



**REPUBLIC OF KENYA**

**IN THE HIGH COURT OF KENYA**  
**AT MOMBASA**

**CIVIL SUIT 145 OF 2005**

**ZACCHEUS SURE MBOYA ..... PLAINTIFF**

**VERSUS**

**ALCOP LIMITED ..... DEFENDANT /APPLICANT**

**Coram: Before Hon. Justice Mwera**

**Gichana for defendant**

**Wameyo for plaintiff**

**Court clerk – Kazungu**

**RULING**

The following ruling arose from two applications which were argued together. The plaintiff's application dated 28th July 2005 was brought under O39 rr. 1, 2, 3, 9 Civil Procedure Rules and Section 3A Civil Procedure Act. The main prayer that Mr. Wameyo pressed was to restrain the defendant company with its agents not to levy distress over the household goods of the plaintiff lying in a house standing on **PLOT NO. 923 KIZINGO MOMBASA**.

Briefly put, the court was told that the house on the said plot belonged to the plaintiff who had no landlord / tenant relationship with the defendant. That once upon a time there was house No. HG/63 Category B standing on the subject plot. It was allocated to the plaintiff on 15th May 1995 to live in as a civil servant. However, in the intervening period this plot was subdivided into plots No. 398, 939 and 923 and given out to some 3 private owners. That then the plaintiff filed a MISC. CIVIL APPLICATION NO. 213/98 against the Commissioner of Lands seeking judicial review orders of certiorari to quash the commissioner's decision subdividing the subject land in 3 plots which he gave to Chadim Investments Limited (No. 398) Nazir Mohamed (No. 939) and the subject Plot NO. 923 to the defendant herein. That when leave was granted to the plaintiff it operated as stay for any dealing involving these 3 plots. But before that judicial review application went further, on 13th July 2000 a consent was recorded wherein the owners of plots No. 938 (not 398) and 939 accepted to jointly and severally pay the plaintiff Kshs. 1.2m whereupon the plaintiff would vacate the plots on 1st November 2000. The consent order added that if the plaintiff failed to vacate then he would pay rent of Kshs. 100,000/- per month to the two. Plot No. 923 (subject here) with its owner, the defendant, were not part of that consent. So the plaintiff told this court that with exclusion of Plot 923, the dispute over it with the defendant was still outstanding. But that even with that state of things, the defendant had sought to levy distress for rent at Kshs. 100,000/- per month against the plaintiff because he was still in occupation of Plot No. 923. That the defendant could not do such a thing first because it was not privy to the consent order of 13th July 2000 and secondly that

an earlier proposed consent to withdraw the entire cause (covering all the 3 plots) had aborted. So the injunction now under consideration was sought.

The defendant filed its own application dated 29th July 2005 which Mr. Gichana argued, in essence, opposing the plaintiff's application above. This application, brought under O39 r 4 Civil Procedure Rules and Section 63, 3, 3A Civil Procedure Act prayed the court to discharge vary or set aside its ex parte injunction orders of 28th July 2005 or grant a stay of the same until the inter partes hearing of the plaintiff's application.

Mr. Gichana argued that the court had made interim injunction orders against the law since the orders would run well in excess of 14 days. For this it should right away appear clear that Vacation started soon after the orders complained of. It was added that the orders of 28th July 2005 were issued without hearing the defendant. To this the short answer is that that is the nature of ex parte orders. But it was put forth with considerable force that the defendant was in fact the registered owner of Plot 923 as per the Certificate of Lease issued to it on 14th July 1997. That is definitely so but it was not correct to depone in reply to the plaintiff's application:

*“8. That the consent order recorded was affecting all parties herein and our contribution of Kshs. 400,000/- was forwarded ordered (sic) to the advocate making the entire payment of Kshs. 1,200,000/-.”*

By the above Mr. Gichana made it appear to the court that his client was party to the consent orders of 13th July 2000 which the court set out above. That deposition was clearly far away from the truth. The truth is that although the MISC. APPLICATION NO. 231/98 involved all the 3 plots of the subdivision of the subject plot, when it came to the consent to pay Kshs. 1.2m to the plaintiff, only plots No. 938, 939 were subject and their owners were to pay the agreed sum. Plot NO. 923 here in issue was not involved and the defendant would not and seemingly did not pay part of Kshs. 1.2m to the plaintiff. There is no evidence to that effect. So all said and done the miscellaneous application was compromised by the consent order of 13th July 2000 only in respect of Plots NO. 938, 939 with their owners while the fate of Plot No. 923 over which the defendant is registered, hung in the balance. It can be assumed that that remains the case to date.

In this court's view, that being the current state of things the defendant is not justified to ask for any rents from the plaintiff and worse, move to distrain for them. There is no tenant – land lord relationship between the two or none has been shown to exist. However, if the plaintiff is a trespasser on the defendant's plot No. 923, the remedy is to eject him together with a demand for damages but not to ask for any rents from him. If any rents were to be paid at Kshs. 100,000/- per month by the plaintiff to the owners of Plots No. 938, 939, it was all in the consent order of 13th July 2000 to which the defendant was not a party. Accordingly, the defendant's moves to seize any property of the plaintiff on account of rents for / from Plot NO. 923 is unwarranted, unjustified and unlawful.

In sum, the injunction sought by the plaintiff is granted with costs. The defendant's application dated 29th July 2005 is in turn dismissed with costs.

Orders accordingly.

Delivered on 14th September 2005.

**J.W. MWERA**

**JUDGE**