



REPUBLIC OF KENYA

IN THE ENVIRONMENT AND LAND COURT AT KISUMU

ELC CASE NO.73 of 2016

MOHAMMED PEISSAL MOHAMUD.....1ST PLAINTIFF

IBRAHIM MOHAMED OSMAN.....2ND PLAINTIFF

YASIN MOHAMED MOHAMUD.....3RD PLAINTIFF

VERSUS

RICHARD GUYA MEMBO.....1ST DEFENDANT

DISTRICT LAND REGISTRAR KISUMU.....2ND DEFENDANT

RAMOGI CHEMIST LIMITED.....3RD DEFENDANT

RULING

1. The notice of motion dated 22nd June 2016 is indicated to be filed by Ramogi Chemist Limited, who is described as the 1st defendant but is actually the 3rd Defendant. It seeks for the following prayers among others;

- Temporary order of injunction restraining the Plaintiffs by themselves or agents from “demanding, collecting, receiving and or getting rent from tenants on land parcel numbers **Kisumu Municipality/Block 7/275 and 276** and the said rent be collected by the 1st Defendant herein or its representatives”, pending the hearing and determination of this suit and counterclaim.
- Alternatively the rent being collected from the tenants be collected by “the 1st defendant herein or its representatives and deposited in a joint account in the name of the counsel for the parties herein “pending the hearing and determination of this suit.

The application is based on the four grounds on its face and supported by the affidavits sworn by Richard Guya Membo, the 1st Defendant, on the 22nd June 2016 and 26th September 2016.

2. The application is opposed by the 1st to 3rd Plaintiffs through the replying affidavit sworn by Mohamed Feisal Mohamud, the 1st Plaintiff, on the 8th July 2016.

3. The counsel for the 1st Defendant filed and served their written submissions dated 26th September 2016 while the Plaintiffs counsel filed their submissions dated 18th November 2016.

4. The court on the 22nd March 2017 fixed the application for ruling today. The court on the same date directed counsel to file submission on the 2nd and 3rd Plaintiffs application dated 17th February 2017 awaiting further directions on 24th May 2017. The notice of motion dated 17th February 2017 sought for the following prayers:

- That the 1st and 3rd Defendants be held to be in contempt of court for disobeying the court order given on the 13th April 2016 and 20th April 2016 by continuously and persisting in storming into the suit property and frustrating the quiet and peaceful occupation and use by the Applicants and their tenants and should be punished “by committal to jail, fine or both for a period of six months or such lesser period in addition to their properties being sequestered.”
- That the Defendants be denied audience by the court unless and until they “purge the contempt herein by committing to desist from so acting in compliance with the court order.”

The application is based on the six grounds on the notice of motion and is supported by the affidavit sworn by Yassin Mohammed Mohamud, the 3rd Plaintiff, on the 17th February 2017. The application is opposed by the 1st and 3rd Defendant through the replying affidavit sworn by Richard Guya Membo, the 1st Defendant, on the 20th March 2017. The counsel for the 2nd and 3rd Plaintiff filed their written submission dated 10th April 2017 while counsel for 1st and 3rd Defendants filed theirs dated 19th April 2017.

5. The court has decided to prepare one ruling relating to the two applications dated 22nd June 2016 and 17th February 2017 so as to fast track the disposal of this suit. The following are therefore the issues for determination by the court;

- a) Whether the 1st Defendant has established a case for injuncting the Plaintiffs from collecting rent from the tenants on the two suit lands.
- b) Alternatively whether the 1st Defendant has made a case for the rent collected to be deposited in a joint account in the parties counsel’s names.
- c) Whether the 2nd and 3rd Plaintiffs have established disobedience of the court orders by the 1st & 3rd Defendants, and if so, what punishment to issue.
- d) Whether the 1st and 3rd Defendants should be denied audience by the court.
- e) Who pays the costs of each of the two applications.

6. The court has carefully considered the grounds on the two applications, the affidavit evidence by both sides, the submissions by both counsel and come to the following determinations;

- a) That before the notice of motion dated 22nd June 2016 was filed, the 1st Plaintiff had earlier filed the notice of motion dated 6th April 2016, while the 1st Defendant had also filed the one dated 12th April 2016. The two applications sought for more or less similar orders against the other party. That when counsel for the parties appeared before the court on the 13th April 2016 a consent was entered for parties to maintain the status quo obtaining under court order of 16th March 2016 issued in Kisumu CMCC NO.110 of 2016 pending the hearing and determination of this suit.
- b) That the order issued in Kisumu C.M.CC NO.110 of 2016 on the 16th March 2016 is attached to the replying affidavit sworn by Mohamed Feisal Mohamud on the 8th July 2016 in answer to the 1st Defendant’s notice of motion dated 22nd June 2016. That the relevant portion of that order states as follows;

