



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

Civil Case 61 of 2006

RACHAEL MUMBI KIGUNDA..... PLAINTIFF

VERSUS

HOUSING FINANCE COMPANY LIMITED.....1ST DEFENDANT

CRYSTAL VILLA LIMITED2ND DEFENDANT

RULING

The plaintiff claims to be the lawful Attorney of Salim M. Githiomi and Elizabeth W. Githiomi and has filed this suit seeking a permanent injunction restraining the 1st defendant from transferring and/or putting the 2nd defendant into possession of L.R. No.1870/111/70 – Nairobi. The plaintiff has pleaded in her plaint that at all material times the said Salim M. Githiomi and Elizabeth W. Githiomi have been the registered owners of the said property and the 1st defendant their chargee. She has also pleaded that sometimes in the year 2000 the 1st defendant filed HCCC No.1035 of 2000 seeking possession under the Mortgages (Special Provisions) Act cap 304 Laws of Kenya which suit was dismissed on 28.3.2001 and despite the said dismissal the 1st defendant has threatened to use extra-judicial means to take possession of the said property and put the 2nd defendant in possession of the suit property. The plaintiff has further averred that the 1st defendant having elected to exercise its rights under the provisions of the Mortgages (Special Provisions) Act the 2nd defendant can only be put into position by a Court Order.

Simultaneously with the filing of the plaint, the plaintiff lodged an application craving for an interlocutory injunctive and prohibitory relief expressed to be under the provisions of Order XXXIX Rules 1, 2 and 3 of the Civil Procedure Rules and all other enabling provisions of the law. The primary prayer is expressed as follows:

“That the 1st defendant be restrained by an order of this court from transferring and/or putting the 2nd defendant into possession of the suit property L. R. No.1870/111/70 until the hearing and determination of this suit.”

The primary reason for the application is that despite the dismissal of the 1st defendant’s suit seeking vacant possession of the suit premises in **HCCC No.1035 of 2000** the 1st defendant has issued a notice threatening to evict the plaintiff’s tenants and put the 2nd defendant into possession unlawfully.

On 22.2.2006, the plaintiff appeared ex parte before Ransley J and obtained an interim order restraining the 1st defendant from transferring and/or putting the 2nd defendant into possession of the suit property. The learned judge then ordered that the application be served and the same be heard inter partes on 15.3.2006. After several adjournments the application came up before me on 15.6.2006 for hearing.

The plaintiff has supported her application by her own affidavit which has recited the averments in the plaint. Annexed to the affidavit are two exhibits one of which is the ruling in **HCCC No.1035 of 2000**. The application is opposed and the 1st defendant has filed a replying affidavit sworn by one Joseph Kania the 1st defendant's Manager, Legal Services. Annexed to that affidavit are several exhibits including a consent order filed in **C.A. No.126 of 2001**. The appeal was against the judgment of the High Court in **HCCC No.1035 of 2000**. The 1st defendant has also exhibited a copy of a Grant in respect of the suit property. The 1st defendant has also filed a defence to the plaintiff's claim. The 1st defendant has averred **inter alia** that the issues now raised by the plaintiff in her plaint have already been litigated upon between the 1st defendant and the said Salim M. Githiomi and Elizabeth W. Githiomi and the same have been settled. The 1st defendant has also averred that the suit property is not registered in the names of the said Salim M. Githiomi and Elizabeth W. Githiomi and further that the 1st defendant is not a chargee thereof. The 1st defendant has further sworn a supplementary affidavit by the same Joseph Kania which further elaborates the 1st defendant's position taken against the plaintiff's claim.

The 2nd defendant has filed Grounds of Opposition. The main ground is that the plaintiff's application is intended to circumvent the orders given in **HCCC No.272 of 2005**. The suit and application are therefore ***res judicata***.

This being an application for a temporary injunction, I will consider it in the light of the known principles applicable which principles were laid down in the rule making case of **Giella –vs – Cassman Brown & Co. Ltd & Another [1973] E.A.358**. The principles are as follows:- First the applicant must show a prima facie case with a probability of success at the trial but if the court is in doubt it should decide the application on a balance of convenience. Secondly, normally an interlocutory injunction will not be granted unless the applicant would suffer an injury which cannot be compensated in damages.

So has the plaintiff met those conditions for the grant of interlocutory injunctive relief? From the material on record and the submissions of counsel, I think not. Firstly the plaintiff has purported to institute these proceedings as the lawful attorney of Salim M. Githiomi and Elizabeth W. Githiomi. Yet she has not exhibited the Power of Attorney giving her authority to sue. Secondly, she has alleged that at all material times the said Salim M. Githiomi and Elizabeth W. Githiomi have been the registered owners of the suit property. Yet the 1st defendant's exhibit JK9 shows that LR No.1870/111/70 the suit property was on 30.1.2006 transferred to the second defendant and the 1st defendant has no interest therein. Of greater importance however, is the fact that the said Salim M. Githiomi and Elizabeth W. Githiomi are no longer the registered proprietors of the property. For an applicant to be entitled to the equitable remedy of injunction he should show that his legal right is in danger of being violated by the unlawful acts of another party. In the case at hand, the plaintiff is purporting to act as an Attorney of the said Salim M. Githiomi and Elizabeth W. Githiomi who as at the time of filing this suit had no interest registered against the suit property. They therefore had no legal right to protect. These findings in my view are sufficient to dispose of this application. There are other findings that show on a prima facie basis that the plaintiff's basis for seeking relief is fallacious. The foundation of the plaint and application is the Ruling of my Learned brother Khamoni, J. in **HCCC No.1035 of 2000**. That ruling was on an application by the 1st defendant herein who was the plaintiff in that case. The 1st defendant sought the eviction of the Githiomis and delivery of possession of the suit property. The Learned Judge dismissed both the application and the entire suit. The 1st defendant appealed to the Court of Appeal in **Civil Appeal No126 of 2001**. In that Court the parties by consent recorded that **“the matter be and is hereby marked as fully settled.”** That was on 31.8.2005.

Subsequently, on 20.1.2006, in **HCCC No.272 of 2005** the 1st defendant and the Githiomis recorded

the following order by consent:-

“That the High Court Registrar be and is hereby ordered to execute the SURRENDER and the REPLACEMENT CHARGE in respect of LR. No.1870/111/70 and any other documents that may be required to be executed by SALIM MWARANGU GITHIOMI and/or ELIZABETH WANJIRU GITHIOMI in relation thereto.”

It would appear that pursuant to that consent order, in addition to the Surrender and Replacement Charge, the following documents were registered against the suit title: A reconveyance of Mortgage and a transfer by chargee in favour of the 2nd defendant. The Transfer by Chargee was registered on 30.1.2006.

The plaintiff has not challenged the transfer by chargee to the 2nd defendant. Indeed in her plaint she gives the impression that the suit property is registered in the names of the said Salim M. Githiomi and Elizabeth W. Githiomi and that the 1st defendant intends to transfer the same to the 2nd defendant and put it in possession. Is it not the case of attempting to lock the staple when the horse has bolted?

In these premises, I find that the plaintiff has not shown a prima facie case with a probability of success at the trial. I need not address my mind to the other conditions for the grant of an interlocutory injunction. The application is dismissed with costs to the defendants.

Orders accordingly.

DATED and DELIVERED at NAIROBI this 11th day of July 2006.

F. AZANGALALA

JUDGE

11.7.2006

Read in the presence of:-