



REPUBLIC OF KENYA



KENYA LAW
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Arunga & another v NCBA Bank Kenya PLC & 3 others (Environment & Land Case 4 of 2018) [2022] KEELC 3894 (KLR) (28 July 2022) (Ruling)

Neutral citation: [2022] KEELC 3894 (KLR)

REPUBLIC OF KENYA
IN THE ENVIRONMENT AND LAND COURT AT NAIROBI
ENVIRONMENT & LAND CASE 4 OF 2018
SO OKONG'O, J
JULY 28, 2022

BETWEEN

MICHAEL ANGAYA ARUNGA 1ST PLAINTIFF

PAMELA KAWIRA ARUNGA 2ND PLAINTIFF

AND

NCBA BANK KENYA PLC 1ST DEFENDANT

ATHINYA MUTHURI HARON 2ND DEFENDANT

LYDIA WAWERU T/A PURPLE ROYAL AUCTIONEERS 3RD DEFENDANT

DISTRICT LAND REGISTRAR KIAMBU 4TH DEFENDANT

RULING

1. At all material times, all that property known as Kiambaa/Kihara/2861 (hereinafter referred to as “the suit property”) was registered in the names of the plaintiffs. The plaintiffs had charged the suit property to the 1st defendant to secure a loan facility that was advanced to them. In their amended plaint filed on June 24, 2020, the plaintiffs averred that without following the laid down procedure for exercising statutory power of sale, the 1st defendant through the 3rd defendant sold the suit property to the 2nd defendant to recover the then outstanding loan. The plaintiffs averred that the purported sale was conducted in secrecy and that there was no public auction. The plaintiffs averred that the secret sale was conducted so as to deprive the plaintiffs of their right to redeem the suit property. The plaintiffs averred that the suit property was sold to the 2nd defendant at an undervalue and that the whole process was illegal and fraudulent in that even the necessary statutory notices were not served upon the plaintiffs before the said sale that was conducted through private treaty camouflaged as public auction. The plaintiffs averred that the suit property that was purportedly sold by the 1st defendant to the 2nd defendant at Kshs 22,400,000/- was last valued in April 2019 at Kshs 87,500,000/-.



2. The plaintiffs sought among other reliefs; an order nullifying the auction that was conducted on February 20, 2020 and the purported sale of the suit property to the 2nd defendant, an order that a fresh valuation of the suit property be conducted by an independent valuer and in the alternative, an order for the defendants to compensate the plaintiffs for the loss incurred as a result of the unprocedural valuation and auction of the suit property. The 1st, 2nd and 3rd defendants filed separate statements of defence on March 28, 2022, April 28, 2022 and March 23, 2022 respectively in which they denied the plaintiffs' claims in their entirety.
3. What is now before me are two applications brought by the 1st plaintiff by way of notice of motion dated March 11, 2022 and notice of motion dated April 25, 2022. In the application dated March 11, 2022, the 1st plaintiff has sought the following orders;
 1. That the 2nd defendant by himself or through his agents more specifically High Class Auctioneers or any other auctioneer be restrained from levying distress for rent, attaching and/or selling any movable property including but not limited to household goods and motor vehicles from the suit property pending the hearing and determination of the suit.
 2. That interlocutory judgment in default of filing a defence be entered against the 2nd defendant.
 3. That the costs of the application be provided for.
4. The application that was supported by the affidavit of the 1st plaintiff was brought on the grounds that the 2nd defendant's application seeking to compel the plaintiffs to pay rent and to vacate the suit property was dismissed by the court on February 15, 2022. The 1st plaintiff averred that the plaintiffs had no landlord and tenant relationship with the 2nd defendant. The 1st plaintiff averred that despite the fact that there was no landlord and tenant relationship between the plaintiffs and the 2nd defendant, the 2nd defendant had purported to levy distress against the plaintiffs on March 1, 2022 to recover alleged rent arrears. The 1st plaintiff averred that he would suffer substantial loss if the application was not allowed.
5. In his application dated April 25, 2022, the 1st plaintiff sought the following orders;
 1. That prayer 2 in the 1st plaintiff's application dated March 11, 2022 be granted pending the hearing of the said application inter-partes restraining the 2nd defendant by himself or through his agents more specifically High Class Auctioneers or any other auctioneer from levying distress for rent, attaching and/or selling any movable properties from the suit property pending the hearing of the application or further orders by the court.
 2. That the 2nd defendant be ordered to return the plaintiffs' goods attached by High Class Auctioneers from the suit property pending the hearing and determination of the main suit.
 3. That the 3rd defendant be directed to produce the CCTV footage of 20th February 2020 from the CCTV recording in the 3rd defendant's offices at Cargen House Nairobi.
 4. That the respondents do pay the costs of the application.
6. The application that was also supported by the affidavit of the 1st plaintiff was brought on the same grounds as the application dated March 11, 2022. The 1st plaintiff added that on April 22, 2022, High Class Auctioneers in the company of goons and Police Officers from Gigiri Police Station invaded the suit property, broke into the plaintiffs' house and carried away all kitchen ware and appliances together with the household items in the sitting room and dining area. The 1st plaintiff averred that the said goons vandalised the said house by breaking the door and gaining access. The 1st plaintiff averred that



