



SARAH JEMUGE TOROITICH..... PLAINTIFF

VERSUS

THE BOARD OF TRUSTEES

TELEPOSTA PENSION SCHEME..... 1<sup>ST</sup> DEFENDANT

POSTAL CORPORATION OF KENYA ..... 2<sup>ND</sup> DEFENDANT

### **RULING**

Before the court is an application dated 16<sup>th</sup> December, 2008 brought by way of Chamber summons pursuant to Order 39 Rule 1,2,3 & 7 of the Civil Procedure Rules and Sections 3A & 63 (e) of the Civil Procedure Act. It is supported by the affidavit of *SARAH JEMUGE TOROITICH* and on the grounds on the face of the application.

The application seeks for the following orders:-

**(1) That the Application be certified as urgent and service be dispensed with and be heard in the first instance.**

**(2) That the Defendant by themselves and/or through Teleposta Pension Scheme fund their servants or agent or anyone of them by themselves or otherwise, howsoever be restrained by a temporary order of injunction from advertising for sale, disposing, selling by public auction, private treaty, tender, bids or at any time completing by conveyance, transfer or surrender concluded by auction, private treaty, leasing, tender or otherwise or whosoever interfering with the Plaintiff/Applicant priority right to purchase all those premises known as NAIROBI/BLOCK/27/542 Unit27 JACARANDA ESTATE, NAIROBI belonging to the Defendant pending the hearing and determination of this application and of the suit.**

**(3) That an order of temporary injunction do issue to restrain the Defendant/Respondent their servants or agent from issuing a notice to vacate, threatening or evict or evicting and/or otherwise interfering with the Plaintiffs quiet possession and enjoyment of all those premises known as HOUSE No.13 L.R. No. 209/315 JACARANDA ESTATE, NAIROBI belonging to the Defendant pending the hearing and determination of this application and the suit or until further orders of this Honourable Court.**

**(4) That in the alternative and in the event only that the Plaintiff will have been evicted from the suit premises before the hearing and determination of this application and/or suit, mandatory injunction orders do issue compelling the Defendant or its servants or agent or any one claiming under them or any of them to reinstate and allow the Plaintiff back into the premises.**

**(5) That the costs of this application be provided for.**

Orders 1 & 2 are spent, the ruling will therefore be confined to prayers 3 to 5 of the Chamber Summons.

The Respondent opposed the Application and relied on a Replying Affidavit dated 13<sup>th</sup> May, 2009 sworn by Lucy **J. Barno**.

The Applicant's contention is that she has been a resident of the suit premises since, 2000, and still remains a member of the Defendant although she no longer works for Postal Corporation of Kenya. That she has been discriminated upon by the Defendant who has not given her priority as other members, to purchase the property subject matter herein. That she is ready and willing to take up the offer to purchase the suit premises. That if the property is sold to a third party, she will suffer irreparable loss & damage.

The Respondent on its part contends that, the Applicant has not come to court with clean hands as she is in arrears of rent amounting to **Kshs.645,000/=** as at March, 2009. That priority was given to tenants without outstanding arrears. That the Applicant has come to court 2 years since the property was offered for sale. Further that the Applicant has not made a *prima facie* case with probability of success. The Respondent demonstrated that they have entered into a sale agreement and executed transfer in favour of a third party.

The issue before me is whether or not to issue a temporary injunction against the Defendant/Respondent, its servants or agents from transferring, or alienating all that property known as **NAIROBI/BLOCK 27/542 Unit 27** pending final determination of this suit.

The Applicant herein is seeking for an equitable remedy of injunction. It is a well settled principle of law that he who comes to equity must come with clear hands. The Respondent's assertion that the Applicant has since June, 2006 not paid her rent remains uncontroverted. I also note that other than stating that she is ready and willing to purchase the said property, the Applicant has not demonstrated her ability to do so.

Order 39 Rule 1 & 2 of the Civil Procedure Rules, set out the circumstances in which a temporary injunction is to issue. The object of such an order is either to preserve or restore the subject matter to the condition before the dispute. It must also be remembered that an injunction is as equitable remedy that will be granted under certain conditions.

I will at this point consider the Principles applicable to the granting of an interlocutory injunction as set out in the notable case of **GIELLA vs. CASSMAN BROWN & CO. LIMITED & ANOTHER (1973) E.A.** at 385, where the Court of Appeal of East Africa set the conditions applicable. First that Applicant must show a *prima facie* case with a probability of success, if in doubt the court should decide on a balance of convenience. Secondly, normally an interlocutory injunction will not be granted unless the Appellant will suffer irreparable loss and damage which cannot be adequately compensated.

The Applicant's case is that she is a former employee of Postal Corporation of Kenya and a member of the Defendant. The Applicant has exhibited two letters SJT 2 & 3 as exhibit of an offer to purchase the

subject matter. Exhibit SJT3 gave various conditions to be met by interested purchasers. No evidence was adduced by the applicant of her compliance with any of the conditions. The Respondents on their part deny that the letters amounted to an offer. Further, there is no Sale Agreement exhibited by the Applicant nor part performance on her part. It is also noteworthy that the letters referred to were made in 2003 & 2004 respectively. Cognizant of the fact that I ought not to make a definite finding of fact or law at this stage, and in view of above, I find that the Applicant/Plaintiff has not made out a *prima facie* case with a probability of success.

The second condition of granting an injunction is whether an award of damages would be an adequate remedy. In the case of **MWAKIO vs. KENYA COMMERCIAL BANK (C.A. No. 28 of 1182 & 69 of 1983 )** Nyarangi J in upholding the trial Judge's refusal to grant a temporary injunction said :-

**“The trial Judge was right in refusing to grant a temporary injunction. The Appellant had little chance of proving his claim. In any case the Respondent Bank had all the means to compensate the Appellant by damages if it became necessary.”**

Although the subject matter herein is property, guided by the above authority I am of the view that damages if any can be adequately compensated by the Defendant and on this score I decline to grant the injunction.

I will now turn to consider the conduct of the Applicant/Plaintiff herein. It remains uncontroverted that since around June, 2006 the Applicant/Plaintiff has not paid her rent. In her own words she is still in possession of the suit premises. It has been alleged that for several years she has not paid her rent. She has not in her affidavit dispute this allegation or even offered to clear the said arrears. The Applicant's/Plaintiff's conduct has not been equitable in any way and I do agree with the Respondent's/Defendant's counsel she is not deserving of an equitable relief.

The upshot of my ruling therefore is that I decline to grant the application dated 16<sup>th</sup> December, 2008 and dismiss the same with costs.

Dated and delivered at Nairobi this 19<sup>th</sup> day of October, 2009.

**ALI-ARONI**

**JUDGE**