



**REPUBLIC OF KENYA**

**IN THE HIGH COURT OF KENYA AT NAIROBI**

**MILIMANI COMMERCIAL & TAX DIVISION**

**CIVIL CASE NO. 266 OF 2017**

**TSS SPINNING AND WEAVING COMPANY LTD.....APPLICANT**

**-VERSUS-**

**NIC BANK LIMITED.....1<sup>ST</sup> RESPONDENT**

**WAWERU MATHENGE.....INTENDED 2<sup>ND</sup> RESPONDENT**

**RULING**

**BACKGROUND**

**PLAINT & APPLICATION OF 22<sup>ND</sup> JUNE 2017**

The Plaintiff filed suit on 23<sup>rd</sup> July 2017 whose claim is that the Defendant on 12<sup>th</sup> June 2016 wrongfully, unlawfully in bad faith and in breach of contract and breach of trust of existing agreements exercised statutory power of sale over the plaintiff's charged **property LR 337/626**. The Plaintiff deposed that one of the Directors, Twahir Sheikh Said Ahmed (TSS) died on 10<sup>th</sup> January 2017. The Plaintiff, through the other Directors approached the Defendant Bank to consider negotiations on how to redeem the outstanding loan. The Plaintiff alleged the Defendant failed to serve the requisite statutory notices and therefore the process and outcome of sale remains challenged. The Plaintiff sought declaration that the sale of suit property L.R. 336/626 was null and void and at the same time sought injunction to stop the auction. Plaintiff filed Certificate of urgency on the same date and sought injunction to stop the auction based on similar grounds deposed in the Plaintiff.

**REPLYING AFFIDAVIT**

The Defendant by Replying Affidavit filed on 27<sup>th</sup> September 2017 deposed that based on their documents, the Plaintiff borrowed USD 16,200,000 and Ksh 700,000,000/- which was secured by a charge over the Plaintiff's Company property LR 337/626 and a debenture over assets of the Plaintiff/Borrower. The Plaintiff defaulted in repayment from 2015 of the principal sum and as at 5<sup>th</sup> January 2016 arrears stood at Ksh 1,073,808,451.48 and the total amount outstanding was Ksh 2,282,734,385.56/-. The Defendant annexed the charge document and copies of statutory notices served to the Plaintiff Company/Borrower. The Defendant confirmed that they conducted valuation of the suit property before auction and annexed a copy of the Valuation Report.

The Trial Court Hon. L. J. R. Ngetich on 27<sup>th</sup> June 2017 granted orders that the Defendant was restrained from proceeding with the scheduled auction on condition the Plaintiff deposited Ksh 1 million and paid Auctioneers fees by 3.00 pm on the same day.

**APPLICATION OF 7<sup>TH</sup> MAY 2018**

The Plaintiff/Applicant filed certificate of urgency and sought orders to enjoin Mr Waweru Mathenge, Head of Legal Services of 1<sup>st</sup> Respondent Bank for purposes of pursuing contempt of Court proceedings against him.

The Plaintiff/Applicant obtained injunctive orders on 27<sup>th</sup> June 2017, restraining the Defendant from conducting the auction of Plaintiff's charged property. The Plaintiff alleged that the Defendant in flagrant disregard of existing Court Order, the Defendant transferred the suit property to its name. The Plaintiff also alleged that the conditions to granting injunctive relief were complied with.

There is no evidence of the application having been served to the Respondent or that any pleadings were filed with regard to the instant application.

## **HEARING & DETERMINATION OF APPLICATIONS OF 10<sup>th</sup> MAY 2018 & 17<sup>th</sup> JULY 2019**

On 25<sup>th</sup> February 2020, the parties through Counsel informed the Court

that the application for hearing and determination was according to the Defendant/Applicant the Application of 17<sup>th</sup> July 2019. The Plaintiff/Respondent informed Court that the instant application could be heard and determined in isolation and its application of 10<sup>th</sup> May 2018 ought to be heard and determined together with the instant application.

