



**REPUBLIC OF KENYA**

**IN THE ENVIRONMENT AND LAND COURT AT NAIROBI**

**ELC SUIT NO. 357 OF 2019**

**JOHN NDUNG’U MBUGUA.....PLAINTIFF**

**=VERSUS=**

**KINDE PROPERTIES LIMITED.....DEFENDANT**

**ELEMA WHOLESALERS LIMITED.....INTERESTED PARTY**

**RULING**

What is before me is the Notice of Motion dated 8<sup>th</sup> July, 2021. In the application, the defendant has sought an order that the court does certify the Notice of Motion dated 18<sup>th</sup> November, 2020 as urgent and grants prayers 2, 3 and 4 thereof pending the hearing of the defendant’s (applicant) application dated 4<sup>th</sup> May, 2020.

In the Notice of Motion dated 18<sup>th</sup> November, 2020, the defendant (hereinafter referred to only as “the applicant”) sought the following orders;

1. THAT a conservatory order be issued against the plaintiff and the proposed 2<sup>nd</sup> defendant, David Ndungu restraining them from developing, leasing, renting and/or subletting the suit property pending the hearing and determination of the suit.
2. THAT the Honourable court directs that all rent accruing from the suit property be paid to KENSTATE VALUERS LTD. which will furnish the court with statements of account from time to time.
3. THAT the costs of the application be provided for.

The application dated 8<sup>th</sup> July, 2021 was brought on the grounds set out on the face thereof and on the affidavit of Wachira Nderitu sworn on 8<sup>th</sup> July, 2021. The application was brought on the ground that the applicant’s application dated 4<sup>th</sup> May, 2020 seeking among others an order that the tenants on Dagoretti/Riruta/770 (hereinafter referred to as “the suit property”) do pay rent accruing from the property to court is pending hearing. The applicant averred that it came to its attention that the plaintiff’s son David Ndung’u whom it intended to add to the suit as a defendant was in the process of developing the suit property further and leasing it to unsuspecting tenants notwithstanding that there was a dispute over the ownership of the suit property. The applicant averred that the plaintiff had continued to collect rent from all the tenants on the suit property save for the interested party. The applicant averred that the plaintiff had refused to furnish the court with a list of the tenants on the suit property even after it was directed to do so by the court. The applicant averred that it was necessary to avoid a situation whereby third parties would be dragged into this suit. The applicant averred that it was also necessary that appropriate orders be given to preserve not only the suit property but also the rent being paid by the tenants.

When the Notice of Motion dated 8<sup>th</sup> July, 2021 seeking urgent hearing of the Notice of Motion dated 18<sup>th</sup> November, 2020 came up for mention ex parte on 8<sup>th</sup> July, 2021, the court directed the applicant to serve the same and also to file a further affidavit in which it was to annex copies of the profile of KENSTATE VALUERS LTD. and a letter from the company confirming that it was not conflicted and that it was ready to collect rent from the suit property under the direction of the court.

The applicant filed a further affidavit sworn by Wachira Nderitu on 12<sup>th</sup> August, 2021. In the affidavit, Wachira Nderitu, the applicant’s director stated that KENSTATE VALUERS LTD. was no longer interested in collecting rent from the suit property. He stated that upon receiving communication from KENSTATE VALUERS LTD. on the issue, the applicant approached another estate agent, CRYSTAL VALUERS LTD. which agreed to collect rent from the suit property under the direction of the court and to give account. The applicant’s director annexed to his further affidavit the profile of the said company and also a letter addressed to the court of its willingness to collect rent. The applicant urged the court to appoint Crystal Valuers Ltd. to collect rent from the tenants on the suit property in place of Kenstate Valuers Ltd. that the applicant had proposed earlier.

