



**REPUBLIC OF KENYA  
IN THE HIGH COURT OF KENYA  
AT NAIROBI (NAIROBI LAW COURTS)  
Environmental & Land Case 562 of 2008**

**BENSON IRUNGU MBARIA.....PLAINTIFF**

**VERSUS**

**CITY COUNCIL OF NAIROBI.....DEFENDANT**

**RDFK**

**LAND AND ENVIRONMENTAL LAW DIVISION**

**RULING**

The plaintiff moved to this court, vide a plaint dated 14<sup>th</sup> day of November 2008. The salient features of the same in a summary form are as follows:-

-There is a suit land known as LR. NO. 209/14/30.

-The defendant agreed to lease the said property to one Mr. Njoroge Simon Nyoike at a stand premium of Kshs. 1,100,000.00.

-The offer to lease was accepted.

-The acceptance of lease was on 24<sup>th</sup> September 1992.

-On 9<sup>th</sup> October 1996 the said Nyoike entered into a sale agreement with the plaintiff over the said subject matter.

-The purchase deal went through and the plaintiff took possession of the said property.

-Subsequently the plaintiff leased the same property to Nyoike on a month to month basis at a basic rent of Kshs. 25,000.00

-It is the plaintiff who paid the stand premium to the defendant.

-Also paid were all sums of money due under the terms of sale.

-The defendant allegedly executed an undated transfer to the plaintiff in the year 2000.

-The transfer has not yet been registered at the Registry of titles because a grant has not yet been given by the defendant.

-Despite receipts of all the money, due to, it the defendant has failed to complete the transfer and is therefore in breach of its duty to deliver all documents of title relating to the suit property, to enable the plaintiff obtain a certificate of title, which breaches are named in paragraph 8 of the plaint.

-The plaintiff has further become aggrieved and moved to court, because the defendant has given notice to the plaintiffs tenant to vacate the premises on or before 3<sup>rd</sup> November 2008, and on 12<sup>th</sup> November 2008, the defendants sent its agents to evict the tenant.

-Contend that the defendant's action of evicting the plaintiff's tenant and its attempt to take possession of the property forcefully is illegal and unlawful which actions have caused the plaintiff mental distress, hardship and will result in substantial loss if the defendant is not injuncted.

In consequences thereof the plaintiff prayed for:-

(a) A declaration that the plaintiff is the beneficial owner of the suit property.

(b) A permanent injunction restraining the defendant, whether by itself, agents, servants or otherwise howsoever from trespassing upon, accessing or taking possession of the suit property.

(c) A permanent injunction restraining the defendant whether by itself, agents, servants or otherwise howsoever from evicting the plaintiffs tenants from the suit property and or interfering in any manner whatsoever with the plaintiffs quiet possession of the suit property.

(d) An order be issued directing and compelling the defendant to forward the grant or any other documents of title in the defendants possession in respect of the suit property to the plaintiff.

(e) Costs of this suit together with interests thereon at court, rates from the date of filing suit until payment in full.

(f) Any such other or further relief as this Honourable court, may deem appropriate.

On the afore said pleadings, the plaintiff anchored an interim application filed simultaneously with the plaint. It is brought under section 3,3A and 63 C and (e) of the CPA cap 21 laws of Kenya, and order XXXIX rules 2, 3 and 5 of the CPR. Three prayers are sought namely:-

1. Spent

2. Pending the hearing and determination of this application interpartes, this suit or until further orders.

(a) The defendant whether by itself, agents, servants or otherwise howsoever be restrained from trespassing upon, accessing, remaining and or destroying the plaintiffs tenant personal effects on L.R. NO. 209/14130 Nairobi and or interfering in any manner whatsoever with the plaintiffs quiet possession of the suit property.

(b) The defendant whether by itself, agents, servants or otherwise howsoever be restrained from evicting, the plaintiff, tenants from the suit property on LR NO. 209/14130 Nairobi and or interfering in any manner whatsoever with the plaintiffs quiet possession of the suit property.

3. That the costs of the application be provided for.

The grounds in support are set out in the body of the application, supporting affidavit, written skeleton arguments, and case law. The major ones are a reiteration of the consent of the plaint already set out herein. The following are stressed.

-The applicant is the beneficial owner of the suit property.