Counsel for the parties submitted extensively on both applications based on written submissions filed on 5<sup>th</sup> February 2020 by Plaintiff's advocates and written submissions filed on 10<sup>th</sup> January 2020 by Defendant'

### **APPLICATION OF 5<sup>TH</sup> SEPTEMBER 2019**

This Court noted that there was also in between these applications, the Defendant/Applicant's application of 5<sup>th</sup> September 2019. The Defendant/Applicant sought orders that the rental income from the suit property LR No 337/626 formerly owned and charged by the Plaintiff Company and now registered in Defendant's name be paid into Court or in a joint Bank Account pending hearing and determination of the application of 10<sup>th</sup> May 2018.

By Replying Affidavit filed on 2<sup>nd</sup> April 2019, the Plaintiff/Respondent deposed there are 2 pending applications for hearing and determination; the Applications of 22<sup>nd</sup> June 2017 and 10<sup>th</sup> May 2018. The Trial Court then Hon. L.J. R. Ngetich issued orders of 27<sup>th</sup> June 2017 and 14<sup>th</sup> May 2017 which the Plaintiff alleged that the Defendant failed to comply with. In the Plaintiff's view the application of 5<sup>th</sup> September, 2019 is to seek review of these orders. The orders granted maintenance of *status quo* and as at 14<sup>th</sup> May 2018, the Plaintiff collected rent and thereafter continued to collect the rent as it claimed that what happened at the time *status quo* order was granted.

### **APPLICATION OF 10<sup>th</sup> MAY 2019**

By a Certificate of Urgency Application dated 10<sup>th</sup> May 2018, filed together with a Notice of Motion and Supporting Affidavit, the Applicant urged the Court to hear their matter on priority basis for reasons;

- a) That on the Applicant's Application dated 22<sup>nd</sup> June 2017, which application was filed under certificate of Urgency, the Court on 27<sup>th</sup> June 2017 issued an order of temporary injunction restraining the Respondent from proceeding with the sale on condition that the Applicant deposited a sum of Ksh 1 Million plus auctioneer's fees by 3.00 pm on the same day.
- b) That the scheduled auction did not take place and the Applicant complied with Court order to deposit Ksh 1,000,000/-plus Auctioneers Fees.
- c) That despite the order being in existence, the Applicant through its Directors, vide a letter dated 9<sup>th</sup> April 2018 copied to the Applicant's former advocates on record, Messrs Biko Adera & Company Associates advocates wherein indicating that the Respondent sold and transferred to itself Land Reference No. 337/626.
- d) That the Respondents wrote to the Applicant's tenants indicating that they had taken over the premises situated on the suit property.

In the Notice of Motion pursuant to **Order 40 Rule 3(1) and 3(3) of the Civil Procedure Rules 2010 and section 1A, 1B, and 3A of the Civil Procedure Act Cap 21 Laws of Kenya, Section 4(1) (a), 5 (b) 27 (b) 28 and 29 of the Contempt of Court Act, Section 80 of the Land Registration Act, Section 94 and 100 of the Land Act No.6 of 2012** and all enabling provisions of the law, the Applicant sought orders;

- a) That this Court grants leave to enjoin one Waweru Mathenge, the Head of Legal Services of the 1<sup>st</sup> Respondent and to be committed to civil jail for a term of six months or for such period of time that this Court may deem fit for contempt of court having deliberately disobeyed orders of this court issued on 27<sup>th</sup> June 2017.
- b) That this Court issues an order restraining the Defendant from any further dealing on all that parcel of land known as Land Reference No. 337/626 as ordered by the Court's order dated 27<sup>th</sup> June 2017 pending the *inter partes* hearing of this application and the main suit.
- c) That the purported sale and or transfer of that parcel of Land known as Land Reference No. 337/626 on 29<sup>th</sup> December 2017, or on any subsequent date be set aside.
- d) That consequently this Court issues an order directing the Registrar of Titles to cancel entry number 21 on the Certificate of Lease which entry denoted the transfer to NIC Bank Limited which was done in complete disregard of the orders of this Court.

The Application was based on grounds;

- a) That the Applicant obtained injunctive orders restraining the 1<sup>st</sup> Respondent from selling by way of public auction all that parcel

of land known as Land Reference No. 337/626 on 27<sup>th</sup> June 2017.

