REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA

AT NAIROBI (NAIROBI LAW COURTS)

Civil Case 828 of 2006

ALBERT KIHANYU GIKARIA……....…….....……..APPLICANT

VERSUS

NATIONAL HOUSING CORPORATION & ANOTHER…....RESPONDENTS

RULING

Before me is an application by way of a Chamber Summons dated 27th July 2006 and expressed to be brought under Order XXXIX Rules 1 and 2 of the Civil Procedure Rules in which the Plaintiff seeks orders:

1. That the 1st Defendant be restrained from evicting the Plaintiff from Flat No. MF8-J Makadara Estate and from giving possession to the 2nd Defendant pending the hearing and determination of this application.

2. That the 2nd Defendant be restrained from taking possession of Makadara Estate Flat No. MF8-J .

3. That the 1st Defendant be restrained from terminating the Plaintiff's tenancy unprocedurally and he be restrained from evicting the Plaintiff from Makadara Estate Flat No. MF8-J.

The application is premised on the grounds that the 1st Defendant has threatened through its officers to evict the Plaintiff from the suit premises; that the Plaintiff is not in breach of tenancy terms and has been in possession since 1973 and has deposited over Shs.200,000/= to purchase the flat and that the Plaintiff will suffer irreparably loss if evicted as the flat is for his family use.

The application is also supported by an affidavit sworn by the Applicant in which he avers that by a Lease Agreement dated 28th February 2005 between him and the 1st Defendant he became a tenant for a 3 years term at a monthly rent of Shs.9,870/=; that by a letter dated 3rd February 2005, the 1st Defendant offered to sell the suit premises to him which offer he accepted and paid the requisite deposit of Shs.238,750/= to the 1st Defendant; that while awaiting allocation, the 1st Defendant handed over duplicate keys to the 2nd Defendant and allowed her to take possession as a purchaser and that the conduct of the 1st Defendant is illegal as it has not terminated his tenancy and had accepted his deposit to purchase the suit premises.

The application is opposed by the Defendants who have filed Replying Affidavits. The Replying Affidavit by the 1st Defendant is sworn by John Agutu the Chief Estates Officer of the 1st Defendant on 24th August 2006 in which he avers that the Plaintiff had breached Clause 10 of the Tenancy Agreement which forbade sub-letting the suit premises without a written consent of the 1st Defendant. The Plaintiff had sub-let the suit premises to one Danson Musyoka at the monthly rent of Sh.16,000/= while he was paying the 1st Defendant the rent of Shs.9,870/=. This is admitted by the Plaintiff that he had accommodated the said Danson Mosyoka as a mere licencee but the 1st Defendant has availed documents showing that i.e. Lease Agreement executed between the Plaintiff and the said Danson Musyoka on 2nd February 2005 and a letter dated 27th June 2006 written by Danson Musyoka to the 1st Defendant stating that he had been in occupation of the suit premises and handed over the keys to the suit premises to the 1st Defendant.

In the same letter he also acknowledged that he had been paying rent of Kshs.16,000/= per month to the Plaintiff.

While the Replying Affidavit sworn by the 2nd defendant on 24th August 2006 she merely avers that the 1st Defendant had advertised houses for sale and she applied and was offered the suit premises. She paid the requisite deposit and she was handed over the keys and she took possession.

On application for an injunction in aid of a Plaintiff's alleged right, the court will usually wish to consider whether the case is so clear and free from objection on equitable grounds that it ought to interfere to preserve the property without waiting for the right to be finally established. This depends upon a variety of circumstances and it is impossible to lay down any general rule on the subject by which the court ought in all cases be regulated, but in no case will the court grant an interlocutory injunction as of course.

There are various authorities on what the court should take into account in granting an interlocutory injunction and more so the well known principles as laid down in **GUELLA VS. CASSMAN BROWN & CO. LTD [1973] EA 358.**

These are: first, the Applicant must show a prima facie case with a probability of success, secondly, on interlocutory injunction will not normally be granted unless it is shown that the applicant will otherwise suffer irreparable loss which could not be compensated in damages; and, thirdly that if the court is in doubt as to the existence or otherwise of a prima facie case, it should decide the application on a balance of convenience.

I also bear in mind that at the interlocutory stage the court is not being called upon, indeed it is forbidden to make findings of fact and law. Considering the facts as stated in the pleadings and the submissions by both counsel, this cannot be said to be a clear case to enable the court to issue the orders sought. The Plaintiff has not satisfied the principles as enunciated in the celebrated case of **GUELLA VS. CASSMAN BROWN** above.

The Plaintiff's application therefore fails and it is dismissed with costs.

Dated and delivered at Nairobi this 23rd day of April 2007.

J.L.A. OSIEMO

JUDGE