

REPUBLIC OF KENYA
IN THE HIGH COURT OF KENYA
AT NAIROBI (NAIROBI LAW COURTS)
Civil Suit 929 of 2004

DOROTHY WANGARI NDERI1ST PLAINTIFF

EDWARD NDERI MARINE2ND PLAINTIFF

LUCY WANJIRU MARINE.....3RD PLAINTIFF

VERSUS

HABIB BANK LIMITED.....1ST DEFENDANT

JOSEPH MURIITHI MWANGI2ND DEFENDANT

RULING

- (1) The Plaintiffs are the Administrators of the estate of their late father, Alfred Marine Nderi (“**the deceased**”) who died in 1995. He was the registered owner of a property known as L.R No. 4480/149 Ngong, Kajiado District (“**the suit land**”). On the 24th April 1985, the deceased charged the suit land to Habib Bank Ltd., the First Defendant (“**the Bank**”), to secure the repayment of the sum of K.shs.1,500,000/= lent to him by the Bank.
- (2) At the time of his death, the deceased had not repaid the debt. After issuing the necessary notices, the Bank exercised its statutory power of sale and instructed an Auctioneer to sell the suit land by public auction. The auction was held on the 3rd September 2004 and the suit land was sold to Joseph Muriithi Mwangi, the Second Defendant, who is now the registered proprietor.
- (3) On the 2nd September 2004, the Plaintiffs sued the Bank and sought an injunction restraining the Bank from selling, disposing of or interfering with the suit land. The Plaintiffs’ Advocate amended the Plaintiffs’ Plaint on the 30th September, 2004, to add Joseph Muriithi Mwangi, as Second Defendant. The relief sought against the Second Defendant remained as in the original Plaint.
- (4) More than two years since the Plaint was filed, the Plaintiffs’ Advocates have taken no steps to serve the summons on the Defendants. The consequence of that is that neither Defendant has filed a defence in the suit. But in the meantime, the Plaintiffs have resorted to acts of intimidation and harassment against the Second Defendant to evict him from the suit land. It is for that reason that the Second Defendant filed this Chamber Summons on the 11th January 2006 and asked for a restraining order against the Plaintiff.
- (5) In the supporting affidavit, the Second Defendant depones, *inter alia*, that he brought the suit land at a public auction for K.Sh.5,000,000/=; that he is the legal owner for which claim he has exhibited an abstract of title; and that he is being harassed by the Plaintiffs.
- (6) The replying affidavit dated the 20th January 2006 was sworn by Dorothy Wangrai Nderi, the First Plaintiff. She denies the Second Defendant’s ownership and claims that her attempts to carry out a search at the Lands Office have been unsuccessful because the relevant file cannot be traced. There is no averment in that affidavit that the debt had been repaid in full before the Bank exercised its statutory

power of sale. Nor does she dispute the fact that the Second Defendant bought the suit land at a public auction.

(7) As I have already pointed out, no defences have been filed in this case. It is not the fault of the Defendants because the Plaintiffs have apparently refused to serve them with the summons. So at this stage, I cannot tell what the Second Defendant's defence to the claim is except, of course, what he states in the various affidavits. The acts of harassment and intimidation constitute serious trespass and interference with the Second Defendant's right of ownership. Since he is being deliberately obstructed by the Plaintiffs from filing a defence in this suit in which he can, if so advised, raise a counterclaim against the Plaintiffs, his best bet would be to institute a separate suit and apply for appropriate reliefs.

(8) Much as I sympathize with the Second Defendant's plight, I cannot grant the injunction sought in the Chamber Summons dated and filed on the 11th January 2006 because there is not pleading in this suit upon which I can do so. It is with considerable regret, therefore, that I have to order that the application be and is hereby dismissed. I make no order as to costs.

Dated and delivered at Nairobi this First day of December 2006

P. Kihara Kariuki

Judge