



**REPUBLIC OF KENYA**

**IN THE HIGH OF KENYA AT MOMBASA**

**Civil Suit 46 of 2012**

**SYLVIA FURAHA KATUNDA.....PLAINTIFF**

**VERSUS**

**1. JORAM MIGWI MWAURA**

**2. DORCAS MUKAMI MIGWI.....DEFENDANTS**

**RULING**

1. I have before me the Plaintiff's application dated 3rd February, 2012 brought under Order 40 Rules 1, 2 and 3 and Order 51 Rules of the Civil Procedure Rules. At this stage, the Plaintiff seeks, an injunction restraining the Defendant/Respondents or their agents from dealing, wasting damaging or interfering with the house on plot NO. 624/II/MN Mombasa.

2. A brief summary of the facts, gleaned from the Applicant's supporting affidavit deponed on 13<sup>th</sup> February, 2012 is as follows:

The applicant entered into a tenancy with Award Saleh and Said Saleh Sherman on 17<sup>th</sup> August, 2009, commencing on that date.

The previous tenant is indicated as Truly Elijah ("SFK 2") who signed a transfer of "House without Land" on 6<sup>th</sup> April, 2009; in consideration of Shs. 300,000/=. The Applicant then issued One (1) month's notice to the Defendants who were the tenants in occupation on 26<sup>th</sup> October, 2009.

3. Thereafter, Nothing seems to have happened until 25<sup>th</sup> November, 2011. Then, under the plaintiff's instructions, a firm of auctioneers known as "**Work No Words**" issued a notice on 25<sup>th</sup> November, 2011 demanding Shs. 616,000 rent arrears from the Defendants. All the information in this regard is contained in the Applicants' supporting affidavit.

4. The Defendants replied to the application by Affidavit deponed by Dorcas Mukami Migwi. She says that she and her husband purchased the House without Land on plot NO. 624/11/MN. It cost them Shs. 850,000/= and the sale was effected by an agreement ("DMM 1") dated 1<sup>st</sup> November, 2000. The purchase was from one Robert Katana Katunda. He had in turn taken a Transfer for Shs. 600,000/= from Abubakar Rahul Ndira holder of a Power of Attorney on behalf of Saud Saleh Said and Awadh Said Saleh.

5. The Defendant also exhibited receipts for amounts they had paid between 2004

– 2006 as rent for the plot to Mugane Enterprises. The latter are Auctioneers who had on 21<sup>st</sup> April, 2004 issued a notice for distress for rent to Emily Elijah claiming rent arrears. The Defendants claim they purchased the house and paid the arrears of ground rent to the auctioneer, and on 9<sup>th</sup> August, 2007 took a transfer of the house without land (see DMM 4a).

6. These were the facts on record at the time the application came up for submissions by the parties. It may be noted that when the application first came up under urgency seeking interim injunction on 13<sup>th</sup> February, 2012, this court declined to certify urgency as the alleged sale had occurred in 2009. Mr Shimaka for the Applicant had argued:

***“...the applicant is the owner of house on Plot No. 624/II/MN which was transferred to her. There were tenants in occupation at the hosue currently claiming to be owners.***

7. I have noted that the Applicant has deponed in her supporting Affidavit as follows:

“.....

***4. That on 6th April, 2009 Emily Elijah Mwangombe transferred the house without land to me and I became the legal owner of the same.***

***5. That the suit property had tenants who are the Respondents who were already in occupation of the same.***

***6. That upon their failure to pay rent to me I gave them notice to vacate and give vacant possession but they failed.” (underlining mine)***

8. From the above, the Respondents were in possession by the time the Applicant purchased the suit property.

As earlier noted, the Respondents exhibited a transfer agreement dated 1<sup>st</sup> November, 2000; (“DMM 2”) and a Transfer for house without Land dated 9<sup>th</sup> August, 2007. All these pre-date the agreements of the Applicant. They partly explain why the Plaintiff found the Respondents in occupation of the house. I have also pointed out receipts for 2004 – 2006 for money paid by Respondents to the alleged auctioneers.

9. On the basis of the above I do not consider that the applicant has discharged the burden of proving the principles for grant of injunction set out in Giella Vs Cassman Brown [1973] EA 358.

These principles are, first that the applicant must show: a *prima facie* case with a probability of success; second, that she stands to suffer irreparable harm not compensable in damages; and third that, if in doubt, the court must assess the balance of convenience. Both parties, cases are equally compelling. The Defendants have been in residential occupation of the house and should not be restrained from **“interfering”** with it. The balance of convenience suggests that the matter be heard fully when parties will fully ventilate their cases.

10. Accordingly, this application for injunction is for dismissal, which I hereby do, with costs to the Respondents.

**Dated, signed and delivered this 12th day of September 2012**

**R.M. MWONGO**  
**JUDGE**  
**Read in open court**  
**Coram:**

1. Judge: Hon. R.M. Mwongo

2. Court clerk: R. Mwadime

**In Presence of Parties/Representative as follows:**

a) .....

b) .....

c) .....

d) .....