



**REPUBLIC OF KENYA**

**IN THE ENVIRONMENT AND LAND COURT**

**AT MILIMANI LAW COURTS**

**ELC CASE NO.1321 OF 2013**

**MARIA LWANDE & OTHERS.....PLAINTIFFS**

**VERSUS**

**REGISTERED TRUSTEES OF**

**TELEPOSTA PENSION SCHEME.....DEFENDANTS**

**RULING**

1. This is a ruling in respect of three separate applications. The first application is brought by the plaintiffs/applicants. It is dated 5<sup>th</sup> February, 2018 and it seeks the following orders:-

***1. Spent***

***2. That the defendant be cited for being in contempt of the Court's order made on 23<sup>rd</sup> September 2008 and be jailed for six (6) months and /or fined such sum of money as the Court may deem just.***

***3. That the defendant be ordered to forthwith purge the contempt by complying strictly with the orders of court the issued on 23<sup>rd</sup> September 2008 particularly by issuing copies of title documents to each of the plaintiffs who have not purchased the houses and forwarding letters expressly stating that each plaintiff to look for a financier to purchase their houses.***

***4. That the costs of this application be provided for.***

2. The second application is brought by the plaintiffs/applicants. It is dated 21<sup>st</sup> June 2018 and it seeks the following orders:

***1. Spent***

***2. Spent***

***3. That this Honourable Court be pleased to issue orders restraining the respondent through its agents and/or its servants from interfering with the applicants quiet possession and occupation of the suit premises in whichever way by levying distress for rent, issuing notices to vacate and/or threatening to evict pending hearing and determination of the suit in Nairobi ELC No.1321 of 2013 Maria Lwande & Others Versus Telposta Pension Scheme (Consolidation with HCCC 215 of 2008,HCCC 739 of 2008 and HCCC 264 of 2008)***

***4. That costs of this application be provided for.***

3. The third application is brought by the defendant/applicant. It is dated 26<sup>th</sup> October 2018 and it seeks the following orders:-

***1. Spent***

***2. The Honourable Court do issue an order directing ALL the non-rent paying plaintiffs and their sub tenants, sub-lessees and all their relatives, proxies, servants ,agents, and or/their employees or occupants howsoever to IMMEDIATELY vacate all the houses they occupy;***

**3. The National Police Service through the O.C.S Makadara Police Station be directed to supervise the eviction exercise on ALL the earmarked houses;**

**4. The costs of this application be borne by the Plaintiffs/Respondents**

4. This is a classic case which shows how applications can be used to delay finalization of cases. The plaintiffs who are members of the defendant have filed at least three cases against the defendant. The first one is Nairobi HCCC No.215 of 2008, the second one is Nairobi HCCC No. 264 of 2008 and the third one is Nairobi HCCC No.739 of 2008. All the three cases were filed before the Environment and Land Court was established. When the Environment and Land Court was established and was fully functional, NBI HCCC NO.215 of 2008 was transferred to the Court where it was given a new number that is ELC 1321 of 2013.

5. A look at the proceedings show that an application was made in Nairobi HCCC No.739 of 2008 seeking to consolidate the three files. It appears the application for consolidation was never prosecuted and may have been dismissed for non-attendance. This is at least from a replying affidavit in one of the numerous applications made in the three files. The handwritten proceedings in NBI HCCC No.215 of 2008 are so mixed up such that it is almost impossible to get the tail or head.

6. Though the parties herein are proceeding on the assumption that the three files were consolidated, there is nothing on record which shows that the three files were consolidated. The closest one can come to such consolidation is some photocopies of handwritten proceedings for 20<sup>th</sup> February 2013 which show that NBI HCCC No.739 of 2008 was consolidated with NBI HCCC NO. 264 of 2008. NBI HCCC NO.264 of 2008 is not among the other two files. In these same proceedings of 20<sup>th</sup> February 2013, there is a further order which clearly stated that the other two files i.e NBI HCCC No.264 of 2008 and NBI HCCC No.739 of 2008 should not be consolidated with NBI HCCC No.215 of 2008 ( Now ELC 1321 of 2013). What is interesting is that there is no original handwritten notes of the Judge as regards the consolidation. One does not understand why the originals are not in the file and what is more interesting is that there are other proceedings for the same day which do not show whether there was any consolidation made. The typed proceedings have no record of any consolidation. It is therefore clear that in the absence of original handwritten proceedings where the alleged consolidation took place and in the absence of any backing from the typed proceedings, it is safe to conclude that there was no consolidation made.