- the plaintiffs' said household goods were carried away in the presence of the plaintiffs' son who was the only one in the house. The 1st plaintiff averred that it took the intervention of the OCS Gigiri Police Station to stop the auctioneers and the said goons from carrying away the rest of the household goods. The 1st plaintiff contended that the 2nd defendant decided to employ unorthodox means to evict the plaintiffs from the suit property contrary to the advice that was given to him by the court in the ruling that was delivered by the court on 15th February 2022. The 1st plaintiff averred that the plaintiffs would suffer irreparable loss and damage if the orders sought were not granted.
7. The 2nd defendant opposed the two applications through grounds of opposition dated April 26, 2022. The 2nd defendant contended that the application was *res judicata*, misconceived and lacked merit. The 2nd defendant contended that the court was *functus officio* and had no jurisdiction to grant the orders sought. The 2nd defendant contended that the suit property belonged to the 2nd defendant and that the plaintiffs had no interest or proprietary rights over the same. The 2nd defendant contended that the application was not anchored in the plaint.
 8. The 1st defendant opposed the two applications through grounds of opposition dated April 27, 2022. The 1st defendant averred that the 2nd plaintiff had filed a similar application in ELC Petition No 17 of 2020 and as such the application was an abuse of the process of the court. The 1st defendant averred that the court had declined to grant the orders sought on March 17, 2022 in ELC Petition No 17 of 2020. The 1st defendant averred that after the suit property was sold by public auction on February 20, 2020 and transferred to the 2nd defendant, the plaintiffs became trespassers on the suit property. The 1st defendant averred that the 1st plaintiff's application had been overtaken by events as what is sought to be restrained had already taken place. The 1st defendant averred that there was no provision for interlocutory judgment in matters of this nature.
 9. The application was argued on April 28, 2022. The 1st plaintiff's advocate Mr Owaga submitted that the 1st plaintiff was seeking prayer 3 in the application dated March 11, 2022 and prayers 2, 3 and 4 in the application dated April 25, 2022. Mr Owaga submitted that the distress that was levied against the plaintiffs was illegal and that the same was an attempt by the 2nd defendant to use unorthodox means to obtain possession of the suit property. He dismissed the grounds put forward by the defendants in opposition to the application as irrelevant. Mr Kabaiku for the 1st defendant relied entirely on the 1st defendant's grounds of opposition. He added that there were two appeals pending in the Court of Appeal over the decisions made by this court against the plaintiffs. Mr Kurauka for the 2nd defendant submitted that the application was frivolous in that the issues raised therein had not been established. He submitted that the distress was lawful in that the plaintiffs were occupying a property that the 2nd defendant purchased using a bank loan that he was still paying. Mr Kurauka submitted that the 2nd defendant as the owner of the suit property did not require leave of the court before levying distress. He submitted that the 2nd defendant obtained an order from the lower court for police assistance and that the goods had been removed from the suit property and were awaiting sale. He submitted that the 1st plaintiff should pay auctioneers charges and storage charges in case the orders sought were granted. He also urged the court to order the 1st plaintiff to deposit in court rent of Kshs 5,000,000/-.

