



REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA
AT NAIROBI
CIVIL CASE NO. 1370 OF 2001

AMY KAGENDO GICHARU PLAINTIFF

V E R S U S

STANDARD CHARTERED BANK

LTD

DOLPIN AUCTIONEERS
..... DEFENDANTS

RULING

This is a Amended Chamber Summons made under Order 39 Rule 2 '2A', 7 (a) (i), and Section 3A of Civil Procedure Rules and Act respectively praying:-

1. (a) *That pending hearing and determination of this suit the 3rd defendant whether by himself his servants and or agents be restrained from alienating, transferring or in any other manner howsoever dealing with the property known as LR No. NAIROBI/BLOCK 209/7420.*
2. *That the hearing and determination of the suit herein and or further orders of the court, the court be pleased to order the maintenance of status quo ante reinstating the applicant to her residential premises i.e. LR No. NAIROBI/BLOCK/209/7420.*
3. *That court be pleased to make any further order/ or give directions as it deems just.*

The supporting affidavits by Amy Kagendo Gicharu dated 11th February, 2002 and another of 19th September 2001 state that she sued the defendants for wrongful eviction by filing a suit HCCC No. 1596 of 2001 on 19th September 2001 wherein she claimed a declaratory judgement that the eviction was wrongful the pendency of that suit. She claims that the defendant has no rightful ownership over the land nor has he the right to possession. The plaintiff claims that when her property was purported to have been sold in a public auction on 10th August 2001 the memorandum of sale was signed earlier on 8th August 2001. She contends that no actual auction took place and therefore the defendants' purported transfer is based on illegality and should not support any transfer.

The defendants have sworn several affidavits first one on 4th April 2002 and the second one of 5th April 2002 by Kinyanjui Wanjure and third of 7th April 2002 by Yobesh Amoro sale was due being in exercise of chargee's right of sale and that indeed there was an amount of money due and unpaid on the account of the charger, that the sale was regular and that the public auction was properly conducted and yielded Kshs. 8.4 million an amount which was above the reserved price of Kshs. 8 million. Regarding the allegation of wrong dates between the memorandum of sale and the date of auction 8th August 2001 and 10th August 2001 the 2nd defendant said:-

“In executing the memorandum of sale, I erroneously dated on of the copy 8 th August, 2002 instead of correct date of 10 th August 2001 but all the other copies in possession of the plaintiff and 3 rd defendant are properly dated correctly.”

That is the essence of the case before me from the parties and at law the prayers are for prohibitive as well as what I consider to be mandatory injunction. I have stated the facts, now as for the law the principles are trite. First, for prohibitive injunction the applicant to succeed should show that he has a prima facie case with probability of success, and that the court will only grant injunction if the applicant shows that he would suffer irreparable injury that cannot be conveniently compensated by an award of damages and where there is doubt then the court to decide the case on the balance of convenience. At this stage that is what the applicant should show, and all that the affidavit evidence shows is that there was discrepancy on the date of the memorandum of sale and that of the auction dated of 10th August 2001. To establish this will require evidence to be taken. It is when evidence is received at the trial that it will be established whether it was a mistake or it is evidence of collusion and in the event that it is innocent mistake the sale would not be assailed on that account or if it was intentional and fraudulent whether it would or would not vitiate the sale. This depends on evidence and that at this stage this court cannot be certain which way the decision will take. Applying the principle of *Giella Vs Cassman Brown & Co. Ltd* 1973 E. A. 358 I would grant injunction on the balance of convenience and so I hereby do.

Regarding reinstatement again the consideration of *Giella Vs Cassman Brown & Co. Ltd* 1973 Ea 358 above comes into play but with further principles of application that the court would use its inherent power to grant a mandatory order very sparingly and almost reluctantly and the applicant must show a very strong probability upon the facts that very grave damage will accrue to it in the future or that if it occurs damages will not be adequate to save defendant from incurring expenditure. See Lord Upjohn’s judgement in *REDLAND BRICK LTD VS MORRIS* (1970) AC652, Court of Appeal in *KAMAU MUCUHA VS THE RIPPLES* C. A. Civil Application NO. NAI 77/92 and other cases.

Here the complaint of the applicant is that the plaintiffs have moved to effect transfer when the case to stop them is still pending and that the manner of eviction was forceful and fearsome as she said on paragraph 10 of the supporting affidavit of 11th February 2002.

“That during the pendency of this suit and HCCC NO. 1596 of 2001 aforesaid, the third defendant went ahead to forcefully evict me from the suit premises with the assistance of Senior Police Officer from Kilimani Police Station.”

Definitive findings of fact are not to be made on these interlocutory applications but in the Ripples case the court of appeal observed that such civil orders (like injunction) should not be enforced through police action per (Kwach J.A) and also that such forceful eviction are intolerable and cannot be sanctioned by courts (per Shah J. A) by this I believe the court of appeal meant to direct that court orders when disobeyed ought to be executed by Civil process.

Although this is a borderline case I think the order asked for should issue and I grant same to compel the defendant to reinstate the applicant. This should relate to the period that was immediately before the acts complained of. For these reasons, I think the order must issue and I so grant it.

I would however, in consideration of fairness direct that a substantive hearing of the actual case be fixed in 14 days in the registry. Costs in the cause.

Delivered this 18th day of June 2002.

A. I. HAYANGA

JUDGE

Read to Hon. Karua for Applicant.