**Application dated 5<sup>th</sup> February, 2018.**

7. In this application, the applicants contend that there was an order given by Lady Justice Ang'awa on 23<sup>rd</sup> September 2008 in which the Judge among other orders directed the respondent to forward copies of title documents to the applicants who had not purchased their houses to enable them look for financiers to facilitate purchase of their houses. The copies of the title documents were to be forwarded within 5 days of the date of the order.

8. The court order was extracted and served upon the respondent. Besides service of the order, the respondent's lawyers were aware of the same as it was out of a consent recorded in court. The applicants further contend that the respondent has disobeyed the order of 23<sup>rd</sup> September 2008 and that the Respondent has been using the ruling of Lady Justice Gacheru delivered on 25<sup>th</sup> February, 2015 to harass them by demanding rent on the pretext that all the orders of 23<sup>rd</sup> September, 2008 had been set aside by the ruling 25<sup>th</sup> February, 2015.

9. The respondent opposed the application dated 5<sup>th</sup> April, 2018 through a replying affidavit sworn on 13<sup>th</sup> September, 2018. The respondent contends that though there was a consent order recorded on 23<sup>rd</sup> September 2008, that consent was conditional upon the applicants getting financiers who were to be confirmed on 18<sup>th</sup> November 2008 during the mention of the case. As at 18<sup>th</sup> November 2008, the applicants had not obtained financiers and if any had been identified they were not disclosed. The applicant's lawyer wrote seeking for extension of time to look for financiers but despite the extension , only twenty (20) out of the sixty seven (67) applicants had purchased the houses they were occupying and had the houses transferred to them even without disclosing who their financiers were.

10. The respondent further argues that the application for contempt is incompetent as it has not disclosed who the contemnors who are to be punished are and that there was no penal notice served together with the order which the respondent is alleged to have disobeyed. The respondent further argues that the basis upon which the contempt application is being brought was set aside vide ruling of the court delivered on 25<sup>th</sup> February 2015.

11. I have considered the applicants' application as well as the opposition to the same by the respondent. I have also considered the submissions filed by the parties herein. The only issue for determination is whether the respondent is in contempt of the court order given on 23<sup>rd</sup> September 2008. The background of this application can be traced to the suit which the applicants had filed against the respondent. The applicants had sought to restrain the respondent from attaching their goods for non-payment of rent or threats to evict them. The applicants were residing in houses constructed by the respondent along Jogoo Road and one on Elgeyo Markwet Road, Kilimani and some in South B Nairobi. The respondent was receiving rent from the applicants but there was a decision to dispose of some assets of the respondent. The respondent's members who were in occupation of the houses were given priority to purchase the houses.

12. A Consent was recorded on 23<sup>rd</sup> September 2008 to the effect that those who had not purchased the houses which they were occupying had to be given copies of title documents within 5 days to enable them to get financiers. A date was fixed for confirmation whether the applicants had found financiers. As at the time set for confirmation, the applicants had not obtained financiers. Their lawyer requested for extension of time which was granted but even after the extended period had passed, only 20 out of 67 applicants had purchased the houses and their houses had been transferred to them. This averment by the respondent was not controverted.

13. Prior to the recording of the consent on 23<sup>rd</sup> September 2008, the applicants had obtained an injunction which restrained the respondent from sending auctioneers to attach properties of those who had failed to pay rent. Some applicants sheltered under the injunctive orders and refused to pay rent or even go ahead with purchase of their houses. The respondent had to file an application for the discharge of the

injunction orders granted on 23<sup>rd</sup> September 2008. The injunctive orders were discharged vide ruling delivered on 25<sup>th</sup> February 2015.

