



REPUBLIC OF KENYA
IN THE HIGH COURT OF KENYA AT NAIROBI
ENVIRONMENT AND LAND COURT
MILIMANI LAW COURTS
ELC. CASE NO.13 OF 2009

NEPTUNE CREDIT MANAGEMENT LTD...1ST PLAINTIFF/APPLICANT

BRYAN YONGO2ND PLAINTIFF/APPLICANT

=VERSUS=

DR. JIGISHA P. JANI1ST DEFENDANT/RESPONDENT

JAY SAILESH JANI2ND DEFENDANT/RESPONENT

R U L I N G

Coming up for determination are **three Notices of Motion** applications filed by the Plaintiffs herein.

The **1st Notice of Motion** is dated **6th August 2014**, and is brought by the 2nd Plaintiff herein **Bryan Yongo** and was purportedly filed under Order 22 Rules 51 and 52 of the Civil Procedure Rules 2010 and Sections 1A, 1B and 3A of the Civil Procedure Rules and all enabling provisions of the law.

The Applicant has sought for the following orders:

a) Spent

b) THAT a temporary injunction do issue forthwith restraining the Defendants/Respondents, their agents and in particular Leakeys Auctioneers, its servants or employees from distressing or evicting the Plaintiffs from the suit premises pending hearing and determination of this application.

c) THAT all other matters relating to this suitland in any way whatsoever, be stayed pending the hearing and determination of this application.

d) THAT there be a Stay of Execution of any distress pursuant to the instructions by the Defendant's lawyers herein M/S M Washe & Co. Advocates vide their letter dated 24th July 2014, to MS Leakey Auctioneers, pending hearing and determination of this application.

e) THAT the Defendants herein be cited for contempt of court in contravention of the Consent

Order entered herein on the 19th of April 2010.

f) THAT the Defendants application dated 12th June 2014, be stayed pending hearing and determination of this application.

g) THAT the monthly instalments of Kshs.181,500/= as ordered in the consent recorded on the 19th April 2010, be paid into the court henceforth.

h) THAT costs of this application be provided for.

This application is premised on the grounds stated on the face of the application and upon the Supporting Affidavit of **Bryan Yongo**. These grounds are:

1) THAT there is no rent which is in arrears and due to the Defendants and no breach of the consent entered herein on the 19th April 2010, to warrant the inequitable conduct of the Defendants.

2) THAT the levying of distress in light of the circumstances of this case is an attempt to steal a match on the Plaintiffs and in view of the facts stated, grant of the orders sought is necessary and justified.

3) THAT it was an express term of the Consent Order 'Any other disputed arrears be canvassed at the full hearing so that there cannot be any distress purportedly from the period February 2008 to the period the consent was recorded hence the illegality of the purported distress herein' and this is discernible from the consent and the record herein.

4) THAT the Defendants' actions are malicious, unlawful and calculated to humiliate the Plaintiffs and has resulted to grave loss, which loss is irreparable and their conduct is oppressive and criminal.

5) THAT the circumstances of this case are special and merits the issuance of the orders sought.

6) THAT the said intended attachment/distress is illegal, null and void.

In his Supporting Affidavit, the 2nd Plaintiff herein **Bryan Yongo**, averred that he is the **Managing Director** of the **1st Plaintiff's Company** and that the 1st and 2nd Defendants are the registered owners of the suit premises **LR. No.7471/269**. He also alleged that the Defendants had offered the Plaintiffs the said premises for sale as is evident from annexure **BY 1**, which is a Letter of Offer and the Sale Agreement. Further that on or about the **10th February 2008**, the Defendants as the registered owners offered the said premises to the Plaintiffs for leasing at a monthly rent of **Kshs.150,000/=** an offer that the Plaintiffs accepted and thereafter took possession of the suit property, as is evident from annexure **BY 2**, the Tenancy Agreement. It was his contention that based on the offer for sale and after taking possession, the 2nd Plaintiff injected the sum of kshs.2.4 million to complete the house which was a newly constructed house with substandard works.

He further contended that the Sale Agreement entered between the Plaintiffs and the Defendants **novated** the Tenancy Agreement. 2nd Plaintiff further contended that they had no arrears owing to the Defendants as was evident from the correspondences between their respective lawyers. Therefore the letter to **Ms Leakay Auctioneers** dated **24th July 2014**, was a fraud.

The 2nd Plaintiff averred that on **19th April 2010**, the parties herein recorded a **Consent** before the court which was adopted as an Order of the Court to the effect that *status quo* be maintained with the Plaintiffs paying a monthly instalment of **Kshs.181,500/=** by **15th day of every month** until the hearing and determination of the substantive suit. Further that it was also the terms of the Consent Order that any

other disputed arrears be canvassed at the full hearing. The said **Consent Order** was annexed as **BY 5**. The deponent also deponed that the Plaintiffs dutifully continued to pay the monthly instalments of **Kshs.181,500/=** as was evident from the bundle of receipts annexed as **BY 6**. He contended that he was therefore shocked when served with the **Notice of Motion** application dated **12th June 2014**, in which the Defendants had sought from the Court an order that the Plaintiffs do pay the Defendants a sum of **Kshs.1,502,850/=** being the outstanding rent as at **15th May 2014**. He alleged that between **10th April 2014** and **4th July 2014**, he had paid a further sum of **Kshs.520,000/=** to the 1st Defendant which sum was duly acknowledged. It was also contended that the Plaintiffs have honoured the conditions of the Consent filed herein by paying the monthly instalments of **Kshs.181,500/=** and they do not owe the Defendants any arrears.

