



**REPUBLIC OF KENYA**

**IN THE ENVIRONMENT AND LAND COURT**

**AT KISUMU**

**ELC CASE NO. 136 OF 2016**

JACOB OMONDI NYAMBEGA.....1<sup>ST</sup> PLAINTIFF  
KENNEDY OMOLLO ONYANGO.....2<sup>ND</sup> PLAINTIFF  
SAMWEL OTIENO OBUYA.....3<sup>RD</sup> PLAINTIFF  
PHILIP OTIENDE ADUNDO.....4<sup>TH</sup> PLAINTIFF  
SIMON OMONDI AKINA.....5<sup>TH</sup> PLAINTIFF  
PAULINE AKWACHA.....6<sup>TH</sup> PLAINTIFF

**VERSUS**

VICTORIA COMFORT INN.....1<sup>ST</sup> DEFENDANT  
KENYA AFRICAN NATIONAL UNION.....2<sup>ND</sup> DEFENDANT  
NICK SALAT.....3<sup>RD</sup> DEFENDANT  
GIDEON MOI.....4<sup>TH</sup> DEFENDANT  
ATTORNEY GENERAL.....5<sup>TH</sup> DEFENDANT

**RULING**

1. Phillip Otinde Adundo, Simon Omondi Akina and Pauline Akwacha, the 4<sup>th</sup> to 6<sup>th</sup> Defendants and hereinafter referred to as the Applicants, filed the notice of motion dated the 19<sup>th</sup> March 2018 seeking for injunctive orders barring the 1<sup>st</sup> to 3<sup>rd</sup> Plaintiffs and 2<sup>nd</sup> to 4<sup>th</sup> Defendants, hereinafter referred to as the Respondents, from trespassing into their and other tenants/investors business premises in Kisumu Municipality/Block 9/118, the suit land, and attempting to auction their property pending the **“hearing and final determination of this application”**. They also seek for an order that the Applicants and other tenants/investors should not pay rent until they fully recover the money used to build the permanent structures on the suit land, and thereafter to deposit the rent in court to be released to the bona fide owner of the premises upon completion of the suit. The application is based on the eight (8) grounds on its face that they have lease agreements for business space at the property that was then vacant and undeveloped; that they have put up permanent buildings on the parcel using their own money; that the Respondents’ agents intend to auction the suit land despite the Applicants being owed Kshs. 68,000,000/= worth of developments; that there is a dispute on the ownership of the plot and that there is imminent threat of auction and eviction that would occasion them irreparable loss, among others. The application is supported by the affidavit sworn by Philip Otiende Adundo, on the 19<sup>th</sup> March 2018.

2. The application is opposed by the 1<sup>st</sup> Plaintiff through his affidavit sworn on the 16<sup>th</sup> March 2018, reiterating that the directions in the ruling of 24<sup>th</sup> January 2018 on the management of the premises suffices.

3. The 2<sup>nd</sup> and 3<sup>rd</sup> Plaintiffs also responded to the application vide their replying affidavits sworn on the 16<sup>th</sup> May 2018 supporting the application.

4. That the 1<sup>st</sup> Defendant filed the motion dated the 23<sup>rd</sup> March 2018 seeking for orders that the 1<sup>st</sup> to 6<sup>th</sup> Plaintiffs render true and accurate account of all rents accruing from their possession of the suit property; that all rents accruing from the Plaintiffs and or other tenants/occupants of the suit land be deposited with the court pending the final determination of the ownership of the property; injunction order restraining the Plaintiffs or any other tenants/occupants from erecting any structures or carrying any further developments thereon pending the hearing and determination of the suit. The application is based on the four (4) grounds on its face that 1<sup>st</sup> Defendant became the registered proprietor of the property on the 23<sup>rd</sup> October 2014 and is yet to enjoy the benefits of ownership; that 1<sup>st</sup> to 3<sup>rd</sup> Plaintiffs have been collecting rent from the 4<sup>th</sup> to 6<sup>th</sup> Plaintiffs and have not accounted for it to the 1<sup>st</sup> Defendant; and that the 1<sup>st</sup> to 6<sup>th</sup> Plaintiffs have been erecting further structures or developments on the said plot without 1<sup>st</sup> Defendant's consent among others.

