



**REPUBLIC OF KENYA**  
**IN THE HIGH COURT OF KENYA**

**AT KAKAMEGA**

**Civil Case 50 of 2007**

**KALUNA COMPANY LTD. .... PLAINTIFF**

**V E R S U S**

**MUNICIPAL COUNCIL OF KAKAMEGA ..... DEFENDANT**

**RULING**

The application before me is for an injunction to restrain the defendant from selling, entering onto or in any other way interfering with the suit property, **L.R. NO.KAKAMEGA MUNICIPALITY/BLOCK II/11**.

It is the plaintiff's case that the defendant acted unlawfully by advertising the suit property for sale, whilst the defendant had never sued the plaintiff for any alleged arrears of Land Rates or Land Rents.

By acting as it did, the defendant is said to have denied the plaintiff its natural rights, as the plaintiff had not been given any hearing. Indeed, the plaintiff holds the view that the defendant had, by its said actions, become a judge in its own cause.

The plaintiff submitted that it was the owner of the suit property. As a matter of fact, the plaintiff deems the issue of ownership of the suit property as free from any doubt.

The court was told that the suit property was advertised for sale in the "**Daily Nation**" newspaper dated 21<sup>st</sup> February 2007.

As at that date, the defendant alleged that the plaintiff owed a sum in excess of KShs.3.0 million, in respect of Land Rents.

However, the plaintiff contends that it did not owe any rents or rates, as it had been regularly paying the same.

In any event, if there were any arrears of Land Rates or Land Rents, the plaintiff believes that those constitute civil debts, which were therefore subject to civil procedures.

The plaintiff, exhibited the "Valuation Roll" which, in the plaintiff's understanding, indicated that the annual rates had been assessed at KShs.12,896/80.

That being the case, the plaintiff says that when it paid KShs.130,000 on 29<sup>th</sup> April, 1998, it had paid

the rates in advance, for a period of over ten years.

Notwithstanding the payment, the plaintiff accuses the defendant of making an absurd demand for rates at KShs.278,644 per year. That demand was described as unreasonable.

The plaintiff therefore demanded a breakdown from the defendant. However, the defendant had not provided the breakdown.

The plaintiff now asks that until the suit was heard and determined, the defendant should be restrained in the manner spelt out at the beginning of this ruling.

In answer to the application, the defendant asserts that the plaintiff had failed to prove a prima facie case with a probability of success.

First, the defendant contends that the plaintiff had failed to prove ownership of the suit property. That submission is founded upon the fact that the document of title which the plaintiff produced before the court was a lease for a period of 33 years, commencing from 1<sup>st</sup> July 1959.

That being the case, as the plaintiff had not demonstrated that the said lease had been renewed, it was the defendant's submission that the plaintiff did not have a good title.

The plaintiff, however, thinks that as it was the registered owner of the suit property, they were the owners thereof regardless of the fact that the lease had expired in 1992.

On a prima facie basis, the plaintiff appears to be the owner of the suit property, as it has held over the said property after the lease had expired. That presumption is derived from the provisions of section 53 of the Registered Land Act.

Furthermore, the defendant is deemed, on a prima facie basis, to have recognized the proprietorship of the plaintiff, when the defendant demanded the payment of rates or of rents from the plaintiff.

If the defendant did not recognize the plaintiff's proprietorship of the suit property, it would not have demanded payments from the plaintiff.

The defendant did accept payment of KShs.130,000/= from the plaintiff, as payment of land rent. Therefore, pursuant to **section 52 (2)** of the Registered Land Act, that constitutes evidence that the defendant had consented to the plaintiff's continued occupation of the land.

The payment which the defendant accepted was clearly receipted on 30<sup>th</sup> April 1998. The receipt expressly indicates, on the face thereof, that the payment was for:

***“the year 1997 & previous.”***

Therefore, I find that there is absolutely no basis for the plaintiff's contention that that payment was for the ten year period, between 1998 and 2007.

The plaintiff's own exhibit **“LM6 (b)”** indicates that as at 20<sup>th</sup> February 1998, the annual rent and rates was KShs.12,896/80. However, as at that date, the arrears were in the sum of KShs.419,744/45, whilst the interest on the outstanding amounts was KShs.100,738/65.

Therefore, when the plaintiff paid KShs.130,000/=, there was still a substantial amount left outstanding.

The plaintiff has not shown to the court the money which it paid between April 1998 and February 2007. I will therefore assume that the plaintiff did not make any payments during that period.

That being the case, as I understand it for now, I find that the plaintiff was in arrears of rates, and that the defendant was entitled to take action to recover the same.

To that end, the defendant published a notice in the “Daily Nation” newspaper dated 21<sup>st</sup> February 2007. By that Notice, the defendant said, inter alia, that:

“Those who fail to settle their accounts will be taken to court.”

That notice was in line with the provisions of section 17 of the Rating Act (Cap.267 of the Laws of Kenya).”

Thereafter, the defendant caused the plaintiff to be served with a notification of sale dated 4<sup>th</sup> May 2007, indicating that Messrs Galaxy Auctioneers Limited would sell the suit property by way of public auction, on 6<sup>th</sup> July 2007.

The defendant has not told this court the legal basis for the notification of sale. I say so because the only notice which had hitherto been given to the plaintiff was to the effect that if it failed to pay-off the arrears of the rates, it would be taken to court. And, as I have indicated hereinabove, by virtue of the provisions of section 17 (2) of the Rating Act;

***“If any person who has had such demand served upon him makes default, the rating authority may take proceedings in a subordinate court of the first class to secure the payment of such rate and interest in the manner hereinafter prescribed.”***

As the defendant has not shown that it took out proceedings against the plaintiff, I find and hold that the plaintiff, although it may be in arrears, was nonetheless entitled to come to court, to obtain an injunction to stop the intended sale of the suit property.

Accordingly, an injunction shall issue forthwith, to restrain the defendant from selling the suit property until this suit is heard and determined. This injunction shall, however, stand vacated if the defendant shall first take out legal proceedings against the plaintiff, and if a court of competent jurisdiction shall issue appropriate orders in favour of the defendant herein, enabling the said defendant to recover the outstanding rates.

Costs of the application are awarded to the plaintiff.

***Dated, Signed and Delivered at Kakamega, this 8<sup>th</sup> day of July 2008***

**FRED A. OCHIENG**

**JUDGE**