



REPUBLIC OF KENYA
IN THE HIGH COURT OF KENYA
AT NAKURU

Civil Case 78 of 2006

JANE C. CHEPKWONY.....PLAINTIFF

VERSUS

BETTY CHEPNGENO NGENY.....DEFENDANT

RULING

The plaintiff/applicant is the registered owner of a parcel of land known as number 631/232 Kericho Municipality (hereinafter referred to as “*the suit premises*”). The defendant was residing in the suit premises as a tenant before the plaintiff purchased the same. On purchasing the suit premises, the plaintiff requested the defendant to pay her rent but the defendant failed to do so. The plaintiff then requested the defendant to vacate the house which she was occupying in the suit premises but she refused. The plaintiff stated in her plaint that the defendant was now making attempts to fraudulently acquire the suit premises and dispossess her of the same. The defendant was also unlawfully constructing a house on the suit premises. In her plaint, the plaintiff prayed for an order of vacant possession and/or eviction of the defendant from the suit premises, mesne profits and costs of the suit.

Together with the said plaint, the plaintiff filed an application by way of chamber summons brought under **Order XXXIX rule 1, 2 and 3** of the **Civil Procedure Rules** and **Section 3A** of the **Civil Procedure Act**. She sought a temporary injunction to restrain the defendant from constructing or continuing with any construction work on the suit premises pending the hearing and determination of the suit.

Before the said application was heard, the defendant filed a preliminary objection and stated that the application was incompetent, bad in law as it contravened the provisions of the **Civil Procedure Rules**. She prayed that it be struck out with costs.

Mr. Akang’o for the defendant submitted that if an application was brought under **Order XXXIX rule 2**, there has to be a prayer for a permanent injunction in the plaint. Such prayer was not there in the plaint that is on record and therefore the order sought could not issue.

He further submitted that although the application was expressed to have been brought under **Order XXXIX rules 1, 2 and 3**, rule 1 was not applicable because it had not been shown in the plaint that the property in dispute was in risk of alienation or was likely to be sold in execution of a decree or that the defendant was threatening or intending to dispose of the property in circumstances affording reasonable probability that the plaintiff will or may be obstructed or delayed in the execution of any decree that may be passed against the defendant in the suit as provided by **rule 1(a) and (b)**. He sought to rely on the

decision of Ringera J, as he then was, in ***KIHARA VS BARCLAYS BANK (K) LTD [2001]2 EA 420***. In that decision, it was held that when an application is brought under any of the sub-rules of **Order XXXIX**, under **rule 1** of the **Civil Procedure Rules**, there is no requirement that a suit in which the temporarily injunction is sought must be one which itself seeks any restraining orders but where the application is brought under **Order XXXIX rule 2**, it is an express requirement that the suit in which the injunction is sought must be one for restraining the defendant from committing a breach of contract or committing the tort complained of.

Mr. Gai for the plaintiff opposed the said preliminary objection. He submitted that the plaintiff's application was proper in law as the property in question was being wasted by the defendant. He added that the defendant was putting up houses on the plaintiff's parcel of land. In his view, therefore, the orders sought could be issued as **rule 1** of **Order XXXIX** provided for such a scenario as was obtaining in the dispute before the court. He further submitted that the preliminary objection was unwarranted and was not brought in good faith.

I have carefully considered the submissions by counsel with regard to the aforesaid preliminary objection. The suit premises are registered in the name of the plaintiff. There is a Grant that was annexed to the plaintiff's affidavit as annexure '**JCC1**' and it clearly shows that the plaintiff was registered as the proprietor thereof on 16th August 2001. She purchased the same at a consideration of Kshs.800,000/- as shown in the transfer dated 10th August 2001 which is also annexed to her affidavit. It has not been shown that she acquired the property fraudulently. There is no dispute that the defendant has been in occupation as a tenant since 1993. She was paying monthly rent of Kshs.4,500/- to the County Council of Kipsigis. From the replying affidavit on record, the defendant is alleging that the property had not been properly and lawfully transferred to the plaintiff and the Clerk to the said County council had informed her that she was at liberty to apply to be allocated the suit premises and she had already done so. It is evident that the defendant is doing her best to dispossess the plaintiff of the said property. The County Council of Kipsigis is not a party to this dispute and the plaintiff's ownership of the suit property has so far crystallised. The defendant had started construction of a house on the suit premises but was stopped by an order of this court from continuing with the said construction. In my view, therefore, there is **prima facie** evidence that the property in dispute is in danger of being wasted, damaged or alienated by the defendant. Whether that is actually so can only be determined once the application has been heard and decided. In the circumstances, I am satisfied that the application before the court is properly brought pursuant to the provisions of **Order XXXIX rule 1** of the **Civil Procedure Rules**. **Rule 2** thereof is not applicable. I therefore dismiss the preliminary objection with costs to the plaintiff.

DATED, SIGNED and DELIVERED at Nakuru this 17th day of November, 2006.

D. MUSINGA

JUDGE

Ruling delivered in open court in the presence of Mr. Oira holding brief for Mr. Akango for the defendant and Miss Waruhiu holding brief for Mr. Gai for the plaintiff.

D. MUSINGA

JUDGE