



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

Civil Case 105 of 2008

ASILA MOHAMED ADAN.....PLAINTIFF/APPLICANT

VERSUS

ITLAF SYED..... DEFENDANT/RESPONDENT

RULING

By chamber summons dated 27.03.08 stated to be brought under Order 1 rules 3 and 10 (2) and Order XXXIX rule 1 of the Civil Procedure Rules and section 3A of Civil Procedure Act, Cap.21, the plaintiff, *inter alia*, applied for:-

- a) An order of injunction restraining the respondent from evicting the applicant or in any way interfering with the applicant's possession of L.R.36/11/55 Eastleigh, Nairobi pending the hearing and determination of this suit.
- b) That costs of this application be provided for.

The grounds upon which the application is based are:-

- i. That the respondent has indicated his willingness to dispose of L.R. 36/11/55 Eastleigh, Nairobi.
- ii. That the applicant is a long time tenant of the premises and has invested heavily in the premises.
- iii. That the applicant has reliably learnt that the respondent wishes to secretly dispose of the property to another party.
- iv. That the applicant is ready and willing to purchase the said property at the price stated by the respondent and/or lease the premises until the same is offered for sale.
- v. That the applicant will suffer irreparable loss and damage if evicted from the said property.

The application is supported by the applicant's affidavit sworn on 27.03.08.

At the *inter-partes* hearing of the application on 17.04.08, the applicant was represented by learned counsel, Mr F. M. Mutua while the respondent was represented by learned counsel, Miss E.W. Kamuyu.

Applicant's counsel said he relied on the applicant's affidavit entirely. He expressed surprise at the averment in the respondent's replying affidavit sworn on 14.04.08 that the suit premises have been sold and urged the court to exercise its discretion under Order XXXIX and grant the interim injunction sought.

On the other hand, respondent's counsel opposed the application. She relied on the respondent's replying affidavit sworn on 14.04.08.

The plaintiff's/applicant's case is that she has been a tenant of the defendant/respondent in the suit premises for the last 20 years, paying a monthly rent of Kshs.32,000/=; that the respondent offered the property to the applicant at Kshs.14 million which the applicant accepted on condition that she be given ample time to arrange for the purchase price and that in the meantime she continues paying rent at Kshs.32,000/= per month until the matter is resolved. The applicant complains that the respondent's current advocate has since 01.01.08 refused to confirm the deal and/or have the same reduced into writing, which has led the applicant to believe that the respondent may be planning to sell the property to another person without giving the applicant the first option to purchase the said property. The applicant has deponed that she runs a boarding and lodging business in the suit premises; that she has invested in furniture for the business; and that if the property is sold to another person, she (applicant) stands to suffer irreparable loss and damage. The applicant says she is ready and willing to purchase the property and that the respondent should not be allowed to sell the property to another person. The applicant adds that the respondent has refused to accept rent since January, 2008; that the respondent is planning to evict her from the premises; and that the court should grant the restraining orders sought. The applicant has offered to deposit rent in court pending hearing and determination of this application.

On the other hand, the respondent opposed the application. The respondent has deponed that he is the registered owner of the suit property and that the applicant has been his tenant until 31.12.07; that in March, 2006 he offered to sell the property to the applicant for Kshs.11 million but that the applicant made a counter-offer to purchase the property for Kshs.7 million which the respondent says he refused to accept. The respondent has deponed that he has already sold the suit property. He has annexed to his replying affidavit an agreement of sale between him and one Kore Nasiri Jillo signed on 20.01.08. The sale agreement shows that the respondent has sold the property for Kshs.14 million. The respondent confirms in his replying affidavit that he has received full payment from the purchaser and that after expiry of notice to the applicant, the respondent expects the applicant to hand over vacant possession of the suit premises. It is the respondent's case that since 01.01.08 the applicant has continued to occupy the suit premises unlawfully. Respondent has deponed that the applicant has stationed 6 young men to guard the suit property and forcefully prevent the respondent from gaining entry into the property. Respondent has also deponed that the applicant has threatened him with actual bodily harm and death if he sets foot on the suit property. It is the respondent's case that the applicant is not worthy of the protection she seeks from court, that her application be dismissed with costs and that she be ordered to give vacant possession of the suit premises.