- b) That the Applicant came to learn that the Respondents in flagrant disregard of existing Court Order and in very unclear circumstances proceeded to transfer the property to itself.
- c) As a result of the Respondents actions the authority and dignity of this Court and the fundamental principles of the rule of law have been, and continue to be exposed to ridicule and disrepute.
- d) That the rule of law must be protected at all times to ensure the administration of justice
- e) That the Respondents are in willful and blatant contempt of the orders.
- f) That in the interest of justice and for the purpose of upholding the dignity and honour of this Court that the orders sought herein to be granted.
- g) That the Applicant has no other means of enforcing the order save through the intervention of this Court.

In the Supporting Affidavit sworn by Mohammed Tahir Sheikh Said, Director of the Applicant herein, he stated that the Court certified the said application as urgent on 27<sup>th</sup> June 2017 and concomitantly issued a conditional order of injunction restraining the 1<sup>st</sup> Respondent from proceeding to dispose of the suit property and required the Applicant to deposit a sum of Ksh 1 Million plus auctioneer's fees by 3 pm on the same day. The matter was scheduled for *inter partes* hearing on 24<sup>th</sup> July 2017, marked as **MTSS -1(a) and (b)** is a copy of the said Court Order and the banking slips.

He averred that despite the existence of the aforementioned court order, the 1<sup>st</sup> Respondent through its Head of Legal Affairs, (the 2<sup>nd</sup> Respondent herein) proceeded and arbitrarily transferred to itself the suit property. The same has been marked as entry No. 21 on the Lease Title which was registered on 29<sup>th</sup> December 2017, marked as **MTSS- 2** is a copy of the title.

He contended that **Sections 94 and 100 of the Land Act No. 6 of 2012** require that any sale and/or the taking of charged property by a Chargee can only be effected by leave of the Court and that he was not aware of any such leave having been sought by the 1<sup>st</sup> Respondent nor given by the Court.

That the Applicant was in possession of another letter written by the 1<sup>st</sup> Respondent to the Applicant's tenants in the suit premises, notifying them of the takeover and management of the suit property; marked **MTSS- 4** is the 1<sup>st</sup> Respondent's letter dated 2<sup>nd</sup> May 2018 addressed to the Applicant's tenants.

That in addition to the foregoing, through an official search conducted on the suit property on the 7<sup>th</sup> May 2018, he had ascertained that;

- a) The 1<sup>st</sup> Respondent registered a charge over the suit property on the 16<sup>th</sup> October 2014 to secure an amount of Ksh 700,000,000.00 and USD 16,200,000 (see entry No. 20).
- b) The 1<sup>st</sup> Respondent on the 29<sup>th</sup> December 2017 transferred the suit property to itself for the sum of Ksh 280,000,000. (see entry no. 21)

He stated that it was apparent that the consideration which the 1<sup>st</sup> Respondent had purportedly paid for the suit property was way below its market value and the only logical conclusion and/or the inference that could be drawn from the foregoing was that, the 1<sup>st</sup> Respondent had been clearly engaged in a fraudulent sale. The impugned sale was calculated to defeat and/or fetter the Applicant's equity of redemption in the suit property.

### **REPLYING AFFIDAVIT**

The application is opposed vide a Replying Affidavit of Waweru Mathenge, the Deputy Company Secretary and Head of Legal Services of the 1<sup>st</sup> Respondent herein dated 21<sup>st</sup> May 2018. He deponed that he had read and understood the contents of the Plaintiff's/Applicants Notice of Motion application dated 10<sup>th</sup> May 2018 together with the supporting Affidavit of Mohammed Tahir Sheikh Said sworn on an even date and respondent to the same as hereunder:

He averred that he is aware that at 11.00 am on 27<sup>th</sup> June 2017, the Auction of the suit property took place and the Respondent in accordance with the provisions of **Section 100 (3) of the Land Act 2012** submitted its bid for purchase of the suit property. The Respondent's bid in the sum of Ksh 280,000,000/- was the highest bid at the Auction. Marked as "**WM2**" are copies of the memorandum of sale, certificate of sale, correspondence from the Auctioneer and an **RTGS** Transfer slip by the Auctioneer remitting to the Borrower's Bank Account with the Respondent, the Ksh 10,000,000 Deposit paid to the Auctioneer on the fall of the Hammer at the Auction.

That he is aware of the provisions of the **Land Act 2012** and particularly the provisions of **Section 100 (3)** which allowed the Respondent to purchase the suit property at the Auction on condition that it complies with the provisions of **Section 100 (3) (a) & (b) of the Land Act 2012** on having submitted the highest bid and the amount of the bid being equivalent to the reserve price set prior to the Auction.

