



0REPUBLIC OF KENYA

IN THE ENVIRONMENT AND LAND COURT

AT MILIMANI LAW COURTS

ELC NO. 407 OF 2014

DONALD WEKESA MUYUNDO.....PLAINTIFF

=VERSUS=

JUSTUS KIMAU MUSYIMI.....1ST DEFENDANT

VERONICA NDINDI MUSYIMI.....2ND DEFENDANT

(AS ADMINISTRATORS OF THE ESTATE OF THE LATE STEPHEN MUSYIMI KIMOLO)

AND

BY WAY OF COUNTER CLAIM

JUSTUS KIMAU MUSYIMI.....1ST PLAINTIFF

VERONICA NDINDI MUSYIMI.....2ND PLAINTIFF

(AS ADMINISTRATORS OF THE ESTATE OF

THE LATE STEPHEN MUSYIMI KIMOLO)

=VERSUS=

DONALD WEKESA MUYUNDO.....1ST DEFENDANT

NIC BANK LIMITED.....2ND DEFENDANT

RULING

Background.

1. The defendant /Applicants are the Administrators of the Estate of Stephen Musyimi Kimolo (Deceased)who was the registered owner of LR No. Nairobi/Block 106/12 (suit property). The deceased was a director of Utalii Transport Company Limited (The Company) In or around September 2003, National Industrial Credit Bank (NIC Bank) offered a financial facility to the company over which title to the suit property was placed as security.
2. The company failed to repay the facility. The NIC Bank commenced the process of realizing the security. This forced the company to file Nairobi HCCC No. 97 of 2009 against NIC bank and an Auctioneer. This suit was however marked as settled vide a consent filed on 12th June 2009.
3. The suit property was eventually sold to the Plaintiff/Respondent by private treaty as agreed in the consent filed in Nairobi HCCC No.97 of 2009. The suit property was transferred to the Respondent after he cleared repaying the loan which was owed to NIC Bank. The Respondent then demanded to have vacant possession of the suit property. The Applicants refused to yield possession. The Applicants instead proceeded to file Nairobi HCCC No. 32 of 2010 against NIC Bank and an Auctioneer.

4. In the year 2014, the Respondent filed the present suit in which he sought for among other reliefs vacant possession and mesne profits. The Applicants filed an application seeking to stay this suit pending the hearing and determination of Nairobi HCCC No. 32 of 2010. On 14th May 2018, the parties filed a consent in which this suit was stayed pending the hearing and determination of Nairobi HCCC 32 of 2010. Nairobi HCCC No. 32 of 2010 was fully heard and it was dismissed with costs on 15th March 2021. In the dismissed suit, the Applicants had sought among other reliefs the setting aside of the consent which was recorded in Nairobi HCCC No.97 of 2009.

5. The Applicants were aggrieved with the decision in Nairobi HCCC No. 32 of 2010 and have since filed an appeal against the said decision. This is what prompted the Applicants to file a Notice of Motion dated 23rd April 2021 which is the subject of this ruling.

The Applicants' application.

6. In the application dated 23rd April 2021, the Applicants are seeking the following orders:-

1) Spent

2) Spent

3) THAT, a temporary injunction do issue restraining the Plaintiff/ Respondent whether by himself, through his agents, servants and/or employees from taking steps to evict the Defendants from or in any other way interfering with the Defendants' occupation of the suit property Title No. Nairobi/ Block 106/12 pursuant to the eviction Notice dated 15th January 2021 pending the hearing and determination of the suit or further orders by this Court.

4) THAT, there be a stay of the proceedings in the instant suit pending the hearing and determination of the intended appeal from the Judgment of the Court in HCCC No. 32 of 2010 Utalii Transport Company Limited & Others vs. NIC Bank Limited & Another.

5) THAT, the costs of the application be borne by the Plaintiff/ Respondent in any event.

7. The Applicants contend that following the dismissal of Nairobi HCCC 32 of 2010, the Respondent went ahead to issue them with an eviction notice and that the Respondent sent auctioneers to the suit property where they distrained for rent arrears. The auctioneers carried away their household goods and attempted to evict them but the attempt was thwarted.

8. The Applicants therefore argue that if the Respondent is not restrained by way of an injunction, he will proceed to evict them yet they have filed Nairobi HCCC No.32 of 2010. They also argue that they have a counter claim in this suit which is yet to be heard and the proceedings in this case should be stayed pending the hearing and determination of the appeal which they have filed.

Respondent's Contention.

9. The Respondent has opposed the Applicants' application based on a replying affidavit sworn on 12th May 2021. The Respondent contends that the Applicants have been enjoying the suit property for over 10 years without paying rent; that the Applicants have no case against him and that this application is only meant to delay the finalization of this case which was effectively determined upon dismissal of Nairobi HCCC No. 32 of 2010.

10. The Respondent further argues that the Applicant have not demonstrated that they have a prima facie case with probability of success and that in any case their only remedy lies in damages if they will succeed in demonstrating that the auction of the suit property was illegal. The Respondent further contends that he had conceded to stay of this suit pending the outcome of Nairobi HCC No.32 of 2010 and now that the said suit has been determined, pursuing this suit will be in contravention of Section 7 of the Civil Procedure Act.

Analysis.

11. I have carefully considered the Applicants' application as well as the opposition to the same by the Respondent. I have also considered the submissions by the parties herein. There are only two issues which fall for determination. The first one is whether the Applicant has met the threshold for grant of an injunction. The second is whether this suit should be stayed.

12. On the first issue, the Principles for grant of an injunction were well stated in the case of **Giella Vs Cassman Brown & Co.Ltd (1973) 358**. Firstly, an Applicant must demonstrate that he has a prima facie case. Secondly, if the Applicant will suffer injury which is capable of being compensated in damages, no injunctions will be granted. Thirdly, if the court is in doubt, it will decide the application on a balance of convenience.

13. In the instant case, the suit property was sold in a public auction in which the parties consented that it be sold by private treaty. This consent was recorded in Nairobi HCCC No. 97 of 2009. The suit property was transferred to the Respondents upon sale. It is therefore clear that the Applicants have not demonstrated that they have a prima facie case with probability of success.

14. On whether the Applicant will suffer loss which will not be compensatable in damages, the answer to this is a no one. The suit property had been offered as security. This means that it is capable of being valued in monetary terms and can be compensated. The Respondent has already been registered as owner of the suit property. The law is clear that if the sale process will be faulted, the only remedy lies in damages against the chargee and the auctioneer involved in the sale.

15. I am not in any doubt in this matter as to consider determining this application on a balance of convenience. In any case the balance of convenience tilts in favour of the Respondent who has been kept out of the suit property for over a decade.

16. On the issue as to whether the proceedings herein should be stayed, the answer is a big No. The Respondent had conceded to these proceedings being stayed pending the outcome of Nairobi HCCC No. 32 of 2010. This case has since been determined and it has been dismissed with costs. Staying these proceedings again pending an appeal against the judgment in Nairobi HCCC No. 32 of 2010 will inflict further pain upon the Respondent who will ultimately not be the one to pay compensation in case the sale process is found to have been wrong.

Disposition.

17. From the analysis hereinabove, it is clear that the Applicants' application has no merits. The same is hereby dismissed with costs to the Respondent.

It is so ordered.

DATED, SIGNED AND DELIVERED AT ELDORET ON THIS 11TH DAY OF NOVEMBER 2021

E.O.OBAGA

JUDGE

In the Virtual Presence of :-

Ms Ada for Plaintiff/Respondent

Ms Aomo for M Issa for Defendant/Respondent

Court Assistant: Mercy

E.O. OBAGA

JUDGE