



REPUBLIC OF KENYA

IN THE ENVIRONMENT AND LAND COURT AT KISUMU

ELC CASE NO.132 OF 2014

ST. MARY SACRED HEART CHRISTIAN BROTHERS

AND SISTERS INTERNATIONAL.....PLAINTIFF

VERSUS

AKENYA INVESTMENTS LIMITEDDEFENDANT

RULING

1. This ruling relates to two notices of motion dated 18th September 2015 and 15th February 2017. The notice of motion dated 18th September 2015 is by **St Mary's Sacred Heart Brothers and Sisters International**, the Plaintiff and seeks for the following orders;

a) Stoppage of any illegal attachment and eviction from **Kisumu/Municipality/Block 4/147**, distress for rent and sale by auction relating to the Plaintiff's property pending the hearing and determination of this suit.

b) A mandatory injunction compelling Akenya Investment Ltd, the Defendant, to return and restore to the Plaintiff's all the goods and chattels which the Defendant had distrained in respect of arrears of rent or the monies and proceeds realized from the sale of such goods, in the unlikely event that the auction has taken place.

c) That the Defendant be compelled to acknowledge payment made between September 2013 and February 2014 and the deposit made in March 2014 of Ksh.161,000/= . The application is based on the five grounds on the notice of motion and supported by the affidavit of Patricia Aluoch Oketch, sworn on the 16th September 2015. The application is opposed by the Defendant, Akenya Investments Ltd, through their replying affidavit sworn by Phillip Adera Onyango, on the 24th June 2016.

2. The Notice of motion dated 15th February 2017 was filed by the Defendant and seeks for the following orders;

a) An order of eviction be issued against the Plaintiff from **Kisumu Municipality/Block 4/147** for failing pay rent, as ordered in the ruling of 7th May 2015, pending the hearing and determination of this suit.

b) That the O.C.S. Central police station, Kisumu, do provide security during the eviction. The application is based on the seven grounds on the notice of motion and is supported by the affidavits worn by Phillip Adera Onyango, on the 17th January 2017 and 14th June 2017. The application is

opposed by the Plaintiff through the replying affidavit sworn by Patricia Aluoch Oketch, on the 30th March 2017.

3. That when the two applications came up for hearing on the 29th May 2017, the court issued directions, by consent of the parties counsel present, that written submissions be filed and exchanged within specified timelines. That the applications were listed for mention on the 29th November 2017 when counsel informed the court that they would not be filing any submissions, but would rely on the affidavits evidence and authorities filed. The court then fixed the two applications for ruling today.

4. The following are the issues for determination by the court on the two applications;

a) Whether the Plaintiff has made a reasonable case with probability of success for the injunction orders sought to be issued at this stage.

b) Whether the Plaintiffs are in contravention of the order of 7th May 2015, and if so, whether the Defendant has made a reasonable case for eviction order to issue against the Plaintiff at this stage.

c) Who pays the costs in each of the applications and Defendant's suits.

5. The court has carefully considered the grounds on the two notice of motion, affidavit evidence, the court record and come to the following conclusions;

a) That the Plaintiff commenced these proceedings through the plaint dated 19th May 2014 seeking for the following prayers against the Defendant;

- Declaration that the letter dated 29th May 2014 from Abonge is null, void and of no effect.
- The notice of distress for rent served by Nyaluonyo auctioneers of 13th May 2014 is null, void and of no effect.
- Perpetual injunction to restrain the Defendant from breaching its commitment to Kisumu Municipality/Block 4/147 to the Plaintiff at the agreed sum of ksh.45,000,000/=, as long as the Plaintiff is able and willing to keep its part of the bargain.
- Costs of the suit.

b) The Plaintiff's claim is opposed by the Defendant through their statement of defence dated 17th January 2017, and filed on the 14th February 2017, that contains a counterclaim for the following prayers;

