



REPUBLIC OF KENYA

IN THE ENVIRONMENT AND LAND COURT

AT NAIROBI

ELC SUIT NO. 322 OF 2018

PETER NDUNGU GATHUMBI

PETER MUNGAI GATHUMBI

JAMES NJENGA GATHUMBI (Suing as legal representatives of the Estate of

GATHUMBI KOMU, deceased).....PLAINTIFFS

VERSUS

JOAN NJOKI NDUNGI (Sued as a legal representative of the Estate of

JAMES SAMUEL GICHURU, deceased).....1ST DEFENDANT

AND

PERSIAH MUTHONI MASINDE (legal representative of the Estate of

JOHN GITAU GICHURU, deceased).....INTERESTED PARTY

RULING

What this court has been called upon to determine is to whom and how the rent due to the estate of James Samuel Gichuru, deceased (hereinafter referred to only as “the deceased”) from all that property known as L.R No. 209/2412(hereinafter referred to only as “the suit property”) should be paid. The matter was referred to the Court Annexed Mediation and the parties were unable to reach a settlement. The following facts are not disputed;

1. The suit property is owned by the deceased and one, Gathumbi Komu, also deceased (hereinafter referred to only as “Komu”) as tenants in common.
2. The suit property is rented out to tenants who pay rent on a monthly basis.
3. The rent payable for the suit property as at the time of filing this suit was Kshs. 320,000/- per month.
4. The plaintiffs are the administrators of the estate of Komu while the defendant is a beneficiary and an administratrix of the estate of the deceased.
5. The interested party is a beneficiary of the estate of the deceased.
6. The estate of the deceased and the estate of Komu are supposed to share the rent from the suit property equally.
7. On 24th September, 2019 during the pendency of this suit, the High Court declared in Nairobi Succession Cause No. 20 of 1983 that the estate of the deceased shall be divided equally between the defendant herein and the interested party in her capacity as a legal representative of the estate of the deceased’s son, John Gitau Gichuru.
8. The defendant and the interested party are supposed to share the rent due to the deceased from the suit property equally in

accordance with the said High Court order.

9. The tenants on the suit property have been paying only 50% of the monthly rent for the suit property which has been going to the plaintiffs since October, 2017.

10. The defendant as the administratrix and a beneficiary of the estate of the deceased has not received the 50% share of the rent from the suit property since October, 2017.

The plaintiffs brought this suit on 18th July, 2018 seeking an order to compel the defendant to sign a lease in respect of the suit property in favour of Samuel Kigathi Gachara, Peter Mungai Gathumbi and Hassan Guihad Abdille following the expiry of the lease that was in force and a permanent injunction restraining the defendant from evicting and/or interfering with the occupation, tenancy and possession of the tenants on the suit property or disrupting their business. Together with the plaint, the plaintiffs brought an application by way of Notice of Motion dated 18th July, 2018 seeking the reliefs sought in the plaint on an interim basis pending the hearing and determination of the suit.

When the Notice of Motion application dated 18th July, 2018 came up for hearing on 23rd October, 2018, the same was adjourned to 11th June, 2019. In the meantime, the court ordered that the status quo relating to the tenancy, occupation and possession of the suit property was to be maintained. The plaintiffs' said application was not heard on 11th June, 2019 due to other applications that were brought by the parties.

On 11th December, 2019, the defendant instructed Sterling Auctioneers to levy distress for rent against the tenants on the suit property for the recovery of rent arrears to the tune of Kshs. 8,640,000/- together with legal fees of Kshs. 1,000,000/- On 16th December, 2019, the said auctioneers levied distress for rent against the tenants on the suit property as instructed by the defendant by distraining their movable assets.

On 19th December, 2019, the plaintiffs brought another application by way of Notice of Motion dated 19th December, 2019 seeking an order restraining the defendant from levying distress against the tenants on the suit property and/or disrupting their businesses or evicting them from the property. The plaintiffs also sought an order that the court does find the defendant and her advocate to be in contempt of the orders that were made on 23rd October, 2018 and 26th September, 2019 and order that they be committed to civil jail for 6 months.

