



REPUBLIC OF KENYA

IN THE ENVIRONMENT AND LAND COURT

AT MOMBASA

ELC 325 OF 2016

1. RAMADHAN SAIDI

2. HAMADI IDDI

3. PAULINE OGENGA

4. BENEDICT MWAKIO

5. THOMSA MAKU BARU

6. SYSLVESTER JOSHUA.....PLANTIFFS

VERSUS

SUDI HAFIDHI

RUKIA BINTI SOUD.....DEFENDANTS

JUDGMENT

1. This suit was instituted by way of plaint dated 3rd November, 2016 in which the plaintiffs sought for the following orders:

a. A declaration that the 1st and 2nd defendants cannot sale the plaintiffs' houses/properties to recover Ground Rent and that such sale if any is null and void.

b. An order for a permanent injunction restraining the 1st and 2nd defendant either by themselves or through their agents/servants and/or employees from selling, auctioning, demolishing, charging, sub dividing, taking possession or otherwise dealing in any manner with the said houses situate on suit property known as PARCEL NO.MN/VI/1852, MN/VI/1997, MN/VI/2102, MN/VI/1398, MN/VI/1400, MN/VI/1400/2014, NM/VI/1403, MN/VI/1993/1404, MN/VI/1834 located in Changamwe, Magongo Mombasa County.

c. Costs and interest at court rates.

d. Any other further relief that the court deems just and fit.

2. The plaintiffs' case is that they own residential houses on the suit property. That the defendants have instructed auctioneers to sell their houses situate on the suit property to recover Ground Rent which they claim to be in arrears and have issued through their auctioneer Notices of Distress against the plaintiffs and other persons who have since died. The plaintiffs aver that no notice can be issued against dead persons. The plaintiffs have contested the capacity of the defendants to demand payment of Ground Rent on behalf of the Estate of the Late Soud Bin Ali Bashir and stated that the Ground Rent cannot be recovered by the defendants by levying distress upon the plaintiffs' properties.

3. Ramadhan Saidi, the first plaintiff testified on behalf of the plaintiffs. He adopted the contents of his affidavit sworn on 3rd November, 2016 as his evidence-in-chief. His evidence is that he purchased a house on the suit property from one Mwanaisha Nyoka. That soon thereafter he entered into a written agreement for the purchase of the land on which the house occupies with the 2nd defendant who agreed to process title for the 1st plaintiff. He produced the agreements as exhibits. He stated that the rest of the plaintiffs own houses on the aforesaid parcels of land. The 1st plaintiff testified that they received a notice for distress from Tip Top Auctioneers who claim to have been instructed

by the firm of Ojode Udoto & Onjoro acting on behalf of the 2nd defendant who they claim is the Administrator of the estate of the late Soud Bin Ali Bashir. That the same notice of distress were issued to one Mohamed Mzee, on Rashid Iddi Khamisi, one Mwanaidi Mbaruk, one Gabriel Waiharo Hinga and one Rashid Kariuki Mugo. Copies of the notices of distress were produced also as exhibits. He stated that he was aware that the said Mohamed Mzee, Rashid Iddi Khamisi, Mwanaidi Mbaruki, Gabriel Waharo Hinga and Rashid Kariuki Mugo are all dead. Copies of their death certificates were produced as exhibits. It is the evidence of the plaintiffs that notices cannot be issued to persons who are dead as dead people cannot receive notices, and that no property can be legally sold whose known owner has since passed away. The plaintiffs deny existence of any landlord/tenant relationship between them and the defendants. That there exists no court order permitting the sale of the plaintiffs' houses to recover any ground rent. The plaintiffs urged the court to grant them the reliefs sought in the plaint.

4. Mr. Nyange Sharia, the plaintiffs' advocate submitted that the plaintiffs herein do not have any contractual relationship with the defendants therefore rendering the notices of distress null and void. Counsel relied on the case of **Boniface Njenga Kuria – v- Julius Keru Njoroge & 5 Others (2008)eKLR** and **Ideal Locations Limited –v- Nakumatt Holdings Limited & Another (2015)eKLR** and reiterated that both the plaintiffs and the defendants do not owe each other duties and obligations since there was no contractual relationship between them. It was submitted that for a notice of distress to be issued, there must be a contractual relationship between the parties which did not exist in this case. The plaintiffs' counsel also relied on the case of **C.Y.O. Owayo –v- George Hannington Zephania Aduda t/a Aduda Auctioneers & Another (2007)eKLR**. It was further submitted that the issuance or service of the Notices of distress was illegal since a dead person cannot serve or issue any notices. They cited Section 3 of the Distress of Rent Act which spells out under what circumstances a right to distraint for rent arises.

5. The defendants were duly served but never entered appearance nor filed defence. The plaintiffs' suit is therefore uncontested.

6. I have considered the material presented to the court in this case. The issues that arise for determination are whether, there was a landlord/tenant relationship or contractual agreement or relationship between the plaintiffs and the defendants; whether the issuance of notice of distress was legal; who is entitled to distraint for rent, and whether the plaintiffs are entitled to the reliefs sought.

7. In this case, the plaintiffs have produced documentary evidence showing that they are the owners of the houses situate on the aforesaid parcels of land. The plaintiffs have stated that there was no any form of agreement between them and the defendants. The plaintiffs' evidence is that they entered into an agreement with Soud Bin Ali Bashir (now deceased) who was their landlord. The defendants herein have not shown their rights over the properties, neither have they presented any evidence in form of letters of administration showing that they are administrators of the deceased landlord. The Distress for Rent Act Cap 293 Laws of Kenya is very clear as to who is entitled to distraint for rent. This right is enshrined in Section 3 of the said Act which reads: "3 (1) subject to the provision of this Act and any other written law, any person having any rent or rent service in arrears and due upon a grant, lease, demise or contract, shall have the same remedy by distress for the recovery of that rent or rent service as given by common law." It is clear from a reading of the section that in order to qualify for a right to distraint for rent, one must show that he is any person having any rent or rent service in arrears and due upon a lease, demise or contract. For one to claim or be granted remedies for recovery of rent or distraint for rent, the parties must have been in a contractual relationship. There must also be evidence by way of letters of administration that one is acting on behalf of the estate of a deceased person.

8. In this case, the plaintiffs' have stated that they do not have any contractual relationship with the defendants. The plaintiffs' suit is undefended and therefore the evidence presented before court is not challenged and remains uncontroverted. The distress for rent was no doubt illegal. In the premises I find and hold that the plaintiffs have proved their case on a balance of probabilities and are entitled to the reliefs sought.

9. The upshot is that judgment is hereby entered for the plaintiffs against the defendants as prayed in the plaint. Costs of the suit are awarded to the plaintiffs.

DATED, SIGNED and DELIVERED at MOMBASA this 16th day of March, 2021

C.K. YANO

JUDGE

IN THE PRESENCE OF:

Yumna Court Assistant

C.K. YANO

JUDGE