



**REPUBLIC OF KENYA**  
**IN THE HIGH COURT OF KENYA AT NAIROBI**  
**CIVIL SUIT NO. 329 OF 2016**

**WINFRED KABURU KINYUA.....PLAINTIFF/APPLICANT**

**VERSUS**

**KANWALJIT SINGH CHADDA.....DEFENDANT/RESPONDENT**

**RULING**

1. The Plaintiff/Applicant moved this court by a notice of motion dated 29<sup>th</sup> December, 2016. The application is expressed to be brought under order 40 rules 1, 2 and 3 of the civil procedure rules and section 3 & 3A of the Civil Procedure Act. The plaintiff seeks the following order:

That an injunction be issued restraining the defendant, his agents, auctioneers, employees and/or servants from evicting, selling, alienating, transferring, parting with possession or in any way dealing or interfering with peaceful occupation of the plaintiff on land premises known as LR No. 1870/IV/157, Pilipili way off Rhapta Road, Nairobi until hearing and determination of this suit.

2. The motion is based on the grounds that are listed on the body of the application and the supporting affidavit of the plaintiff sworn on 29<sup>th</sup> December, 2016. According to the plaintiff, he and the defendant entered into a written sale agreement for the suit property with an intention to complete sale transaction in his favour. That he rented the suit premises pursuant to an agreement dated 1<sup>st</sup> September, 2012 at an agreed monthly rent of Ksh.100,000/=. That although the effective date for the tenancy as per clause 3 of the agreement was 1<sup>st</sup> October, 2012, the same was impossible due to the derelict nature of the premises. He stated that the premise had been vacant for 2 years prior to his tenancy and was in an advanced state of disrepair. That in reliance to the clause 'special agreement', he undertook repair work to bring the premises to a state of human occupation. That consequently, her effective occupation of the premises occurred in January, 2013. She stated that she undertook the repairs because of the protection afforded under clause "refund of extensions/repairs". That she and her family enjoyed quiet possession of the premise until 9<sup>th</sup> December, 2016 when a stranger, Mercy Wanjiru appeared on the premises with auctioneers, two hired policemen and several hired goons.

3. She stated that the defendant threatened to sell by auction her properties as per an undated 7 day notice of sale of movable property issued to her on 9<sup>th</sup> December, 2016. That on the said date, Inverbrass auctioneers carried away goods that they are precluded from confiscating by Auctioneers Act and Rules. That they unlawfully carried away food, personal clothes and other items belonging to her and her family. She contended that the Auctioneer did not comply with the laid down rules since they did not serve her with 14 days' notice of proclamation. That the Auctioneers forcibly seized and carried away items that were not in the inventory. She stated that she has made payment for the suit premises.

4. In response thereto the defendant swore an affidavit on 11<sup>th</sup> January, 2017. He stated that the landlord/

tenant relationship between the plaintiff and the defendant started in September, 2012 when the plaintiff's lawyer drew up a tenancy agreement; he signed it and took it back to the tenant's lawyer who was meant to ensure that his client signed and they return a copy to the defendant. That the plaintiff has failed to remit rent into his account as agreed since 1<sup>st</sup> July, 2015 occasioning him financial stress since that is his source of livelihood and medication. That whenever he asked the plaintiff for rent she threatened him telling him that he knew people in power who could frustrate him and that if he goes to court the case would drag for many years and he would lose his house. That, he is aware that the plaintiff is using the premises for commercial purposes contrary to the tenancy agreement he appended his signature to. That he on 20<sup>th</sup> October, 2016, instructed his lawyers to issue the plaintiff with a demand notice for rent arrears of KShs. 1.5 Million but she did not respond to the letter. He then instructed auctioneers to levy distress. That the distress was levied on 9<sup>th</sup> December, 2016 but she refused to vacate. The plaintiff instituted a suit at the Rent Restriction Tribunal on 15<sup>th</sup> December, 2016 to prevent him from selling her goods to recover money for medication. That he was later informed that the house was being vandalized. On 24<sup>th</sup> December, 2016 as he was watching news he saw the plaintiff claiming to be the purchaser of the property. That on 25<sup>th</sup> December, 2016, the Nation Newspaper had an article covering the vandalism and the respondent claimed to the newspaper that she had paid the defendant KShs. 14 Million as a purchaser of the property. That she also claimed in the newspaper that she had paid the defendant's KShs. 400,000/= medication at M.P. Shah Hospital.

5. Onesmus Kimani also swore an affidavit in support of the defendant's case. He stated that he witnessed the execution of the agreement between the parties herein. That the defendant asked him to witness the agreement since he had no lawyer.

6. The plaintiff filed a further affidavit where she contended that she was a stranger to the tenancy agreement cited by the defendant and stated that it was unenforceable and void because she did not execute it as required by law. She contended that she did not know the purported Onesmus Kimani and that Kimani is not an advocate. She stated that Mercy had no locus in this suit because she is not a party. She further contended that the purported power of attorney is not registered and is therefore null and void. She averred that the power of attorney is not properly registered by the registrar, that it lacks an IPA number. That the IPA number is cancelled by the registrar and thereby raises serious queries. That while the donor's photograph is put, the donee's photograph is missing. She stated that she recently received an anonymous call informing her that Mercy intends to sell the property. She denied allegations that she sent goons to vandalize the premises. That it is in fact the defendant and Mercy who orchestrated the illegal act because she met their hired guards at the premise even before the police officers arrived. She stated that on 22<sup>nd</sup> December, 2016, the defendant's agents invaded her premises and maliciously damages the house, her properties and items valued at KShs. 10,000,000/= and harmed her daughter and watchman. That on 23<sup>rd</sup> December, 2016 she reported the matter at Kileleshwa Police Station under OB47/23/12/16 and the matter is pending investigations and action in relation to the said vandalism. That she received an anonymous call on 28<sup>th</sup> December, 2016 informing her that the defendant had hired goons and bull dozers to demolish the main house at the suit premises anytime from December, 2016. That on 15<sup>th</sup> June, 2016 Mercy accompanied by somebody visited the premise and informed the watchman that she intended to sell the property to him. That the watchman refused to open and she threatened him and ordered him to vacate the premise.