The application that was supported by the affidavit of Peter Ndungu Gathumbi and Samuel Kigathi Gichara was brought on several grounds. The plaintiffs (applicants) averred that the defendant had a dispute with the interested party on the distribution of the estate of the deceased. They contended that as a result of that dispute, the tenants on the suit property had withheld the payment of 50% of the rent that is due to the estate of the deceased as they did not know to whom the rent was to be paid as between the defendant and the interested party. The plaintiffs averred that the interested party opposed the release of the rent arrears to the defendant until the mode of distribution of the estate of the deceased was determined. The plaintiffs averred that the court had issued an order of status quo on 23rd October, 2018 that was extended on 26th September, 2019. The plaintiffs averred that despite the existence of that order, the defendant instructed auctioneers to levy distress against the tenants on the suit property. The plaintiffs averred that unless the orders sought were granted, the defendant would proceed with the said distress by attachment and sale of the said tenants' goods. The plaintiffs averred that the tenants on the suit property were innocent in that they were willing to pay rent save for the stalemate that had arisen between the defendant and the interested party as to the distribution of the said rent. The plaintiffs averred further that the defendant had exaggerated the rent in arrears which was Kshs. 3,412,000/- as at September, 2019 and not Kshs. 8,640,000/- as claimed by the defendant. The plaintiffs averred that unless the illegal distress levied by the defendant was stopped, the tenants on the suit property were likely to suffer great loss and damage.

The defendant opposed the plaintiff's application through grounds of opposition dated 3rd February, 2020 and a replying affidavit filed on 20th May, 2021. The defendant contended that the distress for rent was levied against the tenants on the suit property who had not complained against the same and as such the plaintiffs had no business coming to court to stop the same. The defendant contended further that the orders sought by the plaintiffs were not based on the reliefs sought in the plaint. The defendant contended that the plaintiffs had no business litigating on behalf of the tenants on the suit property who are not parties to the suit.

The defendant contended further that the orders made by the court for the maintenance of status quo did not entitle the tenants on the suit property to stay on the property for free. The defendant contended that as a co-owner of the suit property, she was entitled to rent the same as the plaintiffs and as such since the tenants had not paid rent, she was entitled to levy distress to recover the same. The defendant contended that in the circumstances, the distress levied against the said tenants was lawful. The defendant contended that the rent arrears in respect of which distress for rent had been levied had not been contested by the tenants on the suit property and that the same was based on the rent payable for the property. The defendant contended that the plaintiffs were using the tenants on the suit property to defraud her.

In his replying affidavit, the defendant stated that the rent due to her was Kshs. 180,000/- per month which had not been paid from May, 2018. She contended that the rent due to her as at the time of levying distress was Kshs. 6,480,000/-. The defendant contended that in addition, there were previous rent arrears of Kshs. 2,160,000/- that was outstanding. She stated that the total rent in arrears came to Kshs. 8,640,000/- as at the time of the distress for rent. She stated that in addition to the rent, there were auctioneer's fees of Kshs. 864,000/- to be paid. The defendant stated that she was old and ailing and that the tenants in occupation of the suit property could vacate the property at any time before paying the outstanding rent. The plaintiff stated that she had not received rent from the suit property for the last 5 years. The plaintiff contended that there was no longer any dispute with regard to the distribution of the rent from the suit property as between her and the interested party. The defendant argued that rent should not be paid to court as she will not be able to access the same for her daily upkeep.

