



REPUBLIC OF KENYA

High Court of Kisii

Environmental & Land Case 362 of 2012

MASABA FARMERS CO-OPERATIVE

UNION LIMITED.....PLAINTIFF

V

GETEMBE HOSPITAL LIMITED..... DEFENDANT

RULING

1. The parties herein have had a long running dispute going back to the year 2007 over the parcel of land known as L.R.No. Kisii Municipality/Block II/17 (hereinafter known as “**the suit premises**”). This is the 6th in a series of court cases and applications that the parties have had over the suit premises. Before going to the merits of the application before me, I would like to set out in summary the history of the dispute between the parties as far as I have been able to gather from the material

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placed before the court. This history will become relevant and useful at a later stage in this ruling in understanding the context in which present case and application have been brought. At all material times, the Plaintiff was and still the registered proprietor of the suit premises while the defendant was a tenant therein. The tenancy relationship between the Plaintiff and the defendant was a controlled tenancy within the meaning of the provisions of section 2(1) of the Landlord and Tenant (Shops, Hotels and Catering Establishments) Act, Cap. 301 Laws of Kenya. Sometimes in the year 2007 or thereabouts, the Plaintiff served the defendant with a notice to terminate the defendant’s tenancy. The grounds for the termination are not clear from the record as the said notice has not been produced in court by either party. The Plaintiff’s notice of termination of tenancy was opposed by the defendant. This gave rise to Business Premises Rent Tribunal at Kisii, Case No. 41 of 2007, Getembe Hospital-vs-Masaba Farmers Co-operative Union

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(hereinafter referred to as “**the Tribunal’s case**”). The Tribunal’s case was heard and determined in favour of the Plaintiff on 10th February, 2009. The Plaintiff’s notice to terminate the defendant’s tenancy was allowed and the defendant ordered to vacate the suit premises on 1st April, 2009. The defendant was aggrieved with the decision of the Tribunal and preferred an appeal against the same in, Kisii High Court, Civil Appeal No. 25 of 2009, Getembe Hospital Ltd.–vs-Masaba Farmers Co-operative Union (hereinafter referred to as “**the appeal case**”). On its part, the Plaintiff filed a miscellaneous application in the Chief Magistrates Court at Kisii for the adoption and execution of the order that was issued in the Tribunal’s case aforesaid. This was in Kisii Chief Magistrate’s Court, Misc. Application No. 106 of 2009(hereinafter referred to as “**the execution case**”). The defendant applied in the appeal case for stay of execution of the Tribunal’s order but its application was dismissed by Justice

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A. Muchelule on 14th July, 2009. After the dismissal of the stay application, the defendant sought a review of the said order of dismissal and a stay of execution of the Tribunal’s order pending the hearing and determination of the said appeal. Justice A. Muchelule gave interim orders of stay of execution on this new application on 19th October, 2009 and set down the application for hearing on 4th November, 2009. On 4th November, 2009, the hearing of the said application was adjourned to 2nd December, 2009 and the interim orders of stay granted on 19th October, 2009 were extended to that date. On 2nd December, 2009, once again the defendant’s application was adjourned to 14th July, 2010. On that day the interim orders of stay that had been issued on 19th October, 2009 were not extended. On 14th July, 2010, the said application was stood over generally. It is not clear from the record whether the said application was ever listed for hearing again. The same applies to the appeal case in which it was filed.

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2. As regards, the execution case, the same was allowed by Kimutai, SRM on 13th October, 2009 and Moco Auctioneers were authorized to evict the defendant from the suit premises with the assistance of the O.C.S Kisii Police Station. On 14th October, 2009 the defendant lodged an application for injunction in the said application for execution to restrain the eviction of the defendant from the suit premises. The defendant’s application was heard by Hon. Thuku R.M who granted interim orders of injunction on 14th October, 2009 and set down the application for hearing inter partes on 19th October, 2009. On 19th October, 2009, Thuku R.M made a consent order on the following terms;

“By consent, the application dated 12th October, 2009 is stayed pending the hearing and determination of Civil Appeal No. 25 of 2009, in the High Court. This is pursuant to orders granted for stay in that matter.”

