. The 3rd and 4th defendant on their part claim that they entered into a verbal lease with the plaintiff (which for the record the plaintiff denies) that she would pay a monthly rent of Ksh. 150,000/-. The plaintiff did not pay such rent as she totally denies that she was a tenant to the 3rd & 4th defendants. The 3rd and 4th defendants proceeded to instruct William Kamau Muchedu (the 5th defendant) who is a licenced auctioneer to proceed to levy distress for rent. Despite being served with the notice for distress (a fact the plaintiff denies) no rent was forth coming. The 5th defendant proceed to court and obtained breaking orders. He then moved onto the premises and attached certain goods. The plaintiff on her part maintains that the 5th defendant descended on her home with a gang of hooligan and proceed to forcibly eject (evict) her from the premises. The plaintiff further claims that during this process some of her personal property like clothes, jewellery etc were carried away by the 5th defendant and have not been returned to her todate.

The plaintiff in this application seeks injunctive orders as against the defendants. The concise Oxford Dictionary 9th Edition defines an injunction thus:-

“a judicial order restraining a person from an act or compelling redress to an injured party”.

Halsbury's Laws of England 4th Edition at P.511 defines an injunction thus:-

‘901 meaning of “injunction” an injunction is a judicial remedy by which a person is ordered to refrain from doing or to do a particular act or thing ...’

It is clear from the above texts that in law an injunction is a court order compelling a party to do or refrain from doing a particular act.

The law with respect to the conditions under which an injunction may be granted was very well elucidated in the celebrated case of **Giella –Vs- Cassman Brown & Co. Ltd Civil App. 51 of 1972 High Court of Uganda**. In that case it was held inter alia that the conditions which a court needs to consider in deciding whether or not to grant an injunction include the following:-

“(i) an applicant must show a prima facie case with a probability of success.

(ii) an injunction will not normally be granted unless the applicant might otherwise suffer irreparable injury.

(iv) when the court is in doubt, it will decide the application on the balance of convenience”

In this application dated 28th April 2008 the plaintiff has enjoined the 1st defendant Mr. Sadiq Ghalia as well as the 2nd defendant Yves Dugerdil as parties thereto. However it is not clear to the court exactly what orders the plaintiff is seeking as against the two. As pointed out by Mr. Ghalia in his submissions to the court the plaintiff does not seek even one single injunctive order as against the 1st and 2nd defendants. In this application the plaintiff makes a total of seven specific prayers. None of these seven prayers makes any reference to the 1st or 2nd defendant. A reading of prayers (2), (3), (4), (5), (6) and (7) reveal that the orders sought are being sought as against the 3rd, 4th and 5th defendants. No single order sought touches on the 1st or 2nd defendant – why then have the two been enjoined in this application. The plaintiff “gripe” so to speak against the 1st and 2nd defendant could be their claim to have purchased the suit property from her late husband which the Plaintiff contests. This alone is not sufficient ground to haul them into court. In Clause 18 of her supporting affidavit the plaintiff avers as follows:-

“18 That I had to seek the assistance of the lessor of the property where I was able to get copies of the following documents

(a) Transfer dated 16th January 1992 from Frances Gerard Mac Connel for consideration of Kshs.1,000,000 to the 1st defendant

(d) Copy of the extract of Title showing that the 2nd Defendant was registered as the proprietor of the property on 24th April 2006”

Therefore it was well within the plaintiff knowledge and she even annexed documents to show that at some point the 1st and later on the 2nd defendant were duly registered as proprietors of the suit property. The court asks the question again why are the two in court what orders are being sought as against them? If it is the plaintiff allegation that these registrations were somehow fraudulent and ought to be nullified then she ought to have made it clear in her pleadings in which case she should have sought the relevant orders as against the Registrar of Titles. Mr. Khatib for the plaintiff does in his submissions make reference to what he terms as a fraudulent (forged) signature of the deceased on one of the documents. Again no mention is made of this in the pleadings before court thus this remains an unsubstantiated allegation from the bar and court will treat it as such.

