



**REPUBLIC OF KENYA
IN THE HIGH COURT OF KENYA
AT NAIROBI (NAIROBI LAW COURTS)**

Civil Suit 72 of 2008

1. Land Environmental Law Division

2. Subject of main suit: - Land

i) Title No Nairobi Block 55/205, 206, 209, 210, 212, 214, 216, 217, 218, 219, 221, 223, 225, 226, 227, 228, 230, 231, 232, 233, 234, 235, 236, 237, 238, 239, 240, 241, 242, 243, 244, 245, 246, 247, 248, 249, 250 and 251.

ii) Original Plot No. 211/PT(B) AND LR No. 209/12554 LN154 IR83989

iii) Property consists of staff residential properties of former defunct Kenya Posts and Telecommunication Corporation.

iv) By LN.154 No. 59 of 5.11.1999. Properties

de commissioned and vested in plaintiff.

v) Plaintiff sub divided to sell.

vi) Alleged occupants with permission of Telkom (K) Ltd purported to have been granted permission to reside which permission is false.

vii) Intention to have the occupants led by 1st, 2nd, and 3rd defendant be evicted from the premises.

viii) Mandatory injunction sought for defendant to vacate premises. Injunction sought to restrain defendant from occupying premises.

3. Reply – Nil

4. Held

a) Defendants 1,2 and 3 appears to be so sued on behalf of other occupants, of this, is so Civil Procedure Rules for leave by court to bring representative suit required.

b) Injunction to restrain defendants agents, servants and or others – from entering encroaching, occupying taking possession, constructing building supposes that defendants are not in possession. The defendants are infact in possession and an injunction can not issue for an act already committed.

c) Mandatory injunctions not available in Kenya save for special and or certain circumstances.

d) Injunction and damages cannot be granted at same time.

e) Use of Health Act noted

5. Held

a) Injunction application rejected.

b) Defendants to be served with summons to enter appearance

c) Full trial be held.

6. Case Law.

7. Advocate

S.K. Bundotich of Kale, Maina Bundotich & Co. Advocates for plaintiff/applicant – present

Watts Wata Odongo 1st defendant)

Tom Opiyo 2nd defendant) in person

John Onyango 3rd defendant)

TELPOSTA PENSION SCHEME TRUSTEE REGISTRED...PLAINTIFF/APPLICANT

VERSUS

WATTS WATA ODONGO.....1ST DEFENDANT/RESPONDENT

TOM OPIYO.....2ND DEFENDANT/RESPONDENT

JOHN ONYANGO.....3RD DEFENDANT/RESPONDENT

RULING

I. INJUNCTION

1. Teleposta Pension Scheme Trustee registered filed this main suit on 4th March 20088 seeking the prayers of this court for:-

“i) An order of permanent injunction restraining the defendants by themselves this agent servants, and or any person whatsoever from entering encroaching occupying taking possession, constructing building any structure or in any manner interfering with the plaintiffs right of ownership and possession of those properties known as Titles number Nairobi Block55/205-206, 209-210, 212, 214, 216-219, 221-228, 230-251.

ii) An order of mandatory injunction compelling the defendants whether by themselves their agents servants and or any other person howsoever to forthwith vacate the plaintiffs properties known as Title number Nairobi Block55/205-206, 209-210, 212, 214, 216-219, 222-228, 230-251.

iii) General Damages.

iv) Costs of suit.

v) Any other relief Hon. court may deem fit”.

2. On the same day of 4th March 2008, under a certificate of urgency the plaintiff filed a chamber, Civil Procedure Rules the plaintiff/applicant sought the courts leave to notify all the occupants and or interested parties of the institution of this suit by way of advertisement in the Daily Nation Newspaper and East Africa Standard Newspapers.

3. The application was certified as urgent (K. Kariuki J 4.3.08). Leave to serve through advertisement to be so done between 4.3.08 and 7.3.08 was granted. Inter parties hearing was placed for 12th March 2008 before the Land and environmental Law Division.

4. On 12th March, 2008 the file was placed before me for inter parties hearing. The three defendants attended in person undefended. They had filed no papers in response. The plaintiff/applicant addressed me on their application.

II. BACKGROUND OF APPLICATION

5. According to the pleadings and submission made by the advocates for the plaintiff/applicant, there existed along Jogoo Road of the Nairobi area known as original Plot No. 211/PT(B) that had residential buildings belonging to the former defunct Kenya Posts and Telecommunication Corporation. This corporation was later partially taken over by Telkom (K) Ltd.