He stated that contrary to the Plaintiff/Applicant's assertion, no leave of court was required prior to the Respondent purchasing the suit property as **Section 100 (3) of the Land Act** is an exception to the requirement for leave envisaged in **Section 100 (1) and (2) of the Land Act 2012** and is therefore not applicable to this matter.

That on 30<sup>th</sup> June 2017 more than 2 days after the Auction had taken place, the Respondent was served with a copy of the Plaintiff filed in the instant suit together with an order issued by the Court on 27<sup>th</sup> June 2017 restraining the Respondent from proceeding with the sale of the suit property on condition that the Plaintiff deposits Ksh 1,000,000 plus Auctioneers fees by 3 pm on 27<sup>th</sup> June 2017. A copy of the order served upon the Respondent is marked "WM3".

He asserted that he was aware that the Applicant did not comply with the conditions of the said order by depositing a sum of Ksh 1,000,000 and Auctioneers fees on 27<sup>th</sup> June 2017. A copy of an Affidavit by the Auctioneer confirming that the Applicant did not pay his fees on 27<sup>th</sup> June 2017 or on any other dated is marked as "WM4".

#### **NOTICE OF MOTION DATED 17<sup>TH</sup> JULY 2019**

The Defendant (herein '**the Respondent**') by a Notice of Motion Application dated 17<sup>th</sup> July 2019, under the provisions of Section **1A, 1B, 3A, 63(e) 80 and 99 of the Civil Procedure Act and Order 45 Rule 1, Order 42 Rule 6, Order 45 Rule 1 and 2 and Order 51 Rule 1 of the Civil Procedure Rules 2010** and all enabling provisions of the law, sought orders;

a) That this Court be pleased to vary, review, set aside and/or discharge the order issued in this matter on 14<sup>th</sup> May, 2018 by the Honourable Lady Justice R. Ngetich.

The Application is based on grounds that;

a) On 10<sup>th</sup> May 2018, the Plaintiff filed an application seeking to set aside the sale of the suit property to the Defendant. This application came up for *inter-partes* hearing on 14<sup>th</sup> May 2018, before Lady Justice R. Ngetich who ordered *inter alia* that the *status quo* be maintained.

b) The *status quo* order of 14<sup>th</sup> May 2018, was vague as it did not specify which status ought to be maintained.

c) The Defendant being aggrieved by the effect of the said order which deprived it from collecting rental income lawfully accruing to it filed in court on 5<sup>th</sup> September 2018, an Application seeking that the rental income emanating from the suit property be paid to the Court or a Bank account to be opened at the Court's direction pending hearing and determination of the Plaintiff's suit and Application dated 10<sup>th</sup> May 2018.

d) Whilst the Defendant's said Application was pending before this Court for hearing the Plaintiff who had at all times been in possession of the suit property, by itself or through its servants, agents, employees or 3<sup>rd</sup> parties unlawfully and without any colour of right orchestrated, occasioned, or condoned the demolition of all the buildings and other developments erected on the suit property. The demolition/destruction could not take place without the Plaintiff's knowledge and acquiescence.

e) The said unlawful demolition has tremendously degraded the suit property and unless the status quo order of 14<sup>th</sup> May 2018, is discharged, the Defendant is apprehensive that the Plaintiff will continue with its wanton and willful destruction and degradation of the suit property.

f) The Defendant has demonstrated sufficient reasons for review of the order aforesaid.

#### **PLAINTIFF/RESPONDENT'S GROUNDS OF OPPOSITION**

The Plaintiff opposed the Defendant's Notice of Motion on grounds that it was misconceived, scandalous, vexatious and an abuse of the Court's process for it was meant on causing unreasonable delay. That the motion was mischievous and smacks of malice. As the Defendant seeks to further tarnish the image of and reputation of the Plaintiff's character while trying to intimate that the circumstances under which the Plaintiff employment at Kenya Airways was on disciplinary grounds.

That there is no explanation justifiable, plausible or otherwise discernible from the application dated 17<sup>th</sup> July 2019 to compel this Court to grant the orders sought and the orders sought are incapable of being granted.

