



REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA AT NAKURU

CIVIL SUIT NO. 167 OF 2009

PRIVATE DEVELOPMENT COMPANY LIMITEDPLAINTIFF

VERSUS

REBECCA NGONYO.....1ST DEFENDANT

SAMUEL KAMAU MACHARIA.....2ND DEFENDANT

RULING

1. On **20th December, 2011** the plaintiff (applicant), Private Development Company Limited, moved this Court by way of Notice of Motion dated **29th October, 2011**. The motion was brought under Section 3A of the Civil Procedure Act; and **Order 40 Rule 7, Order 41 Rule 1 (1)** and **Order 51 Rule 1** of the Civil Procedure Rules respectively. By that application the applicant seeks the following prayers:

1) ... (spent)

2).....(spent)

3) That pending the hearing and determination of the suit an order do issue preventing the 1st defendant from interfering with the rent collection and management of NAKURU MUNICIPALITY BLOCK 4/46;

4) That this honourable court be pleased to appoint messrs. Njema Construction Company as agent for purposes of collection of rent and deposit the same in joint account as earlier ordered vide the order dated 29/11/2011;

5) That the OCS Nakuru Police Station to assist in the execution of the orders and provide security

6) Costs of the application be provided for.

2. The application is premised on the grounds that on **18th October, 2006** the parties in this suit recorded a consent to the effect that the rent outstanding and accrued in respect of the suit property be collected by an independent agent. The parties also agreed that pending the appointment of the agent, none of them shall either by themselves or their agents or otherwise howsoever collect rent in respect of the suit property. The applicant contends that the 1st defendant in willful and blatant contempt of the said consent order, failed to give up possession of the suit property and to account for interest and mesne profits passed on to her. The 1st defendant is also accused of having interfered with tenants in the suit property by collecting rent in contravention of the said court order. The applicant argues that the 1st defendant's unlawful possession of the suit property puts the suit property in danger of being wasted or damaged.

3. The applicant further contends that, owing to the 1st defendant's unlawful possession of the suit property it will be further obstructed, delayed and/or defeated in executing the decree passed against the defendants. It is also apprehensive that the 1st defendant may not be in a position to compensate it for the loss and damage suffered owing to her illegal conduct.

4. It is the applicants case that unless the 1st defendant is restrained from continuing with her illegal acts in respect of the suit property, it stands to suffer irreparable damage. The applicant also contends that the 1st defendant's continued disobedience of the orders herein is likely to put the dignity and authority of the court into disrepute.

5. For the foregoing reasons the applicant urges this court to appoint an agent to manage the suit property by, *inter alia*, collecting rent and preserving it pending the hearing and determination of the ownership dispute.

6. In the affidavit sworn in support of the application, the various orders issued by the court in respect of the suit property are introduced by way of evidence. These include: the court order issued on **18th October, 2006 (annexture HKG1)**; the order recorded on **29th November, 2011 (annexture HKG2)** and the order issued on **16th December, 2011 (annexture HKG3)**.

7. The deponent of the said supporting affidavit, **Hosea Kimotho Gitonga** (who is one of the directors of the applicant) deposes that because of the pecuniary benefit that the 1st defendant is getting from the suit property (over Kshs. 200,000/ = per month as rent), the 1st defendant is willing to do anything possible to frustrate the implementation of the court orders herein. To prove this fact, he referred to a letter dated **30th November, 2011** annexed to the 1st Defendant's supporting affidavit to her (1st defendant's application) dated **14th December, 2011**. In that letter the 1st defendant's advocate addressed her as follows:-

“
.....

RE: NAKURU HCC NO.167 OF 2009

PRIVATE DEVELOPMENT COMPANY LTD VS. REBECCA NGONYO & ANOTHER

We attended court on 29/11/2011 for hearing of your case mentioned above.

Pursuant to the orders made on 19/10/2006 (copy enclosed) the court directed that a new joint account in our names and the names of the plaintiff be opened within the next TEN (10) days from 29/11/2011, Future rent collections from the disputed property shall be deposited in this account. We managed to resist to have you account for the rent that has been collected during this intervening period but it is possible that this matter will be raised during the hearing of the main suit. (emphasis supplied).

8. To understand the import of the contents of the foregoing letter from the 1st defendant's advocate, it is noteworthy that the consent order of 19/10/2006 forbade any of the parties thereto from collecting rent from the suit property pending the appointment of an agent to collect rent on behalf of the parties as contemplated under clause 1 (iii) of the consent order. The said clause provides as follows:-

"1. (iii) That the rent outstanding and accruing be collected by an independent agent agreed by the advocates for the plaintiff and the 1st defendant respectively that is C.N Kihara & Co. Advocates and Mirugi Kariuki Advocates."

Sub clause (v) thereof provides:-

"That pending the appointment of the agent pursuant to clause (iii), hereof none of the parties to this suit shall collect rent from the suit premises either by themselves or their

agents or otherwise howsoever."

