



REPUBLIC OF KENYA
HIGH COURT, AT NAIROBI
CIVIL SUIT NO 3258 OF 1990

PHILIP M NYUTU

SAMUEL MACHARIA

JAMES M KIGOTHO

H K KIMEMIA APPLICANTS

VERSUS

MARY WANJIRU GATHERU

SUSAN WANGUI GATHERU

MUCHIRI GATHERU RESPONDENT

RULING

The application under consideration is the one of Chamber Summons dated and filed in court on 28th June 1990. There are four applicants, the plaintiffs in the suit. The respondents who are three in number, are the defendants in suit. There are four prayers:

- (1) An interlocutory injunction issue restraining the respondents by themselves, their servants or agents from interfering with the plaintiffs' tenancy on plot No 6 Noon Kopir / Kitengela, pending further order of this court.
- (2) A mandatory injunction issue directing the respondents to open the tenancy premises on the suit plot.
- (3) An order issue to the officer in charge Athi River police station to ensure compliance of the above.
- (4) Costs of the application be provided for.

Whether or not to grant an injunction is in the discretion of the court. The discretion is a free one but must be judicially exercised. It must be based on commonsense and legal principles. To succeed an applicant must, firstly, show a *prima facie* case in the suit with a probability of succeeding when it will come for hearing. Secondly, that unless granted an injunction he is likely to suffer injury incapable of adequate redress by an award of damages. Thirdly, that in the event the court is in doubt on either or both the above matters that the balance of convenience, when circumstances of both parties are put on the balance, is in favour of granting an injunction. This application was heard for two days. On the first day the

applicants presented the application. Their advocate, Mr Chege, put forward submissions in support of the application. There was no time for Mr Agina for the respondents to reply. So the matter was put off to another day. On that day he did not turn up at the place and the time when the application was supposed to be argued. The court waited for an hour but he did not appear. It was therefore left with no alternative but to indicate the date of the ruling. His clients had however, sworn affidavits in opposition of the application.

From the affidavit evidence before me it is clear that the respondents have an interest and rights over the suit property. They have deponed in their affidavits that Kigotho Kabiru Njuguna (under Kigotho) who the applicants allege is their landlord, has no interest or rights over the property.

From that an issue arises whether he had any right to let out the suit premises to the applicants, if lease there is. The rights of the applicants to be in possession is challenged. Consequently an injunction will work injustice to the respondents if granted as prayed. It will mean the court will be excluding them from exercising control over the use of the suit premises.

Mr Chege argued that the dispute as to ownership of the suit property does not affect his clients, and, therefore, they should be left to run their business therein unmolested and without any interference. Mr Chege appears to have overlooked one fact. The respondents are challenging the right of Kigotho to let out the property. In effect they are alleging that he is a trespasser. If that be so then he would not pass any good title to the applicants.

It was also Mr Chege's submission that the respondents took law into their hands by moving into the suit premises and evicting his clients by force instead of following legal channels. In a way there appear to have been provocation by Kigotho. The tenancy agreement he executed with the applicants appear to have ignored the respondents whom he concedes in his affidavit filed herein, to have a beneficial interest in the suit property. Considering all the evidence and circumstances of the case it will be unfair to grant an injunction against the respondents in favour of the applicants.

The effect will be permitting Kigotho to manage the property to the exclusion of the respondents who may have at least equal rights with him if not superior rights over the property. Consequently I will order that the suit premises remain locked, but after the applicants are given an opportunity to take away from inside the premises what is justly theirs. The removal to be supervised by the officer in charge Athi River Police Station on a date to be agreed between the parties and which is convenient to them. The preservation order to remain in force until further order of court.

Costs of this application to be in the cause.

Orders accordingly.

Dated and Delivered at Nairobi this 30th Day of July, 1990,

S.E.O. BOSIRE

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JUDGE