14. The respondent then went after the properties of those who refused to pay rent and were not purchasing the houses they were occupying. The applicants have sought an application for contempt without specifying who are claiming that the court orders of 23<sup>rd</sup> September 2009 had been disobeyed. A party can only be punished for contempt if it is demonstrated that there was a deliberate disobedience of the court order. In the instant case, there is affidavit evidence that as at the time the applicants were to confirm that they had obtained financiers, none had secured a financier. The advocate for the applicants sought for extension of the period to get financiers. There was no complaint that copies of title documents had not been forwarded as per the consent. There was only a delay in forwarding but the documents were given. Some applicants bought their houses without disclosing who their financiers were. It cannot therefore be argued that the respondent did not meet its side of the consent. There is absolutely no proof that the respondent is in contempt of court order. I therefore find no merit in this application which is hereby dismissed with costs to the Respondent.

It is so ordered.

**Application dated 21<sup>st</sup> June 2018.**

15. In this application, the applicants are seeking for injunctive orders seeking to restrain the respondent from in any way interfering with their quiet occupation of their houses by levying distress for rent, issuing notices to vacate or in any manner threatening the applicants pending the hearing and determination of NBI HCCC No.215 of 2008, 264 of 2008 and 739 of 2008. The applicants contend that the respondent has been sending auctioneers to go and levy distress for rent.

16. The applicant's application is supported by the affidavit of one of the applicants who deposes on how her properties were attached by auctioneers on instruction of the respondent. The deponent contends that the respondent cannot levy distress for rent when there are suit pending where the issue of rent is outstanding.

17. There were no grounds of opposition or replying affidavit filed by the respondent.

18. I have considered the applicant's application as well as the submissions filed. The only issue for determination is whether an injunction can be given in the terms prayed for. As I had already stated herein above by way of background, there was no consolidation of the three suits. ELC 1321 of 2013 was the one known as NBI HCCC 215 of 2008 before it was transferred to ELC Court. The other files have never been consolidated. There were injunction orders given in NBI HCCC No.215 of 2008. These orders were discharged following an application by the respondent. The orders were discharged because the applicants were using them not to pay rent yet they did not want to purchase the houses they were occupying. They cannot therefore come back and seek fresh injunctions seeking to stop the respondent from collecting rent. I find that this application not only lacks merit but is an abuse of the process of court. I proceed to dismiss the same with costs to the respondent.

It is so ordered.

**Application dated 26<sup>th</sup> October 2018.**

19. In this application, the applicant is seeking to have some of the respondents evicted from their respective houses. The ground for seeking eviction is that some respondents have sub-let their houses to third parties and that some are not paying rent. The applicant argues that the respondents who are not paying rent do not automatically qualify to purchase their houses; that the non-paying rent respondents collude with others not to pay rent and that it has been impossible to collect rent from those defaulting

20. The applicant contends that it is holding the houses on behalf of the respondents who are pensioners who are benefitting from the pension but they are not paying rent which should go towards payment of their pension dues. The applicant contends that it is owed millions in rent arrears and therefore it wants the respondents out of the houses which will then be sold out in order to comply with the fixed assets portfolio required by the rules.

21. The applicants' application is opposed by the respondent through a replying affidavit sworn on 29<sup>th</sup> November 2018. The respondents contend that they had been offered priority to purchase the houses they were occupying but some were not given the offer letters. For those who were given offer letters, they entered into sale agreements with the applicant and paid 10% deposit. The applicant failed to provide completion documents leading to loss of the 10% deposit. The respondents therefore contend that they have been discriminated against as they cannot be treated as purchasers and tenants at the same time. The respondents contend that they are willing to purchase the houses on any conditions which the court may impose.

22. I have considered the applicant's application as well as the opposition to the same by the respondents. The only issue for determination is whether the applicant can be granted eviction orders. To start with, the applicant does not have a counter-claim the basis on which it can seek an order of eviction. The respondents have a pending suit. The best way to get over this matter is to have this case determined after which the applicant can see the best way on how to deal with those who are occupying the houses but are not paying. The applicant cannot be given orders of eviction even if the same would have been possible through a simple application which is not based on a suit. The applicant has the option of levying distress for rent as there are no orders restraining it from doing so. I therefore find no merit in this application which is dismissed with costs to the respondents.

It is so ordered.

**Dated, Signed and delivered at Nairobi on this 21<sup>st</sup> day of February 2019.**

**E.O.OBAGA**

**JUDGE**

In the presence of;-

Mr Wanyonyi for M/s Nduta for Plaintiffs

Mr Gikera , Mr Olao and M/s Nyabenge for Defendants

Court Assistant: Hilda

**E.O.OBAGA**

**JUDGE**