-He purchased it from one Nyoike who had been allotted the same from the defendant.

-Upon purchase, he paid the full purchase price to Nyoike as well as the stand premium to the defendant.

-The property is a residential plot and had an occupant who was unlawfully kicked out by the defendants' agents in 2008 November.

-That the said tenant was on the land.

-He has an undated transfer from the defendants, which has not been registered because the defendant has not given a grant.

-That the applicant stands to suffer irreparable loss if the injunction is not issued.

-They rely on the exhibits exhibited namely annexure BM11, the sale agreement between the plaintiff and one Nyoike, BNN2 the letter of allotment to one Nyoike, copy of a cheque for Kshs. 1,150,000.00 payable to the defendant BM1 3, receipts in the name of Njoroge Simon Nyoike for the amount on BM12, an undated copy of the a transfer BM14, letter from the town clerk to the commissioner of land dated 13<sup>th</sup> June 2001.

The application is also supported by a supporting affidavit from one Njoroge Simon Nyoike who has confirmed the following:-

-He was allotted the suit plot as per his annexure NSN1.

-He transferred the said suit land to the plaintiff with the consent of the defendant as per NSN2.

-Confirmed that he gave a vacant possession to the plaintiff and then leased the same from the plaintiff at a monthly rent and he stayed till November 2008 when the defendant attempted to kick him from the suit premises. He supported the interim application.

The written skeleton arguments simply fortified what has been stated above as regards the allotment, from defendant to Nyoike, sale from Nyoike to the plaintiff, amount paid for the stand premium, proof of payments, quiet enjoyment of the property from 1996 till 2008 November.

-That though the defendants claim ownership, it has not exhibited title to prove the ownership.

-Concede that the issues of ownership is contested and it has to be determined at the trial.

-The above notwithstanding the plaintiff has demonstrated a prima facie case with a probability of success as per the documents exhibited.

-The court to rule in favour of the plaintiff/applicant because the plaintiff has exhibited evidence to show that the transfer to him has been hampered by the defendant.

-Will contend that the defendants having acquiesced in the plaintiff's occupation of the said property, they are estopped from demanding vacant possession.

-Contend that the plaintiff is entitled to the occupation of the suit property on the basis of the assurance received from the defendant that transfer will be effected and on the basis of this, the plaintiff is entitled to question the defendants' assertion that they are entitled to vacant possession of the suit land.

-They assert that this is not a matter whereby compensation in terms of damages will be adequate as the plaintiff would have lost a property he has acquired through purchase from a person who was lawfully allotted the same.

-Also maintains that the defendant transferred the property to the plaintiff vide the undated transfer exhibited herein.

-They defend their purchase of the suit property because the seller was the defendants' tenant in purchase and was entitled to sell.

-There has been no denial of the issuance of the allotment letter by the defendant to one Njoroge Nyoike Simon.

-The court, is invited not to accept the defendant's assertion that the allotment did not obtain the necessary approvals, when the same was allocated way back in 1992.

-Denies committing any fraud or crime in relation to the acquisition of the said property.

-Transfer to him could only be effected after obtaining the grant in favour of the defendant before the same could be transferred to the plaintiff.

-Maintains that the provisions of the Registration of titles Act do not apply because the property is not yet registered under any registration systems of law.

-Maintains that he has locus standi in this matter and his suit is well founded.

The respondent have opposed the application on the basis of the replying affidavit sworn by one Mary N. Ngethe on the 28<sup>th</sup> day of November 2008 and filed the same date. The salient features of the same are as follows:-

-The defendant is a stranger to the plaintiff.

-The defendant owns the suit property which is a unit in a block of flats, which flats are used by employees of the defendant as staff houses specifically.

-All that they know is that Njoroge Simon Nyoike was their employee in the water department, and later moved to Nairobi Water Company and sewerages. He had a rental premises at Kabete House number 5 whose rent was paid for through the payroll as evidenced by the annexed pay slip.

-The alleged allotment is invalid as the same was not sanctioned by a council resolution approved by the relevant minister as non has been annexed by the applicant.