6. The said property was then registered as LR209/12554 IR83989 for the purpose of vesting the said property. The plaintiff reasons being that the plaintiff was mandated to pay pension for the former employees of the corporation. (There is no where deponed to in the pleadings that this sum required is 50 million per month. This is information given to me from the bar. Neither have I seen any where in the affidavits and pleading that the suit properties require 78 million from the sale proceeds). The advocate attempts to convince this court that money was urgently required by the plaintiff to maintain a pension scheme. To achieve this the Ministry of Finance vested the suit land in the plaintiffs. This occurred in 1999 when the said Minister of Finance by Kenya Gazette supported notice No. 59 of 5th November, 1999.

7. The plaintiff took action by sub-dividing the said property to raise Kshs.7 million. Their challenge was that the 1st, 2nd defendant, 3rd defendant. Watts Wata Odongo, John Opiyo and John Onyango were all occupying the said premises with others not before the court. From the pleadings it was implied that the three trespassed onto the premises sometime in 2006 and proceeded to erect some structures. There may have been other persons but such persons were not recognized and or known to the plaintiff. The plaintiff issued a notice of 13th July 2006 to notify them to vacate “PBJ4”

“Notice to vacate condemned House” The units at St. Stephens Road Nairobi (Block N) are condemned and should not be occupied at all. This is to advice any persons occupying the said issues to vacate immediately but at any rate not later than 31.8.06”.

8. The occupants, according to the plaintiff/applicant, purported to have had permission from Telkom (K) Ltd to occupy the premises. Although the plaintiff stated that they too requested the occupants to vacate there is no such proof of this from Telkom (K) Ltd.

9. The houses were then condemned. The Public Health Department urgently demanded the plaintiff/applicant to deal with the nuisance and abate any health hazard. When the plaintiff/applicant faced criminal prosecution they hired a bulldozer to demolish the premises. This was not possible as the occupants were still on the premises.

10. The above background is subject to evidence in court and proof thereof.

II. OPINION

11. There appears to be material non-disclosure by the plaintiff in this matter. The said premises/dwelling buildings were originally occupied by - I presume from the pleading PBJ5, by the staff of the defunct Kenya Post and Telecommunication Corporation. The persons are known by the plaintiff/applicant and most certainly have their records with the Telkom (K) Ltd, the new Organization.

12. Record keeping is essential in any organization. The records of the occupation should have been made available by the plaintiff through its sister/related organization. This is essential as the proceedings are brought under Order 1 rule 8(2) Civil Procedure Rules. This means that the defendant are sued under "a representative suit" namely on behalf of others not before the court. In order for this occur the plaintiff is required to seek the leave of the court first to bring a representative suit. What the plaintiff/applicant sought on 4th March, 2008 from the duty judge was leave to service through an advertisement on press. This requirement requires to be complied.

13. On the main prayer for injunction, it seems that plaintiff/applicant main intention is to evict the occupants from the building/premises. In order to do this it has issued a notice to vacate in 2006 to unknown persons not named including defendant 1-3. The plaintiff/applicant recognize that occupants are in the premises. What seems to be before me is prayers for instructions to restrain it to stop the said occupants/defendants from entering, encroaching, taking possession, constructing building any structure.

14. The act has already been committed. An injunction is prayed for stopping the occupants and defendants occupation. It is something that has already past. It is therefore seen that a mandatory application is asked for namely that the occupants do vacate the premises. The said occupants are described as the defendants, agents served and or other persons.

15. Mandatory injunction is not available in Kenya unless it is for a special purpose. I note that the injunction prayed for are identical to the main suit. The applicant has come to court by an interlocutory application to evict the occupants from the premises.

16. Due process requires that the applicants serve the respondents after due compliance with order 1 rule 8 Civil Procedure Rules with summons to enter appearance, the plaint. To require that the said matter go to trial and orders made by the court.

17. I am aware that there is the Public Health requirements under the said act. It is a well known establishment that owners of premises must keep the same under good condition. It is also known that many owners of buildings who want their tenants removed allow the premises to be dilapidated in order that the Public Health Act might come as to pay and have their tenants evicted. The High Court in the past have stated if there is any criminal prosecution all the tenants should be served to attend such proceedings to present their rights.

18. In this application I believe it has been brought in a cunning way. The applicant cannot take a short cut through an injunction which is not unavailable to them by an interlocutory application and on at all. What the applicant/plaintiff served have filed suit is that of eviction and on that of vacant possession to be given to their property - not an injunction.

19. The prayers to use the police to effect eviction under Buru Buru police station was abandoned. The Ripples case clearly states in civil matters the police are not to be used to enforce court orders. This lies with the court Bailiffs.

20. I reject this application and dismiss it with costs to defendants.

DATED THIS 13TH DAY OF MARCH 2008 AT NAIROBI.

M. A. ANG'AWA

JUDGE

S.K. Bundotich of Kale, Maina Bundotich & Co. Advocates for plaintiff/applicant – present

Watts Wata Odongo 1st defendant)

Tom Opiyo 2nd defendant) in person

John Onyango 3rd defendant)