



REPUBLIC OF KENYA

High Court at Embu

Civil Case 39 of 2011

ROSEMARY WAMBUI MIANO.....PLAINTIFF

VERSUS

KENYA COMMERCIAL BANK.....DEFENDANT

R U L I N G

The Plaintiff/Applicant filed the Notice of Motion dated 23/3/2011 under Order 40 Rule 1(a) and 2 of the Civil Procedure Rules and Section 3 of the Civil Procedure Act for the following order. An injunction to issue against the Defendant from disposing the properties removed from the plaintiff's premises by the Defendant and or his agents. In the alternative the said goods be released.

The application is supported by the grounds on the face of the application plus the supporting affidavit of the Plaintiff/Applicant. In it she says she took a loan facility from the Defendant and was not up to date with her repayment. She however kept the Defendant posted of all that she was doing. She obtained an injunction vide Civil Case No. 58/2009 Gichugu Court stopping the defendant from disposing of her property. (RWM3) This was on 29/9/2009 (RWM5) authorizing them to sell the Applicant's property.

The Defendant/Respondent through its Kerugoya Credit Officer filed a long replying affidavit explaining what has been happening in this matter. In paragraph 18 he says the attached items were sold and raised Shs.15,541 (CNG11). The counsels agreed to dispose of the application by way of written submissions. Ms. Wangari for Applicant relying on the case of ***MRAO LTD VS FIRST AMERICAN BANK OF KENYA LTD & 2 OTHERS [2003] KLR 125*** submitted that the Applicant had established a *prima facie* case. Mr. Kibicho again submitted citing what has been happening in this case.

I have considered the averments in the affidavits, annexures and the submissions. The Applicant wants this Court to restrain the Defendant/Respondent from disposing of her properties attached or to order for release of the goods to her. The Defendant/Respondent states that the list provided by the Applicant is too exaggerated.

I have with interest noted that the Plaintiff/Applicant had filed a similar civil suit No. 58/2009 at Gichugu Law Courts where she obtained some restraining order. (RWM3). In the same file the Court authorized the Defendant/Respondent to dispose of the attached property. She does not however say what has become of that suit. She does not mention anything about it in her plaint or verifying affidavit. The chances are that it is still pending.

From the facts before this Court the Defendant/Respondent with the permission of the Court at Gichugu sold the goods that it had attached. The Defendant/Respondent has also given an account of the

proceeds. The Plaintiff/Applicant may agree with it or not but that is not for now. It would therefore be an exercise in futility for this Court to issue any restraining orders to dispose as the goods have been disposed off.

There is nothing to be ordered returned to the Plaintiff/Applicant. The other issues raised by parties can only be dealt with vide a full hearing. And that being the case I do not find it necessary to get into the areas of deciding whether the principles for granting an injunction have been met. I therefore find no merit in the application which I dismiss with costs.

I also find that with the enhanced jurisdiction for the Magistrate's Courts, this matter can very well be handled by the SPM Kerugoya from where this matter arises. I therefore order that the matter be transferred to the SPM Kerugoya for hearing and determination.

However, before it proceeds before the SPM Kerugoya there must be evidence in writing to that Court to the effect that the Gichugu Civil Case No. 58/2009 has been withdrawn.

DELIVERED, DATED AND SIGNED AT EMBU THIS 7TH OF NOVEMBER 2012.

H.I. ONG'UDI

JUDGE

In the presence of:-

Ms. Nyaga for Ms. Wangari for Plaintiff/Applicant

Ms. Muthike for Mwaura for Defendant

Njue CC