



REPUBLIC OF KENYA

High Court at Nakuru

Civil Case 167 of 2009

PRIVATE DEVELOPMENT COMPANY LIMITED.....PLAINTIFF/APPLICANT

VERSUS

REBECCA NGONYO.....1ST DEFENDANT/RESPONDENT

SAMUEL KAMAU MACHARIA.....2ND DEFENDANT/RESPONDENT

AND

JACKSON NJENGA NJOROGE.....INTERESTED PARTY

RULING

At the centre of this dispute is the ownership of property known as BLOCK 4/46 NAKURU MUNICIPALITY.

There are several suits brought by different parties against various individuals.

Apart from seeking the consolidation of those suits, the instant application by way of a motion dated 6th February, 2012 seeks:

- i) the court's interpretation of two consent orders recorded on 18th October, 2006 and on 29th November, 2011;
- ii) in the alternative to (i) above, there is prayer that all proceeds collected from the suit property be collected by an independent agent and deposited into either a joint interest-earning account in the names of the parties' respective counsel or into court, and
- iii) further and in the alternative to (ii) above it is sought that there be an order to open a joint interest-earning account in the names of counsel representing the parties.

It has been deposed on behalf of the applicant, Private Development Company Limited (the plaintiff) that the 1st respondent, Rebecca Ngonyo, has frustrated the two consent orders by failing to give possession of the suit property and participate in the appointment of an agent. She has instead continued to appropriate the proceeds from the property to the applicant's detriment.

The situation has not been made any better by this court's orders of 16th December, 2011 temporarily

staying the execution of the consent order of 29th November, 2011. It is further stated that the 1st respondent's continued breach of the consent order has put the suit property to waste as she continued to collect rent.

In reply, the 1st respondent contends that the consent orders did not involve all the parties particularly the 2nd respondent, Samuel Kamau Macharia or his counsel; that in entering into the consent counsel them representing the 1st respondent did not have the latter's authority to do so; that the orders were made in disregard of other related pending suits and/or the parties, hence creating conflict of orders.

The interested party, Jackson Njenga Njoroge has filed a notice of preliminary objection and a replying affidavit (erroneously headed supporting affidavit), the combined effect of which is that the entire application is incompetent and amounts to an abuse of the court process; that he acquired the suit property through a public auction, which auction has not been set aside; that he took over possession of the property in 2005 and remains in possession todate, paying rates to the Municipal Council of Nakuru; that the claim to rent from the property by the applicant and the 1st respondent is without basis and is only intended to deprive the interested party his proprietary rights as enshrined in the Constitution.

The two orders, central to this application are reproduced here below. The one issued on 18th October 2006 reads as follows:

“.....IT IS HEREBY ORDERS BY CONSENT:

1. THAT pending the hearing and determination of the plaintiff/applicant chamber summons filed on 11th October:

- (i) The interim orders granted on 13th October, 2006 be and are hereby vacated.**
- (ii) That all the tenants of or in the suit premises as at the 13th October, 2006 remain in their respective premises without interference by any of the parties to this suit and or their respective agents or otherwise whatsoever.**
- (iii) That the rent outstanding and accruing be collected by an independent agent agreed by the Advocates for the plaintiff and the first defendant respectively that, is C.N. Kihara & Company Advocates and Mirugi Kariuki & Company Advocates.**
- (vi) That all the monies collected thereafter by such agent be deposited in an interest earning account in the joint names of the Advocates for the plaintiff and the first defendant such account to be of a commercial bank of repute and good standing to be agreed upon by the said Advocates for the plaintiff and first defendant.**
- (v) That pending the appointment of the agent pursuant to clause iii), hereof none of the parties to this suit shall collect rent from suit premises either by themselves or their agents or otherwise howsoever.**
- (vi) The agent's fees and charges shall be paid from the rent collected.**
- (vii) That the suit premises be maintained as it is by all the parties either by themselves and/or their agents and/or servants and/or employees.**

2.

3.

4.

5. **THAT on the final determination of the plaintiff’s chamber summons filed on the 11th October, 2006, the court do issue directions as to whom the amount held in the joint account and/or with the agent will be released to.**

6.

7. **THAT the order by consent in terms and condition set forth and stipulated hereinabove be and are hereby entered and recorded accordingly.”**

The second consent recorded on 29th November, 2011 reads in material part as follows:

“1.

2. That an account be opened in the joint names of

Mirugi Kariuki & Company Advocates and Wambeyi Makomere in a reputable commercial bank into which shall be collected (sic) and deposited the proceeds of the property known as LR No. Nakuru Municipality Block 4/46, within 10 days.....”

From the two orders the following are clear:

- i) the tenants were to remain in the premises, without interference from any of the parties to the suit;
- ii) rent was to be collected by an agent to be agreed upon and rent collected was to be deposited into a joint account in a reputable bank;
- iii) none of the parties to the suit was to collect rent before the appointment of an agent;
- iv) the suit premises were to be maintained in the same condition;
- v) the determination as to which party was entitled to the collected rent was to await the hearing of application filed on 11th October, 2006;
- vi) the consent of 29th November, 2011 reiterated that a joint account be opened into which rent would be deposited;
- vii) both consents were recorded in the presence of counsel for the applicant, the 1st and 2nd respondents.

The applicant seeks, in the first instance that the court gives directions or interprets the two consent orders. The two orders as reproduced and explained in the preceding paragraphs need no interpretation or direction. The second prayer, which is sought as an alternative to the first prayer is to the effect that court orders the rent collected from the suit premises to be collected by an independent agent and deposited into a joint account of both counsel for the parties or into court.

Such an order will be superfluous as the two consent orders cover the relief sought. The respondents particularly cannot raise in their reply the issue of lack of authority to their counsel to enter into the consents in question. They ought to have been sought by an application for the setting aside of the orders.

Although there was a temporary order to stay of 29th November, 2011, that order did not relate to the earlier order of 18th October, 2006, which was detailed and clear in its terms. Parties ought to obey it as it has not been set aside.

Where a party violates an order of the court, there is a procedure to address such violation which

procedure does not include duplication of similar order. The application of 11th October, 2006 does not appear to have been heard *interpartes* to determine which party is entitled to the rent.

In the result, the application fails save for the prayer for consolidation. The application is dismissed with costs. Prayer (e) of the motion is allowed and the cases listed there consolidated.

Dated and Signed at Nakuru this 4th day of February, 2013.

**W. OUKO
JUDGE**

Dated, Signed and Delivered at Nakuru this 12th day of February, 2013 by Hon. Justice M. J. Anyara Emukule.

JUDGE