

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

Civil Case 685 of 2006

MADINA AMIR MOHAMED.....PLAINTIFF

VERSUS

KITAVI INVESTMENTS CO. LTD.....DEFENDANT

RULING

The plaintiff purchased the suit property LR NO.NAIROBI/90/566 situate at Loresho in Nairobi through public auction pursuant to a transfer by a Chargee –Cooperative Bank of Kenya Ltd) in the exercise of its statutory power of Sale dated 31st March 1996 in consideration of the sum of Shs.8,600,000/=. The property was purchased without vacant possession as the defendant was in occupation and continued to occupy the suit property without the authority or consent of the plaintiff.

The plaintiff by way of this plaint filed this suit against the defendant and sought an order of eviction directed to the defendant, his agents, servants or employees from the suit premises. He prayed for judgment for a mandatory injunction to compel the defendant whether by its agents, servants employees, tenants or otherwise to forthwith vacate the suit premises.

Filed simultaneously with the plaint under Certificate of Urgency was a Chamber Summon seeking similar orders as those sought in the plaint pending the hearing and determination of the suit.

On 12th July 2006 the defendant filed Notice of Preliminary Objection based on the ground that the plaintiff's suit and application are misconceived and bad in law and without prejudice to prayer 1 above, the plaintiff's application is incompetent and bad in law and cannot issue.

Although the notice did not disclose the point of law upon which this Preliminary Objection is raised it came out during the submissions. Mr. Mutuli counsel for the defendant submitted that the plaintiff has come to court by way of a plaint instead of an Originating Summons under Order XXXIX Rule 3(f) and this makes the suit as well as the application incompetent as the same seeks a mandatory injunction.

Mr. Oriaro in opposing the Preliminary Objection submitted that the Preliminary Objection is misconceived and that the suit commenced by way of a plaint is properly before this court.

A Preliminary Objection consists of a point of law which has been pleaded or which arises by clear implication out of pleadings, and which if argued as a Preliminary Point may dispose of the suit i.e. an objection to the jurisdiction of the court, or a plea of limitation or a submission that the parties are bound by the contract giving rise to the suit to refer the dispute to arbitration.

The orders sought by the plaintiff is eviction whereby evidence is required to establish the claim. A Preliminary Objection is raised purely on a point of law with an assumption that facts are admitted.

The plaintiff claims that he purchased the suit premises and the same is registered in his name and the defendant is a trespasser and all that he wants is an order for eviction. This suit brought by way of a Plaint is properly before this court.

The defendant's Preliminary Objection has no merit and the same is dismissed with costs to the

plaintiff.

Dated and delivered at Nairobi this 19th day of September 2006.

J.L.A. OSIEMO

JUDGE