



**REPUBLIC OF KENYA**

**IN THE ENVIRONMENT AND LAND COURT AT NAIROBI**

**ELC. CASE NO 193 OF 2010**

**ALTON HOMES LIMITED..... 1ST PLAINTIFF**

**JOHN KANGOGO..... 2ND PLAINTIFF**

**VERSUS**

**DAVIS NATHAN CHELOGOI.....1ST DEFENDANT**

**JOHN NDUATI NJUGUNA.....2ND DEFENDANT**

**SAMUEL KUGEKA NDEGWA.....3RD DEFENDANT**

**RULING**

1. On 23/2/2018, Lady Justice Gacheru rendered a Judgment in this matter in favour of the plaintiffs. The decree extracted consequent to the judgment reads as follows:

- 1) The 1st defendant's sale and transfer of property Nairobi Block 26/113 to the 2nd defendant on the 14th day of January, 2010 was obtained in breach of the law, fraudulently and is null and void ab initio and is hereby cancelled.***
- 2) The 1st defendant be and is hereby ordered to specifically perform the first agreement dated the 27th day of May, 2007, the addendum to the first agreement dated 3rd day of May, 2009, and the last agreement dated the 4th day of August, 2009, and deliver to the 1st plaintiff the original certificate of lease, an executed transfer together with all necessary consents and forms to enable the registration of the property Nairobi Bloc 26/113 in the name of the 1st plaintiff.***
- 3) The 1st and 2nd defendants by themselves or by their agents, servants or otherwise howsoever be and are hereby restrained from advertising, offering for sale, leasing, mortgaging, charging, transferring (other than to the 1st plaintiff) or assigning and/or otherwise dealing with property Nairobi Block 26/113.***
- 4) The 1st, 2nd and 3rd defendants by themselves or by their agents, servants or otherwise howsoever be and are hereby restrained from entering upon property Nairobi Block 26/113, levying distress upon, attaching the 1st and 2nd plaintiffs' furniture and chattels, evicting the 1st plaintiff from and/or in any manner whatsoever interfering with the 1st and 2nd plaintiffs' occupation of property Nairobi Block 26/113.***
- 5) The 2nd and 3rd defendants by themselves or by their agents, servants or otherwise howsoever be and are hereby restrained from advertising, offering for sale, leasing, mortgaging, charging, transferring or assigning and/or otherwise dealing with the 1st and 2nd plaintiffs' furniture and chattels distressed from the premises on property Nairobi Block 26/113.***
- 6) The 2nd and 3rd defendants by themselves or by their agents, servants or otherwise howsoever be and are hereby directed by an order of mandatory injunction to return to the 1st and 2nd plaintiffs, and at the said 2nd and 3rd defendants' cost, all the furniture and chattles distressed from the premises on property Nairobi Block 26/113.***
- 7) The 1st and 2nd plaintiffs be and are hereby awarded general damages of Kshs 5,000,000.00 plus interest thereon from the date of judgment till payment in full.***
- 8) The 2nd and 3rd defendants be and are hereby ordered to pay the 1st and 2nd plaintiffs damages in the sum of Kshs 805,000.00 for trespass, wrongful seizure of the 1st and 2nd plaintiffs' goods, conversion and illegal distress.***
- 9) The 2nd defendants' counterclaim dated 14th May, 2010 be and is hereby dismissed with costs.***

**10) The 1st and 2nd plaintiff are entitled to a refund of Kshs 400,000.00 deposited in Court on 7th March, 2011, as per the Deposit Receipt Number 0013045 as security for the injunctive order.**

**11) The 1st and 2nd plaintiffs be and are hereby awarded costs of the suit and interest thereon to be borne by the defendants jointly and severally.**

2. Subsequently, on 13/6/2018, the plaintiffs brought a notice of motion dated 30/5/2018 under Sections 94 and 98 of the Civil Procedure Act seeking the following orders:

**1) This application be and is hereby certified as urgent.**

**2) The defendants, their agents, servants or anyone claiming title and possession under the said defendants, be evicted from property Land Reference Nairobi Block 26/113 and possession thereof given to the 1st plaintiff.**

**3) The warrants of eviction be issued to Siama Auctioneers.**

**4) The Officer Commanding Station, Kileleshwa Police Station, do provide assistance in enforcing the warrants of eviction.**

**5) The transfer of property Land Reference Nairobi Block 26/113 to the 1st plaintiff and all completion documents required to be executed by the 1st defendant be executed by the Deputy Registrar of this Court.**

**6) The costs of this application be borne by the defendants.**

3. The application was supported by the 2nd plaintiff's affidavit sworn on 30/5/2018, in which he deposed that during the course of the hearing of this suit, the defendants dispossessed the 1st plaintiff land title number Nairobi Block 26/113. He added that upon delivery of the judgment herein, the defendants were duly notified to deliver vacant possession of the suit property to the 1st plaintiff and to sign all necessary vesting instruments but they have failed to do so. He exhibited copies of the judgment, decree and notices. He further deposed that unless the order sought in the application are granted, the defendants will continue to deprive the 1st plaintiff the right to title, possession and use of the suit property. There was no replying affidavit filed in response to the notice of motion.

4. At the plenary hearing of the application, Mr Havi, counsel for the plaintiffs submitted that the motion seeks to enable the plaintiff get title and possession of the suit property as decreed by the court. He added that the defendants had failed to comply with the decree herein despite having been notified to comply. Counsel further submitted that this court has powers to grant the orders sought within the framework of Sections 94 and 98 of the Civil Procedure Act as read together with Order 22 rule 29 of the Civil Procedure Rules.

5. Mr Ombwayo, counsel for the defendants, submitted that the application was premature because the plaintiff's bill of costs had not been presented and/or taxed. He added that the court had not been given the opportunity to consider whether execution should proceed before taxation. Counsel added that under Section 34 of the Civil Procedure Act, this court is required to consider any further evidence in respect of execution of a decree. He urged the court to dismiss the application.

6. I have considered the tenor and import of the orders sought in the application under consideration. I have also considered the affidavit in support of the application and the parties' respective submissions. The application was filed on 13/6/2018 and served on all the defendants in June 2018. At the time it came up for plenary hearing, none of the defendants had filed a replying affidavit in response to the application. Consequently, the evidence placed before the court by the applicants remains uncontroverted.

7. The application was brought within the provisions of Section 94 of the Civil Procedure Act which provides a framework for execution before taxation. It was also expressed to have been brought within the framework of Section 98 of the Civil Procedure Act which provides a legal mechanism for execution of vesting instruments in cases where the party decreed or ordered to execute the documents neglects or fails to comply. The reason given for seeking execution before taxation is that the defendants have refused to comply with the decree and have continued to deny the 1st plaintiff title and possession of the suit property. That ground has not been controverted because no replying affidavit was filed in response to the application.

8. I have carefully examined the terms of the decree issued in this suit. It, *inter alia*, barred the defendants against entering the suit property. It further barred them against interfering with the plaintiff's occupation of the suit property. Further, it decreed that the defendants do execute vesting instruments in favour of the 1st plaintiff. It has been demonstrated without denial that the defendants have continued to ignore the decree. Judgment was rendered on 23/2/2018 and the decree was issued on 10/4/2018.

9. In my view, given the circumstances of the case, there is a proper basis for an order allowing execution before taxation. Similarly, there is a proper basis for directing the Deputy Registrar of this court to execute the vesting instruments. Consequently, the Notice of Motion dated 30/5/2018 is allowed in terms of prayers 2, 3, 4, 5 and 6.

**DATED, SIGNED AND DELIVERED AT NAIROBI ON THIS 7TH DAY OF FEBRUARY 2019**

**B M EBOSO**

**JUDGE**

**In the presence of:-**

Ms Gichoya holding brief for Mr Havi for the plaintiffs

June Nafula - Court Clerk