Through the consent order of 29 / 11 / 2011 parties to the consent had agreed:-

"That an account be opened in the full names of Mirugi Kariuki & Company Advocates and Wambeyi Makomere Advocate in a respectable Commercial Bank into which shall be collected and deposited the proceeds of the property known as LR NO. Nakuru/Municipality 4/46 within (10) days."

9. That order (the order of 29th November,2011) was subsequently stayed vide the order of **16th December,2011** pending the hearing and determination of the 1st defendant's application **14th December, 2011** inter-partes.

10. It is noteworthy that the order of **16th December, 2011** did not set aside the order of 18th October, 2006 which at clause 1(iv) required all the monies collected by the agent agreed upon by the Advocates for the parties (C.N Kihara & Co. Advocates and Mirugi Kariuki & Co. Advocates) be deposited in an interest earning account in the joint names of the said Advocates for the parties. See the ruling of Ouko J., in respect of that issue. The judge stated:-

"Although there was a temporary order to stay the order of 29th November, 2011, that order did not relate to the earlier order of 18th October, 2006, which was detailed and clear in its terms. Parties ought to obey it as it has not been set aside."

11.It is the applicants case that the 1st defendant has unlawfully and deliberately frustrated all attempts to enforce the consent orders herein and that having done so, she continues to unlawfully collect rent from the suit property from May, 2006 to-date.

12. Arguing that it is unfair and unjust for the 1st defendant to continue collecting rent from the suit property against its interest therein and in blatant disobedience of a court order, the applicant urges this court to appoint an agent to protect, preserve and maintain the suit property by collecting rent and preserving it pending the hearing and determination of the ownership dispute.

13. Having perused the entire court record, I agree with the observation of **Ouko J.**, in the ruling herein that the orders of **18th October, 2006** have neither been stayed nor set aside. That being the case and in view of the admission of the implied admission that the parties have never complied with those orders, I find and hold that the 1st defendant's dealings with the property have been and are unlawful. My view that the allegation leveled against the 1st defendant have been admitted is informed by the contents of the 1st defendant's advocates' letter reproduced herein above. In that letter, it is suggested, albeit, indirectly that the 1st defendant had been collecting rent despite existence of a court order prohibiting any of the parties to the dispute from doing so.

14. Clause 1(iii) of the order of **18th October, 2006** required the advocates for the parties thereto to agree on who the independent agent was going to be.

15. From the testimony of the deponent of the supporting affidavit hereto, which has not been controverted, attempts by the applicant to comply with that order have been frustrated by the 1st defendant who is unlawfully enjoying proceeds from the suit property. Owing to the difficulty encountered in complying with the order for appointment of an agent to manage the suit property, collect and preserve rent and profits therefrom, the applicant brought the current application seeking the court's intervention and resolution of the stalemate that has affected the management of the suit property since May 2005.

16. The sole issue for determination in this application is whether the applicant has made up a case for issuance of the orders sought.

17. In determination this question I reiterate that the order of **18th October, 2006** which required the

parties thereto to appoint an agent to manage the suit property pending the hearing and determination of the dispute hereto has never been discharged, varied, stayed and/or set aside. That being the case the parties thereto were under a legal obligation to cooperate in the enforcement of that order. From the affidavit evidence adduced in this application, this never happened. That notwithstanding, having perused the record before me, I note that there is a change of circumstances which obtained at the time the consent order of 18/10/2006 was made. For instance, the firm of advocates that represented the 1st defendant at that time is no longer on record for her. There is also the entry of the interested party, who was not represented in that consent order.

18. To protect the interest of all the parties in the suits herein, I hold the view that it would not be in the interest of justice to order the enforcement of the order of **18th October ,2006** as is.

19. As for the order of **29th November, 2011** which the applicant wants enforced pending the hearing and determination of the suits herein, from the ruling of **Ouko J.**, mentioned herein above, it is clear that the interested party was not party to that consent order yet he has a legitimate concern regarding the preservation of rent collected from the suit property.

20. Since the interest of the third party will not be properly served if the rent collected by the proposed agent, is deposited in an account opened and operated by the parties proposed therein, that is to say, Mirugi Kariuki & Co. Advocates and Wambeyi Makomere Advocates, to protect the interest of all the parties, I hold the view that the rent collected from the suit property should be deposited in court.

21. The upshot of the foregoing is that the application is allowed in terms of prayer 3 and 5. Prayer 4 is allowed but in the following terms:-

"That this honourable court do appoint Messrs. Njema Construction Company as agent for purposes of collecting of rent and deposit the same in court." (Amendment effected pursuant to the power of this court under Section 3A of the Civil Procedure Act as read with Section 100 thereof).

Costs of the application to be costs in cause. Parties are at liberty to apply.

Dated, signed and delivered in open court at Nakuru this 7th day of November 2014.

L N WAITHAKA

JUDGE

PRESENT

Ms Nasimiyu holding brief for Mr Wambeyi for the plaintiff

N/A for the 1st defendant

N/A for the 2nd defendant

N/A for the interested party.

L N WAITHAKA

JUDGE.