



REPUBLIC OF KENYA
IN THE ENVIRONMENT AND LAND COURT AT KISUMU
ELC CASE NO.109 OF 2016

W.E. TILLEY (MUTHAIGA) LIMITED1ST PLAINTIFF

VICTORIA DELIGHT LIMITED.....2ND PLAINTIFF

VERSUS

VICTORIA DISTRIBUTORS LIMITED.....1ST DEFENDANT

NYALUONYO AUCTIONEERS.....2ND DEFENDANT

RULING

1. W. E. Tilley (Muthaiga) Limited and Victoria Delight Limited, hereinafter referred to as the 1st and 2nd Plaintiffs, filed the notice of motion dated 19th May 2016 under **Order 40 Rule 1 and 4, Order 51 Rule 1** of Civil Procedure Rules and **Section 63 (e)** of the Civil Procedure Act, seeking for injunction orders restraining **Victoria Distributors Limited** and **Nyaluonyo Auctioneers**, hereinafter referred to as 1st and 2nd Defendants respectively, from distressing, attaching, removing, advertising auctioning, selling or dealing in any other way whatsoever with items belonging to the Plaintiffs that are on **L.R. Kisumu Municipality/Block 3/123**, pending the hearing and determination of the suit. The Plaintiffs also seek for the proclamation of 14th May 2016 by the 2nd Defendant, and any subsequent attachment, advertisement for sale or auction be declared illegal, irregular, unlawful and be set aside. The notice of motion is based on the seven grounds on its face and the supporting affidavit sworn by Zulfikar Haiderali Jessa, a director of the 1st Plaintiff, on the 19th May 2016.

2. The notice of motion is opposed by the Defendants through the replying affidavit of **Vuay Dawda**, a Director of the 1st Defendant, sworn on the 6th June 2016. It is also opposed by **IDB Capital Limited, the Interested Party**, through the replying affidavit sworn by **Priscilla Nduru Njuguna**, Manager legal affairs, on 30th June 2016.

3. That interim orders in terms of prayer 2 of the notice of motion was granted on the 23rd May 2016.

4. That on the 26th September 2016, the counsel for the parties entered a consent on filing of written submissions on the notice of motion dated 19th May 2016.

5. The following are the issues for the court's determinations'

a) Whether the Plaintiffs have established a prima facie case with a probability of success for injunctive orders to be issued at this interlocutory stage.

b) As an alternative to (a) above, whether the Defendants proclamation, attachment and sale pursuant to distress for rent contravenes the order issued on 27th October 2015 in Nairobi

High Court Commercial & Admiralty Division C C No.522 of 2015.

c) What orders to issue

d) Who pays the costs.

6. The court has carefully considered the grounds on the notice of motion, the affidavit evidence by the parties, written submissions by all counsel and come to the following findings;

a) That the 1st Plaintiff has admitted being in arrears of rent owed to the 1st Defendant in respect of premises on **Kisumu Municipality/Block 3/123**. That the 1st Defendant had instructed the 2nd Defendant to carry out the distress for rent which was done on 14th May 2016 as confirmed by the documents availed by the Plaintiffs and marked ZJI 12.

b) That the Imperial Bank Limited (under the statutory receivership of the receiver manager) filed Nairobi High Court Commercial and Admiralty C.C. No.522 of 2015 against 20 Defendants, including the Plaintiffs in this case, who appear as 1st and 5th Defendants respectively.

c) That the only record availed in this court of the order of 27th October 2015 and marked ZJ6 the order reads as follows:

“1. THAT the notice of Motion be heard ex parte in the first instance.

2. THAT an injunction pending the hearing and determination of this application inter partes be and is hereby barring the Defendant/Respondents, their servants and/or agents or otherwise howsoever from removing from this jurisdiction, disposing of mortgaging (and /or further mortgaging,) charging (and/or further charging), assigning, diminishing, transferring, disposing, alienating, operating and/or otherwise interfering and/or dealing with any of their assets within this jurisdiction, which said assets include but are not limited to:

Schedule of Known Assets

a. All Bank Accounts in the names of the Defendants in Kenya.

b. The Following Real Estate and /or Land Holdings and the Developments thereon:

i. L.R No.214/796 Nairobi (which is Charged to Fidelity Commercial Bank);

ii. L.R. No. 214/797 Nairobi (Which is Charged to Fidelity Commercial Bank);

iii. L.R. No. 18995/3 Nairobi (Which is currently charged to Diamond Trust Bank);

iv. L.R. No. 13560/3 (Which is currently charged to Diamond Trust Bank);

v. L.R.No. 9042/809 Nairobi (Which is currently charged to Diamond Trust Bank);

vi. L.R No. Ruiru Township 517 and 518 (Which are currently charged to Prime Bank); and

vii. L.R. Numbers 15081/32 and 15081/33 (Which are currently charged to Prime Bank).

