



**REPUBLIC OF KENYA**  
**IN THE HIGH COURT OF KENYA AT NAIROBI**  
**MILIMANI LAW COURTS**  
**ENVIRONMENT AND LAND COURT**  
**ELC. CASE NO. 218 OF 2014**

**SARAH JEMUGE TOROITICH..... PLAINTIFF**

**VERSUS**

**THE BOARD OF TRUSTEES**

**TELEPOSTA PENSION SCHEME..... DEFENDANT**

**JUDGMENT**

The Plaintiff commenced this suit by way of a Plaint dated and filed on 16<sup>th</sup> December 2008 wherein she sought for judgment to be entered against the Defendant on the following terms:

- a. An order for specific performance compelling the Defendant to offer for sale to the Plaintiff all those premises known as House No. 13 on L.R. No. 209/315 Jacaranda Estate Nairobi (hereinafter referred to as the “suit property”) on like terms as offered to her co-tenants.
- b. An order of permanent injunction to restrain the Defendant whether by themselves and/or through their servants, agents, representatives or any one of them from advertising for sale, disposing or selling by public auction, private treaty, tender or bids howsoever or at any time completing by conveyance, transfer or any sale of the suit property.
- c. Damages
- d. Costs of this suit.
- e. Interest thereon.

**Pleadings**

In the Plaint, the Plaintiff stated that at all material times, she was an employee of Telkom Kenya Limited. She also stated that she was a member of the Defendant by virtue of her employment at Telkom Kenya Limited and that she was on 6<sup>th</sup> March 2000 allocated the suit property. She stated that she took possession of the suit property and has remained in possession up until the date of filing the suit, paying a monthly rent. She then stated that sometimes in the year 2003, the Postal Corporation of Kenya and the Defendant embarked on a scheme to sell to its members the premises which they were in occupation of

and gave out letters of offer to purchase to them. She further stated that on 18<sup>th</sup> March 2004, she was dismissed from her employment with the Postal Corporation of Kenya. She then stated that the Defendant wrongfully, unlawfully and fraudulently gave out letters of offer to her co-tenants but expressly discriminated against her by neglecting and refusing to grant her a letter of offer in spite of the fact that she was a member of the Defendant and also a pensioner. She listed the following particulars of fraud and breach:

1. That the Plaintiff was a member of the Defendant and it is fraudulent to tie her eligibility to offer to purchase with cessation of employment with the Postal Corporation of Kenya as the scheme caters for past and present employees as members.
2. That the Plaintiff was denied the right as a member of the first priority to take up the house offer as with other members but was instead lumped up in the market with higher prices.
3. That the Defendant reneged on her membership and denied her the tenancy which is fraudulent.
4. That the aforesaid action is a breach of trust.

She further stated in her Complaint that she was apprehensive that the Defendant would if not stopped by injunction proceed to sell the suit property to a third party and evict her therefrom thereby rendering her destitute and a vagrant. She added that despite notice of demand and intention to sue, the Defendant had refused and neglected to comply and persists in such refusal and neglect.