#### **DETERMINATION**

This Court outlined all applications filed by parties in the matter to demonstrate the various disputes between the parties arising from concurrent applications filed by parties through their advocates.

This Court was asked to hear and determine the application for review of the Court orders issued by the Trial Court Hon L.J R. Ngetich on 14<sup>th</sup> May 2018 as it was vague and it did not specify which status should be maintained. The Defendant alleged that the injunctive Order has occasioned the Defendant/Applicant loss and damage as the Plaintiff /Respondent continues to collect rental proceeds. Also recently, it was also alleged that the Plaintiff/Applicant directly/individually/through 3<sup>rd</sup> Parties demolished the rental premises and degraded the suit property.

From these facts and submissions filed the issue for determination is whether this Court shall review the Orders of 14<sup>th</sup> May, 2018.

## **SUBMISSIONS**

The Applicant submitted and relied on Order 45(1) CPR 2010 on grounds for review.

The Applicant relied on the cases of ;

**Muyodi vs Industrial & Commercial Development Corporation**

**(ICDC) & Anor [2006] 1E.A 243** held;

***“...In Nyamogo & Nyamogo –vs- Kogo (2001)EA 174 this court said that an error apparent on the face of the records cannot be defined precisely or exhaustively, there being an element of indefiniteness inherent in its very nature, and it must be left to be determined judicially on the facts of each case. There is real distinction between a mere erroneous decision and an error apparent on the face of record. Where an error on a substantial point of law stares one in the face, and there could reasonably be no two opinions, a clear case of error apparent on the face of the record would be made out. An error which has to be established by long drawn process of reasoning or on points where there may conceivably be two opinions, can hardly be said to be an error apparent on the face of the record. Again, if a view adopted by the court in the original record is a possible one, it cannot be an error or wrong view is certainly no ground for a review although it may be for an appeal. This laid down principle of law is indeed applicable in the matter before us” (emphasis mine).***

The Plaintiff submitted that by virtue of vagueness of the status quo orders these orders became defective in nature. The error is self-evident; apparent on the face of the record and can only be cured by a review of the orders.

The Respondent relied on the cases;

**Econet Wireless Kenya Ltd vs Minister of Information & Communication of Kenya & Anor[ 2005] 1 KLR 828** on compliance of Court orders;

***“It is essential for the maintenance of the Rule of Law and Order that the authority and the dignity of our Courts are upheld at all times. The Court will not condone deliberate disobedience of its Orders and will not shy away from its responsibility to deal firmly with proved contemnors***

See also; **A.B. & Anor vs R.B Civil Application No 4 [2016] eKLR** on the same point and it relied on **South African case Burshell vs Burshell Case No 364 of 2005.**

***“Compliance with Court orders is an issue of fundamental concern for a society that seeks to base itself on the rule of law. ....Failure to enforce court orders effectively have the potential to undermine confidence in recourse to law as an instrument to resolve civil disputes and may thus impact negatively on the rule of law.”***

The Plaintiff/Respondent stated that by definition *status quo* meant preservation of the subject matter pending determination of right. The impugned orders were granted upon the Plaintiff /Respondent filing the application of 10<sup>th</sup> May 2018 that challenges the process of Defendant’s statutory power of sale and the outcome, which application is pending for determination to date. Until the application is determined, the Defendant’s title to the suit property was/is defective by virtue of **Section 26 (1) & (2) of Sale of Goods Act Cap 31.**

The Plaintiff/ Respondent deposed that subsequent to the impugned orders the Defendant took possession of the suit property in further disregard of the orders. There can be no legal basis then to seek review.

The subsequent application disclosed that the Plaintiff/Respondent alleged to continue collection of rent from rentals on the suit property sold in the auction by and to the Defendant. The Plaintiff/Respondent is also accused of involvement in demolition of the rental premises.

