



**REPUBLIC OF KENYA**  
**IN THE HIGH COURT OF KENYA**  
**AT NAIROBI**  
**MILIMANI LAW COURTS**  
**ENVIRONMENT AND LAND DIVISION**  
**ELC NO. 874 OF 2012**

LILIAN M'MBONE ABABU.....PLAINTIFF

=VERSUS=

NAIROBI AVIATION COLLEGE LTD.....1<sup>ST</sup> DEFENDANT

MIKE OYOO WAGUNDA.....2<sup>ND</sup> DEFENDANT

CO-OPERATIVE BANK LTD.....3<sup>RD</sup> DEFENDANT

COMMISSIONER OF LANDS.....2<sup>ND</sup> DEFENDANT

**RULING:**

The matter coming for determination before me is a Notice of Motion application dated 8<sup>th</sup> July 2012 brought by the Plaintiff/Applicant herein **Lilian M'Mbone Ababu** brought under **Order 22 Rule 51 and 52 of the Civil Procedure Rules, Section 3 & 3A of the Civil Procedure Act Cap 21** and all other enabling provisions of the law. The applicant seeks for these orders:-

- a. *That there be a stay of execution of the attachment pending hearing and determination of this application.*
- b. *That the proclamation and/or attachment of the objectors /plaintiff household goods be lifted.*
- c. *The costs if this application be provided for.*

The application was premised upon the grounds stated on the face of the application and on the supporting Affidavit of **Lilian M'Mbone Ababu**. These grounds are:-

- a. *The matter herein is between the 1<sup>st</sup> and 2<sup>nd</sup> Defendants.*
- b. *The 1<sup>st</sup> Defendant has instructed auctioneers to attach the household goods of the objector/Plaintiff who is not a party to their dispute nor is the objector plaintiff a tenant of the 1<sup>st</sup>*

*Defendant.*

- c. *The dispute pending in court is an ownership dispute over the property known as 209/10498/55 between the Plaintiff and Defendants and the dispute between the 1<sup>st</sup> and 2<sup>nd</sup> Defendant does not involve the Plaintiff which has caused the proclamation to be issued.*
- d. *It is fair and just to grant the orders sought.*

The applicant **Lilian M'Mbone Ababu** in her Supporting Affidavit averred that she has filed a suit against the Defendants in respect of LR No. 209/10498/55 over a dispute between the 1<sup>st</sup> and 2<sup>nd</sup> Defendants of which she is not a party to and there is no suit pending on the same. She further averred that the 2<sup>nd</sup> Defendant is her fiancée and is embroiled in a dispute with the 1<sup>st</sup> Defendant. She contended that she is the owner of the **LR No. 209/10498/55** and the 2<sup>nd</sup> Defendant sometimes resides at her house. It was her contention that she was surprised when she found a Notice dated 26<sup>th</sup> June, 2013 in her house addressed to the 2<sup>nd</sup> Defendant proclaiming her household goods over rental arrears of **Ksh. 1840,000/=** as evidence by **LMA1**.

She further contended that as far as she is conceived, she is not a Tenant and she has no landlord and if indeed the 2<sup>nd</sup> Defendant has any arrears then his own personal items ought to be proclaimed as she does not have any Tenancy agreement whatsoever with the 1<sup>st</sup> Defendant. She averred that the issue herein is between the 1<sup>st</sup> and 2<sup>nd</sup> Defendants and she should not be dragged into the issues as she is not a tenant and she risks having her household goods attached over a rental dispute that she is not a party to and the subject property is the bone of contention in the suit that she has filed in court. She further deposed that she is the legal owner of all the attached goods and the 2<sup>nd</sup> Defendant has no legal and/or equitable right of ownership in the house or the household goods. She deposed that she feared that her personal household goods may be illegally attached anytime to satisfy rental income due from the 2<sup>nd</sup> Defendant over a property that belongs to herself and the subject of a suit pending in court.