Nothing material seems to have taken place in this case after

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this order until, 10th August, 2010 when the Plaintiff requested the Chief Magistrate by a letter to re-issue the eviction order that was given by Kimutai R.M on 13th October, 2009 on the ground that the defendant had not obtained a stay of execution in the High Court. The eviction order was re-issued accordingly as requested by the Plaintiff, after which the defendant was evicted from the suit premises on 13th August, 2010. The said eviction was carried out in a very high handed and ruthless manner. It therefore resulted in serious damage to the suit premises and to the defendant’s properties which were in the suit premises.

3. After its eviction from the suit premises as aforesaid, the defendant moved the High Court in Misc. Civil Application No. 167 of 2010(hereinafter referred to as **“the contempt case”**), seeking inter alia an order that the Plaintiff herein, the Plaintiff’s then advocate, one, Charles Ayienda and one, Kennedy Mokuia t/a Moco Auctioneers be punished by the

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court for disobeying the order that was issued by Justice A. Muchelule on 19th October, 2009 in Kisii HCCA No.25 of 2009(appeal case). The defendant also sought an order that the Plaintiff be ordered to purge its contempt of the orders of 19th October, 2010 aforesaid by repairing and/or restoring the suit premises to the same condition in which it was prior to the eviction of the defendant therefrom and/or returning the defendant’s properties therein and by making payment and/or compensating the defendant for the defendant’s properties which were damaged and/or got lost during the eviction. The defendant’s application for contempt was brought on the ground that the Plaintiff carried out the eviction of the defendant while there existed in force an order of stay of execution issued by Justice A. Muchelule on 19th October, 2009. The defendant’s application was heard by Justice Musinga. In his ruling dated 9th December, 2011, Justice Musinga found the Plaintiff and his then advocate aforesaid guilty of contempt of

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court. Justice Musinga held that although the Plaintiff did not breach the order issued by Justice Muchelule on 19th October, 2009 as the defendant had claimed, the Plaintiff and his said then advocate had breached the consent order that was made by Thuku, R.M. on 19th October, 2009. According to Justice Musinga, the order recorded before Thuku R.M. on 19th October, 2009 had stayed the execution of the Tribunal's order pending the hearing and determination of Civil Appeal No.25 of 2009. The Judge pronounced himself as follows at page 17 of the ruling

“ Even if there was no extension of the interim orders issued in HCCA 25 of 2009, Mr.Ayienda was well aware that on 19th October, 2009 a consent order had been recorded before Thuku R.M. to the effect that there would be stay of execution of the Tribunal's orders “Pending the hearing and determination of Civil Appeal No. 25 of 2009.” Parties are bound by their consents and courts of law cannot permit one party to

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wriggle out of a consent order to the detriment of the other”.

With the foregoing finding, the Plaintiff's then advocate, Charles A. Ayienda was found guilty of contempt and fined Ksh.100,000.00 and in default of payment 30 days imprisonment. The Judge however declined to order the Plaintiff to purge its contempt reasoning that the orders sought for compensation were of such a nature that could not be granted in a miscellaneous application and that the order for restoration of the suit premises would have been prejudicial to the Plaintiff's interest. The defendant has since filed a suit before this court against the Plaintiff and its said former advocate Charles Ayienda, namely, Kisii HCCC No. 154 of 2012 (hereinafter referred to as **“the compensation case”**), seeking general damages for illegal entry and eviction of the defendant from the suit property. In the said contempt of court proceedings, Justice Musinga had reached a finding that there

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was in force an order of stay of execution of the Tribunal's orders of 10th February, 2009 terminating the defendant's tenancy and ordering the defendant to vacate the suit premises and that the said order of stay

was breached and/or disobeyed. Even after reaching this finding, the judge still declined to order the Plaintiff to purge its contempt which would have enabled the defendant to return to the premises. It is as a result of this decision that the defendant took a cue and decided to file the compensation case aforesaid. The compensation case has been brought by the defendant to claim damages arising from its unlawful eviction and malicious damage to its property. There is no evidence on record that the said decision by Justice Musinga was stayed, varied or set aside.