-The genesis of litigation was because one Njoroge Simon Nyoike stopped paying to the defendant monthly rent of Kshs 2275/= per month which accumulated to Kshs. 320,000.00 as at 31<sup>st</sup> 12.2007 which prompted the defendant to issue the eviction notice. The first notice annexure 2 was ignored, necessitating the 2<sup>nd</sup> notice annexure 3 issued on 3<sup>rd</sup> November 2008 which resulted in the eviction complained of.

-After the eviction, Nyoike, wrote a letter acknowledging rent arrears and making proposals to pay the same with no mention that the council had sold the suit land to him contend the supporting affidavit of Nyoike is full of falsehoods and it amounts to perjury.

-Maintains that documents allegedly emanating from the defendants as evidencing sell of the suit property is suspected fraud and should be treated as such. More so when the allotment letter does not say which property is being allotted, since LR.NO 209/14130 has several flats.

-That the council never received the alleged payments made towards payments for the suit property.

-Concede indeed request was made by the defendant to the commissioner of lands to have the grant to the property issued to the defendant and not Njoroge Simon Nyoike.

-The purported agreement of sale does not specify the property being sold.

-Plaintiff has no locus standi to institute this suit and that the same should be struck out.

-By reason of what has been stated above the plaintiff does not have a prima facie case with a probability of success in order to be entitled to an injunctive relief.

In addition to the averments, there is the reliance on the annexure namely a pay slips of December 2004, January 2005 and June 2006 showing evidence of deduction of rent due and payable, annexure 2, the notice to vacate dated 17/10/2008, as well as annexure 3, annexure 4 allegedly emanating from Nyoike promising to pay economic rent and concedes that he has not paid any rent for 2 years.

In their written skeleton arguments the defence counsel reiterated the content of the replying affidavit, and then stressed the following after reviewing the documentations of each side.

-By the time the plaintiff moved to this court, on the 17<sup>th</sup> day of November 2008 eviction had already been effected.

-Annexure MNN4 confirming existence of arrears which has not been controverted by either the plaintiff/applicant or the Nyoike, it is sufficient proof that he had been evicted and was in rent arrears for 2 years and was willing to pay the same.

-By reasons of the above, it is evident that the plaintiff is trying to use the court, to gain access to the premises.

-Confirm that the defendant is in possession of the house but cannot use it because of the existing court order.

-The plaintiffs has no locus standi as he has failed to enjoin Nyoike who allegedly sold the property to him, whom the defendant has proved to have been their tenant in the first instance, and in the second instance, the transfer relied upon by the applicant is undated purportedly signed by the defendant officers without witnesses.

-The defendant has demonstrated that it is the owner of the suit land. Which is one in it out of the many flats on the said suit property, a fact not denied by the plaintiff.

-It has also been demonstrated that the plaintiff is a stranger to the defendant as there is no transaction between the two.

-Payments relied upon do not assist much as they do not state in what account the same was being made. More so when the receipt relied upon was written four years before the money was paid and has no link to the cheque relied upon.

-No proof of tenancy of Nyoike has been exhibited.

-The allotment letter has not specified the property which was being allotted, neither does it mention LR NO. 209/14130.

(ii) The size of the property also differs.

(iii) No bank statements have been exhibited by the plaintiff to prove that payment.

(iv) The receipt is not in the name of the plaintiff.

On case law, the defendants referred the court to the case of NAIROBI MAMBA VILLAGE VERSUS NATIONAL BANK OF KENYA (2002) IEA 197 (CCK) in an application for an injunctive relief, Ringera J as he then was held inter alia that:-

*“(i) A party seeking to prevent alienation, wastage or damages to the property under order XXXIX of CPR had to establish that it had legal rights in such property*

*(ii) Though the plaintiff had an interest in the charged property, as it was both the security for its indebtedness and the location of its business, neither of those interests mounted to a proprietary interests on the property. None of the cases cited showed that a principal debtor could sue and obtain a relief on behalf of the guarantor. As such the plaintiff had no standing to question the exercise of the power of sale.”*

The defence on the other hand relied on the case of COMMISSIONER OF LANDS VERSUS HUSSEIN (1968) EA 585 where it was

held inter alia that:

(i). *The army authorities had encouraged the defendant's father, the defendant's predecessor in title to spend money on erecting the building on the understanding fostered by them that he could and would be given a reasonable measure of security of tenure.*

(ii). *The plaintiff was estopped by acquiescence from claiming possession of the suit premises.*