“ 2. That pending the hearing and final determination of this application, there be an order of injunction restraining the Respondents of their own, their agents, servants and or employees, or any such persons acting on their behalf howsoever from trespassing into, meddling with or in any manner howsoever interfere with the smooth and peaceful occupation, by the applicant, and the operation of the business by his tenants and management by the applicant of the affairs of the property herein designated as Kisumu Municipality/Block 7/275 and 7/276”

c) That what the 1st Defendant seeks to attain through his notice of motion dated 22nd June 2016 by seeking to have the Plaintiffs restrained from collecting rent from the tenants on the two suit properties and instead he be the one empowered to collect the rent is pure and simple at variance with the consent order of 13th April 2016 which was entered into by consent of the parties counsel, who included his counsel on record.

d) That for the 1st Defendant to succeed to have the consent order of 13th April 2016 varied, he has to prove that the consent was obtained by fraud, or collusion or by an agreement that is contrary to the policy of the court or that the consent was given without sufficient material facts or obtained through misrepresentation or ignorance of such facts that would in general enable the setting aside of an agreement. The counsel for the Plaintiffs cited the case of **Kenya Commercial Bank Limited –V- Specialized Engineering Company Ltd** [1982] KLR 485, which sets out clearly what an applicant seeking to set aside or vary a consent order needs to establish. The 1st Defendant has not established any of the foregoing grounds but instead states the following at page 2 of their submissions.

“ ...the orders sought by the applicant does not in any way seek to circumvent or set aside the consent orders recorded in court by the parties herein. The consent orders recorded in court was to the effect that there was not going to be any interference with the business operations in the suit properties pending the hearing and determination of the case on the other hand orders being sought by the applicants are to the effect that the rent proceeds being collected from the suit premises be deposited in a joint account in the name of counsel for both parties”.

That is an erroneous interpretation of the consent order which adopted the position decreed in Kisumu CMCC No.110 of 2016 which clearly restrained the Respondents, who included the 1st Defendant herein as the 5th Respondent, from interfering or meddling with the “smooth and peaceful occupation by the applicant and the operation of the businesses by his tenants and management by the applicant of the affairs of the property.” The element of collection of rent is an integral part of the management of the suit properties and cannot be said to be outside the order as the 1st Defendant appears to believe.

e) That in view of the finding in (d) above, the court finds no merit in the 1st Defendant’s notice of motion dated 22nd June 2016.

f) That the court agrees with the 1st and 3rd Defendants counsel’s submission that an applicant who desires to have a respondent punished for contempt of a court order must avail evidence and to prove disobedience beyond reasonable court. [see **SamNyamweya & 3 others –V- Kenya Premier League Limited** [2015] eKLR, **Shimmers Plaza Limited –V- National Bank of Kenya** [2015] eKLR and **Caroline Wairimu Wanjihia & Another -V- I & M Bank Limited & Another** [2015] eKLR].

g) That the deposition in the affidavit of 3rd Plaintiff in support of the notice of motion falls short of the proof required in that it does not give details of the nature of the threats attributed to the 1st and 3rd Defendants. That there is no affidavit evidence of the tenant or tenants who were threatened to corroborate the deposition by the 3rd Plaintiff.

h) That in view of the findings in (f) and (g) above, the court finds no merit in the notice of motion dated 17th February 2017.

i) That as the two applications have not succeeded, each side well bear their own costs.

7. The flowing from the foregoing, the notices of motion dated 22nd June 2016 and 17th February 2017 are both dismissed with each party bearing their own costs.

It is so ordered.

S.M. KIBUNJA

ENVIRONMENT & LAND – JUDGE

DATED AND DELIVERED THIS 24TH DAY OF MAY 2017

In presence of;

Plaintiffs Absent

Defendants Absent

Counsel Mr. Onsongo for 1st Plaintiff

Mr. Ouma for the 2nd and 3rd Plaintiffs

Mr. Onyango for the 1st and 3rd Defendants

S.M. KIBUNJA

ENVIRONMENT & LAND – JUDGE

24/5/2017

24/5/2017

S.M. Kibunja Judge

Oyugi court assistant

Parties absent

Mr. Onsongo for the 1st Plaintiff

Mr. Ouma for 2nd and 3rd Plaintiff

Mr. Onyango for 1st and 3rd Defendants

Court: Ruling dated and delivered in open court in presence of Mr. Onsongo for 1st Plaintiff, Mr Ouma for 2nd and 3rd Plaintiffs and Mr. Onyango for 1st and 3rd Defendants.

S.M. KIBUNJA

24/5/2017