



REPUBLIC OF KENYA
IN THE HIGH COURT OF KENYA
AT NAIROBI (MILIMANI COMMERCIAL COURTS)
Civil Case 82 of 2009

FRANCIS MWANGI NJUGUNA1ST PLAINTIFF

MARGARET WANGECHI NJUGUNA2ND PLAINTIFF

VERSUS

ZECHARIAH SOMI NG'ANG'A.....DEFENDANT

RULING

Application dated 3/2/2009 brought under **Order 39 Rules 1, 2 and 3** and **Section 3A** and **3 Civil Procedure Act, Cap.21**. The orders sought are injunction restraining the defendant and his agents from wasting or dealing in any manner with the suit land being Nairobi/Block/72/1026 pending hearing the determination of this suit. Further order requested is for the eviction of the defendant forthwith from the said suit land.

The grounds on which the application are set down on the application, namely; that the plaintiffs are the registered owner of the suit property having purchased at a public auction. Further the defendant filed a High Court **Suit No.62 of 2008** which suit was dismissed and there are no other proceedings between the parties now existing. The defendant has refused to move and vacate the suit property. The plaintiff purchased the property for their daughter and now she is paying rent for accommodation.

The supporting affidavit is sworn by Francis Mwangi Njuguna sworn on 3/2/09. He confirmed that the property was purchased for their daughter and they paid 25% of their bid which was Kshs.2,500,000/= and balance on 29/1/2004 (Kshs.1,875,000/=). Then the defendant filed suit so property could not be transferred then but the transfer was thereafter registered on 4/1/2007. Certificate of lease is exhibited and is in the name of both the plaintiffs.

I have perused the replying affidavit. It is alleged that there was irregularity in the conduct of auction and that the money was not paid as per price of auction sale. He alleges the loan was restricted to Kshs.400,000/= but he realized that the loan had been added to Kshs.664,437/70 and that statutory notice was illegal and was sent to wrong address.

I have perused the written submissions filed by both sides. The plaintiff submits that they are purchasers for value. Although defendant filed **Suit No.62 of 2004** in a bid to stop the transfer of the suit property to the plaintiffs, they were not successful but the suit land was transferred to the plaintiffs on 24/1/2007. The suit was dismissed. No appeal has been filed against the dismissal.

The plaintiffs have demonstrated a *prima facie* case and therefore an injunction can be granted as prayed. The plaintiffs also submit that this suit is now *res judicata* and should not be entertained by any court in view of the case **No. HCC 62/2004**.

I have read the submissions filed by the defendant. The point is that the defendant has litigated on the issue of the sale of property in another case. **Section 7 of Civil Procedure Act** prohibits any court to try any suit in which the matter directly and substantially in issue has been directly and substantially in issue in a former suit which has been heard and finally decided. Therefore, it is clear the defendant has no case that he can raise on the issue of sale of his property by chargees/plaintiffs.

I have perused the several authorities cited by both sides and I am satisfied that the applicants have satisfied the

grounds warranting the granting of injunction. On the issue of eviction, I am convinced that the plaintiffs are entitled to the possession of the property they have purchased. They were registered as proprietors on 4/1/2007 and the defendant has not been able to cancel the sale. It is the applicants who are suffering not the defendant.

This declares that any claims by the defendant is *res judicata* and the plaintiffs have demonstrated *prima facie* case. Damages as a remedy cannot compensate the plaintiffs and in any case, the defendant had no money to pay the chargee and will not have any funds to compensate the plaintiffs. I am of the view that the applicants are entitled to injunction as sought and I do grant the same.

Regarding the issue of eviction, it is my view that the applicants are entitled to eviction order as prayed and I order that the defendant shall vacate the applicant's property on or before the expiration of 30 days from today.

The defendant shall pay the costs of this application.

Orders accordingly.

DATED, SIGNED and DELIVERED at Nairobi this 19th day of October 2009.

JOYCE N. KHAMINWA

JUDGE