



**REPUBLIC OF KENYA**  
**IN THE HIGH COURT OF KENYA**  
**AT NAIROBI (MILIMANI COMMERCIAL COURTS)**

**Civil Case 993 of 2002 & 1506 of 2000**

**TRIPLE EIGHT INVESTMENTS (K) LTD..... PLAINTIFF**

**VERSUS**

**CITY FINANCE BANK LIMITED.....1<sup>ST</sup> DEFENDANT**

**NYANJA HOLDINGS LIMITED.....2<sup>ND</sup> DEFENDANT**

**RULING**

This is a protracted dispute. It involves a property i.e. **LR No.37/256/3** (*hereinafter referred to as the suit property*), which is registered in the name of the plaintiff. The plaintiff was so registered after purchasing the same from the 1<sup>st</sup> defendant, which purportedly sold it to the plaintiff in exercise of its statutory power of sale by mortgagee. The suit property was previously registered in the name of the 2<sup>nd</sup> defendant. There are rental premises in the suit property. On 21<sup>st</sup> June, 2007, Warsame J made the following order as regard the suit property:

*“The plaintiff in the present case is asserting a right which accrued through the said property’s sale, which is hereby contested by the plaintiff in the earlier suit, who is also the 2<sup>nd</sup> defendant in this suit. I have been told the purchaser of the suit property paid the full purchase price and is unable to access the property and the rent that accrues therefrom. I think it is up to the court to determine whether the contested sale is valid or not but the parties have to enjoy equal rights pending the determination of the dispute. A party who has paid a substantial sum way back in 8/06/2000 cannot be said to be at par with the party who has been enjoying the benefits of the suit property all this years. Justice is both ways. I agree the original owner of the suit property is challenging the alleged sale but a purchaser who has acquired a subsequent title and right is also entitled to equal protection. I am not in any way saying that the rights of the plaintiff herein is valid but he needs protection so that the infringement of rights can be numerized and mitigated. I therefore think the 2<sup>nd</sup> defendant ought to be brought in the same position as that of the alleged purchaser. The only way to so to determine their rights on interim basis. I therefore order the 2<sup>nd</sup> defendant to deposit KShs.400,000/= every month effective from 30.06.2007 till the determination of both suits to conclusion in the joint names of all the Advocates in this matter.”*

The said order by Warsame J has not been set aside. Neither has it been stayed. It is a valid order which must be obeyed by the parties.

On 21<sup>st</sup> January, 2008, the plaintiff filed an application under the provisions of **Order XL Rules 1, 2 and 3** and **Order L Rule 1** of the **Civil Procedure Rules** seeking orders of this court to appoint a receiver for the suit property pending hearing and determination of this suit. The plaintiff proposed that Mr. Samuel Mwangi Njihia of Njihia Muoka Rashid & Co. Ltd (*Registered Valuers, Estate & Management Agents*) to be appointed receivers of the suit property. The plaintiff proposed that the receiver be conferred with power to collect the rents and profits in respect of the suit property and further bring and defend suit for the realization of rents, management, protection, preservation and improvement of the suit property pending the hearing and determination of the suit. The grounds in support of the application are on the face of the application. The application is supported by the affidavit of James Nderitu Gachagua, the managing director of the plaintiff. In the said affidavit, the plaintiff complains that despite of being the registered owner of the suit property since 12<sup>th</sup> June, 2000, the plaintiff has been kept out of the suit property by the 2<sup>nd</sup> defendant. It was the plaintiff's contention that the 2<sup>nd</sup> defendant had enjoyed rental income from the suit property and had refused to comply with the order of the court requiring the said rental income to be deposited in a joint interest earning account. The plaintiff urged the court to appoint a receiver to manage the suit property and give effect to the order of the court and also protect, preserve and maintain the suit property pending the resolution of the dispute by the court.

The application is opposed. George Boniface Njau Mbugua Nyanja, a director of the 2<sup>nd</sup> defendant swore a lengthy replying affidavit in opposition to the application. In the said affidavit, he complained that the said order issued by the court was oppressive to the 2<sup>nd</sup> defendant. He deponed that the 2<sup>nd</sup> defendant was aggrieved by the said order and had filed notice of intention to appeal against the said decision to the Court of Appeal. It was the 2<sup>nd</sup> defendant's contention that it had been prevented from prosecuting the said appeal because the court file could not be traced to enable proceedings to be typed. The 2<sup>nd</sup> defendant gave the litigation history of the case. It was its view that the application was unmerited since the 2<sup>nd</sup> defendant had been in possession of the suit property since the year 2000 when the plaintiff claims to have been registered as the owner thereof. It was further the 2<sup>nd</sup> defendant's contention that it was the lawful owner of the suit property and was therefore entitled to the rental income. The thrust of the 2<sup>nd</sup> defendant's argument was that, since it was challenging the purported exercise of the statutory power of sale by the 1<sup>st</sup> defendant in transferring the suit property to the plaintiff, there was no urgency for the court to make any orders that would in effect change the current existing circumstances relating to possession before the suit was heard and determined. The 2<sup>nd</sup> defendant was of the view that the present application was filed by the plaintiff in its bid to frustrate the hearing and eventual determination of the suit on merits. The 2<sup>nd</sup> defendant urged the court to disallow the application. The 1<sup>st</sup> defendant did not file any papers either in support or in opposition to the application.

