



**REPUBLIC OF KENYA**

**IN THE HIGH COURT OF KENYA AT ELDORET**  
**Civil Case 68 of 2006**

**GRACE WANJIKU KAMAU:.....PLAINTIFF**

**VERSUS**

**FRANCIS MBEGA NJUGUNA:.....DEFENDANT**

**RULING**

The Plaintiff in this application seeks the following orders against the Defendant that:-

- a) Service of this application be dispensed with in the first instance pending the hearing of this application.
- b) Pending the hearing of this application the Defendant be and is hereby restrained from collecting rent or leasing that property known as Eldoret Municipality/Block 15/450 and that all rent be paid to court or a bank account as to be opened at the court's direction.
- c) Pending the hearing and determination of this suit the Defendant be and is hereby restrained from collecting rent or leasing that property known as Eldoret Municipality Block 15/450 and that all rent be paid to the court or a bank account to be opened at the court's direction.
- d) This Honourable court be pleased to consolidate this suit with Eldoret H.C.C.C.No.5 of 2006 (O.S).
- e) The Tenants at the premises be served with the order of court for due compliance.
- f) Costs be provided for.

The applications is made under the provisions of Order 39, Rule 1 and 2 and Order II, Rule (1) of the Civil Procedure Rules. This court had heard and determined a previous application in H.C.C.C.No. 5 of 2006 (O.S). As a result, the plaintiff abandoned prayer (d) herein for consolidation. The only prayers that remained for determination were prayers ( c ), (e) and (f), above.

The suit property was previously owned by and registered in the name of the Defendant. In the course of 1997, the Defendant obtained a loan from Delphis Bank Limited, the predecessor of Oriental Commercial Bank Limited, the First Defendant in H.C.C.C.No.5 of 2006 (O.S). The said Bank in exercise of its power of sale as chargee caused a public auction to be held on 2<sup>nd</sup> December,2005. The plaintiff claims that she was the successful purchaser at the said public auction. As a result, the suit property was transferred to her by the Bank. The Transfer was registered on 11<sup>th</sup> January,2006 and a certificate of Lease issued to her on the said date.

It is on this basis that the plaintiff has filed this suit in which she seeks an eviction order against the

Defendant and the refund of all rents collected from 2<sup>nd</sup> December,2005 until the delivery up of possession or judgement in her favour. In the meantime, the plaintiff wants this court to restrain the Defendant from collecting rent or leasing the suit property.

The Defendant opposes the suit herein inter alia, on the following grounds which are set out in his Defence:-

1. That the suit property herein was advertised sold and transferred to the plaintiff in circumstances of fraud and the Defendant has challenged the same in court through H.C.C.C.No.5 of 2006 (O.S.).
2. That the conveyance giving rise to the plaintiff's title is subject to pending litigation.
3. That the earlier suit ought to be determined before the later one can be allowed to proceed. Accordingly the institution of this suit offends the provisions of section 6 of the Civil Procedure Act.

Apart from the contents in the Defence, the Defendant opposed the application by the plaintiff on, inter alia, the grounds that:-

1. The orders sought by the plaintiff are premature on the basis of the pending and earlier suit.
2. The application is misconceived as it seeks to obtain orders against persons who are not parties to the suit without hearing them.
3. The application seeks far reaching orders which can only be obtained after taking of evidence.

I have considered the application, Replying affidavit and submissions by both counsel. As this application seeks interim injunctive orders, I shall be guided by the principles laid down by the court of Appeal in **GIELLA –V- CASSMAN BROWN LTD 1973, E.A 358**. These are that:-

1. An applicant must show a prima facie case with a probability of success.
2. An injunction will not be normally be granted unless the applicant might otherwise suffer irreparable injury.
3. When the court is in doubt, it will decide other application on a balance of convenience.