The case of M/S GUSII MWALIMU INVESTMENTS CO. LIMITED AND 2 OTHERS VERSUS M/S MWALIMU HOTEL KISII LIMITED NAIROBI CA NO. 160 OF 1995. It concerned a situation where the landlord levied distress for rent and in the process evicted the incumbent tenant and installed another one. The incumbent tenant moved to court, to seek restraint orders and reinstatement. Indeed the lease had expired but rent was accepted for eight months on the old terms. It was held inter alia that “ *having accepted rent for 8 months, after the expiry of the lease, the landlord cannot be heard to say that the tenant was a trespasser. It has been urged that the tenant has not pleaded its case on this basis.*

(ii) *In any event section 116 of the transfer of property Act or section 52 of the registered land Act cap 300 laws of Kenya.....quite clearly states that a tenant holding over at the expiry of the lease and the landlord assenting there to expressly or impliedly is not a trespasser.*

(iii) *The court, would not succumb to the temptation of not granting an interlocutory equitable remedy merely for want of proper pleading. The plaint can be amended more so when there is evidence on record to justify such an amendment.*

(iv) *The court, cannot drive a party away from a judgement seat when the facts of the matter call out for the obvious righting of a wrong to obtain possession by levying illegal distress is perse wrong. It is also wrong for a court bailit to cart away the tenants' goods under the guise of such distress.*

(v) *The landlord did all it could to obtain the possession unlawfully and the learned judge was entirely right in making the orders he made, if what the landlord did in this case is allowed to happen, we will reach a situation when the landlord will simply walk into the premises exercising his right of re entry and obtaining possession extra Judiciary. A court, of law cannot allow such state of affairs whereby the law, of the jungle take over. It is trite law, that unless the tenant consents, agrees to give up possession the landlord has to obtain an order for possession.*

(vi) *Non-payment of rent or irregular payment of rent does not entitle a landlord to take possession by distress. He must follow the procedure for such remedy as laid down in law that, is to issue a tenancy notice in case of protected tenancy or to file proceedings in case of unprotected tenancies.*

(vii) *The judge restored the lawful status quo, that is the possession of the tenant. Had he not done so, there would in fact have been misjustice.*

While quoting KIBIY ARAP YEGO VERSUS EMILY AND ANOTHER CA 73 OF 1985 UR “*a litigant cannot wrongfully and illegally bring about a state of affairs and then apply to court, to preserve that state of affairs as the status quo by way of an injunction.....The status quo that could be preserved was the status quo before these illegal and criminal acts on the part of the defendant. It is a strange argument to address to a court, of law that we ought to help the defendant who has trespassed and got himself into these premises in the way in which he has done and say that would be preserving the status quo and it would be a good reason for not granting an injunction.*

(ix) *A court, of Equity cannot allow a litigant who takes unlawful and proper steps to evicts a tenant to say that the tenants application ought to be dismissed as the litigant has already put some one else in possession thereby improperly and illegally changing the status quo.*

(x) *With approval of the decision in KAMAU MUCUHA VERSUS THE RIPPILES LIMITED NAI 186 OF 1992 that it is fallacious for a person who forcibly and notoriously enters premises to maintain that his occupation of these premises is the status quo which must be maintained if the appeal were to be allowed the court, would be giving assent to occupation of the premises by a 3<sup>rd</sup> party and assist the landlord to perpetuate what it did illegally Equity conscience does not allow that.”*

Lastly the case of SIMON THUO MUHIA AND ANOTHER VERSUS HOUSING FINANCE COMPANY OF KENYA LIMITED, MILIMANI COMMERCIAL DIVISION NIROBI HCCC NO. 813 OF 2002 decided by Azangalala J on 14/6/2005. In an application by the plaintiffs' chargors to restrain the defendants chargees from exercising their statutory power of sale, the learned judge held inter alia that:-

(i) *A prima facie case, had been established because it had been demonstrated that the money claimed by the chargees and on the basis of which the statutory power of sale was sought to be exercised constituted the extra levies and or charges and or penalty interest not provided for in the contract between them and the defendant.*

