



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

MILIMANI LAW COURTS

Civil Case 338 of 2009

EZEKIEL K. KIBOR.....PLAINTIFF

VERSUS

TELEPOSTA PENSION SCHEME

TRUSTEES1ST DEFENDANT

**PHTUMA AGENCIES2ND
DEFENDANT**

**HILDA WANJIRU IKAHU3RD
DEFENDANT**

RULING

The application before the court is a Chamber Summons dated 22nd June, 2009 brought pursuant to Order XXXIX Rule 1 (a), (b) and 2 of the Civil Procedure Rules and Section 3A of the Civil Procedure Act. It is supported by the affidavit of the applicant **Ezekiel K. Bor** and on the grounds on the face of the application. The said application is seeking for restraining orders against the respondents their servants and/or agents from evicting or in anyway interfering with the plaintiff’s possession of all that property known as L.R. No. Nairobi Block 34/160, unit No.64 Parklands area in Nairobi, pending hearing of the suit. It also seeks for restraining orders against the respondents, their servants and/or agents from assigning and/ or disposing of the plaintiff’s household goods attached allegedly for non payment of rent. The Plaintiff further seeks for a mandatory injunction to issue compelling the respondents to deliver and return the household goods aforementioned pending hearing and determination of the suit.

The Applicant filed suit against the 1st and the 2nd Respondent. However, on the 15th July, 2009 one **Hilda Wanjiku Ikahu** made an application by way of Chamber Summons dated 15th July,2009 under Order 1 Rule 10 (2) of the Civil Procedure Rules and Section 3A Procedure Act seeking to be enjoined to the suit as an interested party. On the 29th July, 2009 with the consent of all the parties the said application was allowed and **Hilda Wanjiku Ikahu** was enjoined as the 3rd defendant

The 1st and 3rd respondents object to the application and have relied on the 1st respondent’s Replying affidavit dated 30th July, 2009 and the 3rd respondent’s Replying affidavit dated 10th August, 2009. The

2nd Respondent did not enter appearance nor file a Replying Affidavit.

I have considered the pleadings, the submissions by learned counsel and authorities cited. In my view there are only two substantive issues for determination before me as follows:-

- 1. Whether or not to issue restraining orders against the Respondents , their servants and/or agents from evicting the applicant or assigning and offering for sale the suit premises pending hearing and determination of the suit.**
- 2. Whether or not to issue the mandatory injunction sought compelling the Respondents to return the attached household goods listed in the application.**

The applicant contends that he was an employee of Telekom Kenya Ltd until 2008, and by virtue of the said employment he became a member of the first Respondent and remains so to date. That some times in 2002 Telekom Kenya Ltd arranged with the 1st Respondent for the plaintiff and its other employees to purchase house units in all that property known as **L.R. No. Nairobi Block 34/160**. The employees including the Plaintiff were to pay 50% of the value of the house units occupied by each of them while the remaining 50% was to be paid over a period of 15 years. As a result of the said arrangement the 1st Respondent offered to the applicant the suit premises vide a circular dated 14th May, 2003 and a letter dated 27th August, 2004. The Applicant further contends that despite the said offer, the 1st Respondent has sought to frustrate his efforts to purchase the suit premises. That the 1st and 2nd Respondents have severally sent auctioneers including on the 17th of June, 2009 when the 2nd Respondent at the behest of the 1st Respondent proclaimed and attached the Applicant's goods which the applicant asserts was wrongful, unlawful and inequitable.

The 1st Respondent does not dispute that the suit property was offered for sale to the applicant but contends that the applicant failed to pay his deposit on good time despite the indulgence extended to him over time, hence the 1st Respondent offer the property for sale at the market value prevailing in 2007, and as a result the 1st and 3rd Respondents entered into an agreement and the property was eventually transferred to the 3rd respondent. It also contends that the Plaintiff has occupied the suit premises without paying rent since the 1st July, 2005 thus accruing rent of **Kshs.587,500/=** as at May 2009. The 1st Respondent admits that there was an attempt by the Plaintiff in 2006 several years later, to pay a part deposit of **Kshs.90, 000/=** which amount the 1st Respondent declined, further that in October, 2006 the plaintiff attempted to pay a sum of 1.7 million which amount the 1st defendant also declined, advising the applicant that the property was to be advertised at the market rate and that he could make an offer alongside other interested buyers. The property was offered for sale to the 3rd respondent in August, 2007 at a price of Kshs.3 million. The property has since been transferred to the 3rd respondent.

The 3rd Respondent on her part states that she entered into a sale agreement with the 1st Respondent on the 13th of November 2007. Upon payment of the full purchase price the property was transfer to her on the 3rd June, 2008 and a title issued accordingly. That it was a term of the sale that the 1st Respondent would deliver vacant possession upon completion of the transaction.

It is not a disputed fact that the Applicant received an offer to purchase the suit premises from the 1st Respondent May, in 2003. It is also obvious from the pleadings that the 1st payment of **Kshs. 90,000/=** was made 3 years after the offer, which amount was declined by the 1st Respondent, subsequently the payment of Kshs. 1,700,000/- was also refused and the applicant through his advocates advised that the property would be on offer at the prevailing market price. This application is being filed 6 years after the

offer was made.

Order 39 Rule 1 (a), (b) & 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. An injunction is an equitable remedy and is granted under certain conditions. In the notable case of **GIELLA vs. CASSMAN BROWN & CO. LIMITED & ANOTHER (1973) E.A.** at 385 The Court of Appeal of East Africa set the conditions applicable as follows:-

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 Applicant will suffer irreparable loss and damage which cannot be adequately compensated.

It is clear to me that the Applicant delayed in meeting the conditions set out in the letter of offer as exhibited in his own pleadings, 3 years is a long time for any seller to wait. 6 years wait before seeking the courts intervention is definitely unreasonable. Although I am cognizant of the fact that I ought not to make a definite finding of fact or law at this stage, I am of the view that the Applicant 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 1st Respondent in the event the sale to the 3rd Respondent is unlawful and on this score I decline to grant the injunction.

I will now turn to consider the conduct of the Applicant herein for purposes of exercising the courts discretion on both the issues before me. It remains uncontroversial that since around July, 2005 the Applicant has not paid his rent. In his own words he is still in possession of the suit premises. He has not, despite the allegation disputed the same or even offered to clear the said arrears. The Applicant's conduct has not been equitable in any way and I find that he is not deserving of an equitable relief. It is a well settled principle of law that he who comes to equity must come with clear hands. I am also indeed that the property has changed hands from the 1st to the 3rd respondent. Equity cuts both ways. No reason has been advanced to deny the 3rd Respondent as the proprietor the property or rent from the said property.

Having found as above it therefore follows that the court cannot compel a landlord to return goods attached for non payment of rent. The prayer seeking for a mandatory injunction cannot stand either. T

The upshot of my ruling therefore is that I decline to grant the application dated 22nd June, 2009 and dismiss the same with costs.

Dated and delivered at Nairobi this 16th day of November, 2009.

ALI- ARONI

JUDGE