I have given due consideration to the application and the opposition thereto.

The applicant deponed that the respondent orally offered to sell the suit property to her for Ksh.14 million, which offer she accepted on condition that she be given ample time to arrange for the purchase price but that in the meantime she continues to pay rent at Kshs.32,000/= per month. The applicant did not indicate a specific time-frame for finding the purchase price. It emerges from the applicant's affidavit that the offer and counter-offer she alludes to were oral. Even if such oral negotiations took place on the actual terms indicated by the applicant, they amount to nothing in law since the deal alluded to involves disposition of an interest in land, which under section 3 (3) (a) of the Law of Contract Act, Cap.23 is required to be in writing for it to be valid. On this score, the applicant has no leg to stand on. But there seems to be an even bigger hurdle for the applicant to overcome.

The respondent's replying affidavit indicates that in March, 2006 he offered to sell the suit property to the applicant for Kshs.11 million but that the applicant made a counter-offer to purchase the property for Ksh.7 million, which the respondent says he refused to accept. In law that means no deal was struck between the applicant and respondent and that it was open to the respondent to offer the property to a

higher bidder. The respondent has deponed that he has subsequently sold the property to one Kore Nasiri Jillo for Kshs.14 million. The respondent annexed to his replying affidavit a sale agreement as evidence of that concluded deal. The respondent has added that he has received full payment from the purchaser, Kore Nasiri Jillo and wants the applicant herein to give vacant possession of the suit premises upon expiry of requisite notice. The notice has not been availed to this court but the principle behind it is solid.

The applicant seems to be of the mindframe that because she has been a long time tenant of the respondent in the suit premises, then she has an automatic right to purchase the property. With respect, being a long time tenant in landed property does not confer on the tenant automatic right to purchase such property. If the applicant wished to purchase the property, she had to comply with the seller's requirements. In the present case, affidavit evidence tendered by the parties present two conflicting versions of what the actual offer made by the respondent to the applicant was. The applicant deponed that the respondent offered to sell the suit property to her for Kshs.14 million, which she (applicant) accepted on condition that she be given ample time to arrange for the purchase price and that in the meantime she be allowed to continue paying rent at Kshs.32,000/= per month. On the other hand, the respondent has deponed that the offer he made to the applicant was way back in March, 2006, that he offered to sell the property for Kshs.11 million (not Kshs.14 million), and that applicant made a counter-offer of Kshs.7 million which the respondent rejected. The respondent has annexed to his replying affidavit a sale agreement showing that he subsequently offered the suit property to Kore Nasiri Jillo for Kshs.14 million. The respondent's affidavit evidence shows consistency and accords with sound common sense. I accept the respondent's affidavit evidence that the offer he made to the applicant was the March, 2006 offer to sell the property for Kshs.11 million and that the applicant made a counter-offer of Kshs.7 million which the respondent refused. That ended their negotiations and the respondent was free to look for a better offer.

The applicant claims that the respondent offered to sell her the suit property for Kshs.14 million, that she accepted the offer on condition that she be given ample time to arrange for the purchase price and that in the meantime she be allowed to continue paying rent at Kshs.32,000/= per month until the matter is resolved. The applicant acknowledges that the respondent's advocate, Mr O gola 'has since refused to confirm the deal and/or have the same reduced into writing.' Even if this version of the applicant is accepted, the applicant's own acknowledgement means the respondent declined to accept the applicant's conditions, which once more leads to the conclusion that no deal was struck between the parties. There is so much going against the applicant's application for interim restraining orders.

I find that the applicant has not made out a case to persuade the court to grant the interim injunction sought vide prayer 2 in her chamber summons application dated 27.03.08. The said chamber summons application is hereby dismissed with costs.

Orders accordingly.

Delivered at Nairobi this 27th day of May, 2008.

B.P. KUBO

JUDGE