- Payment of Ksh.8,352,000/= being the rent arrears as of January 2017, plus Ksh.232,000/= per month thereafter that the Plaintiff continues occupying Kisumu Municipality/Block 4/147, until such a time that eviction is carried out.
- Eviction order against the Plaintiff from the suit land, plus Kshs.200,000/= being the costs of eviction.
- Payment of Ksh.133,101/95 and Kshs.110,789 being unpaid arrears of utility bills and any additional utility bill that may continue to accrue, until the plaintiff vacates from the suit land.
- Costs of the suit and counterclaim, and interests of all payments at 14% per annum, till payment in full.

c) The Plaintiff filed the notice of motion dated 20th May 2014 and amended on the 27th May 2014 seeking for among others, an order of injunction restraining the Defendant and its agent M/S Nyaluonyo Auctioneers, from termination of the Plaintiff's occupation or evicting, distraining

against, or harassing the

Plaintiff in any manner whatsoever and howsoever from its quiet occupation of Kisumu Municipality/Block 4/147. The application was granted in the interim on the 27th May 2014.

d) The Defendant filed the notice of motion dated 10th June 2014 seeking to have the interim orders issued on the 27th May 2014 discharged, varied or set aside pending the hearing and determination of the Plaintiff's application referred to in (c) above.

e) The court gave directions on the 21st July 2014 that the two application be heard together. That further directions were issued on the 21st October 2014 on filing and exchanging of written submissions. That the court rendered its ruling on the two applications on the 7th May 2015 and hereinbelow are the relevant extracts that have a bearing in the determination of the two applications, subject matter of this ruling;

**“ 20 It is clear that parties started their relationship as landlord and Tenant.
.....**

21. It seems clear to me that the Plaintiff is in occupation of the property. It runs a college there and any activity associated with distress for rent is bound to interfere with the smooth running of the college. But it is also obvious that the Defendant is the registered owner of the suit property. The Plaintiff alleges purchase but there are formidable arguments raised against allegations of purchase. The suit property therefore is as things stand, the Defendant's investment and the Defendant is entitled to rent.....

23. In my view, the issue of purchase can stay open until trial. The parties started their relationship on the basis of tenancy. That is the relationship that assumes primacy at this stage.

25. That is why in my view a restraining order of the kind asked by the Plaintiff is necessary. But that order must be conditional upon continued payment of rent by the Plaintiff because the Defendant, as an investor, is entitled to such rent.

26. I therefore make a finding that the first application herein is allowed in terms of prayer 3. But the Plaintiff should continue paying rent. The issue of purchase is for consideration during trial. By its own admission, the Plaintiff has not finished paying purchase money. If the court finds in Plaintiff's favour on the issue of purchase, the rent paid can be converted into purchase money.

27. Thus much must be clear to the Plaintiff though; if there is default or refusal to pay rent, the Defendant would be entitled to institute legal measures to recover it.”

f) That as pointed out by the Defendant through their deposition in paragraph 3 and 4 of their replying affidavit, the issue of restraining order was previously raised vide the Amended Notice of motion dated 27th may 2014, and decided upon through the ruling of 7th may 2015. That such a prayer could only have merit if the Plaintiff were to present evidence that they have fully complied with the condition to continue paying rent whenever it becomes due. That the application would have been to require the Defendant to observe and comply with the court order. That were that the case, the Plaintiff would have moved the court to cite the Defendant for contempt of court order of 7th May 2017, and not to seek for fresh injunctive order. That in this case, the affidavit evidence availed is to the effect that the Plaintiff has not been complying with the court order to continue paying the rent. That the action by the Defendant to instruct Victoria Blue Auctioneers to distress for rent cannot be faulted so long as the Plaintiff continued remaining in arrears. That process must be taken to have been what the court had in mind in its ruling of 7th May 2015, where at paragraph

26, it stated as follows:

“26. This much must be clear to the Plaintiff though; if there is default or refusal to pay rent, the defendant would be entitled to institute legal measures to recover it.”