Determination:

10. The 2nd defendant had brought an application herein dated October 6, 2021 seeking among others an order that the plaintiffs be ordered to pay reasonable rent for the suit property to the 2nd defendant and that the plaintiffs do vacate the suit property on or before November 1, 2021 and give vacant possession



to the 2nd defendant in default of which they be evicted. The 2nd defendant's application was dismissed on February 15, 2022. In the ruling, the court stated as follows in part:

“...At the beginning of this ruling, I have mentioned that the 2nd defendant among others has not filed a defence to the plaintiffs' claim against him. This court cannot give orders in a vacuum. The court has power to grant the reliefs sought by the 2nd defendant. That power is however exercisable on the basis of pleadings. The 2nd defendant's application is not anchored on any pleading before the court. I am of the view that the orders sought by the 2nd defendant are substantive in nature and cannot be granted by the court without a proper foundation being laid for the same. If the 2nd defendant wants to recover possession and damages for loss of use of the suit property from the plaintiffs, the claims must be properly pleaded and the plaintiffs given opportunity to respond to the same. It is on the basis of such pleading that the current application can be brought. As it stands, the 2nd defendant's application has no leg to hold it. It must fall.”

11. The 1st plaintiff's complaint is that the 2nd defendant has levied illegal distress against the plaintiffs and carried away the plaintiffs' household goods. The 2nd defendant has admitted that he levied distress against the plaintiffs and carried their household goods away and that the same are awaiting sale by the auctioneer. It is common ground that there is no landlord and tenant relationship between the plaintiffs and the 2nd defendant. It is not disputed that the suit property is now registered in the name of the 2nd defendant. In my view, that does not make the plaintiffs who were the previous owners of the suit property who have refused to vacate the suit property tenants of the 2nd defendant. It is beyond argument that rent can only be recovered from a tenant. The plaintiffs are at best trespassers on the suit property. What the 2nd defendant can recover from the plaintiffs is damages for trespass and mesne profits. Right to levy distress does not accrue against a trespasser. Rent is contractual. In the absence of an agreed rent, there is no basis upon which distress can be levied. One wonders how the 2nd defendant arrived at the amount of Kshs 4,800,000/- that he claimed as rent in the purported distress. In the circumstances, it is my finding that the purported distress was illegal. The removal of the attached goods was similarly illegal. The 1st plaintiff is therefore entitled to an injunction restrain the 2nd defendant from continuing with the illegal distress. The 1st plaintiff is also entitled to an order for the return of the goods that were removed from the plaintiffs' house pursuant to the said illegal distress.
12. The 1st plaintiff had sought other prayers in addition to those targeting the illegal distress. I have found no merit in the prayer seeking the production of the alleged CCTV footage of February 20, 2020. I am of the view that no basis has been laid for the prayer. There is no evidence before the court that the CCTV was working and that the event for which the footage is sought was recorded. The court has also not been told whether or not the plaintiffs have asked the 3rd defendant for the said footage. The prayer sounds like a fishing expedition for evidence. There was also a prayer for interlocutory judgment against the 2nd defendant. There is a clear procedure in the *Civil Procedure Rules* for requesting for default judgment. It is not necessary to file a formal application for that purpose. In any event, the 2nd defendant has now filed a statement of defence.

Conclusion:

13. In conclusion, I hereby make the following orders;
 1. A temporary injunction is issued restraining the 2nd defendant by himself or through his agents more specifically High Class Auctioneers or any other auctioneer from levying distress for rent against the 1st plaintiff, attaching and/or selling any movable property including but not



limited to household goods and motor vehicles from the suit property pending the hearing and determination of this suit.

2. That the 2nd defendant shall return forthwith the 1st plaintiffs' goods attached by High Class Auctioneers from the suit property pending the hearing and determination of this suit.
3. Each party shall bear its own costs of the two applications.

DELIVERED AND DATED AT NAIROBI THIS 28TH DAY OF JULY 2022.

S OKONG'O

JUDGE

**RULING DELIVERED VIRTUALLY THROUGH MICROSOFT TEAMS VIDEO
CONFERENCING PLATFORM IN THE PRESENCE OF:**

Mr Owaga for the 1st plaintiff.

Ms Pamela Arunga, the 2nd plaintiff in person.

Mr Kabaiku for the 1st and 3rd defendants.

Mr Kurauka for the 2nd defendant.

N/A for the 4th defendant.

Ms C Nyokabi-court assistant.

