



REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA
AT NAIROBI (MILIMANI COMMERCIAL COURTS)

Civil Case 359 of 2004

JOYCE MUKUHI NJENGA.....
.....PLAINTIFF

-V E R S U S-

EQUITY BUILDING SOCIETY.....1ST
DEFENDANT

PATRICK KUNG'U KIMATA t/a

MARCHET AUCTIONEERS.....2ND
DEFENDANT

AGNES WANJIRU MUCHAI.....3RD
DEFENDANT

R U L I N G

By a notice of motion dated and filed in court on 14th March, 2005, the applicant moves the court for orders-

1. THAT a mandatory injunction do issue compelling the defendants to restore possession of the property known as L.R. NO. 209/10679/9 to the plaintiff and to return all the doors thereto removed on 28th February, 2005.
2. THAT costs of this application be provided for.

The application is expressed to be brought under S.3A of the Civil Procedure Act, S.52 of the Transfer of Property Act, and all the enabling provisions of the law. It is based on the grounds that-

- (a) On 28th February, 2005, the defendants employed hooligans who evicted the plaintiff from the suit property by removing all the doors thereto and throwing out the personal effects of the plaintiff's tenant who was in occupation of the suit premises.
- (b) Such eviction was without the sanction of the court and the defendant's actions in evicting the plaintiff are illegal and amount to self help.
- (c) The actions by the defendants were contrary to the statutory provisions of S.52 of the

Transfer of Property Act.

(d) The conduct by the defendant should not be countenanced by this Honourable Court of Justice as the defendants have basically taken the law into their hands.

(e) It is in the interest of justice that the orders sought herein be granted.

It is also supported by the annexed affidavit of JOYCE MUKUHI NJENGA, the applicant.

In opposition to the application, the 1st respondent filed grounds of opposition to the effect that the application is devoid of merit, an abuse of court process and a waste of court's time; the applicant is devoid of *locus standi*; and that there is no issue of ownership of the suit property pending before the court.

The facts of this matter are not in dispute. The plaintiff borrowed some money from the 1st defendant. The debt was secured by a charge over the plaintiff's parcel of land Ref. No.209/10679/9 on which stands a residential house. Upon the plaintiff's failure to repay the loan, the 1st defendant instructed the 2nd defendant, who are a firm of auctioneers, to realise the security by sale of the property by public auction. The third defendant purchased the property at the public auction. Thereafter the plaintiff filed action alleging, *inter alia*, that the sale of the property was null and void. Contemporaneous with the plaint commencing the action, the plaintiff also applied for restraining injunctions. On 5th July, 2004, this court granted temporary injunctions restraining the defendants from evicting the plaintiff or otherwise taking possession of the suit property, and from completing the sale and transfer of the charged property pending the hearing and determination of the application.

When the application came for hearing on 21st February, 2005, the 1st and 2nd defendants raised a preliminary objection along the grounds that the plaintiff's equity of redemption was extinguished upon the sale of the property by public auction and, consequently, the plaintiff had no longer any proprietary interest in the suit property which can be protected by the equitable remedy of injunction. Furthermore, pursuant to the transfer of the suit property to the purchaser, the purchaser's title was unimpeachable and the plaintiff's remedy, if any, lies in damages. On 25th February, 2005, the court upheld the preliminary objection, dismissed the plaintiff's application, and discharged the temporary orders granted on 5th July, 2004.

Three days after the court's ruling, i.e. on 28th February, 2005, "**the defendants**", according to the plaintiff, "**employed hooligans who evicted the plaintiff from the suit property by removing all the doors thereto and throwing out the personal effects of the plaintiff's tenant who was in occupation of the suit premises**" as paragraph (a) of the grounds upon which the application is based. This allegation is not denied. It amounted to a forceful eviction of the plaintiff. Arguing the application for the applicant, Mr. Wanjohi submitted that S.52 of the Transfer of Property Act was applicable to this matter, and that under that section, the eviction could only be done with the authority of an order from the court. He referred the court to **BELLE MAISON LTD. v. YAYA TOWERS LTD.**, HCCC NO.2225 of 1992 and submitted that the defendants should be compelled by a mandatory injunction to follow the law.

Opposing the application, Mr. Mamicha for the respondent submitted that the applicant had contradicted herself severally in her affidavits, consequent whereupon her hands were unclean and therefore she was not a suitable person to approach a court of equity. He further submitted that no law had been breached as the applicant cannot protect by injunction rights which she does not have; that there was no question of immovable property being in issue after the ruling of 25th February, 2005, and that the only issue was how much damages should be awarded. Counsel's parting shot was a rhetorical question – a mandatory injunction pending what? The applicant has no proprietary rights.

In reply, Mr. Wanjohi said that there is still a suit pending between the parties and the defendants should have followed S.52 rather than take the law into their own hands.

After considering the rival submissions of both counsel, I note that the application for a temporary injunction pending the hearing of the case was dismissed. I further note that the grounds upon which it was dismissed are very telling. While I do not in any way condone what happened on the premises on 28th February, 2005, I do not think that S.52 of the Transfer of Property Act applies to this matter. Rather, it is S.69B.(2) which rules. The suit herein was filed in court on 5th July, 2004. The property which is the subject matter of the suit had been sold by public auction on 30th March, 2004. By a letter addressed to the plaintiff on 2nd June, 2004 by the advocates for the purchaser, the said advocates requested the plaintiff to remove herself from the premises as the purchaser had become the registered owner by virtue of the sale and transfer registered as I.R.55743/10 on 31st May, 2004. By the time that the action was instituted in court on 5th July, 2004, the property had already been sold and transferred to the third defendant who had thereby acquired proprietary rights in respect of that property. Such a situation is not covered under S.52 which, in my view, envisages a transfer of property during the pendency of a suit. Such is not the case in this matter in which the property was transferred long before the commencement of the action.

Secondly, the case of **BELLE MAISON LTD. v. YAYA TOWERS LTD.**, HCCC No. 2225 of 1992 is distinguishable from the present one. In that case, there was in existence the relationship of landlord and tenant when the latter was forcibly evicted and a new tenant installed in the premises. No such relationship exists in the present case. The plaintiff is not a tenant. On the contrary, the plaintiff ceased to have any proprietary rights in the suit property when the same was sold and transferred to a third party.

The total effect of these observations is that the plaintiff does not have an enforceable equitable right in the suit property. Her rights are clearly delineated in S.69B. 2 of the Transfer of Property Act, and these lie in damages. Much as I abhor and condemn what took place on 28th February, 2005, the same, in my opinion constitutes a fresh cause of action whose remedy does not lie in equitable reliefs but in a claim for damages. In sum, I find that the applicant is not entitled to the orders she seeks and her application is dismissed. I make no order as to costs.

Dated and delivered at Nairobi this 14th day of April 2005

L. NJAGI

JUDGE