



REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA AT NAIROBI

ENVIRONMENTAL & LAND DIVISION

ELC CIVIL NO. 1189 OF 2013

LILIAN NKIROTE

MARETE.....PLAINTIFF

-VERSUS-

**THE PRINCIPAL SECRETARY, MINISTRY OF LANDS, HOUSING & URGAN
DVPT.....1ST DEFENDANT**

**JOHNSON MURIUKI RUTHUTHI.....2ND
DEFENDANT**

RULING

1. The Plaintiff seeks an injunction against the Defendants to restrain the Defendants from evicting or in any other way interfering with the Plaintiffs possession and or occupation of the suit property namely House No. 740 Rubia Estate pending determination of the suit herein.
2. The suit is effectively against the Government of the Republic of Kenya and the 2nd Defendant has been correctly impleaded under Article 156 of the Constitution. For some inexplicable reason the 1st Defendant, the Principal Secretary in the Ministry of Lands Housing and Urban Development was also impleaded.
3. The Plaintiffs principal grounds are that she bought the suit property from the Defendant in 2004 through a Civil Servants Housing Scheme. That even though the Defendant without just cause rescinded the contract and resold the property to a third party the Plaintiff s yet to be refunded the payments she had made to the Defendants as the purchase price or part thereof. The Plaintiff also states that the Defendants has not obtained any eviction order and any attempted eviction of the Plaintiff as threatened by the Defendant would amount to all illegality. Finally, the Plaintiff argued that the Defendant having sold the suit property has not right to evict the Plaintiff as this is a right exercisable only by the new owner.
4. The Defendants response which can be gathered form the Grounds of Opposition filed in court on 15th November, 2013 is to the effect that the Plaintiff has no interest in or claim to the suit property and further that previous proceedings by the Plaintiff to lay claim to the suit property and further that previous proceedings by the Plaintiff to lay claim to the suit property have been determined by this court and verdicts returned against the Plaintiff. The Defendants finally state that it is the Defendants duty as vendors to deliver up vacant possession of the suit property to the new purchaser and hence the need to have the plaintiff evicted.

5. There is certainly no controversy that the suit property is no longer owned by the Defendants. The suit property was sold to one Johnson Murachi Ruthuthi who is the Interested Party to these proceedings having been joined as such on 28th May, 2014. There is also no controversy that the Plaintiffs attempts to invite and invoke the courts persuasive powers also known as declaratory orders, with regard to the Plaintiff's ownership of the suit property were dismissed on 20th January, 2012 in HCCP No. 379 of 2009. Effectively that decision put to rest any claim by the plaintiff as to ownership the suit property.
6. Having perused the documents filed by the parties in support of their respective cases and having also perused the parties respective written submissions, I come to the simple conclusion that the plaintiff has no prima facie right over the suit property. The contract having been cancelled or rescinded as between the plaintiff and the Defendants and this court having determined that he plaintiff is not entitled to be declared last the owner of the suit property, the Plaintiff cannot legally claim to be entitled to occupation and possession of the suit property. It is true that the Defendants have exhibited the wish to evict the Plaintiff from the suit property from the suit property. It is also true that by virtue of the provisions of **Section 39 of the Land Act**, the Defendants are legally entitled to regain possession of the property from the Plaintiff, the sale contract having fallen through. I however disagree with position taken by the Plaintiff that the Defendants can only regain possession after obtaining a court order. Where a contract of sale has fallen through or has been rescinded and the purchaser had taken possession of the property the subject of the rescinded sale, the vendor under Section 39 of the Land Act may regain possession either peaceably or after obtaining a court order. I do not ascribe to the view that possession may only be regained after obtaining a court order. In these respects there is clear guidance under Sections 39 and 40 of the Land Act.
7. I also hasten to point out that these are Civil proceedings and under the Government Proceedings Act (Cap 40), in particular Section 16 thereof the court is prohibited from issuing injunctive orders in favour of the subjects of the State against the state itself. The statute only recommends that declaratory orders be issued instead and only in appropriate cases. In the instant case I do not think any declaratory orders can issue in favour of the Plaintiff if one takes cognizant of the earlier determinations in HCCP No. 379 of 2009. Further the Plaintiff had also been being notified of the Defendants intention to regain possession of the suit land. It would only be appropriate if the plaintiff vacates the suit premise.
8. In the circumstances and flowing from the foregoing, the Plaintiffs application dated 6th August, 2013 must be dismissed and it is hereby dismissed with costs to the Defendants as no prima facie case has been established and further the Plaintiff can be easily compensated in damages besides the fact that injunctive orders ought not be issued against the Defendants by virtue of the provisions of Section 16 of the Government Proceedings Act (Cap 40).
9. Orders accordingly.

Dated, signed and delivered at Nairobi this 5th day of March, 2015.

J. L. ONGUTO

JUDGE

In the presence of:-

..... for the Plaintiff/Applicant

..... for the Defendants/Respondent