5. The application is opposed by 4<sup>th</sup> Plaintiff through the affidavit sworn on the 2<sup>nd</sup> August 2018 that they have been paying rent to Kenya African National Union, Kisumu Branch Office and were up to date. That they were not opposed to depositing the rent with the court.

6. The application is opposed by the 1<sup>st</sup> Plaintiff through the eight (8) grounds on their grounds of opposition dated the 29<sup>th</sup> March 2018.

7. That Applicants filed their submissions dated the 2<sup>nd</sup> August 2018, while that of the 1<sup>st</sup> to 4<sup>th</sup> Defendants filed theirs on the 20<sup>th</sup> September 2018. The 1<sup>st</sup> to 3<sup>rd</sup> Plaintiffs also filed their submissions dated the 8<sup>th</sup> October 2018.

8. The following are the issues for the court's determinations;

**a) Whether the Applicants have established a prima facie case for the injunctive orders sought in their motion dated the 19<sup>th</sup> March 2018 to issue at this interlocutory stage.**

**b) Whether the 1<sup>st</sup> Defendant has made a case for rendering of accounts, depositing of the rent with the court and injunctive order to issue at this stage of the proceedings.**

**c) Who pays the costs of the applications.**

9. The Court has carefully considered the grounds on the two applications, affidavit evidence tendered, the written submissions, the pleadings and concluded as follows;

a) That the Applicants have clearly shown that there exist agreements between them and the 2<sup>nd</sup> Defendant's trustees and or agents under which the Applicants were to put up business premises within the suit property, and subsequently recover their investment from half of the rent payable as tenants on the premises. That the Applicants claim that the appointment of a property manager for the suit property has been followed by threats of denial of access, eviction and demolition of the premises has not been rebutted by the Respondents. That indeed the Applicants annexed to their supporting affidavit proclamations of attachment of the 5<sup>th</sup> & 6<sup>th</sup> Plaintiffs' movable property made on behalf of the said property manager.

b) That though the Applicants have in view of the finding in (a) above established a prima facie case with a probability of success by demonstrating that they stand to suffer, not only quantifiable injury from loss of their investments of putting up the business premises, but also having the premises demolished and or having their developments auctioned, the prayer for injunction was only to last for the time the application was to be heard and determined. That therefore, as the application is being determined through this ruling, that prayer cannot be granted.

c) That the Applicants' prayer for an order that they pay rent only after recovering their investments in the buildings would amount to interfering, varying or re-writing the agreements they reportedly entered into with the 2<sup>nd</sup> Defendant's agents. That as the court is yet to determine the question of ownership of the suit land, the court finds that the Applicants prayer amounts to asking the court to place the cart in front of the horse. That it is only fair and just that the Applicants continue adhering to the express terms of the agreements. That the Court of Appeal had occasion to address itself on the sanctity of contracts in the case of **National Bank of Kenya Ltd vs Pipeplastic Samkolit (K) Ltd & Another [2001] eKLR** and held as follows;

***"A court of law cannot re-write a contract between the parties. The parties are bound by the terms of their contract unless coercion, fraud or undue influence are pleaded and proved....."***

***"It is clear beyond peradventure that save for those special cases where equity might be prepared to relieve a party from a bad bargain; it is ordinarily no part of equity's function to allow a party to escape from a bad bargain."***

d) That since the ownership of the suit land is yet to be determined, the rent payable by the Applicants must continue to be paid. That the question the court may need to determine is to which party, will the rent be paid to, as the issue of ownership of the plot is determined. That having considered the various positions presented herein, including to have it deposited with the court, and with a view to ensure such rent does not remain without growing, but instead continue to earn interest, the court is of the view that the 1<sup>st</sup> to 4<sup>th</sup> Defendants and the 1<sup>st</sup> to 3<sup>rd</sup> Plaintiffs should urgently, and in any case within thirty (30) days, agree on property agent who will manage the property and collect rent payable. That the agent will then deposit the rent collected in an interest earning account in the joint names of the said parties' Counsel, in a financial institution pending the hearing and determination of this suit.

