



REPUBLIC OF KENYA

IN THE ENVIRONMENT AND LAND COURT

AT NAIROBI
ELC CASE NO. 351 OF 2019

SALIMA ENTERPRISES LIMITED.....PLAINTIFF

VERSUS

NAIROBI CITY COUNTY.....DEFENDANT

RULING

The Plaintiff filed the application dated 11/11/2019 seeking, an order to direct the Defendant, its agents, servants, employees or other persons acting on its authority and direction including its Governor and accounting officers, not to open the premises known as Westlands Market in Nairobi for operations and utilisation by the public pending hearing and determination of the suit. The Plaintiff sought to have the Officer Commanding the Parklands Police Station assist in the enforcement of the orders issued by the court.

The application was made on the grounds that the Plaintiff is the registered owner of land reference number 1870/IX/170 situated in Westlands, Nairobi (“the Suit Property”). The Plaintiff averred that in 2010 the Defendant expressed the intention to acquire the Suit Property but did not actualise the acquisition. That notwithstanding, in June 2013, the Defendant entered the Suit Property and started constructing a market on it. When the Plaintiff objected to the development, the Defendant promised to compensate the Plaintiff.

The Plaintiff filed Nairobi **ELC No. 1144 of 2013 – Salima Enterprises Limited v Nairobi City County** seeking to restrain the Defendant from encroaching on the Suit Property. It later amended its pleadings and sought compensation for the land. Lady Justice Mary Gitumbi ordered on 4/7/2014 that the Defendant was to pay the Plaintiff the sum of Kshs. 325,000,000/= for the acquisition of the Suit Property and mesne profits of Kshs. 200,000/= per month from June 2013 until payment in full.

The Defendant did not pay the sum ordered by the court which prompted the Plaintiff to file **Nairobi High Court Judicial Review Case No. 309 of 2015** seeking orders of mandamus against the Defendant. The court granted the orders through the judgement of Odunga J. dated 7/6/2016. The Plaintiff maintained that there had been no appeal or review against the two judgements. Further, that it filed an application for contempt of court in **Nairobi High Court Judicial Review Case No. 309 of 2015** and that the orders were granted by the court. Parties entered into a consent on 9/1/2018 vide which the sum of Kshs. 600,000,000 was due and payable to the Plaintiff within 21 days. The Plaintiff averred that the Defendant did not pay the monies stated in the consent which the court adopted on 13/2/2019 and that the consent had never been set aside or reviewed.

The Plaintiff averred that owing to the Defendant’s continued default warrants were issued for the arrest of the Governor, Finance and Planning Minister and the Accounting officer on 23/2/2019. The police were to assist in execution of that court order but according to the Plaintiff they failed to do so. The Plaintiff averred that a market had been constructed on the Suit Property and now that it had been completed the premises could be opened to the public any time. The Plaintiff contended that it would become more difficult for it to ever get paid the balance of the money for compensation if the Defendant was allowed to open, occupy and operate the market on the Suit Property.

Hanif Gulam swore the affidavit in support of the application. He deponed that the Plaintiff was up to date with his rates payment. He produced the pleadings in **ELC No. 1144 of 2013** as well as the judgement. He also produced a copy of the application filed in **Nairobi Judicial Review Application No. 309 of 2015** together with the decree and certificate of costs. He deponed that the Defendant had tried all manner of delaying tactics despite orders being made to compel it to pay the Plaintiff. He pointed out that the Defendant’s attempt to stay execution was unsuccessful and that Mativo J. refused to grant stay of execution on 25/6/2019. He averred that the Plaintiff’s advocates had written severally to the Defendant advising it that it would not allow the market to be opened unless it was compensated in full as ordered by the court. The Plaintiff relied on the letters dated 8/4/2019 and 26/6/2019.

Mr. Gulam deponed that in the meantime the Defendant continued to construct the market on the Suit Property and by the time he swore the affidavit, the market was complete and ready for occupation. He attached photographs of people stocking shops in readiness for the opening of the market. He opined that it would become more difficult for the Plaintiff to ever get paid the balance of the monies for compensation if the Defendant were allowed to open and operate the market on the Suit Property.

The issue for determination is whether the court should grant the orders sought by the Plaintiff. According to the consent which was recorded

in **Nairobi Judicial Review Application No. 309 of 2015**, the sum due to the Plaintiff as at 9/1/2018 in relation to the principal sum, interest, mesne profits, costs and disbursements after reconciling accounts and deducting the sums already paid was Kshs. 600,000,000/=. That amount was to be paid within 21 days through the Plaintiff's account. In default of payment execution was to issue by way of warrant of arrest against the Defendant. In the witness statement filed in court on 11/11/2019, the Plaintiff computed the sum due as at 9/4/2019 as Kshs. 705,000,000/= together with interest which continues to accrue interest at 14% per annum.

The court notes from the plaint filed on 11/11/2019 that the only prayer sought by the Plaintiff is an order to stop the opening of the Suit Property for operations and that upon receiving full compensation the Plaintiff was to hand over the title documents and execute all the necessary documents to transfer and surrender the Suit Property to the Defendants at its cost. From the photographs that the Plaintiff attached to the application it is clear that the market was complete and ready for occupation. The Plaintiff did not disclose whether the warrant of arrest issued on 23/2/2018 by Aburili J. against the Minister for Finance and Economic Planning and Nairobi County Government for contempt of court was ever executed. The Minister was to have been presented before court on 12/3/2018. The Plaintiff does not disclose what the balance of the compensation it seeks is but only mentioned that it would be difficult for it to ever get paid the balance of the compensation by the Defendant if the market were opened up.

While the court sympathises with the Plaintiff's plight in the sense that it has a decree against the Defendant which has not been enforced, this court is of the view that it is an abuse of the court process for the Plaintiff to have filed this new suit after judgement was entered in its favour in **ELC No. 1144 of 2013**. It is highly doubtful whether a party can enforce a decree by filing a new suit purely for execution purposes. Going by the terms of the consent which was recorded by the parties on 9/1/2018, the Plaintiff's recourse in default of payment being made by the Defendant was to pursue execution through warrants of arrest against the Defendant's officials.

The Defendant did not file any response to the application. It instructed an advocate who only filed a memorandum of appearance on 15/1/2020. The court referred the matter to mediation on 20/1/2020. The mediator filed a certificate of non-compliance in court on 26/10/2020 intimating that the Defendant failed to comply with the mediator's instructions.

Stopping the occupation of the public market until such time that the Defendant will have paid the balance of the compensation money will not bode well for the public interest considering the facts of this case. The court declines to grant the orders sought by the Plaintiff in the application dated 11/11/2019.

Delivered virtually at Nairobi this 26th day of May 2021.

K. BOR

JUDGE

In the presence of: -

Mr. David Kirimi for the Plaintiff

Mr. V. Owuor- Court Assistant

No appearance for the Defendant