The Defendant filed its Defence and Counterclaim dated 23<sup>rd</sup> February 2010 and filed on 13<sup>th</sup> April 2010 in which it stated that Telkom Kenya Limited and Postal Corporation of Kenya are independent and separate legal entities with respective separate pension schemes. It conceded that the Plaintiff has been in occupation of the suit property but denied that she was paying a monthly rent on account of her occupation and put her to strict proof. It further denied that in the year 2003 it embarked on a scheme to sell to its members premises in which such members were in occupation or that it gave out letters of offer to purchase the said houses. It further denied having expressly discriminated against the Plaintiff as she alleged. The Defendant further denied the particulars of fraud and breach listed by the Plaintiff in the Complaint and put her to strict proof thereof. They asserted that the Plaintiff has not established any reasonable cause of action against the Defendant for the grant of any injunctive orders as sought by the Plaintiff. In the Counterclaim, the Defendant stated that it was at all material times of this suit the registered proprietor of the premises known as Nairobi/Block 27/542 being described as House No. 13 which premises was occupied by the Plaintiff and is the suit property. They further stated that they leased the suit property to Postal Corporation of Kenya until March 2004 and that the Postal Corporation of Kenya allocated the same to the Plaintiff who was at the material time an employee of the Postal Corporation of Kenya. They further stated that on 16<sup>th</sup> June 2006, the Postal Corporation of Kenya advised them that the Plaintiff had been dismissed from their employment and advised the Defendant to recover the rent directly from the Plaintiff. The Defendant further stated that in default of her tenancy obligations, the Plaintiff has refused and or neglected to pay rent and owes the Defendant the sum of Kshs. 782,500/- as at February 2010 and that the Defendant had since levied distress against the Plaintiff for the recovery of the same. The Defendant further stated that it was its policy to offer first priority of purchase to the tenants who had entered into a new tenancy agreement with the Defendant and paid all the outstanding rent arrears. They further stated that the Plaintiff did not regularize her tenancy with the Defendant but continued to occupy the suit property and neglected to pay rent leading the Defendant to sell and transfer the suit property to one Alice Kariuki at a consideration of Kshs. 4,200,000/-. They added that under the terms of agreement for sale between the Defendant and the said Alice Kariuki, they were obliged to give vacant possession to the purchaser upon completion. On those grounds, the Defendant sought for judgment to be entered against the Plaintiff on the following terms:-

1. That the Plaintiff's suit be dismissed with costs.
2. That the Plaintiff be ordered to vacate the suit property and in default an eviction order to issue against her.

### 3. Costs of the counterclaim.

In response thereto, the Plaintiff filed her Reply to Defence and Defence to Counterclaim dated 20<sup>th</sup> April 2010 and filed on 26<sup>th</sup> April 2010 in which she stated that through a check off system, the Defendant retained her rents and or allowances during the period leading to the offers of sale being made. She further denied that she owed the Defendant rental arrears amounting to Kshs. 782,500/- as at February 2010 or at all and averred that any rent was directly recovered from her salary and allowances by Postal Corporation of Kenya and was paid to the Defendant. She emphasized that the Defendant maliciously and wrongfully discriminated against her by refusing to extend the offer to purchase to her in spite of the fact that she was a tenant in occupation and also a registered member of the Defendant. She added that any sale made to a third party was in violation of her rights. She further added that the Defendant unlawfully entered into the suit property in March and April 2010, levied illegal distress and evicted her without a lawful court order.

#### **The Evidence**

Hearing of this suit commenced on 4<sup>th</sup> June 2014 when the Plaintiff's first witness (PW1), Boaz Ouma Omune, took to the witness stand. He stated that he was a former employee of Kenya Posts and Telecommunications and later Telkom Kenya Limited between the years 1980 to 2007. He stated that his employer had a housing policy by which they were housed by their employer and were not paid house allowance. He stated that under that policy, he was housed on 3<sup>rd</sup> Ngong Avenue, Jacaranda Court, House No. 10. He stated that he knew the Plaintiff who he stated was staying in House No. 13 within the same premises which is the suit property. He testified that the rent for those houses was being deducted from them. He then stated that after the restructuring, an employee's dues were paid to the Defendant which looked after retired employees. He said that the Defendant would manage the terminal dues and pay the retirees a monthly pension. He further stated that he was the chairman of Jacaranda Estate and that after the restructuring, the Defendant decided to sell their houses, giving the occupants thereof the first offer. He added that he was offered to purchase the house he was living at a price of Kshs. 3.2 million. He stated that almost all except a few occupants received such offers. He stated that the Plaintiff was one of those who did not receive an offer because she was having issues with her employer Postal Corporation of Kenya. He added that there was a policy that so long as an occupant had a case with the employer, they were denied an offer to purchase their house. He stated that the Plaintiff fell in this category but stated further that the Plaintiff should have been given an offer to purchase the suit property so long as she was in occupation. He further stated that he personally approached the Defendant in his capacity as chairman and enquired why the Plaintiff was not offered the suit property. He stated that he was informed that the Plaintiff had a problem with her employer and that she should first clear that. He stated that his efforts to assist the Plaintiff to get an offer letter were futile. On re-examination, he stated that they paid rent to the Defendant for the houses on a check off system.