In response to this affidavit, the plaintiffs filed a further supporting affidavit on 2nd June, 2021 sworn by Peter Ndungu Gathumbi. In the affidavit, the plaintiffs contended that the defendant never used to collect rent from the suit property until after the death of the interested party's mother who used to collect the rent. The plaintiffs reiterated that the tenants on the suit property were always ready and willing to pay rent and that the withholding of the estate of the deceased's share of rent by the tenants came about as a result of the conflicting instructions that the tenants received from the defendant and the interested party. The plaintiffs averred that the only option left to the tenants was for them to keep the rent until the issue of distribution of the estate of the deceased was determined. The plaintiffs also took issue with the

auctioneers' fees which they claimed to be exorbitant.

On the defendant's claim that the rent due to her was Kshs. 180,000/- per month, the plaintiffs stated that the lease under which the rent would have been increased from Kshs. 320,000/- per month to Kshs. 360,000/- per month was not signed by the defendant and as such the rent payable remains Kshs. 320,000/- per month which means that the defendant is entitled to receive Kshs. 160,000/- per month. The plaintiffs contended that there are outgoings that have to be deducted from the rent due to the defendant. The plaintiffs averred that the net rent due to the estate of the deceased was Kshs. 6,247,953/- which the tenants on the suit property were willing to deposit in any account as may be directed by the court within 90 days of such direction.

The application was argued on 10th June, 2021. The plaintiffs and the defendant made oral submissions while the interested party made oral submissions and also relied on her written submissions that she had filed on 9th June, 2021.

I have considered the plaintiffs' application together with the affidavits filed in support thereof. I have also considered the grounds of opposition and replying affidavit filed by the defendant in opposition to the application. Finally, I have considered the submissions by the parties. The plaintiffs' application has two limbs. The first limb of the application seeks a temporary injunction against the defendant pending the hearing and determination of the suit herein. The second limb seeks committal of the defendant and her advocates on record to civil jail for contempt of court. I will consider both limbs of the application one after the other.

The principles upon which this court exercises its discretion in applications for a temporary injunction are now well settled. In Giella v. Cassman Brown & Co. Ltd. [1973] EA 358, it was held that an applicant for a temporary injunction must show a prima facie case with a probability of success and such injunction will not normally be granted unless the applicant might otherwise suffer irreparable injury which would not be adequately compensated by an award of damages. It was held further that if the court is in doubt as to the foregoing, the application would be determined on a balance of convenience. In Nguruman Limited v. Jan Bonde Nielsen & 2 Others [2014] eKLR the Court of Appeal adopted the definition of a prima facie case that was given in Mrao Limited v. First American Bank of Kenya Limited & 2 Others [2003] KLR 125 and went further to state as follows:

“The party on whom the burden of proving a prima facie case lies must show a clear and unmistakable right to be protected which is directly threatened by an act sought to be restrained, the invasion of the right has to be material and substantive and there must be an urgent necessity to prevent the irreparable damage that may result from the invasion. ...All that the court is to see is that on the face of it the person applying for an injunction has a right which has been threatened with violation...The applicant need not establish title it is enough if he can show that he has a fair and bona fide question to raise as to the existence of the right which he alleges. The standard of proof of that prima facie case is on a balance or, as otherwise put on a preponderance of probabilities. This means no more than that the court takes the view that on the face of it, the applicant's case is more likely than not to ultimately succeed.”

The plaintiffs have sought an injunction to restrain the defendant from levying distress against the tenants on the suit property on the ground that the said distress is illegal. I am in agreement with the defendant that the plaintiffs have no business litigating on behalf of the tenants on the suit property. The plaintiffs are not tenants on the suit property and the distress complained of was not levied against them. The plaintiffs have no legal standing to challenge distress that was not levied against them. The plaintiffs are not competent to say that the distress for rent that was levied against third parties was illegal. Since they are also not tenants on the suit property, they cannot say that the amount claimed as rent from the tenants is not correct. I am also in agreement with the defendant that the plaintiffs' application is not anchored on the plaintiff. The issue of illegal distress is not pleaded. There is also no injunction sought in the plaintiff restraining the distress. The injunction which is sought pending the hearing of the suit is therefore sought in vacuum as the issue of distress is not pleaded and as such will not be tried by the court.

