



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

Civil Case 163 of 2007

PETER GICHORA MWAURA..... PLAINTIFF

VERSUS

JOSEPH WERU NDUNGO.....1ST DEFENDANT

HOUSING FINANCE COMPANY OF KENYA.....2ND DEFENDANT

RULING

This is an application seeking two primary orders in the alternative. The application is by the 1st defendant who seeks an order that the plaintiff pays to the 1st defendant rent for the suit premises being L. R. No.14225/122 Kahawa West Nairobi at KShs.20,000.00 per month pending the hearing and determination of this suit. Alternatively that the plaintiff be ordered to deposit into the 1st defendant's mortgage account No. ML.52186/104 the monthly loan repayment of KShs.22,052.00 in respect of the suit premises pending the hearing and final determination of this suit. The application is based on four grounds stated on the face of the application. The grounds are as follows:-

- (i) That the 1st defendant is currently the registered proprietor of the suit property.**
- (ii) That the 1st defendant is currently servicing a mortgage with the 2nd defendant over the suit property.**
- (iii) That the plaintiff has refused to vacate from the suit premises.**
- (iv) That the suit premises have been neglected by the plaintiff and are fast deteriorating to the detriment of the 1st defendant.**

The application is supported by an affidavit of the 1st defendant sworn on 24.7.2007. In opposition to the application is an affidavit sworn by the plaintiff on 30.7.2007.

Due to the nature of the application a little background information is necessary for a better understanding of the matter. The suit property has not always been registered in the name of the 1st defendant. It was previously registered in the name of the plaintiff. He charged the same as security for a financial facility granted by the 2nd defendant to the plaintiff. The plaintiff defaulted and the 2nd defendant sold and transferred the suit property to the 1st defendant. That prompted the plaintiff to institute this suit against the defendants praying for inter alia a declaration that the transfer of the suit

property to the 1st defendant by the 2nd defendant was done without notice to the plaintiff and should be revoked. The plaintiff further sought an injunction restraining the defendants from dealing with the suit property. Simultaneously with the plaint, the plaintiff filed an application by way of summons in chambers seeking an interlocutory injunction restraining the plaintiff's eviction from the suit property.

On being served with summons to enter appearance the 1st defendant filed his defence denying the plaintiff's claim and raised a counterclaim for inter alia a declaration that the sale and transfer of the suit property to him was legal and for the eviction of the plaintiff. Simultaneously with the defence and counterclaim, the 1st defendant lodged an application for inter alia an order that the plaintiff should be declared a trespasser and be evicted from suit premises. That application was heard by Warsame J and in a reserved ruling dated 10.7.2007 the Learned Judge dismissed the application expressing himself inter alia as follows:-

“In the premises, I do not sincerely think that the plaintiff is a trespasser on the suit premises. There is prima facie evidence to show that his right to enjoy quiet possession of the property has not been properly and validly extinguished. It means he is legally and properly in possession of the suit property as matters stand. I therefore think that the applicant's application dated 8.5.2007 is unmeritorious and is dismissed with costs to the plaintiff”.

The 1st defendant is back in court with the present application seeking the orders referred to above. In view of the background information given above, it is rather surprising that the 1st defendant would still seek the orders sought in an interlocutory application. To grant the said orders would in effect be a determination that the 1st defendant is lawfully and validly registered as the proprietor of the suit property. Yet that is precisely the challenge made by the plaintiff regarding the 1st defendant's registration as proprietor of the suit property. The 1st defendant is no doubt impatient that his investment is not yielding the returns he expected. His concerns are not unrealistic. But he cannot at the moment blame the plaintiff for his predicament. The plaintiff has in his favour the interlocutory findings of my Learned brother Warsame J referred to earlier in this ruling. Those findings were not conclusive and could not be definitive as the Learned Judge was considering an interlocutory application on the basis of affidavit evidence. Notwithstanding the interlocutory nature of the proceedings, the Learned Judge nevertheless held prima facie that the plaintiff's right to enjoy quiet possession of the suit property had not been properly and validly extinguished. He further found, again prima facie, that the plaintiff is legally and properly in possession of the suit property. That ruling has not been set aside or reviewed. The 1st defendant has not otherwise challenged the same in an Appeal to the Court of Appeal. I cannot as a Judge of concurrent jurisdiction at this interlocutory stage hold otherwise.

The 1st defendant has further sought an order that this suit be heard on priority basis. The plaintiff concurs. I see no reason why that aspect of the application cannot be granted.

In the end save for prayer 4 of the application the 1st defendant's application is dismissed. In view of the apparent conflicting interests of the parties, I order that the parties to this suit do conclude pre-trial procedures before the end of the current High Court session to pave way for a hearing of this suit on priority basis.

In view of the peculiar circumstances of this matter, I decline to award costs of the motion to either the plaintiff or the 1st defendant. The costs shall therefore be in the cause.

DATED AND DELIVERED AT NAIROBI THIS 19TH DAY OF NOVEMBER, 2007.

F. AZANGALALA

JUDGE

Read in the presence of:

Kangethe holding brief for Mungai for the applicant.

F. AZANGALALA

JUDGE

19/11/07