



IN THE HIGH COURT OF KENYA
AT NAIROBI (NAIROBI LAW COURTS)
Civil Case 2154 of 2007

1. Land and Environmental Law Division
2. Subject of main suit – ownership of property

LR No.2250/31, Karen Nairobi

- i. Property in question transferred to plaintiff – by way of statutory sale, by Equity Building Society.
- ii. Defendant – vacated premises but returned thereon.

3. Application 25 September 2007 –Injunction

- i) Plaintiffs prays for orders of injunction to restrain defendant from being on the property
- ii) Prays for damages for trespass.

4. Reply by respondent 3.10.07

- i) Auctioneer came to house with “Breaking orders” which he mistook as eviction orders.
- ii) Paid auctioneer Ksh.120,000/- to vacate by 25.8.07.
- iii) Signed documents under duress to vacate but did not.
- iv) Advice from his advocate is “that of breaking order not eviction”
- v) Filed suit in magistrates court CMCC1320/07

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Services.

- vi) Auctioneer distress for rent when he was not the landlord
- vi) Eviction carried out without a court order.
- vii) Sought injunction from levying distress and or selling by public auction
- viii) Distress of rent applied against defendant by plaintiff 7.6.07
- ix) Auctioneer acted on this distress of rent.

5. Held:-

1) Non disclosure of material facts.

i) That another suit filed and pending before this one CMCC 1320/07

ii) Instruction to auctioneer was distress of rent

iii) Senior magistrate at Milimani issued breaking orders and no eviction order

iv) The plaintiff herein had never mentioned a private sale of property.

v) If sale was by way of vacant possession court orders for eviction must be obtained – none was

vi) Suit based on material non disclosure and untruth.

vii) Order of injunction declined

viii) Suit struck out under order VII r 1(e) (2) and (3) Civil Procedure Rules

ix) Parties to proceed in CMCC 1320/07

6. Case law

a. Giella v Cassman Brown Co. Ltd [1973] EA 358

b. Central Bank of Kenya & Another v Uhuru Highway Development Ltd & 4 Others CA 91/91 unreported

c. Ripples case CA

7. Advocates

J. Mburu for John Mburu & Co. Advocates for the plaintiff/applicant-present/absent

P.K. Musyoka for Onesmus Githinji & Co. Advocates for the defendant/respondent- present/absent

CITI GATE DEVELOPERS LIMITED APPLICANT

VERSUS

JOHN MIRIUNG’U KARUKI RESPONDENT

RULING

I: Application dated 25 September 2007 seeking orders of injunction to restrain the defendant John Miring’u Kariuki from entering, trespassing interfering with the Plaintiffs property

LRNO.2250/31

A) Background of application

1. This is a very disturbing case and I am truly appauled that what has occurred herein without due process of the law has happened.

2. The defendant herein John Mirung'u Kariuki (not Charles Miring'u Kariuki as described by the plaintiffs in their pleadings) is a male African adult who is the registered owner of LRNo.2250/31 Karen. He charged this property to the Equity Building Society, now known as the Equity Bank Ltd for a sum of money to secure such advances to his company where he is one of the directors known as Karuri Civil Engineering Company Ltd.

3. The plaintiffs herein purported that the defendant defaulted in the repayment of the said loan. A private sale of his property was made and transferred to the plaintiff being M/s Citi Gate Developers Ltd on 7 May 2007. The transfer was drawn by M/s Kimondo, Gachoka & Company Advocates.

4. The defendant is said not to have been able to pay back the sum of money to Equity Building Society a sum of Ksh. 4 million. The plaintiffs paid Ksh.22 million for the property.

5. According to the plaintiffs the defendant agreed to vacate the suit premises and hand over possession. He moved out but in September he moved back with the help of the police.

6. The plaintiff asked for an injunction to in effect evict the defendant from his premises as it now belonged to the plaintiff.

7. The defendant in reply stated that he was in shock when auctioneers known as M/s Jogan Dries Services came with 3 men and the police to recover rent arrears of Ksh.200,000/-. At no time was he even a tenant of the auctioneer. Further, prior to 17 August 2007 he was not aware that the property had been sold and that it was so sold by private treaty. The auctioneer showed him a breaking order issued by a Senior Magistrate Court but the Magistrates name is not disclosed. This breaking order gave powers to the auctioneer to proclaim goods and sell by auction for rent arrears of Ksh.200,000/-. The defendant mistook this as being an eviction order.

8. Under duress the defendant was made to sign a document entitled "Declaration to hand over vacant possession of LR2250/31 Karen, Nairobi". The defendant agreed to sign this document and agreed to pay Ksh.120,000/- being a sum paid to the auctioneer to postpone the said auction of the house.

9. The auctioneer in fact displayed the breaking order from the magistrate and a letter of instruction from the plaintiff instructing the auctioneer on 7 June 2007 as follows:-

7 June 2007

Citigate Developers

"Jogandries Services Ltd

P.O. Box 376-00600

NAIROBI

Dear Sir

Re: Distress for rent act Cap.293 Laws of Kenya

Tenant John M. Kariuki

Premises LR2250/31, Karen Nairobi.