(b) *On the issue of adequacy of damages as opposed to an injunctive relief, that money is not everything. In any event that it is not the law that no temporary injunction will issue in all cases where damages are an adequate remedy. The wording of the second ingredient” namely an injunction will not issue where the injury complained of would be adequately compensated and damages” suggests that the court, of appeal recognized that there may be cases where an injunction will issue even if damages would be an adequate remedy for the injury the applicant may suffer if the injunction is not granted.*

On the courts', assessment of the facts herein, it is clear that what the applicant seeks herein is an interim injunctive relief. This being the case, it is clear that what the applicant is required to prove is none other than the existence of the traditional ingredients that needs to be established before one can earn such a relief. These are non other than those established in the case of GIELLA VERSUS CASSMAN

BROWN (1973) EA 358 namely:-

- (i). *Establishment of the existence of a prima facie case with a probability of success.*
- (ii). *Demonstration that damages will not be an adequate compensation.*
- (iii). *Demonstration that the absence of (i) and (ii) above notwithstanding, the balance of convenience non the less tilts in favour of the applicant.*

When these ingredients are applied to the rival arguments herein, several questions arise for determination namely:-

1. Whether the defendant allotted the suit land to Njoroge Simon Nyoike.
2. Whether Njoroge Simon Nyoike obtained title to the said property.
3. Whether the said Njoroge Simon Nyoike sold the said property to the plaintiff Benson Irungu Mbaria in the first instance.
4. Whether the said Njoroge Simon Nyoike had a title to pass and did in fact pass title to the plaintiff herein.
5. In view of the findings in number 1-4 above is the defendant a trespasser?
6. If number 5 above is answered in the negative, then on the facts demonstrated before this court, whose tenant was Njoroge Simon Nyoike was, the tenant of the defendants or of the plaintiff.
7. What are the final orders herein?

In response to the first question of whether the defendant allotted the suit land to the Njoroge Simon Nyoike, what the court, has before it to be used as a yardstick are the documentation exhibited by the applicant. The applicant relies on the letter of allotment annexed as BM12. As contended by the defence, the plot allotted was said to have been "*as per attached plan in the above mentioned scheme*". It therefore follows that the plot number is not mentioned, the scheme name is not also given. It is therefore not prima facie or evidently clear that the allotment letter BM12 refers to the suit property. Indeed the addressee of the allotment letter is one Njoroge Simon Nyoike from whom the applicant claims to have acquired title over the suit property, but there is nothing in the said allotment letter that links the said allotment letter to the plot subject of these proceedings.

(ii) The payment document annexure BM13 being a copy of a cheque and the receipt both are contested by the defendant and need to be proved at the hearing, more so when as contended by the defence, they have not been accompanied by bank statement, of either the plaintiff/applicant Njoroge Simon Nyoike to prove such payments or prove that funds left their bank accounts.

(iii) The transfer documents relied upon by the applicant namely BM14 is undated, unregistered and is nor accompanied by minutes and negotiations.

(iv) Indeed in BM14 (b) the city council applied for the issuance of a new grant for L.R.NO. 209/4130, but there is no mention that the issuance of the same was in connection with the transfer of the said property to the plaintiff/applicant.

(v) The supporting affidavit of Njoroge Simon Nyoike does not help much because it has pleaded reliance of the same letter of allotment which does not disclose the name of the plot number or the scheme. Neither have the plans been exhibited.

(2) As regards the question of whether Njoroge Simon Nyoike obtained title from the defendant in respect to the said allotment, the same has been answered in the negative, because in the absence of the suit land being specified in the said allotment letter as the property allotted, and there being a transfer from the defendant to the said Njoroge Simon Nyoike, there is nothing to show that title passed from the defendant to the said Njoroge Simon Nyoike.

(3) In response to the 3<sup>rd</sup> and 4<sup>th</sup> questions, in the absence of Njoroge Simon Nyoike acquiring title from the defendant, there was non that he could have passed on to the plaintiff/applicant in respect of the suit property by way of sale and or purchase.

In response to the 5<sup>th</sup> question, the court, is of the opinion that in lieu of the responses to the 1<sup>st</sup> to the 4<sup>th</sup> questions above, the defendant cannot be termed as a trespasser in respect to the suit land because:-

- (i). It has not been demonstrated that it was the property which was being allotted to the said Njoroge Simon Nyoike.
- (ii). The documentation relied upon to support the applicants case are subject to proof in relation to those involving payments.
- (iii). Proof of payment has no back up information to show that the said amount came either from the applicant or Njoroge Simon Nyoike.
- (iv). The transfer instrument is undated and un executed and is not backed up by minutes and resolutions of the defendant.