PW2 was the Plaintiff, Sarah Jemuge Toroitich. She testified that she was an employee of Postal Corporation of Kenya between the years 1985 to 2004. She stated that she was a Postal Officer. She said that she was housed by her employer at 3<sup>rd</sup> Ngong Avenue, Jacaranda Estate, House No. 13 which is the suit property. She stated that she moved into that house in March 2000 and lived there until 2007/2008 when she was forcefully evicted therefrom by some auctioneers acting on the Defendant's instructions. She further stated that during her tenure at the Postal Corporation of Kenya when she was in occupation of the suit property, rent was deducted from her salary on a check off system. She stated that she sued the Defendant because it refused to give her an offer to buy the suit property yet all her colleagues got an offer. She stated that she was entitled to receive an offer to purchase the suit property from the Defendant because she was a member of the Defendant and an occupant of that house. She stated that when she failed to get an offer letter, she approached the chairman (PW1) to enquire why this was the case. She stated that she accompanied PW1 to the Defendant's offices. She however disclosed that she was not an employee of the Postal Corporation of Kenya, having been dismissed on 18<sup>th</sup> March 2004. She testified the circumstances leading up to her dismissal as that a bag got lost at her workplace as a result of which a number of her colleagues as well as she were told to go home on an interdiction. She stated that they stayed home for 6 months then she got a suspension letter which led to her dismissal. She stated that she

then wrote a letter of appeal to her employer which appeal has to date not been responded to. She stated that she wrote to the Manager of the Defendant a letter dated 15<sup>th</sup> March 2007 enquiring as to why she was not given an offer letter to purchase the suit property. She said that she received a letter dated 16<sup>th</sup> March 2007 to the effect that because she had been dismissed from the employment of the Postal Corporation of Kenya, she was not entitled to receive an offer to purchase the suit property. She confirmed that the title number to the suit property was now Nairobi/Block 27/542/27 and that a title deed to it was processed on 29<sup>th</sup> April 2004. She admitted that she had not been paying rent because she was entitled to an offer to purchase the suit property. She confirmed that the Defendant took steps to recover the rent by way of levying distress for rent. She confirmed that auctioneers did come and evict her out of the suit property and carted away all her household belongings. She stated that she was not served with a court order prior to the eviction. She stated that she wanted the court to return the house back to her. On cross-examination, she stated that though she had a tenancy agreement with the Defendant, she had no copy of the same to show to the court. She further admitted that she has no document to show that she was a member of the Defendant. She admitted further that at the time she filed this suit which was on 16<sup>th</sup> December 2008, she was not aware that the suit property had already been sold to a third party. She further stated that she was not aware of any conditions which required to be met prior to a person receiving an offer letter to purchase a house from the Defendant. She further confirmed that since the date of her dismissal which was 18<sup>th</sup> March 2004 until she was evicted out of the suit property, she did not pay rent to the Defendant because she had written an appeal which was yet to be responded to. She further added that the Defendant did not demand rent from her during that period.

The Defence called only one witness by the name Wilfreda Wakio Mwambao who stated that she is the Property Officer for the Defendant. She stated that the Plaintiff was not a tenant of the Defendant but that the Postal Corporation was their tenant which allocated the suit property to the Plaintiff as its employee. On that account therefore, she clarified that there was no tenancy between the Plaintiff and the Defendant. She further testified that the Plaintiff was a member of the Defendant until December 2001 when she was moved to the Postal Corporation Kenya Pension Scheme. She further testified that the Defendant offered the houses to those who had no rent arrears and that the Plaintiff failed to get an offer to purchase the suit property because she was in rent arrears and had not signed a tenancy agreement with the Defendant as required. She added that by the time the Plaintiff was filing this suit, the suit property had already been sold to a third party. She then said that they filed a counterclaim in which they are claiming from the Plaintiff Kshs. 745,000/- as rent arrears from April 2004 to November 2009 when they got possession of the house from the Plaintiff who had resided therein without paying rent. She confirmed that they engaged a firm of auctioneers who evicted the Plaintiff out of the house. On cross-examination, DW1 confirmed that the suit property was never offered to the Plaintiff though she wrote to the Defendant expressing her interest in buying the house. She confirmed having levied distress on the Plaintiff because she was in rent arrears. She further confirmed that after doing so, they did not give an account of the amount they recovered. She also confirmed that she did not know how much the auctioneers recovered. She also stated that the Defendant had a court order when it evicted the Plaintiff from the suit property but admitted that she had not produced a copy of that court order before this court.