## **ANALYSIS**

In **National Bank of Kenya Limited vs Ndungu (supra)** the C.A. Held;

***“A review may be granted whenever the Court considers that it is necessary to correct an apparent error or omission on the part of the Court. The error or omission must be self-evident and should not require an elaborate argument to be established. It will not be a sufficient ground for review that another Judge could have taken a different view of the matter. Nor can it be a ground for review that the Court proceeded on an incorrect exposition of the law and reached an erroneous conclusion of law. Misconstruing a statute or other provision of the law cannot be a ground for review.***

On 14<sup>th</sup> May 2018, The Trial Court gave directions on the Application filed of 10<sup>th</sup> May 2018, as follows;

**1) The Respondent [was] to file Replying Affidavit within 7 days to the application.**

2) *Each party had 14 days thereafter to file and exchange submissions*

3) *That status quo [was] to be maintained until then.*

4) *The directions on application dated 22<sup>nd</sup> June 2018 [were] to be given after hearing of the application dated 10<sup>th</sup> May 2018.*

5) *The highlighting of written submissions [ought to have been] on 2<sup>nd</sup> July 2018.*

The Trial Court gave directions how parties would proceed in Court with regard to various applications filed and how parties would conduct themselves with regard to the subject matter suit property LR 337/626 whose ownership and/or sale was/is a contested issue pending hearing of the application filed of 10<sup>th</sup> May 2018.

Both parties submitted on what *status quo* means; in *Pricillah Wanja Kibui vs James Jiongo Kibui & Anor ELC 176 of 2011*, the Court referred to Black's Law Dictionary on meaning of *status quo*; it means "the situation as it exists", and referred to the case by;

Hon. J. F. Tuiyott in *Saifudeen Abdullahi & 4 Others in Msa High Court Civil Cause No 11 of 2012* who alluded to *status quo* as

***"In my view, an order [of] to status quo [to] be maintained is different from an order of injunction both in terms of the principles for grant and practical effect of each. While the latter is a substantive equitable remedy granted upon establishment of a right, or at interlocutory stage, a prima facie case, among other principles to be considered, the former is simply an ancillary order for preservation of the situation as it exists in relation to pending hearing and proceedings before determination thereof."***

***It does not depend on proof of right or prima facie case. In its effect, an injunction may compel the doing or restrain the doing of a certain act, such as, respectively, the reinstatement of an evicted tenant or the eviction of the tenant in possession. An order for status quo merely leaves the situation or things as they stand pending the hearing of the reference or complaint. In its negative form, however, an injunction may have the same effect as an order for status quo.***

From the definition and application of *status quo* to the instant matter, the Trial Court granted orders to maintain the situation/subject matter as it existed as at 14<sup>th</sup> May 2018 pending hearing and determination of the application of 10<sup>th</sup> May 2018 which directions were for parties to close pleadings and file submissions and highlight them on 2<sup>nd</sup> July 2018.

With respect, there is no error apparent on the face of the record. The Trial Court suspended any interference with **L.R. 337/626** that would be contrary to the court order of 14<sup>th</sup> May 2018. What parties did differently from 14<sup>th</sup> May 2018 and contrary to the order of *status quo* from 14<sup>th</sup> May 2018 it cannot be construed that there was vagueness or ambiguity of the court order of 14<sup>th</sup> May 2018. The circumstances outlined and the relevant law do not meet the threshold for review. There is no new evidence obtained that could not have been obtained then, there are no circumstances to confirm sufficient reason to review the court orders of 14<sup>th</sup> May 2018.

The truth of the matter is that parties went and effected the Court orders of 14<sup>th</sup> May 2018 each to their own interpretation, circumstances and/or convenience. I say this because, the Court record shows from the proceedings of 14<sup>th</sup> June 2018, neither of the parties through Counsel submitted on or informed the Court what was the situation on the ground at the time on the suit property L.R. 337/626. This was so as to assist the Court to address any urgent or critical issue with regard to *status quo* as it granted these orders. In the absence of any special, urgent or unique circumstances brought to the attention of the Court thereafter in implementing the court order of 14<sup>th</sup> May 2018, the parties cannot rely on vagueness of the order. The *status quo* was to preserve and maintain the situation as it existed on 14<sup>th</sup> June 2018 on the suit property until the application of 10<sup>th</sup> May 2018 was heard and determined.

I see no vagueness in the order, it was/is clear and succinct. The issue is with the enforcement/compliance of these orders by the parties. If there was vagueness in the Order and for there was a challenge, then parties should have gone back to Court for clarification and/or variation of the orders as soon as it was practically possible. It is 2 years down the line since the orders were granted and the Court finds it too late in the day to set aside, review the same where no legal basis is established. The Application for review to set aside the order of 14<sup>th</sup> May 2018 is denied/dismissed.

