



REPUBLIC OF KENYA

High Court at Nairobi (Milimani Commercial Courts)

Civil Case 86 of 2010

SAMSON NGUGI ICHUNG'WA T/A GRENAIR.....PLAINTIFF/RESPONDENT

VERSUS

NATIONAL INDUSTRIAL CREDIT BANL LTD.....1ST DEFENDANT

RAJU DHANANI.....2ND DEFENDANT/APPLICANT

JOSEPH GIKONYO T/A GARAM INVESTMENT.....3RD DEFENDANT

RULING

1. The Application for determination is a Notice of Motion dated 10th October, 2012 in which the Applicant seeks for orders *inter alia* the appointment of Receivers/Managers over property title nos. **KIKUYU/KIKUYU BLOCK 1/48** and **KIKUYU/KIKUYU BLOCK 1/55** pending the hearing and determination of the main suit and any appeals that may be preferred against such determination. The application is brought pursuant to the provisions of Order 41 of the Civil Procedure Rules, 2010, Section 1A, 1B and 3A of the Civil Procedure Act, 2010. The grounds upon which the Applicant relies upon are set out in the application and include that the Applicant purchased the said aforementioned properties at a public auction conducted by the 3rd Defendant. The said property was transferred and registered in his name and as such the Respondent does not have any proprietary rights or any right whatsoever over the property.

2. The Application is supported by the Affidavit of Rajan Rajnikant Dhanani also known as Raju Dhanani sworn on 10th October, 2012. It is contended that the Applicant participated in the auction for the sale of the suit property in which he emerged the highest bidder and purchaser. It is also contended that the property was subsequently transferred and registered in his name on 29th November, 2010 and he was issued with Lease Certificates. Further, it is detailed that despite property being in his possession and exercising proprietary rights over it, the Respondent has unlawfully, illegally and prejudicially denied the Applicant access to the properties, collecting rent and enjoying possession of the same. The Applicant contends that continued possession of the property is prejudicial to his proprietary interests and undue denial of an income that has caused him financial loss and stress.

3. In submissions filed on the Applicant's behalf dated 30th January, 2012, the contents of the Affidavit sworn on 10th October, 2012 are reiterated. It is further submitted that the Respondent has never challenged the transfer and registration of the property and has filed numerous frivolous applications, to wit injunctive applications to prevent the registration and transfer of the suit properties which were denied by Kimaru, J, Koome, J and Kariuki, J on 4th November, 2009, 9th November, 2010 and 8th April, 2011 respectively. It is also submitted that in the interest of protecting the position of the contending parties, an

appointment of an independent Receiver/Manager suffices.

4. In opposing the Application, in the submissions filed on behalf of the Respondent dated 6th February, 2012, it was submitted that the Applicant had failed to satisfy (in his Application) the pre-requisites for the appointment of a Receiver/Manager in respect of the suit premises. It was also submitted that the Application is *res judicata*, given that the issues raised in the Application dated 10th October, 2012 had been effectively and fundamentally been determined in a previous application i.e. **H.C.C.C Misc. App No. 443 of 2011**. It was also submitted that the Applicant in previous suits, namely **H.C.C.C J.R Misc. App No. 279 of 2011**, **H.C.C.C No. 22 of 2012** and **H.C.C Appeal No. 617 of 2012**, had various orders issued against him with regards to the suit premises, namely distraint for rent, the setting aside of illegal and unlawful proceedings as well as against breaching orders issued in the subordinate courts in **C.M.C.C Misc. App No. 536 of 2012** and **C.M.C.C Misc App No. 26 of 2012**.

5. The present application for determination is for the appointment of a Receiver/Manager over the suit premises. Order 41 of the Civil Procedure Rules, as read together with Section 3A, the Court in exercising its inherent and discretionary jurisdiction, will grant such orders as to the appointment of a Receiver /Manager as it considers necessary. The power to appoint a Receiver/Manager is not to be exercised as a matter of course or for the reason that it can do no harm to appoint one. This was as reiterated in the case of **Patrick Thuo Gitandu v Zahir Sheikh & 2 Others [2005] eKLR** in which Ransley, J made reference to a passage in **Mulla: Code of Civil Procedure, 13th Edition, Vol. II**. The learned authors, further at page 1537 of the publication stated;

“...A receiver should not be appointed in supercession of a bona fide possessor of the property in dispute unless there is some substantial ground for inference. The court has to consider whether special inference with the possession of the Defendant is required, there being a well founded fear that the property in question will be dissipated or that other irreparable mischief may be done unless the court gives its protection. The mere fact that the Plaintiff in his Complaint makes violent and wholesome charges is no ground for the appointment of a receiver. (emphasis added). The removal, however, under suspicious circumstances of a large amount of property by the Defendant during the pendency of a suit in which the question of title to that property would be determined is a good ground for the appointment of a receiver.”