From the supporting affidavit it is clear that the plaintiffs main complaint what she terms was the unlawful demand for rent from her by 3rd and 4th defendant and what she terms illegal eviction from the suit premises by the 5th defendant. None of these incidences involved the 2nd or 3rd defendant. It is trite law that a party is bound by his pleadings. The Plaintiff pleadings seek no orders as against the 1st and 2nd defendant and neither has this court found any reason to issue any orders against them. The inclusion of the two in the present application has no merit and this court can only but speculate about the plaintiff reasons for so doing. Based on the above analysis this court dismisses the plaintiff application in so far as it relates to the 1st and 2nd defendants. The plaintiff is further ordered to meet the costs of 1st and 2nd defendant for this application.

In prayer (3) of this application the plaintiff seeks a temporary injunction to compel the 3rd, 4th and 5th defendant to return to her all personal property including beds, clothes, jewellery, personal documents which the plaintiff alleges were taken by the 5th defendant when he came to remove her from the premises. As pointed out by Mr. Gakuo for 3rd and 4th defendant the plaintiff has not provided the court with an itemized list of all the items which she claims were taken on the material day. She merely talks of clothes – what items of clothing and how many. Jewellery what items and in what quantity. The plaintiff further refers to personal items – what personal items are these and in what quantity. The 4th

defendant Judith Leichum did attach to her replying affidavit the exhibit marked **JL'12** which was the notice of distress. This notice includes a schedule of the proclaimed goods. There is no mention of clothes or jewellery in that schedule. Therefore if indeed the 5th defendant did carry away the plaintiff's clothes and jewellery as she alleges then this would amount to outright theft. There is no evidence that this '**theft**' such as it were was reported to any law enforcement agency. The claim made by the plaintiff in this case is too vague. If any items were illegally carted away by the defendant then this court has no idea what those items were. It is the courts view that this prayer must fail for lack of specifics.

The 4th prayer made by the plaintiff is for a temporary mandatory injunction to compel the 3rd, 4th and 5th defendant to reinstate the plaintiff to the disputed property. This prayer is based on the plaintiff allegation firstly that the suit property belongs to her and thus she was rightfully in lawful occupation thereof and secondly that the defendants illegally evicted her therefrom.

From the plaintiff supporting affidavit and the replying affidavits of the defendants this court is not persuaded that the plaintiff has shown a prima facie claim such as would warrant the injunctive orders which she seeks. Secondly as pointed out by Gakuo for 2nd, 3rd and 4th defendant the suit property no longer exists having been demolished by NEMA. This fact is not challenged by the plaintiff. It is trite law that courts will not make orders in vain. What premises is the plaintiff seeking to be reinstated into if the suit premises has already been demolished. What irreparable harm does the plaintiff stand to suffer if the orders sought are not given. This has not been shown to the satisfaction of this court. Here again court is of the opinion that the plaintiff claim lacks merit and must therefore fail.

The plaintiff 5th prayer is for a temporary injunction to restrain the 3rd, 4th and 5th defendant from interfering with the suit property in any manner. Once again court is of the opinion that the plaintiff has not established why such orders should be granted. The plaintiff has not in courts view shown that she has a prima facie case with overwhelming chances of success. The defendants have laid claim to the suit premises and the plaintiff has not sufficiently controverted their claims. The rules laid down in **Geilla – vs- Cassman Brown** have not been sufficiently complied with. This court will not step in to stop the law from taking its course. Once again it is the courts ruling that this prayer must fail.

The plaintiff 6th prayer is for the court to order the OCPD Kilifi to provide the plaintiff with security and ensure compliance with courts orders. Firstly this court has not issued any orders requiring compliance. Secondly the plaintiff seeks order against the OCPD Kilifi yet she has not enjoined him as a party to this application. Thus the OCPD has effectively been denied an opportunity to respond to the application or to put in his own papers. The plaintiff has not shown why she requires police security. Here again court finds that this prayer has no basis and it is dismissed.

Therefore based on the foregoing this court finds that the plaintiff has failed to satisfactorily establish any one of her claims. The whole application does not in courts view meet the laid down standards. The injunctive orders sought are not merited. As such court dismisses this present application in its entirety and awards costs to the 3rd, 4th and 5th defendants.

Dated and delivered at Mombasa this 28th day of May 2009.

M. ODERO

JUDGE

Read in open court

Mr. Njeru holding brief for Mr. Ghalli for 1st Objector

Mr. Njoroge holding brief for Mr. Gakuo for 2nd, 3rd and 4th defendant

Mr. Njeru for 5th defendant

No appearance by Mr. Khatib for plaintiff/applicant