At the hearing of the application, I heard the submission made by Mr. Nyamuga on behalf of the plaintiff and by Mr. Kihara on behalf of the 2<sup>nd</sup> defendant. Mr. Kibanya for the 1<sup>st</sup> defendant supported the submissions made on behalf of the plaintiff. The two counsels basically reiterated the contents of the application and the affidavit filed in response thereto. They both gave the litigation history of the case. I have carefully considered the matters in issue in this application. The issue for determination by this court is whether the plaintiff established a case to enable this court grant an order for the appointment of a receiver to manage the suit property pending the hearing and determination of this suit. **Order XL Rule 1** of the **Civil Procedure Rules** provides that:

*"1. (1) Where it appears to the court to be just and convenient, the court may by order –*

*(a) appoint a receiver of any property, whether before or after decree;*

*(b) remove any person from the possession or custody of the property;*

*(c) Commit the same to the possession, custody or management of the receiver; and*

*(d) Confer upon the receiver all such powers as to bringing and defending suits and for the realization, management, protection, preservation, and improvement of the property, the collection of the*

rents and profits thereof, the application and disposal of such rents and profits, and the execution of such documents as the owner himself has, or such of those powers as the court thinks fit.

(2) Nothing in this rule shall authorize the court to remove from the possession or custody of property any person whom any party to the suit has not a present right so to remove.”

In **Henriette Bengler –vs – Nzuki Kilondo Kittu Mombasa HC Divorce Cause No. 40 of 1999**, Waki J (as he was then) quoted with approval **Mulla’s Commentary on Indian Civil Procedure, 12<sup>th</sup> Edition** which has a provision in *pari materia* with **Order XL** of our **Civil Procedure Rules**. He quoted page 1169 of the said commentary which gave a guide of the circumstances under which a receiver may be appointed by the court:

“The power to appoint a receiver is not to be exercised as a matter of course or for the reason that it can do no harm to appoint one. A receiver should not be appointed in succession of a bona fide possessor of the property in dispute unless there is some substantial ground for interference. The court has to consider whether special interference with the possession of the defendant is required, there being a well founded fear that the property in question will be dissipated or that other irreparable mischief may be done unless the court gives its protection. The mere fact that a plaintiff in his plaint makes violent and wholesale charges of waste is no ground for the appointment of a receiver...”

In **Halsbury’s Laws of England, 4<sup>th</sup> Edition Reissue, Volume 39 (2)** para. 313 states as follows on the procedure for appointment of receivers by court:

“The High Court has a statutory jurisdiction to appoint a receiver by an interlocutory or final order in all cases in which it appears to the court to be just and convenient to do so. Any such order may be made either unconditionally or on such terms and conditions as the court thinks just. The appointment may be made either before or after judgment, and a fortiori by the judgment itself or at the hearing of the action...”

This court may appoint a receiver when it forms the opinion that it would be just and convenient in the circumstances. The court however, has to put in mind that in appointing such a receiver it should not appear to determine the issues in dispute involving the suit property especially when the application for the appointment of a receiver is made at an interlocutory stage.

In the present application, certain facts are not in dispute. It is not disputed that Warsame J issued an order on the 21<sup>st</sup> June, 2007 directing the 2<sup>nd</sup> defendant to deposit the sum of KShs.400,000/= every month, being the monthly rent received, so that the same may be deposited in a joint account of the advocates to the parties to this suit pending the hearing and determination of the suit. This order has not been complied with by the 2<sup>nd</sup> defendant. Indeed, in the opinion of the 2<sup>nd</sup> defendant, the said order was oppressive. May be in its assessment the 2<sup>nd</sup> defendant made a conscious decision not to abide by the said order. The 2<sup>nd</sup> defendant made no application to stay, vary, review or set aside the said order of the court. The said therefore is still valid. This court has a duty to enforce it. Secondly, it is not disputed that although the 2<sup>nd</sup> defendant is in possession of the suit property, the current registered owner is the plaintiff. The 2<sup>nd</sup> defendant disputes the circumstances under which the suit property was transferred to the plaintiff. That is the matter in dispute in this case. The court may or may not find in favour of the 2<sup>nd</sup> defendant. As observed by Warsame J, it is only just fair and convenient for the proceeds from the suit property to be preserved so that upon conclusion of the hearing of the suit, the party who the court will find in its favour will not be prejudiced.

I therefore hold that the plaintiff’s application is meritorious and is hereby allowed. This court appoints Mr. Samuel Mwangi Njihia of Njihia Muoka Rashid and Co. Limited, (*Registered Valuers, Estate & Management Agents*) and of P.O. Box 67959 – 00200, Nairobi as a Receiver for all the suit property known as LR No.37/256/3 situate in Nairobi West. The said receiver shall have the following powers;

(a) To collect the rents and profits in relation to the Suit Property pending the hearing and determination

of this suit.

(b) To bring and defend suits and for the realization of rents, management, protection, preservation, and improvement of the Suit Property, pending the hearing and determination of this suit.

(c) To provide the court with accurate account of all the rents collected and disbursements made thereof.

(d) To deposit in a joint interest earning account in the names of the counsel for the plaintiff and counsel for the 2<sup>nd</sup> defendant the proceeds from the suit property as ordered by Warsame J and render accurate accounts to the plaintiff and the 2<sup>nd</sup> defendant.

(e) To do such acts that would enable him execute his mandate in respect of the powers conferred to him by the court.

The plaintiff's and the 2<sup>nd</sup> defendant's respective counsels are hereby directed to open a joint interest earning account in a reputable bank within thirty (30) days of today's date. This is the account in which the receiver shall deposit the monthly rent received in respect of the suit property. Each party shall be at liberty to apply. The costs of this application shall be in the cause.

**DATED at NAIROBI this 9<sup>th</sup> day of APRIL, 2008.**

**L. KIMARU**

**JUDGE**