### **Issues for Determination**

Arising from the foregoing, it appears to me that there are some conceded facts herein.

1. The first is that the Plaintiff was an employee of the Postal Corporation of Kenya as a Postal Officer for a number of years until she was dismissed from its employment on 18<sup>th</sup> March 2004.
2. It is also conceded by both sides that the Plaintiff was allocated the suit property by her former employer where she remained in occupation even after her dismissal from the employment of Postal Corporation of Kenya up until she was evicted therefrom in the year 2008 by a firm of auctioneers acting on instructions from the Defendant. The exact date of the said eviction did not emerge properly from the pleadings and the evidence adduced.
3. It was also conceded on both sides that at all material times, the Defendant was the registered

proprietor of the suit property being House No. 13 Jacaranda Estate later known as Nairobi/Block 27/542/27.

4. It was also conceded that the Defendant declined to offer the Plaintiff the opportunity to purchase the suit property on the preferential terms offered to the Plaintiff's former colleagues in occupation of other houses on the ground that she was no longer an employee of the Postal Corporation of Kenya.

The Plaintiff's case is that though she had been dismissed from the employment of the Postal Corporation on 18<sup>th</sup> March 2004, she was denied an offer to purchase the suit property yet she remained in occupation thereof and was a member of the Defendant. She contended that it was fraudulent to tie her eligibility to receive an offer to purchase the suit property with cessation of employment with the Postal Corporation of Kenya as the scheme caters for both past and present employees as members. On that account, she claimed that she was discriminated against and her rights were violated. She seeks for the court to order that the suit property be offered to her at the price extended to her former colleagues and not the market price that was given to the public by the Defendant's selling agents. Two issues for determination arise out of this:

1. Whether the Plaintiff was a member of the Defendant.
2. If so, whether she had any right to receive an offer to purchase the suit property at the preferential price offered by the Defendant to former colleagues of the Plaintiff.

On the side of the Defendant, it filed a Counterclaim against the Plaintiff seeking to have judgment entered against her ordering her to remit to the Defendant rent arrears amounting to Kshs. 745,000/- allegedly accumulated after the Plaintiff was dismissed from the employment of the Postal Corporation of Kenya until she was evicted out of the suit property. This gives rise to the third issue for determination as follows:

3. Whether the Plaintiff owes the Defendant the sum of Kshs. 745,000/- being rent arrears for occupation of the suit property from 18<sup>th</sup> March 2004 until she was evicted therefrom.
4. Who should be awarded the costs of this suit and of the counterclaim?

## **Determination**

### **1. Whether the Plaintiff was a member of the Defendant.**

The Plaintiff claimed to be a member of the Defendant. However, she did not produce any documentary evidence to support that claim before this court. The Defendant, on its part, conceded that it is true that the Plaintiff was once a member of the Defendant until December 2001 when the Plaintiff was transferred to the Postal Corporation Kenya Pension Scheme. The letter of dismissal dated 16<sup>th</sup> March 2004 from Postal Corporation of Kenya which the Plaintiff produced in evidence states as follows at the 3<sup>rd</sup> paragraph:

“You will be entitled to your pension contributions for the period you were in service. Payment will be processed by Posta Pension Scheme in accordance with the current retirement benefits regulations.”

This court finds that the Plaintiff has not proved to this court, on a balance of probabilities, that she was a member of the Defendant at the time the Defendant sent out offers for the purchase of the houses to former colleagues of the Plaintiff. To the contrary, the evidence demonstrates that the Plaintiff was a member of the Postal Corporation Kenya Pension Scheme at all material times.

