



REPUBLIC OF KENYA

High Court at Kisumu

Civil Case 58 of 2011

GRACE AKINYI AJWANG

RICHARD OGENDO suing as personal representative of the estate of the said

MANASON OGENDO BODO.....PALINTIFFS

VERSUS

ROSEMARY ATIENO ABUTO.....1ST DEFENDANT

LEONIDA ACHIENG NYAGWARA alias

PHOEBE AATIENO NYAGUDI.....2ND DEFENDANT

SASAH GENERAL MERCHANTS LIMITED3RD DEFENDANT

NATIONAL BANK OF KENYA LIMITED4TH DEFENDANT

COMMISSIONER OF LANDS5TH DEFENDANT

ATTORNEY GENERAL6TH DEFENDANT

RULING

The 3rd defendant/applicants Notice of Motion dated 27th September 2012 prays for orders that:-

- 1) The Honourable Court be pleased to order and or direct the rental income due and or arising from premises situate at L R No. Kisumu Municipality Block 7/319 be deposited in this Honourable Court and or in on Escrow Account in a reputable financial institution so as to safeguard the 3rd defendants/applicants interests.**
- 2) The Honourable Court be pleased to grant such further directions towards the expeditious hearing and disposal of the instant suit so as to protect and or safeguard the interest of the parties and more particularly the 3rd defendant.**

The affidavit of **Samuel A. Odhiambo** sworn on 27th September 2012 together with the attendant annextures supports the 3rd defendants contention.

What is agreeable from the pleadings herein is that the suit property was sold to the applicant by the 1st and 2nd defendant. The applicant after having the same transferred to him did mortgage the suit property to the 4th defendant for a sum of Kshs. 13,392,000.

Subsequently and after charging the property the plaintiff filed this suit and simultaneously filed an application for injunction which to date remained adjudicated.

The plaintiffs /respondent on the other hand has argued through the replying affidavit dated 19th October 2012 that they are the beneficiaries of the estate and that the 1st and 2nd defendants who are relatives but not beneficiaries are the real culprits and that this matter should go for full trial for that was the reason they choose not to prosecute their injunction application.

I have gone through the application as well as the rival affidavits. I have further read the submissions by the applicants and the respondent. The basic issue to determine at this juncture is whether the plaintiff / respondents who are enjoying the use of the premises and the rent shall suffer any loss as against the applicants should the rent be deposited in a neutral place.

There is no doubt that the applicant has charged the property to the 4th defendant. The sum of Kshs. 13 million is not mince meat. It is a colossal sum. Obviously, and although they did not file any response the 4th defendant is an interested player. Should the applicant default in loan payment then the 4th defendant shall exercise its statutory power of sale and in my estimation both the plaintiffs as well as the applicants stand to lose. The only persons who stand to benefit and from my preliminary assessment have benefited are the 1st and 2nd defendant.

Whether the transfer to the applicants was tainted with fraud is for the trial court to determine. Suffice to say that at this juncture what is relevant is to safeguard the interest of both the plaintiffs and the defendant.

The applicant currently is the registered owner of the suit premises whether by fraud as alleged by the plaintiffs or otherwise. Prima facie he has rights over and above any other persons except the 4th defendant. As conceded he does not enjoy the rent or the use of the premises. I do not have however the monthly rent accruing from the suit premises. But from the parties written submissions it must be sufficient to enable the applicant repay the loan.

In the interests of justice and fair play, I do not see any injury that either of the parties especially the plaintiffs and the applicant stand to suffer should the rent be deposited in a neutral account. When the case is finalized either of the parties shall be able to access the funds without any let or hindrance.

Further non of the parties shall steal a match against any other. The suit, granted is to be disposed off expeditiously. But as the things stand now justice seem very slow. The wheels are not moving as anticipated and it is not known when the final verdict shall be delivered and what shall follow thereafter.

In allowing the Notice of Motion therefore I make the following orders:-

- 1) The parties do agree on a registered reputable estate agent to manage and control the suit premises comprised in Kisumu Municipality Block 7/319. Within the next fourteen 14 days from the delivery of this Ruling.**
- 2) If the parties herein do not agree then the Deputy Registrar shall be at liberty to appoint one within seven days thereafter.**
- 3) The said agent to collect the rent and manage the suit property and to deposit the monthly rent less the necessary expenses in an interest earning account at a reputable Commercial Bank. The said bank to be agreed upon by the parties and in default the deputy Registrar to nominate one.**

- 4) The signatories to the said account shall be the counsels for the plaintiff and 3rd defendant.
- 5) The estate agent do provide to the parties and to this court a quarterly report.
- 6) Each party be at liberty to apply .
- 7) The costs of this application shall abide the main suit.

Dated, signed and delivered at Kisumu this 5th day of December 2012.

**H.K. CHEMITEI
JUDGE**

In the presence of:

Ogutu for 3rd defendant for the appellant

Onyango for plaintiff/Respondent

Mwamu for 5th defendant

Omayya for 4th defendant - absent

HKC/aao