



**REPUBLIC OF KENYA**

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

**CIVIL SUIT NUMBER 79 OF 2013**

**MICHAEL ODHIAMBO OPIYO. .... PLAINTIFF**

**VERSUS**

**KAMAU WAITIKI. .... 1<sup>ST</sup> DEFENDANT**

**GIRMAT AUCTIONEERS LIMITED. .... 2<sup>ND</sup> DEFENDANT**

**R U L I N G**

The application before the court is a Notice of Motion dated 8<sup>th</sup> March, 2013. It was filed by the Plaintiff and it sought an injunctive order restraining the Defendants from levying distress for rent or threatening or attempting to threaten to do so or in any other way interfering with the Plaintiff's occupation or quiet enjoyment of the property known as Kajiado/Kaputei North/4370, until this suit is heard and determined.

The facts upon which the application is based are that the Applicant is the original registered proprietor of the property. The property had apparently been mortgaged to Equatorial Commercial Bank Ltd in 2009. The Applicant appears to have failed to settle the funds lent to him and the Bank realized its security by selling the property to the Defendants in a public auction. The Applicant unsuccessfully challenged the public sale to the Defendants in Nairobi HCCC No. 872 of 2010. As a result the property was successfully transferred to the Defendants who are currently the registered owners. In the meantime the Applicant refused to move out of the premises and refused to pay rents. Hence the service of notice for levy of distress.

Since the suit and this application were filed in court, the Respondents have averred that the application has been overtaken by events in that the Applicant voluntarily quit the premises and is unlikely to pursue the application and the suit.

It is observed that the Defendants written submission alleging that the Applicant quit the premises the subject of dispute, were served upon the Applicant. In those circumstances, the Applicant would deny the allegation to the effect that the Applicant had quit the premises or that the application is overtaken by events. The Applicant has however, remained silent and the only interpretation the court would give to the silence is that those allegations are true.

Notwithstanding the above fact, the court in the circumstances accepts as true, the alleged fact that the subject property is now registered in the ownership of the 1<sup>st</sup> Defendant. In such a case the Applicant cannot easily obtain an injunction against the registered owner without proof of a tenancy relationship and in this case the Applicant himself has conceded the absence of a tenancy relationship. The Applicant accordingly has not demonstrated a prima facie case with chances of success. Secondly, the Applicant has not demonstrated that if the injunction sought is not granted he will suffer substantial loss or damage which is unlikely to be compensable with damages. Finally, the circumstances of this case do not show the balance of convenience to be in his favour.

The conclusion the court reaches accordingly is that even if the application was not overtaken by events which is the position this court has accepted to have taken place, the Applicant's application would have no merit and is hereby dismissed with costs. Orders accordingly.

Dated and delivered at Nairobi this 17th day of September, 2014.

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**D A ONYANCHA**

**JUDGE**