### **2. If so, whether she had any right to receive an offer to purchase the suit property at the**

**preferential price offered by the Defendant to former colleagues of the Plaintiff.**

Having found that the Plaintiff was not a member of the Defendant, it would appear an academic exercise to determine whether or not she was entitled to receive an offer to purchase the suit property from the Defendant at the preferential prices offered to the Plaintiff's former colleagues. It is however, an exercise in which I still wish to engage in.

The right to housing is enshrined in the **Employment Act at section 31(1)** which provides as follows:

“An employer shall at all times, at his own expense, provide reasonable housing accommodation for each of his employees either at or near to the place of employment or shall pay to the employee such sufficient sum, as rent, in addition to the wages or salary of the employee, as will enable the employee to obtain reasonable accommodation.”

It is noteworthy that the right to housing only arises when a person is employed. And indeed, it has emerged quite clearly in this case that the Postal Corporation of Kenya, as the employer of the Plaintiff, complied with this legal requirement by allocating to the Plaintiff the suit property at a monthly rent which was deducted from her salary under a check off system. However, this right to housing only extends to a person who is employed. Upon the dismissal of the Plaintiff from the employment of the Postal Corporation of Kenya on 16<sup>th</sup> March 2004, this right was extinguished. The Postal Corporation of Kenya was entitled to receive vacant possession of the suit property from the Plaintiff as at the date of dismissal. In fact, in that dismissal letter, the Postal Corporation of Kenya stated as follows in the penultimate paragraph:

“Please surrender your employment card and other official items in your possession to your Controlling Officer.”

One of the official items in her possession as at the date of the Plaintiff's dismissal was the suit property and she was required to surrender it to her Controlling Officer upon her dismissal. Evidently, this was not done and the Plaintiff continued to enjoy the suit property for a few years after her dismissal until she was evicted therefrom by the Defendant.

It must be stated firstly that no employee has a right to have a house offered to them to purchase at a preferential price as claimed by the Plaintiff. The only right that is recognized in law is a right to housing. Further, the Defendant was not an employer of the Plaintiff and therefore was under no obligation either to offer the Plaintiff housing during her employment or to offer her the suit property at a preferential purchase price.

To that extent therefore, I find that the Plaintiff's rights were not violated in any way by the Defendant declining to offer her to purchase the suit property at the preferential purchase price being offered to the Plaintiff's former colleagues.

**3. Whether the Plaintiff owes the Defendant the sum of Kshs. 745,000/- being rent arrears for occupation of the suit property from 18<sup>th</sup> March 2004 until she was evicted therefrom.**

In its Amended Defence and Counterclaim, the Defendant changed its claim for rent arrears from the Plaintiff from Kshs. 782,500/- to Kshs. 745,000/-. The Defendant's only witness admitted that the Defendant levied distress for rent against the Plaintiff through a firm of auctioneers. The witness admitted that though the Plaintiff's household goods were carted away by those auctioneers, it was not established what the value of those household goods were as no account has ever been made. The witness was unable to demonstrate to what extent the rent arrears of Kshs. 745,000/- was covered by the household goods carted away. I am of the view that this is a very unfortunate situation. The court is not able to establish whether or not the Defendant was able to recoup the rental arrears from the household goods carted away. In light of this, I find that the Defendant should bear the consequences of failing to render an account of the Plaintiff's household goods carted away by its auctioneers. I therefore find that the Plaintiff does not owe the Defendant any sum of money towards the rental arrears of Kshs. 745,000/- claimed by the

Defendant.

**4. Who should be awarded the costs of this suit and of the counterclaim?**

The upshot of the foregoing is that both this suit and the counterclaim are hereby dismissed. Each party shall bear their own costs.

**DELIVERED, DATED AND SIGNED AT NAIROBI THIS 9<sup>TH</sup>**

**DAY OF SEPTEMBER 2016.**

**MARY M. GITUMBI**

**JUDGE**