



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

Civil Case 1295 of 2003

INTRA AFRICA ASSURANCE COMPANY LTD PLAINTIFF

VERSUS

PETER OKINYI OKERI.....DEFENDANT

RULING

By chamber summons dated 05.07.04 and filed on 06.07.04 brought under Order XXXIX rules 1 and 2 of the Civil Procedure Rules and section 3A of the Civil Procedure Act (Cap.21), the defendant applied for the following substantive orders:-

'b. That a mandatory injunction do issue to compel the plaintiff by its officers, servants or agents and in particular M/s Lifeline Traders, Auctioneers to return and restore motor vehicle registration number KAM 962 F Peugeot 405 seized on 26.6.04 in purported distress for rent to the possession custody and control of the defendant.

c. That an injunction do issue to restrain the plaintiff by its officers, servants and agents from evicting, removing, harassing or otherwise howsoever interfering with the defendant's occupation, possession and quiet enjoyment of all that property known as L.R. Number 330/843 (House No.21), Gitanga Hill Court, Nairobi and from selling, leasing, transferring or otherwise interfering with the defendant's interest in the same pending the hearing and determination of this suit or until further orders.'

The grounds upon which the application is based are:-

1. That this application is extremely urgent and any delay would defeat the object for which the orders are sought.
2. That the applicant has a strong *prima facie* case on his counter claim with preponderate chances of success.
3. That the plaintiff has through its agents or servants acted in blatant violation of the law and violated the applicant's rights.
4. That the applicant stands to suffer grave and irreparable loss incapable of monetary compensation.

5. That the balance of convenience tilts in favour of grant of orders sought.
6. That the interests of justice would be served by the grant.

The application is supported by the defendant's affidavit sworn on 05.07.04. There is also a subsequent supplementary affidavit in support of the application sworn by the defendant on 03.06.05

When the application came up for hearing before me, the defendant/applicant was represented by learned counsel, Mr P.O. Kiage while the plaintiff/respondent was represented by learned counsel, Mr. J.M. Thiga.

Plaintiff's/respondent's counsel drew attention to the fact that there was also coming up for simultaneous hearing the plaintiff's earlier chamber summons application dated 10.12.03. The chamber summons dated 10.12.03 applied for the following substantive orders:-

- '3. That the defendant/respondent through himself, his servants or agents and/or successors in title be evicted from L.R. No.330/843 (House No.21), Gitanga Hill Court, Nairobi.**
- 4. That this honourable court do issue an order authorizing the applicant through the assistance of the Commissioner of Police to forcefully evict the defendant/respondent through himself, his servant or agent and/or successors in title from L.R. No.330/843 (House No.21) Gitanga Hill Court, Nairobi.'**

This application by the plaintiff is premised on the plaintiff's plaint dated 10.12.03 vide which the plaintiff prayed for:

'A permanent injunction restraining the defendant whether by himself, his servants or agents from remaining on or continuing in occupation of all that parcel of land known as L.R. No.330/843 (House No.21), Gitanga Hill Court in Nairobi owned by the plaintiff herein.'

The plaintiff also sought general damages and costs vide his suit.

In response to the plaintiff's aforesaid plaint, the defendant did on 01.07.04 file a defence and counter-claim dated the same day. Paragraphs 4 and 6 of the defence state:

- '4. Further to the foregoing, the defendant asserts that his entry into the property was pursuant to a purchase of the same for valuable consideration and his continued occupation thereof stems from his clear purchaser's title thereto.**
- 6. Further to the foregoing, the defendant purchased the said property while in an incomplete state and a substantial part of the purchase price was employed by the plaintiff's agents and/or servants for doing works to complete the same and render it habitable and the plaintiff is therefore estopped from denying the defendant's title and entitlement to the property.'**

The defendant's counter-claim include the following paragraphs:

- '9. The defendant has paid to the plaintiff's agent or servant, acting under the plaintiff's express or ostensible authority, the sum of Kshs.5,535,000/= being the agreed purchase price for all that property known as LR No.330/843 (House No.21) Gitanga Hill Court in Nairobi and has taken possession pursuant to the sale transaction.**
- 10. Despite the payment aforesaid, a substantial part whereof was used to complete and render the house fit for habitation, coupled with the plaintiff's (sic) occupation of the same as a purchaser for value in possession, the defendant (sic) has wrongfully and unlawfully failed, refused and/or neglected to transfer the property to the defendant and has, moreover, purported to deny his entitlement thereto and to interfere with his quiet enjoyment thereof.**

11. The plaintiff has also unlawfully, and mischievously purported to christen the defendant as a tenant and to purport to levy distress for rent by instructing a firm of auctioneers to seize and wrongfully attach the defendant's motor vehicle KAM 962 F when no landlord and tenant relationship exists, has ever existed or can exist between the parties herein in the circumstances.'

According to the defendant, he negotiated for purchase of the suit premises with one Joseph Siro Moisoma, Managing Director of ECON CONSTRUCTION AND ENGINEERING LTD as agent of the plaintiff and, in essence, that he (defendant) validly purchased the suit premises and is lawfully in occupation thereof. The plaintiff company denies any agency relationship between itself and Moisoma of Econ Construction and Engineering Ltd. Among other things, the plaintiff company has drawn attention to a letter of 17.01.04 ascribed to the defendant in which the defendant is recorded to have stated, *inter alia*, as under:

'After studying the documents and serious reflection, I am of the opinion that the above property (LR 330/843 House 21 Gitanga Hill Court) belongs to you and it won't be beneficial to me to contest the matter in court.'

It seems to be the plaintiff's contention that the defendant had conceded the plaintiff's ownership of the suit property. The defendant's explanation is to the effect that he drew that conclusion in a hurry, out of confusion and without the benefit of legal advice and that, following getting legal advice, he has recanted that conclusion.

Regarding the plaintiff company's denial of Joseph Siro Moisoma as its agent, the defendant has drawn attention to a letter dated 17.07.03 addressed by the plaintiff company to the said Moisoma at Kin Holdings Ltd seeking clarification from him regarding a draft agreement for the sale of the suit property. In the letter, the plaintiff company, *inter alia*, questioned Moisoma as to why his initial offer of 14.08.01 for the property remained the same in 2003. It appears to be the defendant's case that the plaintiff's denial of Moisoma as its agent is an afterthought.

I have recorded the above highlights of the parties' respective contentions to illustrate that there are serious contentious issues involved in this case. These include the following:-

- a) Is there agency relationship between the plaintiff company and Joseph Siro Moisoma apparently of Econ Construction and Engineering Ltd and also of Kin Holdings Ltd such as for the said Moisoma to have entered into a valid agreement of sale of the suit property to the defendant on behalf of the plaintiff company?
- b) Does the doctrine of estoppel apply with regard to the alleged agency relationship between the plaintiff company and Moisoma, or with regard to the defendant's alleged concession of the plaintiff's ownership of the suit property?
- c) Is there a landlord and tenant relationship between the plaintiff company and the defendant such as to warrant the distress for rent complained by the defendant?

Having given anxious consideration to the two applications before court, I am of the respectful view that the applications raise weighty issues, as the above three examples illustrate, and that the said issues cannot be comprehensively addressed and determined at this interlocutory stage on the affidavit evidence on record. It will be necessary for the affidavit evidence to be supplemented by oral evidence, at least in cross-examination. I find that no *prima facie* case has been made out to warrant the granting of the orders sought in the chamber summons applications dated 05.07.04 and 10.12.03. Accordingly, both applications are dismissed. Status quo to be maintained. Let the parties take a date at the Registry for the hearing of the main suit. Costs shall be in the cause.

Orders accordingly.

Delivered at Nairobi this 12th day of October, 2006.

B.P. KUBO

JUDGE