The Plaintiff today is the registered owner of the suit property. She bought the suit property in a public auction held by a chargee. The said sale or transfer to the Plaintiff has been challenged in the previous suit. No evidence was placed before this court that the plaintiff is a party in the said previous suit. It was pointed to this court that as a result of a ruling by this court in the said previous suit, consolidation is not possible or necessary through this suit.

The Defendants in the previous suit includes the chargee, the Bank. In the absence of evidence to prove that the plaintiff is a party in the earlier suit, I do not see how the provisions of Section 6 of the Civil Procedure Act can be applied to this case. For this court to terminate or stay this proceedings the plaintiff must be involved in the previous suit and be a party. That is not the case here. The Defendant has not applied for a stay of these proceedings which would have been a basis of effectually staying the subsequent suit on the basis of section 6.

The Defendant has not filed any counterclaim against the plaintiff in this suit to sustain the allegations of fraud against the plaintiff. The allegation of fraud have not been particularized as required by Law. In the absence of any counterclaim seeking the revocation and/or cancellation of the title of the plaintiff, I do not see how the Defendant can succeed in this suit.

I do therefore, hold that the Plaintiff's suit herein which is essentially one by the registered owner of the property for orders of eviction discloses a prima facie case with a probability of success. This meets the

first requirement of the **GIELLA** case.

The second question that I must ask myself is whether the plaintiff is likely to suffer loss or injury if the orders are not granted which cannot be compensated in damages? The suit property is for now, at least, the property of the plaintiff. She is entitled to exercise all propriety rights including the just income there from. The right to income in this case, rent is, in the absence of any other lawful restriction, the inalienable right of the owner of immoveable property. The Defendant has not established or set up any basis for restriction of this right. The question of the amount of rent or its ascertain ability for purposes of compensation does not arise in the circumstances.

In my view, it is not the denial of the rent or income which is in question here. It is the legal right of an owner of property which is in question here. To be denied the right to use and abuse your property within the realms of the Law is a loss that cannot be compensated by damages. This is particularly so where the person causing the injury or loss in doing so in total violation of the law. At the moment the Defendant has not shown that he has any reversionary interest in the suit property as there is no counterclaim against the plaintiff in this suit. The plaintiff is also not a party in the earlier suit.

In the premises, the plaintiff must succeed as she has shown that she meets the contemplation of the first two limbs of the **GIELLA** case. With regard to the allegations that the orders sought will affect persons who are not parties to this suit, the Defendant has not been able to identify such parties or persons who may adversely be affected and who are entitled to be enjoined in this suit as far as the plaintiff's application is concerned. In the application before this court, the plaintiff does not seek the eviction of the tenants. This is a matter that may arise at the trial depending on who is in occupation of the suit premises at the said time and what the judgment will be.

At this stage, I believe, that the Tenants have Laws which protect their rights and the plaintiff shall apply due process in dealing with them. The tenants have not challenged the plaintiff's title in this suit and they will be bound by the orders of this court.

In conclusion I do hereby allow the application in terms of prayers (c), and (e). The Tenants in the suit property shall henceforth pay all their respective rents for the premises they have leased or occupy on Eldoret Municipality Block 15/450, into an **ESCROW ACCOUNTS** in the Joint names of the plaintiff's and Defendant's Advocates. The said account and monies therein shall not be released, and shall be held in trust and to the orders of this court pending the hearing of this suit or upon further orders of the court. The account shall be opened forthwith. The costs of the application shall be paid by the Defendant

In the event the Defendant's advocates shall not co-operate with the Plaintiff's advocates in opening of the Account within period of seven (7) days, the plaintiff shall be at liberty to apply. In the intervening period in such eventuality, the Tenants shall deposit all due rents with the High Court of Kenya at Eldoret until further orders.

Orders accordingly.

**DATED AND DELIVERED AT ELDORET THIS 27<sup>th</sup> DAY OF NOVEMBER,2006**

**M.K. IBRAHIM**

**JUDGE**