That the other legal measure that the Defendant has taken is the notice of motion dated 15th February 2017.

g) That flowing from the finding in (f) above, the court finds that the Plaintiff's notice of motion dated 18th September 2015 is not any different from the Amended Notice of motion dated 27th May 2014, notwithstanding the additional prayer for mandatory injunction. That as the issues raised have already been decided by this court, which is a court of competent jurisdiction, through its ruling of 7th May 2015, and as the parties and subject matter are the same, the application contravenes **Section 7 of the Civil Procedure Act Chapter 21 of Laws of Kenya**, and is hence res judicata.

h) That from the affidavit evidence availed, the Defendant had filed a notice of appeal to the ruling of 7th May 2017. That the appeal has not been heard to date and inevitably, the edicts in the ruling of 7th May 2015 remains not only in force, but both parties are obligated to obey them. That the existence of the appeal on the ruling of 7th May 2015 restraining the Defendant, and requiring the Plaintiff to continue paying rent, does not amount to a stay order. That there is therefore no reasonable excuse for the Plaintiff to have refused, and or defaulted in paying the rent and the Defendant are in order to seek for the payment of the rent and arrears of rent.

i) That the Defendant's notice of motion dated 15th February 2017 is primarily for eviction order against the Plaintiff for failing to pay rent, as ordered in the court's ruling of 7th May 2017. That the Defendant stated the arrears as Ksh.8,352,999/= as of January 2017, and continues to rise by Ksh.232,000/= per month. That between February 2017 to February 2018 are thirteen (13) months, and when multiplied with Ksh.232,000/=, the amount of rent for the period comes to 3,016,000/=. That when Kshs.3,016,000/= is added to the initial claim of Ksh.8,352,000/=:, the total arrears, if no amount has been paid comes to Ksh.11,368,000/=. That from the available affidavit evidence, the Defendant application is not without merit, but as the spirit and intent of the ruling of 7th May 2015 was to allow the Plaintiff to continue using the suit premises on the condition that they continue paying rent as it become due, the court will not issue outright eviction order, but will accord the Plaintiff an opportunity to comply with the court's condition first.

6. That in view of the foregoing the court orders as follows;

a) That the Plaintiff's notice of motion dated 18th September 2015 is dismissed with costs.

b) That the Defendant's notice of motion dated 15th February 2017 has merit and is allowed with costs in the following terms;

i) That the Plaintiff do pay the Defendant all the arrears of rent, and any other rent that becomes due within the next 60 (sixty) days, or alternatively enter into a written arrangement with the defendant on how the arrears of rent and any other rent that becomes due is to be paid within the said period. That such a written arrangement (agreement) be filed with the court before the expiry of the 60 (sixty) days.

ii) That in the event of the Plaintiff failing to pay as ordered in (i) above, or failing to obtain with a written agreement on how the arrears of rent and any rent that becomes due is to be paid and filing such an agreement with the court, the Defendant be at liberty to distress for rent in accordance with the law.

iii) That the matter be mentioned after the expiry of 60 (sixty) days for directions whether or not eviction order against the Plaintiff will issue.

Orders accordingly.

S.M. KIBUNJA

ENVIRONMENT & LAND – JUDGE

DATED AND DELIVERED THIS 28TH DAY OF FEBRUARY 2018

In presence of;

Plaintiff Present

Defendant Absent

Counsel Mr. Ogonda for Amondi for Plaintiff

Mrs. Onyango for Ragot for the Defendant

S.M. KIBUNJA

ENVIRONMENT & LAND – JUDGE

28/2/2018

28/2/2017

Before S.M. Kibunja Judge

Joane court assistant

Plaintiff present

Mrs. Onyango for Ragot for the Defendant

Mr. Oganda for Amondi for the Plaintiff

Court: Ruling dated and delivered in open court in the presence of Patricia Aluochi (Plaintiff), Mr. Oganda for Amondi for Plaintiff and Mr. Onyango for Ragot for the Defendant.

S.M. KIBUNJA

ENVIRONMENT & LAND – JUDGE

28/2/2018