4. In this 6th suit in a series of cases and applications between the Plaintiff and the defendant over the suit premises, the Plaintiff claims that on or about 26th August, 2012, the defendant's

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agents and/or employees returned to the suit premises without the permission of the Plaintiff and installed watchmen thereon to guard the same consequent to which the Plaintiff's agents, servants and employees who had gone to the premises to carry out renovations were assaulted and have since been denied access and/or entry into the suit premises. The Plaintiff contends that the return of the defendant to the suit property as aforesaid long after being evicted amounts to trespass entitling the Plaintiff to damages. The Plaintiff claims against the defendant, a declaration that the Plaintiff is the lawful and registered proprietor of the suit premises, general damages for trespass and a permanent injunction restraining the defendant from entering trespassing onto, maintaining watchmen, interfering with and/or in any other manner dealing with the suit property.

5. Together with the Plaintiff, the Plaintiff also filed an application dated 3rd December, 2012 seeking a temporary injunction to

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restrain the defendant from entering upon, trespassing onto, maintaining watchmen, interfering with and/or in any other manner dealing with the suit property pending the hearing and determination of this suit. The said application is supported by the affidavit of one, Julius Osano Ombaba who described himself as the chairman of the Plaintiff sworn on 3rd December, 2012. In this affidavit, Mr.Osano has restated the history of the dispute between the Plaintiff and the defendant and the cases they have had over the years. Mr.Osano has stated that after the defendant was evicted from the suit premises on 13th August, 2010, the defendant lodged the contempt application, namely, Kisii, Misc. Civil Application No. 167 of 2010 in which it sought amongst others an order that it be reinstated in the suit premises which prayer was rejected by the court. He has deposed further that despite the dismissal of his prayer for reinstatement, the defendant returned to the suit premises, posted its watchmen thereon and has since denied the

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Plaintiff's employees and agents access to the same. The Plaintiff's said chairman has deposed further that on 26th August, 2012 the defendant's said agents and/or employees assaulted the Plaintiffs agents and employees at the suit premises thereby causing them physical injuries. He has annexed to his affidavit copies of P3 forms evidencing the said injuries. The Plaintiff's chairman has stated further that the defendant has now prevented the Plaintiff from accessing the suit property for the purposes of carrying out renovations thereon and other development activities. The Plaintiff's chairman has deposed further that the defendant's re-entry into the suit premises after the court had declined to permit the same amounts to an abuse of the process of the court and taking the law into own hands. In conclusion the Plaintiff's chairman has contended that the Plaintiff has shown that it has a prima facie case with overwhelming chances of success against the defendant and that the Plaintiff is bound to suffer

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irreparable harm unless the orders sought are granted as the Plaintiff has been prevented from benefitting from the suit premises which is situated within Kisii Central Business District.

6. The Plaintiff's application is opposed by the defendant. The defendant has filed a replying affidavit sworn by the defendant's managing director, Gideon Nyachaki Rigira on 19th December, 2012 in response to the application. In this affidavit, Mr.Rigira has deposed that the defendant's eviction from the suit premises was stayed in the appeal case which stay was extended in the execution case. In the circumstances, the defendant's occupation of the suit premises is pursuant to lawful court orders. Mr. Rigira has deposed further that the existence of the said stay orders was confirmed by Justice Musinga in the contempt case and if the injunction sought is granted, it will go contrary to the said order of stay and Justice Musinga's findings. In conclusion Mr. Rigira contended that the

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Plaintiff has failed to demonstrate that it has a prima facie case against the defendant.

