



REPUBLIC OF KENYA
IN THE HIGH COURT OF KENYA AT NAIROBI
COMMERCIAL & ADMIRALTY DIVISION
HCCC NO. 288 OF 2006

MORRIS & COMPANY (2004) LTD:::::::::::::::::PLAINTIFF/RESPONDENT

VERSUS

VICTORIA MINERALS AND

CHEMICALS LIMITED:::::::::::::::::1ST DEFENDANT/RESPONDENT

HARENKUMAR DAMNJI MANDAVIA:::::::::2ND DEFENDANT/RESPONDENT

AND

TRIDENT INSURANCE

COMPANY LIMITED :::::::::::1ST INTERESTED PARTY/RESPONDENT

ROMA SCRAP METAL

DEALERS LIMITED :::::::::::2ND INTERESTED PARTY/RESPONDENT

R U L I N G

1. The application before the court is a **Notice of Motion** dated **11th June 2014** filed in court on 12th June 2014. It seeks the only remaining prayers being:-
3. *That the Honourable Court be pleased to order MR. NIXON ODHIAMBO OKUMU trading as JONI CONSULT AUCTIONEERS to evict the trespasser and put the Interested Party into possession of the suit property forthwith.*
4. *That costs of this application be borne by the trespasser.*
2. The application is premised on the grounds set out therein and is supported by **affidavit** of **MARTIN BETT** dated **11th June 2014**.
3. In his supporting affidavit **MR. MARTIN BETT** gives the background of the application, and states that he is familiar with the facts and circumstances giving rise to this application which he stated briefly as follows:-

- i. *The interested party's bid of Kshs. 40,000,000/-, for the suit property was declared highest by M/s Eshikhoni Agency Auctioneers at a public auction held in Kisumu City on 2nd December 2013.*
 - ii. *The auction had been advertised in the Star Newspaper of 25th November 2013 and the Standard Newspaper of 26th November 2014, respectively.*
 - iii. *There having been no objection by any party, the sale proceeded on 2nd December 2013, as aforesaid.*
 - iv. *An application for vesting orders was made, and allowed on 6th December 2013 and vesting orders issued on 9th December 2013 and registered against the title of the suit property on 18th December 2013.*
 - v. *A new certificate of title in the name of the interested party was issued by the District Land Registrar, Kisumu County on 9th January 2014.*
 - vi. *By a letter dated 22nd April 2014, and served upon the trespassers' agent one MR. RASHID, on 9th May 2014, by a process server known as FERDINAND NYONGESA, the interested party's advocates demanded vacant possession of the suit property pursuant to the provisions of order 22 rule 82 (CPR).*
 - vii. *By a letter dated 22nd May 2014, M/s Kakai Mugalo & Company Advocates responded to the interested party's advocates and claimed that the trespassers were in the suit property as "beneficial owners" and further that they have instructions to defend the trespassers' claim over the suit property.*
 - viii. *By a letter dated 29th May 2014, the interested party's advocates wrote back to the trespassers' advocates demanding vacant possession of the suit property and mesne profits at the rate of Kshs. 400,000/-, per month from 18th December 2013 (when the suit property was registered in the name of the interested party), however to date the trespassers have neither vacated the suit premises nor paid the mesne profits.*
 - ix. *The trespassers' conduct constitute resistance and obstruction to the interested party's attempt to take possession of the suit property within the meaning of order 22 rules 82 and 83 (CPR).*
 - x. *The interested party, therefore, prays that the Honourable Court be pleased to punish the trespassers, order for their eviction by MR. NIXON ODHIAMBO OKUMU trading as JONI CONSULT AUCTIONEERS and put the interested party into possession of the suit property.*
4. The Applicant further denied the contents of paragraph 3 of the trespasser's advocates' letter dated 26th May 2014, to the effect that their director, one Mrs. Rehmat Sumra bought the suit property on 23rd October 2009. The Applicant states that this is an attempt to defeat the course of justice for the following reasons;
- a. *The suit property had been attached way back in 2006, by way of a prohibitory order registered against its title on 29th August 2006, and was, therefore, not open to private sale more than 3 years after the said attachment.*
 - b. *Even if it is assumed (for argument sake), that the trespassers' said director purchased the suit property as alleged on 23rd October 2009, the question remains as to why they did not transfer its ownership.*
 - c. *At the time of registering the vesting orders against the title of the suit property, the interested party had to clear accumulated land rent and ground rates which the trespassers (as the alleged beneficial owners) should have been paying.*
 - d. *The purported consideration of Kshs. 10,600,000/-, smacks of a conspiracy between the judgment debtors and the trespassers, because the suit property was valued at Kshs. 29,500,000/-, according to a valuation report by VICTORIA REAL ESTATES, dated 4th March 2005, which had been commissioned by the judgment debtors themselves (four years earlier than the purported dated of sale).*
 - e. *The same property was valued at Kshs. 40,000,000/-, (open market value), on 17th September 2013, meaning that like in the case of any other immovable property, its value keeps on appreciating and it could not have realistically been sold at Kshs. 10,600,000/-, on*