I, Njama Wambugu being the landlord of the above named plot being occupied by the said tenant herein do instruct you to levy distress under the Auctioneer Act and under Cap.293 Laws of Kenya for recovery of rent in arrears amounting to Ksh.200,000/-

Kindly also collect your charges direct from the said tenant.

I hereby undertake on behalf of the Citigate Developers Ltd to indemnify you herein for any liability or loss that may arise in suit compliance with the said instruction.

Yours faithfully

For: Citigate Developers Ltd

Signed: Njama Wambugu.”

10. It was on the strength of this letter that the auctioneer took action to levy distress upon the defendant and in effect attempt to evict the defendant.

11. The defendant sought advice from his advocate who informed him there was no eviction orders against him lawfully so obtained from the court. The defendant did not vacate the premises on 25 August 2007. On 24 September 2007 Njama Wambugu the managing director tried and attempted to evict the said defendant with the assistance of the police. The said plaintiffs were unable to prove that they had lawful eviction orders from the court.

12. It was as a result of not having these orders that they filed this suit before this court seeking orders of injunction restraining the defendant from remaining on the premises on grounds that, they the plaintiffs, are the new owners. The prayers were very cleverly drafted as there is no prayer for vacant possession but for injunction.

II: The plaint

13. The plaint before court seeks three prayers.

13.1. A declaration that the defendant is not entitled to enter or use the plaintiff's property LR2250/31 Karen, Nairobi or do any building and improvements situated thereon.

13.2. An injunction to restrain the defendant whether by himself, his servants and or agents or otherwise from entering, using interfering with the plaintiff's quiet possession.

13.3. Damages for trespass.

13.4. Any other relief this court may deem fit and just to grant.

13.5. Interest on (a) (b) (c) and (d).

14. This plaint does not seek for vacant possession of the suit premises after lawful sale to the plaintiff by the bank.

15. The plaint and application for injunction describes the defendants as Charles Miring'u Kariuki and not John Miring'u Kariuki.

16. The defendant John Mirin'gu Kariuki had filed a suit in the magistrate's court being Chief Magistrates Court case number Commercial Courts Civil Suit 1320/07.

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Whereby prayers of declaration was sought that the defendant was never a tenant of the 2nd defendant. An injunction to restrain the present plaintiff and auction from levying distress and in order for goods to be refunded. He also sought general damages for wrongful attachment.

17. The rules require that under order VII r 1 (2) and (3) the plaintiff must state in their plaint that there are no other suits pending between the parties namely.

“1(1) the plaint shall contain the following particulars:-

a)

b)

c)

d)

e) An averment that there is no other suit pending, and that there have been no previous proceeding in any court between the plaintiff and the defendant over the same subject matter.”

2) The plaint shall be accompanied by an affidavit sworn by the plaintiff verifying the correctness of the averments contained in the plaint.

3) The court may of its own motion or on the application of the defendant order to be struck out any plaint which does not comply with suit rule (2) of this rule.”

18. The impression the plaintiff herein gave was that the suit premises was sold by private treaty. The defendant claims he was not aware of this. Instead of filing a suit upon the sale of the suit premises and seeking this courts orders for vacant possession the plaintiff unlawfully distress for rent and instructs an auctioneer to so distress. This indeed is irregular. The plaintiff allege the defendant is a trespasser. What one levy's is “mense profits” not rent. The plaintiff and auctioneer used the police to attempt to break in and levy distress. The Ripples case of appeal is very clear that in civil matter police officers are not to levy distress but court bailiffs. That the task of the police is only to supervise that there is no breach of the peace committed.

19. The defendant argues that the principles contained in the case law of Giella v Cassman Brown Co. Ltd (1973) EA 358 has not been established.

I would agree with this.

20. The plaintiff has misled the court by its pleading and application for injunction. Its in effect a mandatory injunction to evict the defendant from the premises without a lawful disclosure of the proper fact. Due process to require to be followed and has not.

III: Finding

21. I decline to grant orders of injunction on grounds of material non disclosure by the plaintiff.

22. That the description of the defendant is incorrect. That the existence of another suit in the subordinate courts requires first to be finalized.

23. I hereby dismiss the application for injunction. I hereby struck out to this suit under order VII r 1 (3) Civil Procedure Rules for non disclosure of the said existence of another suit and mis description of defendant.

24. That the principles under Giella v Cassman Brown (supra) had not been established.

25. I award damages to the defendant at Ksh.10,000/-. I award the cost of this application and suit to the defendants.

26. Parties are to proceed with CMCC 1320/07 at the subordinate courts Nairobi.

Dated this 16th day of October 2007 at Nairobi.

M.A. ANG'AWA

JUDGE

John Mburu & Company Advocates for the plaintiff/applicant

Onesmus Githinji & Co. Advocates for the defendant/respondent