7. On 19th December, 2012, the advocates for the parties agreed to argue the application by way of written submissions. The Plaintiff filed its submissions on 10th January, 2013 while the defendant filed its

submissions on 20th February, 2013. I have considered the Plaintiff's application and the affidavit in support thereof and the affidavit filed in opposition thereto. I have also considered the written submissions filed by the advocates for both parties and the case law cited by them. As was stated in the case of **Giella –vs- Cassman Brown & Company**

Ltd. (1973) E. A. 358, an applicant for interlocutory injunction must satisfy the court that he has a prima facie case with a probability of success against the respondent and that unless the orders sought are granted he will suffer irreparable injury. If the court is in doubt, the court would decide the application on a balance of convenience. The onus was therefore upon the

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plaintiff to satisfy the aforesaid conditions so as to be entitled to the orders sought herein. The facts giving rise to this suit are not disputed. As I have narrated above in the history of the dispute between the parties, the defendant was a tenant of the Plaintiff in the suit premises. The Plaintiff obtained an order from the Business Premises Rent Tribunal to terminate the defendant's tenancy in the suit premises. The defendant was ordered by the said Tribunal to vacate the suit premises. The said order from the Tribunal was filed at the Chief Magistrates Court at Kisii and adopted as a judgment of that court for the purposes of execution. The defendant was not satisfied by the Tribunal's decision and lodged an appeal before the High Court to reverse the same. The said appeal is pending hearing and determination before the High Court. The defendant filed applications for stay of execution both in the Chief Magistrates Court where the Tribunal's order was filed for execution and in the appeal that was filed before the High Court. The

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defendant's first application for stay of execution pending appeal filed in the appeal that was lodged before the High Court was dismissed by Hon. Justice A. Muchelule. The defendant sought a review of the said dismissal and an order of stay of execution pending the hearing of the said application for review. The defendant was granted an interim stay of execution which was to last for a specific period. The said interim stay of execution of the Tribunal's order issued by the High Court in the appeal lapsed by effluxion of time and was never extended. The fate of defendant's application seeking to review the dismissal by Justice A. Muchelule of its application for stay of execution in which the expired interim stay aforesaid was granted is not known. The defendant's application for stay of execution before the Chief Magistrate's Court was never heard on merit. As I have observed at the beginning of this ruling, when the defendant's application for stay of execution in the Chief Magistrate's Court came up

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before Hon. Thuku R.M. on 19th October, 2009, the advocates for the parties recorded a consent staying the application dated 12th October, 2009(I presume this was the application for stay of execution that was before Hon. Thuku R.M) pending the hearing and determination of civil appeal No. 25 of 2009. This consent order was made on the ground that the High Court had already granted a stay of execution of the Tribunal's order in the said civil appeal pending the hearing and determination of the said appeal. The truth of the matter is that the High Court had not granted any such order. The order that had been issued by the High Court in the said appeal was as I have mentioned above were temporary and the same lapsed and were never extended. It follows therefore that there were no orders of stay of execution issued by the High Court in the defendant's appeal pending the hearing and determination of the said appeal. It follows from the foregoing that the defendant did not obtain a stay of execution of the Tribunal's

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order both in the Chief Magistrate's Court and in the High Court. This being the case the Plaintiff moved the Chief Magistrate Court to execute the Tribunal's order. The Chief Magistrate issued appropriate orders and the defendant was forcefully evicted from the suit premises on 13th August, 2010. After the defendant's said eviction from the suit premises, the Plaintiff took possession of the same and commenced renovation works. The defendant did not take its forceful eviction from the suit premises lying down. The defendant moved the High Court through a miscellaneous application to cite the Plaintiff, its then advocate and the auctioneer who had carried out its eviction for contempt of court. In the said application, the defendant claimed that the defendant's eviction from the suit premises had been carried out in breach of the order that had been issued by Justice A. Muchelule on 19th October, 2009. The defendant sought an order for the punishment of the Plaintiff, its said advocate and auctioneer

