



**REPUBLIC OF KENYA**

**IN THE HIGH COURT OF KENYA**

**AT NAIROBI (MILIMANI COMMERCIAL COURTS)**

**Civil Case 44 of 2007**

**ALIKI PRINTERS & STATIONERS LIMITED.....PLAINTIFF**

**VERSUS**

**DANSON MBUGUA NJUGUNA .....DEFENDANT**

**RULING**

The Plaintiff has sued the defendant seeking;

- (1) An order directing the Defendant give to the Plaintiff the vacant possession to the parcel of land Number L.R. No.13459/67.
- (2) Mesne profits from January, 2006 to date.
- (3) Costs of the suit.

It is the case of the Plaintiff that at all material times it is the registered proprietor of the suit property formerly owned by the Defendant. The Plaintiff claims to have purchased the suit property from the East Africa Building Society bank Ltd. formerly known as Akiba Bank Ltd. in exercise of its statutory powers of sale when the Defendant defaulted in repaying a loan facility he had taken from the bank.

And on paying the entire purchase price, the Plaintiff obtained the transfer from the said Bank and further obtained a credit facility from the Standard Chartered Bank of Kenya in the amount of Kshs.8 million. The Plaintiff states that in the month of January, 2006 it promptly issued a notice to the Defendant to vacate and hand over the suit premises to it. The Defendant has completely refused and/or neglected to vacate the suit premises and continues to illegally and unlawfully occupies the said property without any colour of right. Simultaneously with the Plaintiff, the Plaintiff filed a Chamber Summons under Section 3A and 63 of the Civil Procedure Act and Order 39 Rule 7 (1) (b) and 9 of the Civil Procedure Rules. In the application the Plaintiff seeks;

“That this Honourable court do grant leave to the Plaintiff to forthwith enter upon and repossess the suit

premises, being land reference number 13459/67 situate at Karen within Nairobi District”.

In the application the Plaintiff contends that on, 25<sup>th</sup> July, 2005, it entered into a sale agreement with East Africa Building Society Bank for the purchase of the suit property herein. The Plaintiff then paid to the bank an amount of Kshs. 11 million. And that on 20.1.2006 the Plaintiff successfully obtained the transfer in its name after paying up all the purchase price of the suit property as agreed with the Bank.

As a result of the said transfer and sale, the Defendant filed HCCC No.51/2006 suing the Bank and the present Plaintiff together as Defendants. The Defendant then filed Chamber Summons dated 14<sup>th</sup> February, 2006 seeking for an order of injunction. The said application came up for hearing before Justice Ochieng on 26<sup>th</sup> October, 2006 and it was dismissed for non-attendance of both the Plaintiff and his Advocates.

From the evidence presented by the Plaintiff, it is clear that the suit property is registered in its names. The said transfer was effected on 20th January, 2006. The Plaintiff then on the same day created a charge over the suit property having secured a loan of Kshs. 8 million from Standard Chartered Bank.

Mr. Macharia Advocate urged me to look at the original Plaintiff in HCCC No.51/2006 which is over the same parties and it was instituted prior to the instant suit. According to Mr. Macharia Advocate, the earlier suit by the parties was filed by the Defendant on 14<sup>th</sup> February, 2006. And that the charge and transfer were done on 20<sup>th</sup> January, 2006, it was 30 days prior to the filing of the earlier suit. And that there was nothing to injunct the present Plaintiff and that the court was being asked to injunct what had already taken place. Mr. Macharia submitted that when the earlier suit was filed, there were no interim orders against the Bank and the present Plaintiff to restrain their activities and action in the suit property. And when a party alleges fraud, he can only recover damages against the bank, therefore, he urged me to allow the application.

No doubt there is an earlier suit filed by the Defendant against the present Plaintiff and the Bank involving the same subject matter. While it appears the Plaintiff acquired an interest in the suit property on 20<sup>th</sup> January, 2006, it appears there exists some material confusion in the subject property. In a letter dated 3<sup>rd</sup> April, 2006, the Bank's Advocate wrote to the Plaintiff in HCCC No.51/2006 suggesting to record a consent with the Plaintiff's counsel. It is essential to note that item No.4 of the suggested consent stated;

“that in default of the said redemption, the 1<sup>st</sup> respondent shall be at liberty to sell all the property known as L. R. No.13459/67”.

What the bank was stating in that letter dated 3<sup>rd</sup> April, 2006 is that if the present Defendant failed to conform to the terms, it would be at liberty to sell the suit property. If the suit property was sold through an agreement dated 25<sup>th</sup> July, 2005, then I do not understand why the Bank was intimating to the present Plaintiff that it would sell the suit property in default of the terms of the consent. The Bank was giving the chargor that it had opportunity to redeem its property on the suggested terms otherwise the bank would be at liberty to sell the same.

It would appear that the issues at the core of this suit were the same in the earlier suit. The present Plaintiff was sued, in the earlier suit as one of the Defendants. The Applicant/Plaintiff in this case does not state whether it had disclosed in the earlier suit that it had purchased the suit property before 14<sup>th</sup> February, 2006, when the court first issued an injunction. Apart from saying that it had purchased the suit property through a private agreement from the bank, there is no evidence to show that it had disclosed, the said purchase prior to the filing of HCCC No.51/2006.

The remedies being sought herein are substantially of compulsive in nature. The Plaintiff wants to evict and/or remove the Defendant from the suit property, while the Defendants states that the title of the Plaintiff is shrouded by fraud and misrepresentation. I think an order of such a nature would only be

granted sparingly and in exceptional circumstances. The court has a duty to determine the weighty issues raised by the parties through a full hearing and I think the balance of convenience tilts in favour of the chargor, who is in possession of the suit property. The court has a duty to determine the contradictory evidence tendered by the bank and the Plaintiff who now claims to have purchased the suit property. It is not the law that a chargor's remedy in all circumstances lies with an award of damages. And when there is an apparent conflict in the evidence between the bank, the chargor and the purchaser, the court would be reluctant to decide the matter on an interlocutory application.

In the premises the application dated 30<sup>th</sup> January, 2007 is dismissed with costs to the Defendant.

Dated and delivered at Nairobi this 20<sup>th</sup> day of March, 2007.

M. A. WARSAME

JUDGE