3.THAT an injunction pending the hearing and determination of this application inter partes be and is hereby issued barring the Defendant/Respondents, their servants and/or agents or otherwise

howsoever from removing from this jurisdiction, disposing of, mortgaging (and/or further mortgaging), charging (and/or further charging), assigning, diminishing, transferring, disposing, alienating, operating and/or otherwise interfering and/or dealing with any of their assets within this jurisdiction, which said assets include but are not limited to:

- a. All their Bank Accounts in any Bank in Kenya.
- b. The following Real Estate and/or Land Holdings and the Developments thereon:
 - i. L.R. No 214/796 Nairobi (Which is Charged to Fidelity Commercial Bank);
 - ii. L.R. No. 214/797 Nairobi (Which is charged to Fidelity Commercial Bank);
 - iii. L.R. No. 18995/3 Nairobi (Which is currently charged to Diamond Trust Bank);
 - iv. L.R.No.13560/3 (Which is currently charged to Diamond Trust Bank);
 - v. L.R. No. 9042/809 Nairobi (Which is currently charged to Diamond Trust Bank);
 - vi. L.R. No. Ruiru Township 517 and 518 (Which are currently charged to Prime Bank); and
 - vii. L.R. Numbers 15081/32 and 15081/33 (Which are currently charged to Prime Bank).

4. THAT the Defendants may be served by an advert in the Daily Nation and the said advert will not be less one quarter of a page.

5. THAT the application is fixed for inter partes on 29th October, 2015.”

d) That this court’s reading of the order as set out in (c) above is that the persons affected by the injunctive orders are the twenty named “**Defendants/Respondents, their servants and or agents**” who are restrained from “**removing from this jurisdiction, disposing of, mortgaging (and/or further mortgaging) charging, and/or further charging) assigning, diminishing, transferring, disposing, alienating, operating and or otherwise interfering and or dealing with any of the assets within the jurisdiction**”. That the order does not injure the parties’ landlords, like the 1st Defendant, who is not among the injected Defendants, and has not been shown to be a servant or agent or acting at the behalf of any of the named 20 Defendants, from exercising his statutory right to distress for arrears of rent which is owed to him.

e) That the **Kisumu Municipality/Block 3/123**, where the properties proclaimed by the 2nd Defendant on instructions of the 1st Defendant on the 14th May 2016, is not among the properties covered in the Nairobi High Court Case order as can be seen in (c) above.

f) That in view of the foregoing the court finds that the Plaintiffs have not established a prima facie case at this stage for temporary injunctive orders to issue or on which the proclamation done on 14th May 2016 could be faulted. There is also no evidence availed that the Plaintiffs would suffer irreparable harm were the temporary injunction not be issued. The Defendants are only seeking to do what the law entitles a Landlord to do where a tenant is in arrears of rent. The balance of convenience does not fall in favour of the orders being issued.

7. That for reasons set out above, the notice of motion dated 19th May 2016 is without merit and is dismissed with costs.

The interim orders issued on 23rd May 2016 is hereby vacated.

It is so ordered.

S.M. KIBUNJA

ENVIRONMENT & LAND – JUDGE

DATED AND DELIVERED THIS 8TH DAY OF February 2017

In presence of;

Plaintiffs Absent

Defendants Absent

Interested Party

Counsel Mr. Mituka for the Plaintiffs

 Mr. Mamwari for Odongo for interested Party

S.M. KIBUNJA

ENVIRONMENT & LAND – JUDGE

8/2/2017

8/2/2017

S.M. Kibunja

Oyugi court assistant

Parties absent

Mr. Mituka for Plaintiff/Applicant

Mr Manwari for Odongo for Interested Party.

Court: ruling dated and delivered in open court in presence of

Mr. Mituka for the Plaintiff/Applicant and Mr. Manwari for Odongo for Interested Party.

S.M. KIBUNJA

ENVIRONMENT & LAND – JUDGE

8/2/2017