The 1<sup>st</sup> Defendant opposed the applicant's Notice of Motion dated 8<sup>th</sup> July, 2013. One **Peter Iwouni Manyuru**, the Managing Director of the 1<sup>st</sup> Defendant Company swore a Replying Affidavit and admitted that the 1<sup>st</sup> Defendant issued instructions to the Auctioneers to levy distress for rent and that the said distress and subsequent proclamation was lawful and the same cannot be challenged in the manner subject matter herein. He averred that the 2<sup>nd</sup> Defendant is in collision with the Plaintiff to defeat the courses of justice.

He further averred that there was no evidence to show that the plaintiff was the owner of the proclaimed goods. He further contended that the 1<sup>st</sup> Defendant is the registered owner of the land subject matter herein and is entitled to all the rights appertaining to the property including demand for rent. He further averred that the 2<sup>nd</sup> Defendant resides in the property at the behest of the 1<sup>st</sup> Defendant with the full knowledge of the Plaintiff and as such he should pay rent to the 1<sup>st</sup> Defendant. The deponent reiterated that the 1<sup>st</sup> Defendant is the registered owner of the suit property having legally acquired it for valuable consideration and the Plaintiff has no right over it.

The 2<sup>nd</sup> Defendant **Mike Oyoo Wagunda**, filed a Replying Affidavit and stated that he did not oppose the Plaintiff's application as there is no Tenancy Agreement between himself and the 1<sup>st</sup> Defendant or between the Plaintiff and 1<sup>st</sup> Defendant. He further averred that there is a dispute between himself and the 1<sup>st</sup> Defendant through **ELC No. 672/2012**. He further averred that the 1<sup>st</sup> Defendant fraudulently transferred the suit property illegally to the 2<sup>nd</sup> Defendant and then to itself and this can only come out clearly during the full hearing of the matter.

The parties herein consented to canvass this application by way of written submissions. I have now considered these written submissions and the relevant laws and I make the following findings.

There is no doubt that the 1<sup>st</sup> Respondent issued instructions to Galaxy Auctioneers to levy distress for rent over **LR No. 209/10498/55**, in **Akiba Estate**, over rent arrears of **Kshs. 1,560,000/=** on 6<sup>th</sup> November, 2012. There is also no doubt that the said Galaxy Auctioneers went ahead and proclaimed the goods on 14/11/2012 as evidenced by LMA 1.

Due to the above of stated proclamation, distraint of movable property, the applicant herein filed the instant suit on 22/11/2012 and sought for permanent injunction to restrain the 1<sup>st</sup> and 2<sup>nd</sup> Defendant from interfering with the suit property LR No. 209/10498/55. Simultaneously to the above stated suit, the applicant filed a Notice of Motion application even dated seeking for temporary injunction against the 1<sup>st</sup> Defendant and **Galaxy Auctioneers** to restrain them from attaching the applicant's movable assets as proclaimed on 14<sup>th</sup> November, 2012 . The above Notice of Motion was filed under certificate of urgency and interim orders were issued by **Mutungu J** on the same date of filing the Notice for Motion .

There is no doubt that after the issuance of the Interim order this matter was next in court on 6/6/2013. The court noted that there were no interim orders in place as at 6/6/2013 as the same were not extended on 5/12/2012 when the Notice of Motion was to be heard. The said interim Orders had therefore lapsed after 14 days.

I have noted that after the court failed to extend the Interim orders, the applicant filed the instant Notice of Motion and sought for stay of execution of the attachment pending the hearing and determination of this application. The application is opposed and thus subject of this Ruling.

From the attached documents, there is no doubt that the applicant was the registered owner of the suit property as at 31<sup>st</sup> August, 2004. The applicant did confirm that the 2<sup>nd</sup> Defendant is her fiancée and he used to live in the suit house. She also confirmed that she had given her title document for **LR No. 209/10498/55** to the 2<sup>nd</sup> Defendant as security for a loan that 2<sup>nd</sup> Defendant had secured with 1<sup>st</sup> Defendant.

