



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

Civil Case 533 of 2006

SIMON GATHUKU.....PLAINTIFF

VERSUS

JAMES NJUGUNA MWANKI.....DEFENDANT

RULING

The plaintiff brought this suit on behalf of Wilson Gichuhi Gachagwi and Peter Ndiba Kabaya pursuant to a power of Attorney registered as NO. P/A 42860/1 by way of plaint dated 23rd May 2006 and filed the same date.

The plaintiff sought judgment against the defendant for:

- (a) An order for vacant possession of LR NO. 4894/189 to the plaintiff.
- (b) Mesne profits
- (c) Costs of the suit and interest.

Simultaneously with the plaint the plaintiff brought a Chamber

Summons dated 23rd May 2006 under certificate of urgency seeking orders:

- (1) That this application be certified urgent and service of the same be dispensed with in the first instance.
- (2) That the defendant/respondent be ordered to render vacant possession of LR NO.4894/184 to the plaintiff/applicant.
- (3) That all persons currently occupying the said parcel of land LR NO.4894/184 be evicted forthwith with the assistance of the OCS Kasarani Police Station.
- (4) That costs be provided for.

The application is based on the ground that the said Wilson Gachuhi Gachagwi and Peter Ndiba Kabaya purchased the suit property from the Standard Chartered Bank Ltd. On 8th March 2002 in the exercise of

their mortgages statutory power of sale and a memorandum of sale was executed the same day between them and Dolphin Auctioneers, the Bank's Agents, that Wilson Gichuhi Gachagwi and Peter Ndiba Kabaya have caused the property to be registered in their names; that the defendant has no right to remain on the property, his equity of redemption having been extinguished at the fall of the harmer on 8th March 2002; that the defendant has

so far not challenged the sale of the suit property by public auction and that the defendant and his family are still living on the suit property.

The application is supported by an affidavit sworn by Simon Gathaku who has deponed on similar facts as those contained in the grounds above.

The applicant appeared before the Duty Judge on 23rd May 2006 who satisfied the application urgent and ordered that the defendant be served with the summons. Service was effected on 24th May 2006 and there is return of service. The order sought in this chamber summons if granted would amount to the grant of a major part of the relief claimed in the action. The plaintiff filed his suit on 23rd May 2006 and at the same time filed an application under certificate of urgency seeking orders similar to those sought in the main suit. If the court grants the order sought the defendant will be evicted from the suit premises.

This will be done without the court having the advantage of

Discovery. Such an application should be approached with caution and the relief granted only in a clear case. In Canadian Pacific Railway Vs. General [1949] 2 KB COHEN L J said at page 249:

"I entirely agree..... That the granting of a mandatory injunction on interlocutory relief is a very exceptional form of relief to grant, but it can be granted."

In the result I decline to order that the defendant be evicted from the suit premises. It is not proper to give a final order at this early stage without advantage of discovery.

The applicant had also prayed for an order that the defendant be evicted forthwith with the assistance of the OCS, Kasarani Police Station. To this, I would say that it is unlawful to utilize the police in a civil action for the purpose of effecting or aiding private evictions.

The police should never be involved in such matters as there is specific provision for the enforcement of injunctions under Order XXI Rule 28 of the Civil Procedure Rule. The prayer for the assistance of the police to evict the defendant is also declined.

The plaintiffs application is dismissed with no order as to costs.

Dated and delivered at Nairobi this 28th day of June, 2006.

J.L.A. OSIEMO

JUDGE