



**REPUBLIC OF KENYA**  
**IN THE HIGH COURT OF KENYA AT NAIROBI**  
**MILIMANI COURTS**  
**CIVIL SUIT NO 109 of 2013**

**C. DORMANS LIMITED.....PLAINTIFF**

**VERSUS**

**KENYA RAILWAYS CORPORATION.....DEFENDANT**

**RULING**

C. Dorman Limited has sued Kenya Railways Corporations the defendant. In a plaint dated 4/4/13 and filed in court on the 4/4/13 the plaintiff/applicant is seeking orders of injunctive orders to restrain the defendant from evicting the plaintiff/applicant from its property, attaching the plaintiff's property, forcefully obtaining the plaintiff's assets with the intention to sell the same at public auction or in any other way alienating or destroying the plaintiff property without an order from the Court. That the Court makes a declaration that the plaintiff does not or owe the defendant any sums or fees whatsoever in respect of clause 13 of the title deed to the suit property more specifically that the plaintiff does not owe the defendant a siding fee away other fees in respect of any other contribution of any sort.

Simultaneously with the plaint the applicant filed a Notice of Motion brought under certificate of urgency dated the 4/4/13. The application is brought under order 40 rules (1) and 4 of the Civil Procedure Rule 2010 section 3A of the Civil Procedure Act and all other enabling provisions of the law. The applicant is seeking orders that the respondent, her servants, agents and other persons under her control and direction be restrained from evicting the applicant from his premises, unlawfully seeking and attaching the applicant's property or otherwise wasting, damaging or alienating the applicant's property, which property is situated in the Nairobi Municipality (south) in the Nairobi Extension Provincial District and is registered at the Registry of titles as I.R 10491 and mere particularly comprises of the parcel of land known as L.R 209/4248 the suit property. That the respondent pending the disposal of the suit herein another order of the Court in particular be restrained from;

- a. Forcefully evicting the applicant from the suit property.
- b. Forcefully and unlawfully seizing and or selling the applicants assets in respect of the suit property or any part interest.
- c. Levying distress on the applicant for rent arrears allegedly due Respondent in respect of the suit property.
- d. Remitting facilitating or encouraging any third party persons to enter therein with the purpose of taking possession of parts of the suit property.
- e. That pending the hearing of this application inter-parties, the status quo in respect of the suit property be preserved and any wastage, damage or alienation thereof be prohibited and that costs of the application be costs in the cause.

The application is based on 5 grounds stated on the face of the application. They outline the gist of the applicant's case.

The applicant filed an affidavit sworn by Erick Omondi the director of Finance and administration of C. Dorman Ltd. He avers that the applicant leased the property from the governor and Commander in Chief of the Colony and protectorate of Kenya for a term of 99 years which was registered at the registry of Titles as I.R 10491 and more particularly comprise of the parcel. That after purchasing the said property the applicant received an invoice from the respondent in respect of a contribution fee towards the unimproved site value on plot 154 Nairobi which contribution fee was referred to as a siding fee. That the applicant wrote to the respondent claiming that it was unaware of the said payment and in their letter they questioned the legal basis of the siding fee (EOI). There was correspondence between the parties but the respondent failed to adequately address the issues, however the applicant made several payments to the respondent in respect of the said fee under the mistaken fact that fees may be due to the respondent. That in the mid 1990's the applicant took a decision to cease making any further payments to the respondent for the reason that the platform to which the siding fee related could no longer be used and that it had not been in use since the mid 1970's owing to the fact that the respondent had ceased to provide and or operate railway services along that line from that time. That since the applicant was not deriving any benefit or use of the platform for almost 30 years the applicant wrote to the respondent in 2008 requesting for documentation which proved or provided it with legal basis to raise the siding fee. His time the respondent responded through a letter dated 17/8/10 citing clause 13 of the title deed of the suit which states as follows;

*“the guarantee shall pay such taxes clients assessment or outgoing as may be properly imposed charged or assessed by any government or local authority upon the land on the buildings including any contribution or other sum paid by the governor in lieu thereof”*

They stated that they were entitled to charge the siding fee. That upon receiving this response the applicant sought legal advice from its counsel who advised it that it constitutes an unjust enrichment for the respondent to charge the affidavit fees for services which it does not use which it had not used for over 3 years and which it cannot use because the platform to which the siding fee relates is situated on a railway which is no longer in use and has not been in use for over 30 years. That thereafter on the 3/7/12 the respondent through their agents auctioneers threatened inter alia to attach the applicants property forcefully obtain its assess with the intention to sell the same by public auction levy distress on the applicant and forcefully evict the applicant from its property. The applicant responded through their letter dated 12/7/12 explaining that the siding fees were not the scope of clause 13 and that the past payments in relation to the same had been paid under a mistake of fact. That on the 21/1/13 the applicant received a 2<sup>nd</sup> demand letter from the respondent threatening to attach its property, forcefully obtain its assets with the intention of selling the same and to levy distress on the appellant and evict it from its property. That they were advised by his counsel that the respondent ought to have instituted a civil suit as it so alleged debt for recovery of the sums alleged owed rather than the said auctioneers. That it is currently in a state of anxiety and fear that the respondent its agent will cause it irreparable law and unlawfully caring out its threats rather pursue its claim the proper way through the Court. The applicant therefore seeks the injunctive orders as per the notice of motion.

The respondent was served but did not respond to the application.

The applicant before me is therefore unopposed. From what is depones there is an issue on whether the applicant should pay the siding fees and if the respondent can recover the alleged sum owed by due by instructing an auctioneer to levy distress. The applicant has to show that it has a prima facie case with a probability of success, whether it will suffer irreparable loss if the orders are not granted and if the Court is in doubt it will decide the case on balance of convenience. The applicant has annexed the title which set out the terms. The correspondence attached demonstrates the issues the applicant has had with the respondent. It is not clear to me whether the amount claimed is rent or some kind of levy the applicant is to pay. Therefore since I am in doubt, I will decide this matter a balance of convenience. I therefore order that pending the disposal of this suit the respondent is restrained from evicting the applicant form the suit property, the respondent is also restrained from levying distress on the applicant or otherwise wasting,

damaging or collecting the applicant's property situated in the Nairobi Municipality (south) in the Nairobi extension Provincial District and is registered at the Registry of titles as I. R 10491 and more particularly comprises of the parcel of land known as L. R 209/4248. Costs shall be in the cause.

Orders accordingly.

Dated, signed and delivered this 17<sup>th</sup> Day of May 2013

**R. E. OUGO**

**JUDGE**

In the presence of:-

.....For the Plaintiff/Applicant

.....For the Defendant/ Respondent

.....Court Clerk