



**REPUBLIC OF KENYA**  
**IN THE HIGH COURT OF KENYA**  
**AT NAIROBI (MILIMANI LAW COURTS)**  
**ENVIRONMENTAL & LAND CASE 2099 OF 2007**

**KENYA COMMERCIAL BANK.....1<sup>ST</sup> PLAINTIFF/APPLICANT**

**ELIZABETH OGAJA (suing as Executors of the**

**Estate of the Late Prof. Simon Ominde)..... 2<sup>nd</sup> PLAINTIFF/APPLICANT**

**VERSUS**

**GODFREY NGATIA NJOROGE**

**T/A KAREN AUTO BAZAAR ..... DEFENDANT/RESPONDENT**

**RULING**

1. By a Notice of Motion dated 29/7/11 brought under Order 36 Rule 1(b) 2 & 3 and order 40 Rule 10 of the Civil Procedure rules, a section 3A of the Civil Procedure Act the plaintiffs/applicants hereinafter referred to as the applicants are seeking the following orders that;-

i. Pending the hearing and determination of this application, L.R. No. 13400 Karen be preserved and or protected by officers from Karen Police Station and to allow the plaintiff and or their agents to enter upon the premises for purposes of carrying out an inspection/inventory as to the state of the property.

ii. Vacant possession of the premises known as L.R. No. 13400 Karen.

iii. Mesne profit at current rates on the present value of the property from 31<sup>st</sup> March 2006 to date of handing over possession be assessed and paid the plaintiff.

iv. Interest in (4) above.

v. Costs of the suit and interest

The application is based on the following grounds;

i. The plaintiffs and defendant entered into a lease for a term of 6 years from 1<sup>st</sup> December 2004 to 1<sup>st</sup> December 2010.

ii. Vide a letter dated 27<sup>th</sup> February 2006, the plaintiffs through its property agents issued a notice terminating the tenancy with effect from 31<sup>st</sup> March 2006 on account of the defendant's persistent default in the payment of rent.

iii. The defendant contested the notice and continued to remain in possession of the premises and filed Milimani CMCC No. 8704 of 2006 against the applicants.

iv. In a ruling delivered in on 18<sup>th</sup> July, 2007 the lower court dismissed the Respondent's application dated 20<sup>th</sup> July 2007 that sought to restrain distress for rent in its entirety. The court held that the respondent had admitted being in rent arrears.

v. The Respondent through an application dated 16<sup>th</sup> August, 2010 moved to Court seeking to prevent the plaintiffs/Applicant from selling his detained property.

vi. Once again, the lower Court dismissed the Respondent's fresh application vide a ruling delivered on 6<sup>th</sup> December 2010 by Hon. S.A. Okato on the basis that defendant/respondent has admitted being in rent arrears. The Court also noted that the lease in favour of the respondent had expired on 1<sup>st</sup> December 2010.

vii. The lower Court suit by the respondent against the applicant; Milimani CMCC 8704 has since been dismissed with costs for want of pecuniary jurisdiction on 21<sup>st</sup> July, 2011.

viii. The defendant's/Respondents' lease with the plaintiff having expired on 1<sup>st</sup> December 2010, there is no basis in law or otherwise for the defendant to retain possession of the premises.

ix. The defendant/respondent has not sought any relief against forfeiture and despite demand has refused to hand over vacant possession of the premises.

x. The defendant's means and assets are unknown, his only suggested business, a car bazaar, bar and restaurant and sale of household goods hotel could not be carried on and ceased operation because of the residential user of the premises.

xi. The plaintiffs are apprehensive that if the orders sought are not granted, they will continue to suffer loss as the house is in a very dilapidated condition and continues to waste away and or fall into disrepair. Indeed the power supply to the property has been disconnected due to outstanding bills.

xii. The respondent has turned violent and has prevented the plaintiff's and or their agents from accessing the property.

xiii. The defendant/respondent has now legal basis whatsoever to retain possession of the suit premises.