(6) In response to question 6, in the absence of demonstration of an allotment having taken place between the defendant and Njoroge Simon Nyoike, and there being no transfer of the same in pursuance of that allotment having taken place, then it means that the property still remained in the defendant and any occupant of the same did so with the permission of the defendant.

The defendant has maintained that the suit property is a flat amongst many standing on the suit land, which flat was allotted to one Njoroge Simon Nyoike as their employee, whose occupation was subject to payment of economic rent which rent the said employee paid as proved by the copy of the salary slips but defaulted in paying the same. The default led to the issuance of notices that preceded the eviction, which eviction had been effected as at the time the applicant moved to court. The applicants counter to this was just the assertion that he had been sold the suit property and then retained the said Njoroge Simon Nyoike as a tenant.

Weighing the two versions together, the court, finds that the version advanced by the defendant carries weight by reason of what has been stated above in the first instance.

(ii) In the second instance, the sale NSN2 and BM11 purportedly entered into between the plaintiff/applicant one Njoroge Simon Nyoike does not assist as it is not backed up by payment for the same consideration passing from the applicant to the said Njoroge Simon Nyoike.

(b) The alleged lease agreement between the said applicant and Njoroge Simon Nyoike has not been exhibited.

(c) No demonstration that payment of the monthly rent allegedly charged by the applicant and paid by one Njoroge Nyoike was being effected.

Issue were also raised about acquiescence by the defendant to the state of affairs between the applicant and the said Njoroge Simon Nyoike. In this courts', view this does not hold because it has not been demonstrated that the defendant had knowledge of what had allegedly transpired between the two of them and as such estoppel does not lie.

(ii) Njoroge Simon Nyoike has not been joined into these proceedings as a defendant or plaintiff to provide a link between the defendant and the said Njoroge Simon Nyoike.

As regards the final orders herein the court, is of the opinion that prayer 2(a) (b) of the applicants application dated 13<sup>th</sup> November 2008, and filed on the 17<sup>th</sup> November 2008, has been declined for the following reasons:-

1. The letter of allotment relied upon by the applicant and as supported by Njoroge Simon Nyoike does not hold by reason of the fact that the suit land is not named specifically as the property allotted.
2. Document evidencing payment to the defendants by the plaintiff require proof as they have not been backed up by bank statements of either applicant or Njoroge Simon Nyoike to prove that the payment come from them.
3. The transfer instrument relied upon is undated and unregistered.
4. The application for grant document does not state that the grant applied for was in favour of the applicant.
5. The sale agreement between the applicant and one Njoroge Simon Nyoike is not backed up with proof of payment having changed hands from the applicants to the said Njoroge Simon Nyoike.
6. Tenancy between applicant and Njoroge Simon Nyoike has not been proved by existence of a lease and payment of rentals as no receipts have been exhibited.
7. Tenancy between the defendant and Njoroge Simon Nyoike has been proved by exhibition of pay slips, demand notices and acknowledgement by Njoroge Simon Nyoike that he was in default.
8. Acquiescence of the defendant in favour of the applicant does not rise because there has been no demonstration that the defendant was aware of the existence of the state of affairs between the applicant and the said Njoroge Simon Nyoike.
9. By reason of what has been stated in number 1-8 above no prima facie case in terms of the principles in GUIELLA VERSUS CASSMAN BROWN (SUPRA) has been demonstrated.
10. Damages will also be adequate either against the defendant or Njoroge Simon Nyoike in terms of the purchase price and lost rentals.
11. The balance of convenience does not tilt in favour of the applicant because
  - (i). The property was never allotted.
  - (ii). It has been demonstrated that the defendant is not a trespasser.
  - (iii). Njoroge Simon Nyoike has admitted having been a tenant in default.

(iv). The eviction has already taken place.

12. Costs of the application to the defendant.

**DATED, READ AND DELIVERED AT NAIROBI THIS 18<sup>TH</sup> DAY OF SEPTEMBER 2009.**

**R.N. NAMBUYE**

**JUDGE**