The 1<sup>st</sup> Defendant has alleged that the 2<sup>nd</sup> Defendant did transfer the suit land to the 1<sup>st</sup> Defendant for a consideration of **7,000,000/=** on 31<sup>st</sup> July 2009. This is evident by PIMI (a) and PIM1 (b) as at 31<sup>st</sup> July 2009, the 1<sup>st</sup> Defendant was the registered owner of the suit property. It was the 1<sup>st</sup> Defendants contention that after 2<sup>nd</sup> Defendant sold the suit land to the 1<sup>st</sup> Defendant, the 2<sup>nd</sup> Defendant became a tenant and it is that tenancy that the 2<sup>nd</sup> Defendant has breached and failed to pay monthly rent to the tune of **Ksh.1560,000/=** as at 6<sup>th</sup> November, 2012.

The 1<sup>st</sup> Defendant therefore instructed Galaxy Auctioneers to proclaim the 2<sup>nd</sup> Defendant's goods and/or levy Distress. The said Galaxy Auctioneers did proclaim the goods and thus this suit. The applicant has now come to court seeking to have the said attachment stayed and the proclamation lifted.

I have considered the available documents especially certificate of title '**PIMI**' (b). The 1<sup>st</sup> Defendant is the registered owner of this suit property. Without any other documents to the contrary, the court will take that is **prima-facie** evidence of ownership. This is as per Section **26(1)** of the Land Registration Act which provides that:-

**26.(1)The certificate of title issued by the Registrar upon registration, or to a purchaser of land upon a transfer or transmission by the proprietor shall be taken by all courts as prima facie evidence that the person named as proprietor of the land is the absolute and indefeasible owner, subject to the encumbrances, easements, restrictions and conditions contained or endorsed in the certificate, and the title of that proprietor shall not be subject to challenge, except—**

The 1<sup>st</sup> Defendant /Respondent being the registered owner of the suit land enjoys rights and interest conferred on itself by registration. The said rights and interests are protected by **Section 24 (a)** of the Land Registration Act which provides as follows:-

**24 (a) the registration of a person as the proprietor of land shall vest in that person the absolute ownership of that land together with all rights and privileges belonging or appurtenant thereto; and;**

The 1st Defendant therefore can rent out the said premises which it claimed it did so and rented to 2nd Defendant . The 2nd Defendant is a fiancée of the Plaintiff herein and Plaintiff did admit that 2nd Defendant sometimes resides in the said house and she even gave the certificates of title to the 2nd Defendant. I would concur with the 1st Defendant that the Plaintiff was well aware of all the dealings between the 1st and 2nd Defendants. There is allegation that the 2nd defendant has defaulted in payment of rent. The 1st Defendant is therefore entitled to **distress for rent**. Though the Plaintiff/Applicant alleges that the goods in question are her movable property , there was no evidence to show that the goods belong to her and not her fiancée 2nd Defendant .

The applicant alleges that there exist no Landlord/Tenant relationship between the Plaintiff and the 1st Defendants, I have however seen a **Tenancy Agreement ‘ PIMI 4b’** which was made on 1st August 2009 between the 1st and 2nd Defendant. The same was forwarded to the 2nd Defendant on 2/9/2009 for his signature with subsequent several reminders to him but I have noted the same was not signed by 2nd Defendant. A demand letter was later sent to 2nd Defendant on 3/10/2012 as evidenced by **“PIMI6”**.

There is evidence therefore that the 2nd Defendant who is a fiancée of the applicant was well aware of demand for rent for a period of 3 years and applicant cannot now claim to have been in the dark. The applicant ceased to be the registered proprietor of the suit property on **31st July, 2009** when the same was registered in the name of the 1st Defendant.

I have also considered the provisions of **Order 22 Rule 51(1)** of the **Civil Procedure Rules 2010** and the same relates to execution of a Decree. There is no decree herein being executed.

The applicant herein should have pursued her amended Notice of Motion dated **26th June, 2013** instead of filing another Motion seeking what cannot lie.

The upshot of the foregoing therefore is that the applicants Notice of Motion dated 8th July, 2013 is not merited . The same is dismissed with costs to the 1st Defendant.

It is so ordered.

Dated, signed and delivered this 23<sup>rd</sup> **day** of **May, 2014**

**L. GACHERU**

**JUDGE**

In the Presence of:-

.....for the Plaintiff

.....for the 1<sup>st</sup> Defendant

.....for the 2<sup>nd</sup> Defendant

Lukas: Court Clerk

**L.GACHERU**

**JUDGE**