While the application dated 18<sup>th</sup> November, 2020 was pending, the plaintiff died on 5<sup>th</sup> January, 2021 and on 16<sup>th</sup> September, 2021, the court made an order substituting him with his legal representative, David Kamau Ndungu'u as the new plaintiff. The application dated 18<sup>th</sup> November, 2020 was served upon the plaintiff's advocates. The plaintiff opposed the application through a replying affidavit sworn on 16<sup>th</sup> December, 2020. In the affidavit, the plaintiff reiterated his earlier affidavit sworn on 8<sup>th</sup> October, 2020. The plaintiff denied that there was any new development being put up on the suit property. The plaintiff stated that he was not agreeable for having a third party collecting rent from the suit property because that move would prejudice his interest. When the applicant's application dated 8<sup>th</sup> July, 2021 came up for hearing on 27<sup>th</sup> October, 2021, the applicant's advocate told the court that the application was not opposed and urged the court to allow the same. The advocate for the interested party told the court that the interested party had vacated the suit property. The plaintiff's advocates did not attend court.

I have considered the applicant's applications dated 8<sup>th</sup> July, 2021 and 18<sup>th</sup> November, 2020 together with the affidavits filed in support thereof and the supplementary affidavit. I have also considered the replying affidavit that was filed by the plaintiff in opposition to the application dated 18<sup>th</sup> November, 2020. The following is my view on the application dated 18<sup>th</sup> November, 2020 which is the subject of this ruling. It is not in dispute that the ownership of the suit property is contested between the plaintiff and the defendant. The defendant has a title to the suit property while the plaintiff is in occupation. The defendant's title is contested by the plaintiff. It is not disputed that the suit property is developed with a building which is rented out to tenants. It is also not in dispute that although the defendant is the registered proprietor of the suit property, it is the plaintiff who is receiving rent from the tenants on the suit property. The defendant has also placed evidence before the court showing that the plaintiff by himself or through his son who is now his legal representative had attempted to carry out further development on the suit property.

Having considered the dispute between the parties, I am of the view that a case has been made out for the orders sought. There is need to preserve the suit property and for the rent being paid by the tenants to be collected by a neutral party who will be able to account to the court and to the parties in respect thereof at the conclusion of the suit.

The applicant has proposed that rent be collected by Crystal Valuers Ltd. The plaintiff did not attend court and as such did not give any view on the suitability of the proposed rent collector. In the absence of any evidence that the said company is not suitable for the task the court has been called upon to assign to it, I have no reason for declining to give it the assignment.

For the foregoing reasons, I hereby make the following orders;

1. Pending the hearing and final determination of this suit, the plaintiff by himself or through his agents, servants or employees or any other person acting on his behalf is restrained from developing, leasing, renting and/or subletting all that property known as Dagoretti/Riruta/770 (the suit property) or any part thereof.
2. The court appoints Crystal Valuers Limited to manage the suit property.
3. Crystal Valuers Ltd. shall with effect from 1<sup>st</sup> December, 2021 take over the responsibility of collecting rent from the tenants on the suit property, renting out the premises, settling utility bills for the common areas and undertaking any other duties usually undertaken by property managers.
4. Crystal Valuers Ltd.'s management fees shall be agreed upon by the plaintiff and the defendant by 30<sup>th</sup> November, 2021 failure to which the same shall be determined by the court upon application.
5. Crystal Valuers Ltd. shall file in court a statement of account of the rent collected and any expenses incurred quarterly with effect from 1<sup>st</sup> December, 2021.
6. Either party shall be at liberty to apply to court for directions on the keeping or investment of the rent collected by Crystal Valuers Ltd. from the suit property.
7. The costs of the application to be in the cause.

**DATED AND DELIVERED AT NAIROBI THIS 8TH DAY OF NOVEMBER, 2021**

**S. OKONG'O**

**JUDGE**

**Ruling delivered virtually through Microsoft Teams Video Conferencing Platform in the presence of:**

Ms. Kamuyu for the Plaintiff

Ms. Murimi for the Defendant

Ms. Kimani h/b for Mr. Mohamed for the Interested Party

Ms.

C.

Nyokabi

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Court

Assistant