7. Parties submitted orally. The defendants' counsel stated that the rent arrears at the time of the hearing of this motion stood at KShs. 1.5 Million 1<sup>st</sup> July, 2015. That to avoid payment of rent the plaintiff wishes to convert the tenancy agreement to a sale agreement. He denied that the signature on the sale agreement presented in court by the plaintiff is the defendant's. He stated that Onesmus witnessed the signing of the tenancy agreement and therefore his affidavit cannot be wished away. Counsel intimated that the defendant has no opposition to the granting of the orders sought as long as the plaintiff continues to pay rent.

8. In reply the plaintiff's counsel stated that the defendant has not filed an application seeking for payment of rent and or eviction.

9. This court has carefully considered the application together with the affidavits and submissions by the respective. The principles guiding the grant of interlocutory injunctions are well settled. First, an applicant must show *a prima facie* case with a probability of success. Secondly, an applicant must show that he/she will suffer irreparable damage, which would not adequately be compensated by an award of damages if an injunction is not granted. Thirdly, if the court is in doubt, it will decide an application on the balance of convenience. These principles were enunciated in **Giella v. Cassman Brown & Co. Ltd [1973] EA 358.**

10. The courts are also empowered under Order 40 rule 2 (2) to make an order for injunction on such terms as to an inquiry as to among others, damages, the duration of the injunction, giving security or otherwise as the court deems fit. The court shall therefore in appropriate instances grant a conditional injunction with respect to the duration and even impose such terms as may be appropriate to the circumstances of the case. This aspect was highlighted in the case of **Hesbon Owuor Oluoch v. Enos Omollo Kisumu HCCC No. 22 of 2002.**

11. In determining this application, I must remind myself that I should not go into the merits of the case. This is in view of the finding in **Mrao Ltd v. First American Bank of Kenya Ltd & 2 Others [2003] KLR 125** where it was held as follows:

*“in civil cases a prima facie case is a case in which on the material presented to the Court a tribunal properly directing itself will conclude that there exists a right which has apparently been infringed by the opposite party to call for an explanation or rebuttal from the latter. A prima facie case is more than an arguable case. It is not sufficient to raise issues but the evidence must show an infringement of a right, and the probability of success of the applicant’s case upon trial. That is clearly a standard, which is higher than an arguable case”.*

12. It is the plaintiff’s case that she and the defendant entered into a tenancy agreement where she was to pay Kshs.100,000/- per month as rent. That on or about the 9<sup>th</sup> December, 2016 auctioneers carried away goods that they are precluded from confiscating by the auctioneers Act and Rules. These include food personal clothes and other items belonging to her, her daughter, her sons and her guests. That the defendant has threatened to sell by public auction her property anytime as per the undated notification of sale of movable property issued on 9<sup>th</sup> December,2016. That the list of items in the inventory by Inverbrass Auctioneers has omitted many items that the said Auctioneers seized and carried away.

13. It is also averred that the auctioneer acted on illegal instructions and failed to comply with the provisions of the Auctioneers Act.

14. From the evidence on record, the plaintiff admits that she is a tenant and a tenancy agreement is exhibited herein. The plaintiff avers that she has spent money in repairing the said premises to the tune of Kshs.10million and in addition, she paid medical expenses for the defendant when he was admitted at Agakhan. The plaintiff avers that she has renovated the house on the strength of the agreement that provided that she is entitled to a refund for extensions/repair

15. The court notes that the defendant’s counsel did not address the court on the issues of the distress that was levied by Inverbrass Auctioneers on the 9<sup>th</sup> December, 2016 and whether there was notice as required under the law. It is also noted that it was not made clear to the court how much rent if at all, was owing when the distress was levied. Since there is a pending matter before the Tribunal, this court does not wish to dwell on that.

16. Though the plaintiff alleges that she entered into a sale agreement with the defendant for the sale of the suit premises, the same is denied by the defendant. This court appreciates that, this issue can only be determined upon hearing the parties and after taking full evidence.

17. At this juncture, the only thing that is certain is that the plaintiff and the defendant have a tenant/landlord relationship under which relationship, the tenant is expected to pay rent and the landlord has a corresponding duty to give quiet possession of the premises to the tenant.

18. In the premises foregoing, I find and hold that the plaintiff has established a prima facie case to the extent that she has satisfied the court that she is a tenant in the premises. As to whether or not, she is in the process of acquiring the premises, that can only be determined during the main suit. It also came out in evidence that the defendant is not opposed to her occupation of the premises on condition that she meets her legal obligation to pay rent.

The end result is that, the application dated 29/12/2016 is hereby granted in terms of prayer C on **CONDITION** that the plaintiff continues to pay rent to the defendant.

Cost of the application shall be in the cause.

**Dated, Delivered and Signed at Nairobi this 16th day of March, 2017.**

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**L. NJUGUNA**

**JUDGE**

**In the presence of**

.....***For the Plaintiff/Applicant.***

.....***For the Defendant/Respondent.***