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and for the Plaintiff to be ordered to purge its contempt. As I have mentioned herein above, the defendant's application was heard before Justice Musinga. Justice Musinga as I have already mentioned found that there was no stay order issued by Justice Muchelule that had been breached by the Plaintiff as the order of stay issued by Justice A. Muchelule on 19th October, 2009 was interim and the same had lapsed as at the time of the defendant's eviction. Justice Musinga however found that the defendant's eviction was in breach of a consent stay order that was issued by Hon. Thuku R.M. on 19th October, 2009 that I have referred herein above. Justice Musinga found the Plaintiff and its said advocate guilty of contempt and passed appropriate sentence on 9th December, 2011. The decision of Justice Musinga was made about a year after the defendant's eviction from the suit premises. Justice Musinga declined to order the Plaintiff to purge its contempt as had been prayed for by the defendant citing as I have stated above

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that such order would be prejudicial to the Plaintiff. It is now being claimed that two years after the defendant's eviction and a year after the decision of Justice Musinga, the defendant on 26th August, 2012 forcefully re-entered the suit premises and installed watchmen thereon claiming that they are still the Plaintiff's tenants therein. In the course of its re-entry aforesaid, the defendant's agents and/ or employees assaulted the Plaintiff's employees and agents therein. The defendant has now prevented the Plaintiff's employees and agents from accessing the suit premises for the purposes of carrying out the renovations that they had been carrying thereon. The Plaintiff claims that the defendant was evicted from the suit property through a lawful court order and that its re-entry into the suit premises is an affront to the Plaintiff's proprietary rights over the suit premises. According to the Plaintiff, the defendant is a trespasser on the suit premises and as such should be

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injunctioned from continuing with such trespass. In its response, the defendant has not denied that it re-entered the suit premises on 26th August, 2012 or that its agents assaulted the Plaintiff's agents and employees during that act of re-taking possession. The defendant's contention is that it is occupying the suit premises lawfully pursuant to a lawful order of stay of execution that had been issued by the High Court in Civil Appeal No. 25 of 2009 and which orders were extended by consent in Chief Magistrates Court Misc. Civil Application No. 106 of 2009 to last until the hearing and determination of its pending appeal against the Tribunal's order. It is the contention of the defendant that the defendant being in occupation of the suit premises as of right, cannot be a trespasser thereon. The defendant claims that if the court was to grant the orders sought by the Plaintiff herein, such orders would be contrary to the finding that had been made by Justice Musinga in the contempt case in which he found that there is a

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stay in force against the execution of the Tribunal's order. To be able to establish a prima facie case against the defendant the Plaintiff has to show that the defendant is a trespasser in the suit premises. According to the Plaintiff there is no order of stay of execution against the Tribunal's order for the defendant to vacate the suit premises which would entitle the defendant to remain in the suit premises after its eviction. The Plaintiff's further argument is that even if such an order existed, the defendant had been evicted from the premises and a court of law had declined grant the defendant's request to be reinstated back to the premises. According to the Plaintiff therefore, the defendant's forceful re-entry into the suit premises amount's to the defendant taking the law into its own hands an act which is nothing but trespass. I had at the beginning set out in detail the history of the dispute between the parties. I had gone into that history in view of the issues that have been raised by the parties herein. Considering that history and the arguments put

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forward herein, it becomes clear where the truth lies. As I had observed herein above, as at the time of the eviction of the Plaintiff from the suit premises, there was no order of stay in force either from the lower court or the High Court. The defendant's argument that they are in the suit premises lawfully pursuant to an order of stay granted by the High Court in their pending appeal and that was extended by the chief Magistrates Court does not hold any water. As I had observed, the stay of execution that was granted by the High Court lapsed while the consent order of stay that was recorded in the lower court was erroneous as it referred to an non-existent High Court order. I know that my findings herein are contrary to the findings of Justice Musinga in the contempt case which the defendant has cited in support of its contention. I am not sitting on appeal against Justice Musinga's ruling neither am I considering an application for review of the same. I am cognizant of the fact that the said decision by Justice Musinga