The learned judge further observed that;

“...the appointment of a receiver is a discretionary equitable remedy and a court will only exercise its discretion to appoint a receiver where it is satisfied that there are grounds for thinking that the property in dispute will be dissipated if a Receiver is not appointed.”

6. In the grounds adduced by the Applicant in his application and in his submissions, it is stated that the Applicant is in danger of financial loss and stress as he had been denied access to the suit properties to collect rent. It is also stated that the appointment of the Receiver/Manager would serve the interests of both parties. The Applicant alleges that the property was purchased for Kshs. 16, 500,000/-. The Applicant also claims that the properties attract rent of approximately Kshs. 200,000/- per month, which has been denied to him by the Respondent since February, 2010. These are not the same issues as claimed by the Respondent to have been canvassed in the numerous applications and suits as set out elsewhere herein above. Therefore, do these issues qualify as ‘...*special inference*...’ or ‘...*irreparable mischief*...’ as reiterated in **Patrick Thuo Gitandu v Zahir Sheikh** (supra)? At paragraphs 22 and 26 of the Affidavit, the applicant alludes to the fact that the properties are at risk of disrepair and misuse and that the Respondent would be unable to pay accumulated collections. At paragraph 22, the Applicant contends;

22. THAT the Plaintiff is not minded to maintain and repair the buildings and therefore there is danger that the same will be wasted and ruined.

Further at paragraph 26, it reads;

26. THAT the monthly rent from the premises is Kshs. 200,000/- and I believe that the Plaintiff/Respondent will be unable to pay accumulated collections should the Court case he has filed be held against him.

7. However, in opposing the Application, the Respondent submitted that the property does not attract any rental income and that the averments by the Applicant in his Affidavit are frivolous and unfounded. He also contends that the property is residential and that he and his extended family have been in residence of the suit properties for over 25 years. It is also contended that the claims by the Applicant that the Respondent is not minded to maintain and repair the buildings is not proven and are imaginary and intangible. In the Valuation Report submitted in Court dated 3rd February, 2010 and marked “**JG 5**” to the Replying Affidavit of Joseph Gikonyo, the 3rd Defendant herein, in response to the Plaintiff’s Application dated 15th February, 2010, shows development in the suit premises. This development includes, but are not limited to three (3) blocks of flats, which attract a gross realizable rent of Kshs. 202,500/ per month. The Respondent therefore, is not truthful about the real position of the suit properties when he submits that there are no development therein. Does this therefore warrant the Court to exercise its discretion to allow for the orders sought in the application?

8. In dismissing the application to appoint receivers, Ransley, J in **Patrick Thuo Gitandu v Zahir Sheikh** (supra) followed the observations made by Hancox, J (as he then was) in **Adamali & Others v Alibhai C.A No. 26 of 1974** where the learned judge, in dismissing a similar application, held that:

“...that being put out of rent was not sufficient in an interlocutory application to justify the grant of such relief and that to do so was tantamount to advancing the final relief sought.”

In dismissing the appeal, Wambuzi, J.A (as he then was) also observed that:

“In agreement with the trial judge, I am unable to see that the justice and convenience of the case require the appointment of a receiver at this stage. The learned judge exercised his discretion judicially and I would not interfere with his decision.”

9. The determination of each case is made on its own merits and peculiar circumstances. In the present case, the Applicant has not shown that he stands to suffer **‘irreparable loss’** to warrant the Court to issue the orders sought. As was reiterated by Hancox, J, being kept out of rent is not sufficient to grant the orders sought. The claims that the buildings in the suit properties are not being maintained and are in a state of disrepair are not evidenced in the Affidavits before this Court. I am also of the opinion that such matters have been aired before these Courts in earlier suits and are therefore res judicata. As it stands, the application lacks merit and I dismiss the same with costs.

DATED and DELIVERED at NAIROBI this 27th day of February 2013.

**J. B. HAVELOCK
JUDGE**