



**REPUBLIC OF KENYA**  
**IN THE HIGH COURT OF KENYA AT NAIROBI**  
**COMMERCIAL AND ADMIRALTY DIVISION**  
**CIVIL CASE NO. 660 OF 2002**

**SAMUEL O. TIMA.....1<sup>ST</sup> PLAINTIFF/RESPONDENT**

**LYDIA NYAMBONYI..... 2<sup>ND</sup> PLAINTIFF/RESPONDENT**

**VERSUS**

**HOUSING FINANCE COMPANY OF KENYA.....1<sup>ST</sup> DEFENDANT**

**JOSEPH KARIUKI WANYUGI.....2<sup>ND</sup> DEFENDANT**

**RULINGS**

1. The 2<sup>nd</sup> Defendant's Notice of Motion application dated and filed on 7<sup>th</sup> March 2013 sought orders to discharge and or set aside the orders that were issued by this court on 4<sup>th</sup> December 2007 and 11<sup>th</sup> September 2012. The 2<sup>nd</sup> Defendant also sought orders to be allowed to take full possession and occupation and/or access and to collect monthly rents of the suit premises known as LR. No. 36/111/948 Eastleigh, Nairobi (hereinafter referred to as suit premises). In addition he prayed that the Plaintiffs be denied any hearing whatsoever on account of their blatant disobedience and defiance of the court order issued on 11<sup>th</sup> September 2012.
2. In his Supporting Affidavit sworn on 7<sup>th</sup> March 2013, the Plaintiff stated that he purchased the said suit premises for a sum of Kshs 9,000,000/= pursuant to a Sale Agreement between himself and the 1<sup>st</sup> Defendant on/or about 21<sup>st</sup> December 2006. He averred that the said suit premises were subsequently transferred to him on or about 17<sup>th</sup> January 2007. However, on 4<sup>th</sup> December, 2007, the court issued an injunctive order against him and subsequently on 11<sup>th</sup> September 2012, the court ordered that both himself and the Plaintiffs collect rent which was to be deposited in a joint interest earning account to be opened by the parties' advocates pending the hearing and determination of this case.
3. The 2<sup>nd</sup> Defendant also contended that in blatant disobedience of the said order of 11<sup>th</sup> September 2012, the Plaintiffs had been collecting rent of Kshs. 164,000/= every month to his exclusion and that they had also failed to prosecute the case for over five (5) years since the order of 4<sup>th</sup> December 2007 was issued.
4. In the Replying Affidavit by Samuel O. Tima, sworn on 13<sup>th</sup> May 2013 on his own behalf and that of the 2<sup>nd</sup> Plaintiff, the deponent therein denied that the 2<sup>nd</sup> Defendant was the registered proprietor of the suit premises. He contended that they had invited the 2<sup>nd</sup> Defendant's advocates to agree on the opening of the said joint interest account and on 21<sup>st</sup> January 2013, they received a deposit slip under the name of Patrick Machira JA showing that an account had been opened to the

- exclusion of their lawyers. The issue was however, clarified vide a letter from Machira & Co. Advocates dated 23<sup>rd</sup> January 2013.
5. It was the Plaintiffs' averment that they could not prosecute the matter as their application dated 29<sup>th</sup> March 2011 was heard by Njagi J on 19<sup>th</sup> July 2011 and the ruling was subsequently delivered on 11<sup>th</sup> September 2012. The deponent also stated that there were other two (2) applications awaiting determination before their advocates could prosecute the suit herein and in the circumstances, they denied that they had failed to prosecute the suit herein.
  6. The deponent provided evidence showing the monies that had been deposited in the Escrow Account and that he had been paying land rates on the suit premises which as at May 2013 stood at Kshs. 9,631/=. The Plaintiff therefore sought the dismissal of the 2<sup>nd</sup> Defendant's application.
  7. In his written submissions dated 29<sup>th</sup> April 2013 and filed on 9<sup>th</sup> May 2013, the 2<sup>nd</sup> Defendant submitted that he was the registered owner of the suit premises. This is not an issue before this court currently and I will therefore not consider the same while delivering my ruling. Similarly, although I have noted the holdings of various case law submitted by the 2<sup>nd</sup> Defendant to support his claim for the suit premises, I will also not address myself to the same due to the risk of creeping into determination of facts that should ideally be heard at the full trial of the case herein.
  8. The question of whether the monies should be preserved is not one that I find I should dwell on as the same was ventilated and an order issued on 11<sup>th</sup> September 2013. What should concern me is whether or not the Plaintiffs have contravened the said orders to open an Escrow Account and whether they had failed to prosecute the case herein.
  9. From the letters tendered in evidence by the Plaintiffs, it is clear that their advocates forwarded the forms to open a bank account vide their letter of 6<sup>th</sup> November 2012. Several letters were exchanged between the parties advocates which to me shows that the Plaintiffs never sat on their laurels. There was some proactive action on their advocate's part.
  10. I have, considered the 2<sup>nd</sup> Defendant's submissions on the principle that equity does not allow one person to enrich himself unfairly over another. Whereas the Plaintiffs may have been collecting rent for quite some time, I am not satisfied that there has been such enrichment bearing in mind that the order to open an Escrow Account was issued on 11<sup>th</sup> September 2012 and the said account opened on or about January 2013.
  11. In that case, I have no hesitation in agreeing with the Plaintiff's submissions on this issue and find that the Plaintiffs complied with the order of 11<sup>th</sup> September 2012.
  12. I am also in agreement with the Plaintiffs submissions that they had not failed to prosecute the matter herein for the reason that the ruling of the application they lastly filed in court was delivered on 11<sup>th</sup> September 2012.
  13. On the issue of rates, I find that the 2<sup>nd</sup> Defendant did not provide me with any evidence to show that the suit premises were to be sold on account of unpaid land rates. Exhibit SOT 9 attached to the Plaintiffs' Replying Affidavit clearly shows that the outstanding rates as at 3<sup>rd</sup> May 2013 were Kshs. 9,631/=. That is hardly an amount that would cause the suit premises to have been sold by the then City Council of Nairobi.
  14. In his ruling of 11<sup>th</sup> September 2012, Njagi J stated that:-

**“The property was also sold at a throw away price which was further evidence of fraud, and no statutory notice was served on them.”**

Granting the orders sought by the 2<sup>nd</sup> Defendant would be tantamount to sitting on appeal in a ruling delivered by a court of equal jurisdiction and would amount to disregarding all the triable issues that Njagi J found to have been present in this matter.

15. For all the foregoing reasons, I find myself more persuaded by the Plaintiff's written submissions dated 27<sup>th</sup> May 2013 and filed on 28<sup>th</sup> May 2013 and in the circumstances, I am not inclined to grant the orders sought by the 2<sup>nd</sup> Defendant herein.
16. The upshot of my ruling is that the 2<sup>nd</sup> Defendant's Notice of Motion application dated 7<sup>th</sup> March 2013, being unmerited and an abuse of the process of the court, is hereby dismissed with costs to

the Plaintiffs.  
17.It is so ordered.

**DATED and DELIVERED at NAIROBI this 20<sup>th</sup> day of September 2013**

**J. KAMAU**

**JUDGE**