e) That rendering of accounts is provided for under **Order 21 Rule 4 of the Civil Procedure Rules**. That the Court of Appeal in the case of **Ptalla Rutaki vs Michael Dee Robinson & 3 Others [2016] eKLR** quoted with approval the case of **American Cyanamid Company vs Ethicon [1975] A.C 396** stating that once the court is satisfied that there is some preliminary question to be tried, it

should not “...try to resolve conflicts of evidence on affidavits as to facts on which the claims of either party may ultimately depend nor to decide difficult questions of law which call for detailed argument and mature considerations. These are matters to be dealt with at the trial.” That it follows that as the question of ownership of the suit land has not been determined, and cannot in this case be decided on the affidavit evidence tendered, but has to wait for the trial of the main suit, the prayer by one of the parties claiming ownership for the others to take accounts cannot be entertained at this interlocutory stage.

f) That on the prayer for stopping further developments, and in view of the fact that ownership of the suit land is yet to be settled, it is convenient, fair and just to grant the same for such developments to await the determinations of this case.

g) That in view of the fact that the Applicants and 1<sup>st</sup> Defendant have each partially succeeded in their respective applications, the court finds it fair and just that each party bears their own costs in the two applications dated the 19<sup>th</sup> March 2018 and 23<sup>rd</sup> March 2018.

10. That flowing from the foregoing, the court allows the applications dated the 19<sup>th</sup> March 2018 and 23<sup>rd</sup> March 2018 only in following terms;

a) That the 1<sup>st</sup> to 4<sup>th</sup> Defendants and the 1<sup>st</sup> to 3<sup>rd</sup> Plaintiffs do within thirty (30) days agree on a property agent to manage the suit premise. That the property agent is the one to collect the rent payable by the Applicants and other tenants of the premises thereon, and should deposit it in an interest earning account in the joint names of the said parties’ advocates in a financial institution, pending the hearing and determination of this suit.

b) That in case the 1<sup>st</sup> to 4<sup>th</sup> Defendants and the 1<sup>st</sup> to 3<sup>rd</sup> Plaintiffs, and their advocates, fails to comply with (a) above within thirty (30) days, the Deputy Registrar of this court to proceed to appoint a property agent to manage the said premises, collect the rent payable by the Applicants and other tenants and deposit it with the court pending the hearing and determination of this suit.

c) That pending the hearing and determination of this suit, the Plaintiffs and other tenants on the suit land are hereby restrained from erecting any new structures or further developments thereon without the express permission of the court.

d) Each party bears their own costs on the applications dated the 19<sup>th</sup> March 2018 and 23<sup>rd</sup> March 2018.

Orders accordingly.

S.M. KIBUNJA

ENVIRONMENT & LAND

JUDGE

DATED AND DELIVERED THIS 17<sup>TH</sup> DAY OF JULY 2019

**In the presence of:**

Plaintiffs                      1<sup>st</sup> & 3<sup>rd</sup> present

Defendants                      Absent

Counsel                      Mr. Ndemaki for Ouma for 1<sup>st</sup> to 3<sup>rd</sup>

Plaintiffs, Mr. Maua for 4<sup>th</sup> to 6<sup>th</sup> Plaintiffs

Mr. Orengo for 1<sup>st</sup> Defendant

Mr. Odhong for 2<sup>nd</sup> to 4<sup>th</sup> Defendants and M/s Langat for the 5<sup>th</sup> Defendant.

S.M. KIBUNJA

ENVIRONMENT & LAND

JUDGE