



**REPUBLIC OF KENYA**

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

**MATRIMONIAL CAUSE NO. 1 OF 2019**

**CKS.....APPLICANT**

**VERSUS**

**JSS.....1<sup>ST</sup> RESPONDENT**

**SAMUEL OMUSALA LIBUYI.....2<sup>ND</sup> RESPONDENT**

**RULING**

1. On 25<sup>th</sup> April 2019, Njagi J. delivered a ruling herein, on an application dated, 12<sup>th</sup> February 2019, where the 2<sup>nd</sup> respondent was restrained from selling, charging or in any other way interfering with the title to Kakamega Town/Block II/[...], pending the hearing and determination of the suit. The 1<sup>st</sup> respondent was also ordered to keep paying rent at the premises on Kakamega Town/Block II/[...], pending the hearing and determination of the suit.
2. The applicant has now come back to court, by an application, dated 2<sup>nd</sup> July 2020. She seeks that an unspecified respondent be ordered or directed to abide by or observe the orders made on 25<sup>th</sup> April 2019, and be restrained from further harassing the applicant through distraining for rent by attaching her properties. She complains that the 2<sup>nd</sup> respondent has instructed auctioneers, Eshikhoni Auctioneers, to trespass and proclaim her property, which, she argues is a violation of the order. She avers that the act was in collusion between the respondents to harass her and her children. She has attached a copy of the proclamation of the distraint of movable property.
3. There is a reply to the application, by the 2<sup>nd</sup> respondent, vide his affidavit, curiously sworn on 10<sup>th</sup> February 2020, but filed in court on 13<sup>th</sup> July 2020. He asserts that the property, where the applicant resides is his, and he has attached copy of a title document to evidence the same. He argues that the same cannot qualify to be a matrimonial home, since it is a leasehold, right in the middle of Kakamega town. He avers that the applicant and the 1<sup>st</sup> respondent were in rent arrears, totaling to Kshs. 240, 000.00. He states that from the rental income, he meets other expenses, such as security, water, sewage and maintenance of the premises. He asserts that he is entitled to distrain for rent, arguing that he had not disobeyed the order of 25<sup>th</sup> April 2019. He asserts further that he had not interfered with the applicant's occupation of the premises.
4. The 1<sup>st</sup> respondent has also replied to the application, vide an affidavit sworn on 9<sup>th</sup> July 2020. He does not respond to the allegation that he had failed to pay rent, causing the 2<sup>nd</sup> respondent to distrain for rent. He merely says that the application lacked merit, that he had not harassed the applicant in any way and that the application was brought in bad faith.
5. From the averments by the applicant, and the 2<sup>nd</sup> respondent, there can be no doubt that there is a rent issue, and action has been taken by the 2<sup>nd</sup> respondent by way of distress for rent. This is something that the 1<sup>st</sup> respondent should have responded to in his reply. The order, of 25<sup>th</sup> April 2019, had directed him to pay rent for the premises occupied by the applicant. The fact that the rent has not been paid, forcing distress for rent by the 2<sup>nd</sup> respondent, would suggest that the 1<sup>st</sup> respondent has not complied with that order. His conduct borders on contempt of court. He is not doubt compounding that contempt by ignoring the averments made by the applicant and the 2<sup>nd</sup> respondent.
6. The spirit of the orders of 25<sup>th</sup> April 2019 was to protect the applicant's occupation of the said premises pending hearing and determination of the suit herein. I note that the 2<sup>nd</sup> respondent is arguing that the said property cannot be matrimonial property. That is not an issue that I can deal with here, for Njagi J. addressed it comprehensively in the ruling of 25<sup>th</sup> April 2019, and ruled that it was an issue for determination at the main hearing of the suit.
7. The relevant portion of the ruling says as follows:

*“32. It should however be noted that the property herein has changed hands and now belongs to the 2<sup>nd</sup> respondent. A determination as to whether the same was matrimonial property and as to whether the sale and transfer was proper has to be made*

*at the hearing.”*

8. It would appear that there is a deliberate effort by the 1<sup>st</sup> respondent not to pay rent so as to expose the applicant to hardship, of constantly being harassed, over rent, by the 2<sup>nd</sup> respondent, yet the court had placed the responsibility of paying rent on him. It is an effort to defeat the order of 25<sup>th</sup> April 2019. It denies the applicant quiet occupation of the suit premise pending disposal of the suit.

9. Since there is no wrongdoing on the part of the applicant, the actions of the 1<sup>st</sup> respondent should not be visited upon her. To move this matter forward it is only just that the action for distress for rent should only affect the 1<sup>st</sup> respondent. For where it affects the applicant, its effect would be to completely defeat and make nonsense of the order of 25<sup>th</sup> April 2019.

10. The order, that commends itself to me, is that the 2<sup>nd</sup> respondent should be restrained from distraining the property in the suit premises, so long as it is occupied by the applicant, pending hearing and disposal of this suit. The 2<sup>nd</sup> respondent is at liberty to recover the accrued rent arrears from the 1<sup>st</sup> respondent through other means.

11. The application dated 2<sup>nd</sup> July 2020 is, accordingly, disposed of in the terms proposed in paragraph 10 above. That is to say that the 2<sup>nd</sup> respondent is hereby barred from distraining for rent from the suit premises, that is to say House No. [...], on Kakamega Town/Block II/[...], for as long as the applicant remains in occupation of the said premises, during the pendency of this suit, and pending the making of final orders on the status of that property, as directed by Njagi J, in the ruling of 25<sup>th</sup> April 2019. Each party shall bear their own costs.

12. It is so ordered.

**DELIVERED, DATED AND SIGNED IN OPEN COURT AT KAKAMEGA THIS 20<sup>th</sup> DAY OF November 2020**

**W MUSYOKA**

**JUDGE**