



**REPUBLIC OF KENYA**

**IN THE HIGH COURT OF KENYA AT NAIROBI**

Environmental & Land Case 245 of 2012

**JOYCE WAIRIMU KARANJA.....PLAINTIFF**

**VERSUS**

**EDWARD MURANGIRI MUGAMBI..... DEFENDANT**

**RULING**

The application before the Court for determination is one brought by the Plaintiff by way of a Chamber Summons dated 9<sup>th</sup> May 2011, pursuant to the provisions of Order 40 Rule 2 of the Civil Procedure Rules and section 3A of the Civil Procedure Act. The Plaintiff is seeking an order that a temporary injunction do issue restraining the Defendant either by himself, his agents, servants, tenants and/or assigns from interfering, dealing, constructing, erecting structures on, cultivating, wasting, degrading and/or in any other way interfering and/or dealing with LR. No. KIAMBAA/KIHARA/3199, (hereinafter referred to as the suit property), pending the hearing and determination of the suit filed herein.

The grounds for the application are that the Plaintiff is the *bona fide* owner of the suit premises and that the Defendant has trespassed onto the suit premises and is harassing and blocking her from accessing the suit premises. Further, that the Defendant is cultivating, wasting, degrading and occupying the suit premises and denying the Plaintiff the use of her land to service a mortgage she has with M/s Kenya Commercial Bank.

The detailed facts giving rise to the application are detailed out in the Plaintiff's supporting affidavit and supplementary affidavit sworn on 9<sup>th</sup> May 2012 and 15<sup>th</sup> June 2012 respectively. It is stated therein that the suit property was auctioned on 16<sup>th</sup> November 2009 by M/s Habib Bank Ltd following the Defendant defaulting on a loan, and the property was sold to one Stanley T. Mugacha who nominated the Plaintiff to be registered as owner. The Plaintiff annexed a copy of a title deed and certificate of official search showing her to be the registered owner of the suit property.

The Defendant's response is in a replying affidavit sworn on 6<sup>th</sup> June 2012 wherein he avers that he is not a trespasser as the suit property was always been registered in his name until 29<sup>th</sup> March, 2012, and is currently his family home where he resides with his family. Further, that the Plaintiff had not brought any proof to establish how she came to own the suit premises. The Defendant admitted to having charged the suit property to M/s Habib Bank Limited, and relied on a copy of a statement from his loan account with the said Bank to argue that the chargee/chargor relationship was still in existence as his loan account is still in debit.

The Defendant further stated that M/s Habib Bank Limited though their Agents M/s Domicile Services Limited alleged to have sold the suit premises by a public auction alleged conducted on the 16<sup>th</sup> day of June, 2009 to one Mr. Stanley Thara Mugacha for a sum of Kshs.2,300,000/=, and that the said alleged

sale is the subject of the suit in Kiambu CMCC Number 342 of 2009. Further, that interim orders issued therein were registered as against the title to the suit property as a caution.

The Plaintiff in response stated that there were interim orders issued to the Defendant but that the same lapsed on 7<sup>th</sup> January 2011, as the suit in Kiambu CMCC number 342 of 2009 was struck out by Honourable Mrs C. W. Meoli (as she then was) for want of jurisdiction under section 159 of the Registered Land Act. Copies of the court orders relied upon were produced in evidence by the parties.

The parties at the hearing of the application on 24<sup>th</sup> July 2012 reiterated the above stated arguments. The Plaintiff's Advocate further relied on the provisions of section 77 of the Registered Land Act on the extinction of the chargor's right of redemption upon the exercise of a statutory power of sale, and argued that the Defendant's only remedy is an award of damages. The Plaintiff also relied on the decision by this Court (Honourable Justice L. Kimaru) in **Bomet Beer Distributors Ltd and Another vs Kenya Commercial Bank Ltd. and 4 Others (2005) eKLR** in this regard.

I have read and carefully considered the pleadings, evidence and submissions by the respective parties to this application. I am at this stage required to determine the application before me on the basis of the requirements stated in **Giella vs Cassman Brown & Co Ltd, (1973) EA 358** on the grant of a temporary injunction. These are that the applicant must establish a *prima facie* case, and also that he or she would suffer irreparable loss which may not be compensated by an award of damages. If the Court finds that the two requirements are not satisfied, it may decide an application on the balance of convenience.

The first question I must therefore answer is whether the Plaintiff has established a *prima facie* case. The Plaintiff has provided evidence of title to the suit property, and the extracts of title produced in evidence by the Defendant also show that the Plaintiff was registered as proprietor of the suit property on 29<sup>th</sup> March 2012, and that a title deed was issued to her on the same date. The Defendant does not dispute that the suit property was sold by public auction, and the issues he raises of the legality of the said auction, the effect thereof on the parties, and the regularity of the registration of the Plaintiff as proprietor cannot be decided at this stage, but after full trial. It is therefore my finding that the Plaintiff has established a *prima facie* case.

I will proceed to consider the second question of whether damages will be an adequate remedy. The Plaintiff argues that she has taken a mortgage on the suit property, and is unable to enjoy the use of the property to service the said mortgage. I also note that the Plaintiff has sought a prayer for general damages for wrongful occupation and denial of occupation of the suit property in her Plaint dated 9<sup>th</sup> May 2012 and filed in court on the same date. It is therefore possible for the harm she is suffering in this respect pending the hearing of this suit to be quantified in monetary terms. I have also been aided in reaching this finding by the fact that it is not disputed by the Plaintiff that the suit property is currently the Defendant's family home, who will suffer irreparable harm if the prayers sought in the application as currently framed are granted, as the orders will amount to an eviction of the Defendant.

Arising from the reasons given in the following, the Plaintiff's application is only allowed to the extent of the following orders:

1. The Defendant either by himself, his agents, servants, tenants and/or assigns is restrained from constructing on, erecting structures on, wasting, degrading and/or in any way disposing of LR. No. KIAMBAA/KIHARA/3199 pending the hearing and determination of the suit filed herein or until further orders of this court.
2. The Plaintiff is at liberty to apply for further orders.
3. The costs of the application shall be in the cause.

Dated, signed and delivered in open court at Nairobi this \_\_\_\_2<sup>nd</sup>\_\_\_\_ day of \_\_\_\_October\_\_\_\_, 2012.

**P. NYAMWEYA**

**JUDGE**