2. Mr. Ongwae Wycliff a value/property manager with Kenya Trust Company Limited swore a supporting affidavit dated 29/7/2011 in support of the applicant case. Mr. Ongwae states as follows in his affidavit, that the plaintiffs are the executors of the estate of the late Prof. Simon Ominde. The Kenya Trust Company Limited is the property agent of the estates assets including L.R. No. 13400 Langata Road Karen. That the plaintiffs and defendant entered into a lease for a term of 6 years from 1<sup>st</sup> December 2004 to 1<sup>st</sup> December 2010. That vide a letter dated 27<sup>th</sup> February 2006, the plaintiffs through its property agents issued a notice terminating the tenancy with effect from 31<sup>st</sup> March 2006 on account of the defendant's persistent default in the payment of rent but the defendant contested the notice and continued to

remain in possession of the premises and filed Milimani CMCC No. 8704 of 2006 against the applicants. That in a ruling delivered in on 18<sup>th</sup> July, 2007 the lower court dismissed the respondent's application dated 20<sup>th</sup> July 2007 that sought to restrain distress for rent in its entirety and the court held that the respondent had admitted/not denied being in rent arrears. That the respondent through an application dated 16<sup>th</sup> August, 2010 moved to court seeking to prevent the plaintiff/applicant from selling his detained property. That once again the lower Court dismissed the respondent's fresh application vide a ruling/delivered on 6<sup>th</sup> December, 2010 by Hon. S.A. Okato on the basis that defendant/respondent has admitted being in rent arrears. The Court also noted that the lease in favour of the respondent has expired on 1<sup>st</sup> December 2010. That he defendant's/Respondent means and assets are un-known, his only suggested business; a car bazaar, bar and restaurant and sale of household goods hotel could not be carried on and ceased operation because of the residential user of the premises.

That the defendant/respondent despite demand has refused to hand over vacant possession of the premises. That as a result of the foregoing the plaintiffs are suffering loss and damage for user of the premises considering its strategic location and current market value.

3. Mr. Godfrey Ngatia Njoroge the respondent swore a replying affidavit dated 3<sup>rd</sup> August 2011. In brief this is what he states that the plaintiffs application is lacking merit as the plaintiffs have not disclosed material facts, the plaintiffs application 25/2/2010 was dismissed for lacking merit as the Court found that what the plaintiffs had sought was a summary judgment and his defence raised triable issues. That the plaintiffs have failed to disclose that they instructed auctioneers to levy distress on the suit premises on 14<sup>th</sup> September 2005, 14<sup>th</sup> July 2006 and 24<sup>th</sup> June 2010 and 24<sup>th</sup> June 2011. That the plaintiffs still treat him as a tenant of the suit premises and on 24<sup>th</sup> June 2011 they instructed Sannex Auctioneers to demand rent up to the month of January 2011. That the plaintiffs have not served him with any notice to terminate his tenancy and consequently it is not true that he is in illegal occupation of the suit premises.

4. Counsel filed written submission and highlighted the same in Court. I have carefully considered the affidavits filed by the parties and their annexures and the submissions made and I have also perused the Court record. In the application dated 24<sup>th</sup> April 2008 the applicant sought vacant possession of the reference no. Nairobi 13400 situated in Karen and mesne profits from 31<sup>st</sup> March 2006 until date of handing over possession be assessed and paid to the plaintiff. Justice Mbogholi gave a ruling on the same on 25<sup>th</sup> February 2010. In the current application the applicant is seeking the same prayers at prayers 3 and 4. These two prayers were dealt with by Justice Mbogholi and the applicant did not appeal against the said ruling. The matter is *res judicata* as concerns these two prayers. I will therefore not grant the said orders. I am therefore left with the 2<sup>nd</sup> prayer for preservation of the suit premises and protection by officers from Karen Police station and allowing the plaintiff or their agents to enter upon the premises for purposes of carrying out an inspection/inventory as to the state of the property. The application is brought under Order 36 Rule 1 (b) 2 & 3 and Order 40 Rule 10 of the Civil Procedure Rules. Order 36 relates to prayers 3 and 4. Order 40 Rule 10 relates to prayer No. 2. Order 40 Rule 10 applies to applications where a party is seeking an injunction. The applicants are not seeking an injunction against the respondent and is therefore not entitled to an order of preservation nor an order of protection as sought. The plaint filed by the applicant seeks orders for vacant possession and mesne profits. I find no merit in the matter as the issues the applicants are raising now were dealt with by Justice Mbogholi in his ruling dated 25/2/2010. What the applicants should do is set down the suit for hearing so that the issue of vacant possession, the issue of tenancy as submitted in the submissions, notice and mesne profits can be dealt with once and for all. I therefore dismiss the application dated 29<sup>th</sup> July 2011 with costs.

Orders accordingly.

**Dated, signed and delivered at Nairobi this 29<sup>th</sup> day of May 2012**

**R. OUGO  
JUDGE**

In the Presence of:-

..... For the Applicants

..... For the Respondent

..... Court Clerk