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has not been stayed, varied or set aside and as such is binding upon the parties. I cannot therefore take away from the defendant a right if at all that has been conferred upon it by that decision of a court of concurrent jurisdiction. I would therefore give the defendant the benefit of that decision that there was a stay of execution of the Tribunal's order. That granted, the next issue for consideration is whether after being evicted, that stay notwithstanding, the defendant was entitled in law to re-enter the suit premises forcefully and retake possession thereof 3 years after such eviction and after a court of law had declined to order its reinstatement. My answer to this question is in the negative. I am of the view that after the defendant was evicted from the suit premises and possession thereof taken over by the Plaintiff, the defendant could only re-enter the suit premises through a court order. If I was to hold otherwise, I would be perpetuating a state of lawless. As the saying goes, two wrongs do not make a right. The fact that the

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defendant was evicted from the suit premises unlawfully did not entitle the defendant to equally make unlawful re-entry. The decision of Justice Musinga aforesaid binds the defendant with equal force. The defendant had put its case for reinstatement before Justice Musinga who considered it and declined to grant the same with reasons. It is after this that the defendant proceeded to file a suit against the Plaintiff claiming damages for unlawful eviction. I am in agreement with the contention of the Plaintiff that the conduct the defendant herein amounted to taking the law into its own hands. The defendant should have waited for the outcome of its pending appeal against the Tribunal's order or sought other lawful means of re-gaining possession of the suit premises. Due to the foregoing, I am satisfied that the Plaintiff has established a prima facie case with a probability of success against the defendant. I am also satisfied that unless the orders sought are granted the Plaintiff would suffer irreparable harm. During the

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defendant's eviction from the suit premises, the same was seriously damaged. That is why the defendant had sought an order for the restoration of the same in its contempt of court proceedings. At the time of arguing the contempt of court application, the Plaintiff had commenced renovations of the suit premises for the purposes of letting out the same to another tenant. When the defendant made its forceful re-entry 2 years after their eviction, the renovations were still going on. The defendant has now denied the Plaintiff access to the premises. The renovations have therefore stopped. The defendant is neither making use of the suit premises nor paying any rent to the Plaintiff. They have simply installed security guards on the premises to keep the Plaintiff away. In the circumstances, the suit premises are not benefiting anyone. Whereas the Plaintiff wants to carry out renovations so that it can let the premises out, the defendant who has since moved on and is trading elsewhere according to the affidavit filed in

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court by the Plaintiff wants simply to keep the premises in the same state in which it is on the pretext that it is still a tenant therein although it is not carrying out any business therein or paying any rent to the Plaintiff. I am in agreement with the submission of the Plaintiff that the Plaintiff is suffering and will continue to suffer loss which is irreparable if the status quo prevails. As was held by Justice Mbiti in the case of, **Buna Agencies Ltd –vs- Monier International (K) Ltd.**, cited by Justice J.B. Ojwang in the case of **James Muiruri Chege –vs- Evangeline Makena & another [2003] eKLR**, an owner of land is entitled to have access to his land for development and if he is blocked from having that access, he will definitely lose the use

of his land which loss is incapable of adequate compensation in damages.

8. The upshot of the foregoing is that, the plaintiff's application is for granting. I allow the Plaintiff's Notice of Motion application dated 3rd December, 2012 and grant a temporary injunction in

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terms of prayer 3 thereof conditionally. The injunction is granted on condition that in the event that Kisii High Court Civil Appeal No.25 of 2009, Getembe Hospital Ltd.-vs- Masaba Farmers Co-operative Union Limited is determined prior to this case and the defendant is allowed to regain possession of the suit

premises, the injunction granted herein will stand discharged automatically on the date of the said determination unless the said determination is stayed or set aside. In view of the history of the dispute that gave rise to these proceedings, I order that the cost of the application be in the cause.

Signed, dated and delivered at Kisii this 17th day of May, 2013

S. OKONG'O,

JUDGE

In the presence of:-

Mr. Ochwangi for the plaintiff.

No appearance for the defendant.

Mobisa Court Clerk.

S. OKONG'O,

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