



REPUBLIC OF KENYA

IN THE ENVIRONMENT AND LAND COURT OF KENYA AT ELDORET

E & L CASE NO. 275 OF 2012

KISEKEM LIMITED.....PLAINTIFF

VERSUS

MICHAEL KIPKERING CHERWON.....1ST DEFENDANT

THE COMMISSIONER OF LANDS.....2ND DEFENDANT

THE CHIEF LAND REGISTRAR.....3RD DEFENDANT

THE ATTORNEY GENERAL.....4TH DEFENDANT

RULING

[NOTICE OF MOTION DATED 26TH FEBRUARY, 2020]

1. The 1st Defendant filed the Motion dated the 26th February, 2020 seeking for the review and or setting aside the order of 20th November, 2019 on the conditions imposed upon the 1st Defendant to deposit all rent collected or earned from the suit properties from August, 2019 in a joint interest earning account. The application is based on the six grounds on its face marked **(1)** to **(6)** and supported by the affidavit sworn by the 1st Defendant on the 26th February, 2020. That the 1st Defendant's case is that the condition to the stay order cannot be complied with or enforced as there are no structures or developments on the suit land capable of earning rental income. That the period of complying with the condition has since lapsed and is apprehensive the Plaintiff may move to execute the order to his detriment. That the 1st Defendant had instructed Highland Valuers who prepared a valuation report dated the 3rd February, 2020 showing that there are no buildings on the suit property generating rental income, except a concrete slab. That as the valuation report was not available when the condition was issued, the Court should use it to review the order.

2. The application is opposed by the Plaintiff through the replying affidavit sworn by **Willy Rotich Kamuren**, a director of the Plaintiff, on the 13th May, 2020. That it is the Plaintiff's case that the application is an abuse of the Court's process as the 1st Defendant while seeking for stay order had stated that his tenants would suffer if execution was to proceed. That the Highland Valuers had earlier provided a report showing there were tenants on the suit property. That the copies of the photographs taken on 10th March, 2020 and attached to the replying affidavits show fully occupied stalls, and a beehive of activities on the suit property, and the valuer's report of 3rd February, 2020 to the contrary is an act of fraud. That the application is only meant to frustrate the Plaintiff from taking possession of the suit property.

3. That following the Court's directions on the 13th May, 2020, the learned Counsel for the 1st Defendant and the Plaintiff filed their written submissions dated 3rd June, 2020 and 30th June, 2020 respectively.

4. The following are the issues for the Court's determinations;

(a) Whether the 1st Defendant has satisfied the requirements set out under Order 45 Rules 1 and 2 of Civil Procedure Rules for the review of the condition to the stay order.

(b) Who pays the costs of the application?

5. The Court has carefully considered the grounds on the application, the affidavit evidence by both parties, the written submissions by the two learned Counsel, the superior courts' decisions therein and come to the following findings;

(a) That the order being sought to be reviewed through the Motion dated the 26th February, 2020 is part of **Order (a)** contained in

the Court ruling dated 20th November, 2019 in respect of the 1st Defendant's earlier Motion dated the 6th August, 2019. That the condition upon which the order of stay of execution was granted was that the 1st Defendant was to deposit the rental income described thereon "**with a bank in sixty (60) days**". That by the time the Motion dated the 26th February, 2020 was filed, the sixty days had long lapsed. That fact was known to the 1st Defendant as he alluded to it at ground 4 of the Motion and paragraph 7 of the supporting affidavit. That however no attempt has been made to explain the delay in moving the Court for review.

(b) That in opposing the 1st Defendant's application for stay dated 6th August 2019, the Plaintiff had filed a replying affidavit sworn by **Willy Kamuren** on the 31st August, 2019 and at paragraph 11 had deponed "**that there is no substantial loss likely to be occasioned to the applicant (1st Defendant) as all he has constructed are temporary structures and the suit property is occupied by hawkers who pay rent to the Applicant...**" That deposition was not rebutted and or challenged. That the Plaintiff has in their replying affidavit to the Motion dated the 26th February, 2020 annexed nine (9) photographs said to depict the occupied stalls and activities on the suit property which again have not been challenged and or rebutted. That these photographs and other deposition in the replying affidavit effectively challenges the 1st Defendant's claim that the suit property is without any structures or development capable of raising rental income.

(c) That the finding in (a) and (b) above leads the Court to the conclusion that the 1st Defendant has not satisfied the requirements set out under **Order 45 Rule 1 and 2 of Civil Procedure Rules** and the application for review of the condition to the stay order fails.

(d) That the 1st Defendant having failed in this application, should pay the Plaintiff's costs in the notice of motion.

6. That the foregoing shows that the 1st Defendant's Motion dated the 26th February, 2020 is without merit and is dismissed with costs.

Orders accordingly.

Delivered virtually and signed at Eldoret this 14th day of October, 2020.

S. M. KIBUNJA

JUDGE

In the presence of:

Plaintiff: Absent.

Defendants: Absent.

Counsel: Mr. Songok and Omondi for Plaintiff.

M/s Kiptoo for 1st Defendant.

Court Assistant: Christine

and the Ruling is to be transmitted digitally by the Deputy Registrar to the Counsel on record through their e-mail addresses.