There is a second limb to this Court's decision, there are pending multiple applications on record, each application dealing with a dispute arising from events that occurred later in time on the subject matter of the suit. To my mind, no Court can conclusively determine these disputes identified in each of the applications filed in isolation with finality. By hearing and determining each or any one of the filed applications it will result in resolving piecemeal the substantive suit as they all relate to the substance of claim in the suit. To hear and determine each, all or any of the applications is to determine the application and resolve the substance of the suit piecemeal. It will also invite an avalanche of applications by parties aggrieved by orders granted based on each/any of the filed applications.

The suit remains pending for hearing and determination to date since filing in 2017. The Plaintiff alleges irregular sale of the suit property by Defendant. The Defendant alleges due to Plaintiff default of payment of the debt outstanding it carried out statutory power of sale of the suit property. The Defendant also alleges the Plaintiff continued to collect rent from the suit property and later demolished the rentals on the suit property.

The application filed on 22<sup>nd</sup> June 2017 is pending, where the Applicant sought injunction stopping the auction of suit property LR 337/626

The Application of 7<sup>th</sup> May 2018 & 10<sup>th</sup> May 2018 which challenged the statutory power of sale and transfer of the suit property LR 337/626 and the Defendant defended the statutory power of sale under the charge as the loan facility was not redeemed are also pending.

The Application filed on 5<sup>th</sup> September 2019 sought orders of joint collection of rental properties rent from the suit property LR 337/626 pending hearing and determination of the application of 10<sup>th</sup> May 2018.

In **Gatirau Peter Munya vs Dickson Mwenda Kithinji & 2 Others [2014]eKLR;** which states;

*“The person who makes such an allegation must lead evidence to prove the fact. She or he bears the initial legal burden of proof which she or he must discharge. The legal burden in this regard is not just a notion behind which any party can hide. It is a vital requirement of the law. On the other hand, the evidential burden is a shifting one, and is a requisite response to an already-discharged initial burden.*

*“.....The evidential burden is the obligation to show, if called upon to do so, that there is sufficient evidence to raise an issue as to the existence or non-existence of a fact in issue” [cross and Tapper on Evidence, (Oxford University Press, 12<sup>th</sup> Ed, 2010 page 124].”*

The pending applications cannot be disposed of without oral evidence and cross examination to test veracity of each party’s claim.

The only logical and reasonable legal process to determine with finality the dispute(s) between parties under **Section 1A 1B & 3A CPA & 159 COK 2010** is to compromise all pending applications and prioritize and expedite the formal hearing and determination of the suit. The hearing shall consider the issues/disputes raised in the pending applications. The witnesses shall testify and the Trial Court shall test the veracity of the evidence on a balance of probabilities.

### **DISPOSAL**

The orders that commend me to grant are as follows;

- 1) The Defendant/Applicant’s application of 17<sup>th</sup> July 2019 is dismissed with costs.
- 2) The matter shall be set down for hearing of the suit on priority basis on the following conditions;
- 3) The Parties through respective Counsel shall undertake Case Management Conference (CMC) before DR Commercial & Tax Division within 30 days from date of delivery of the Ruling.
- 4) Thereafter, parties through Counsel shall be placed before any Court within the Commercial Division for taking of hearing date(s) on priority basis and directions on procedure (due to the current Corvid 19 situation)
- 5) The *status quo* of the subject matter of the suit LR 337/626 shall be maintained by all parties their agents, servants, employees and/or officials.
- 6) The OCPD Machakos Police Station shall supervise the status quo order, no further demolition/destruction of property or buildings, no carting away of any goods equipment etc from the premises. Exit/Entry by anyone and activity shall be documented.
- 7) Any/all rent collected by either party from date of the orders by the Court of 14<sup>th</sup> May 2018 until hearing and determination of the suit shall be recorded/accounted for and parties shall submit accounts/records to the Trial Court for determination and/or further orders.

**DELIVERED SIGNED & DATED IN OPEN COURT ON 13<sup>TH</sup> JULY 2020**

**(VIDEO CONFERENCE)**

**M.W. MUIGAI**

**JUDGE**

**OKATCH & PARTNERS FOR PLAINTIFF**

**KIMONDO GACHOKA & CO ADVOCATES FOR DEFENDANTS**

**COURT ASSISTANT - TUPET**