I wish to add that even if the application is considered on merit, the same cannot succeed. The defendant was sued in her capacity as the administratrix of the estate of the deceased. As rightly submitted by the defendant, the assets of a deceased person vest upon his estate. As the administratrix of the estate of the deceased, the defendant has a legal duty and obligation to collect the assets of the estate of the deceased and thereafter to distribute the same to the beneficiaries of the estate. I am in agreement with the defendant that the interested party is only a beneficiary of the estate of the deceased. She is not an administrator of the estate of the deceased. The interested party has no role to play in the collection of the assets of the estate and in the distribution of the same. Her role is only to ensure that the defendant collects and accounts for all the assets and that the same is distributed in accordance with the order that was made in the succession court. The interested party being a beneficiary cannot stop a lawfully appointed administratrix of the estate of the deceased from collecting rent from the estate property.

The plaintiffs and the tenants on the suit property being aware that the defendant was the duly appointed administratrix of the estate of the deceased had a duty to pay rent due to the estate to her in that capacity. It was up to the defendant to account to the interested party as a beneficiary of the estate for such rent. The tenants on the suit property and the plaintiffs had no obligation to take instructions from the interested party. They were to comply with the directions of the defendant as the administratrix of the estate of the deceased unless they were advised otherwise by the High Court that was dealing with the succession of the deceased's estate. Due to the foregoing, it was improper for the tenants on the suit property to unilaterally stop paying rent on the pretext that there was a dispute as to whom rent was to be paid. That was not true because the estate of the deceased had an administrator. In the plaintiffs' own admission, rent arrears had accumulated to over Kshs. 6,000,000/- as at 2019 and the same is still accruing and not being paid. I am in agreement with the defendant that the estate of the deceased risks losing this amount. Nothing would stop the tenants on the suit property from moving out without paying the outstanding rent. It is interesting to note that the plaintiffs who have come to court to stop the defendant from recovering rent from the tenants on the suit property are receiving their share of rent every month.

It is my finding that as at the date when the defendant levied distress, she had a legal right to receive or collect rent on behalf of the estate of the deceased and that rent was due and payable by the tenants to the said estate. I wonder how the interested party expects the defendant to account for and distribute the assets of the estate of the deceased if she is prevented from collecting rent from defaulting tenants. It is my finding therefore that the plaintiffs have not convinced me that the distress that was levied by the defendant was illegal. That being my view on the application for injunction, the same is not for granting as a prima facie case has not been established neither has it been demonstrated

that the plaintiffs will suffer irreparable harm that cannot be compensated by way of damages if the orders sought are not granted.

That takes me to the second limb of the application which seeks committal of the defendant and her advocates to civil jail for contempt. On this issue again, I am in agreement with the defendant that the order of status quo made by the court on 23rd October, 2018 was not a license for the tenants on the suit property to occupy the property free of charge. The order did not therefore restrain the defendant from recovering lawful rent due from the tenants in occupation of the suit property. It is therefore my finding that the lawful distress that was levied by the defendant against the tenants on the suit property did not violate the order that was made by the court on 23rd October, 2018 and extended on 26th September, 2019. The application to commit the defendant and her advocate to civil jail for contempt of court must therefore fail.

The upshot of the foregoing is that the plaintiffs' application dated 19th December, 2019 has no merit. The application is dismissed with costs to the defendant.

DATED AND DELIVERED AT NAIROBI THIS 5TH DAY OF OCTOBER 2021.

S. OKONG'O

JUDGE

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

MS. KAGUCIA FOR THE PLAINTIFFS

MS. OLOO H/B FOR MR. MBABU FOR THE 1ST DEFENDANT

MS. AKELLO H/B FOR MR. OYATSI FOR THE INTERESTED PARTY

MS. C.NYOKABI-COURT ASSISTANT