23rd October 2009, as alleged.

- f. That the claim of ownership by the trespassers is borne out of a collusion with the judgment debtors to frustrate the course of justice in this matter.**
5. The Applicant submitted that as the matters stand presently, the interested party who acquired the suit property pursuant to an open public auction and is currently the registered proprietor of the same is being obstructed from taking possession by illegal trespassers in clear violation of order 22 rules 82 and 83 (CPR).
 6. The Applicant further submitted that as the trespassers in this case are liable to pay the interested party mesne profits which on account of the size and location of the suit property should be in the range of **Kshs. 400,000/-**, to **Kshs. 500,000/-**, per month, hence the interested party's claim of mesne profits at the rate of **Kshs. 400,000/-** per month.
 7. Although the application is *ex-parte*, the 2nd, 3rd and 4th Interested Parties opposed it through the **Replying Affidavit** of **REHMAT SUMURA** for the proposed 2nd Interested Party filed in court on **26th June 2014**, and the **Replying Affidavit** of **WILFRED K. MACHINI** for the 3rd Interested party. The affidavit is not dated but is filed in court on 27th June 2014. These Replying Affidavits raise substantially the same issues and I will consider them together.
 8. The application is opposed on grounds that it is mischievous and aimed at circumventing the law as the purported vesting orders obtained on 6th December 2013 were the produce of a fraudulent prohibitory order that was obtained through material non-disclosure and fraud as the property known as Kisumu Municipality Block 6/407 was owned Lake Steel Supplies Limited and who were not parties to this suit. The said prohibitory orders issued on 14th August 2006 were in respect of all the rights and title of the 1st Defendant herein and the parties mischievously included the property know as Kisumu Municipality Block 6/407 yet it was not owned by the 2nd Defendant herein. They further allege that the said property had been charged to Oriental Commercial Bank (formerly Delphis Bank) and the said Lake Steel Supplies Limited was at the time servicing the mortgage. Later the 2nd Interested Party purchased the property.
 9. However before that purchase, the 2nd Interested Party alleges that they were tenants in the property and upon purchase they became the proprietor of the property and have been in continuous occupation, use and possession of the property.
 10. The net effect of the replying affidavits is to impugn the processes, including the process of this court which made the prohibitory orders herein on 14th August 2006, the vesting orders of 6th December 2013, and any further processes. The important thing to note, however, is that these processes which have been undertaken cannot be impugned purely by an affidavit. They are processes which any aggrieved party can either apply to review or set aside or appeal against. The Respondents have not taken any such steps to review, set aside or appeal the vesting order. It is therefore imprudent for this court to consider the extraneous allegation contained in the replying affidavit of REHNMAT SUMAR.
 11. The application before the court is a fairly straight forward one. It merely seeks the leave of this court for the Applicant to adopt a mode of executing this court's order. Those orders are legally enforceable and I have no hesitation allowing the application.
 12. I can see an application on court filed on 26th June 2014 which is yet to be heard. It appears to me that the intended 2nd and 3rd Interested Parties may wish to challenge some of the processes that have taken place herein and which they have extensively referred to in their replying affidavits to this application. However, as I have noted, the application before the case is a simple one on the mode of execution of the orders of this court.
 13. In the upshot, the Notice of Motion application dated 11th June 2014 is allowed as prayed.

Orders accordingly.

DATED, READ AND DELIVERED AT NAIROBI THIS 22ND DAY OF JULY 2014

E. K. O. OGOLA

JUDGE

PRESENT:

No appearance for Plaintiff/Respondent

No appearance for the Defendant/Respondent

Mugalo for the 2nd Interested Party/Respondent

Mugisha for Proposed 3rd Interested party

Teresia – Court Clerk