This application is contested and **Jigisha P. Jani**, the 1st Defendant/Respondent swore a **Replying Affidavit** on **13th August 2014**, and averred that the instant application is defective, bad in law and an abuse of the court process and ought to be dismissed with costs to the Defendants. Further that the application is brought in bad faith and is aimed at an illegality and also aimed at denying the Defendants their right to receive and collect due and payable rent from the Plaintiffs.

She admitted that indeed on **19th April 2010**, both parties recorded a Consent before the Court as stated by the Applicants. Therefore pursuant to the said Consent dated **19th April 2010**, and the **Tenancy Agreement** executed between the 2nd Plaintiff and the Defendants, the 2nd Plaintiff remains a tenant of the Defendants with an obligation to pay monthly rent of **Kshs.181,500/=**. It was her contention that the Tenancy Agreement was very clear that the tenant was not to carry any alterations without the landlords written permission and therefore the 2nd Plaintiff could not have carried any repair works on the suit premises. She also deponed that the said Sale Agreement was rescinded as the 2nd Plaintiff did not pay any amount as purchase price or part thereof.

The Respondent alleged that the Plaintiffs are guilty of causing the delay in this matter as well as failing to pay the consented monthly rent regularly. She contended that the 2nd Plaintiff has failed and refused to pay rent and as at **15th June 2014**, he owed the Defendants **Kshs.1,502,850/=**

Further that even if the 2nd Plaintiff paid a sum of **Kshs.520,000/=** as alleged, there is still an arrears of **Kshs.1,502,850/=** as outlined in the Statement of Account **annexture JP J1**. The deponent further deponed that the Plaintiffs have not honoured the terms of the Consent Order and the Plaintiffs are therefore undeserving of the equitable remedy of injunction as they have failed to discharge their obligations both under the Tenancy Agreement and the Consent dated **19th April 2010**. Further that the 2nd Plaintiff is guilty of misrepresentation, distortion and/or suppression of material facts and therefore they have come to court with unclean hands and are not deserving of the equitable orders sought. Therefore, the 1st Defendant urged the Court to dismiss the Plaintiffs Notice of Motion in the interest of justice.

The **2nd Notice of Motion** is dated **13th July 2015**, filed by the Plaintiffs herein and is brought under Order 40 Rules 1,2 and 3, and Order 51 Rule 1 of the Civil Procedure Rules, Sections 3 and 3A of the Civil procedure Act and all the enabling provisions of Law. The Plaintiffs have sought for the following orders.

1. Spent.

2. Spent

3. That pending the hearing and determination of this suit, the Defendants, their agents and servants be restrained from interfering with the plaintiffs possession and occupation of the premises known as LR.NO.7741/267 and specifically from purporting to levy distress for rent or evicting or purporting to evict the plaintiffs from the said premises.

4. That the 1st and 2nd Defendants be and are hereby found to be in contempt of the Court Order issued by the Honourable Lady Justice Sitati on the 19th April 2010 and be detained in prison for a term of 6 Months.

5. That the costs of this Application be provided for.

This application is also based on the **Supporting Affidavit** of **Bryan Yongo** and on the grounds stated on the face of the application. These grounds are;-

1. That on the 6th July 2015, the Defendants hired agents stormed the said premises, broke into the Applicant's house, vandalized property and took away all movable property, which they later returned after intervention of the Police which is flagrant breach of ,and in contempt of the CONSENT ORDER dated 19th June 2010.

2. That the Defendants have previously attempted to set aside the said consent order , but having failed, have resorted to crude and extra-judicial means to try and evict the Plaintiffs from the premises on issues and matters that are under adjudication by this Honourable court and in total disregard to the terms of the consent Order.

3. That the Defendants' actions are an affront to the dignity and jurisdiction of this Honourable court and it is in the interest of justice and respect for the rule of law, and the sanctity of the Orders of this Court that the prayers sought be granted.

4. That the Defendants agents and servants stole an incalculable amount of property and valuables and destroyed an irreplaceable items like antiques and paintings.

5. That the said attack endangered the safety and security of the Applicant's family, which includes children of tender age and an infant, and the entire family was forced to spend the night elsewhere.

6. That all the said actions were undertaken in total disregard to the orders of this Honourable court, and under the veil of a breaking order from the Magistrate's court, knowing that the same issues are pending before this honourable court.

7. That owing to the Defendant's actions, the Applicant's security and that of his family and staff is at risk, and continues to be so unless they are restrained by this Honourable Court.

In his Supporting Affidavit, the 2nd Plaintiff, **Bryan Yongo** averred that he resides in the suit premises, **LR No.7741/269 Kitsuru Tale close 3.1** together with his family which include his young children and domestic staff and has lived therein since the **15th February 2008**, and has invested heavily and liberally in improving the said premises which he considers to be his permanent home. He further averred that on the **6th July 2015**, the Defendants hired agents, stormed the said premises, broke into the house, vandalized the property and took away all movable property which they later refunded after the intervention of the Police which action was a flagrant breach of and in Contempt of the Consent Order dated **19th June 2010**. He further averred that the Defendants actions are an affront to the dignity and jurisdiction of the court and it is in the interest of justice and respect of the rule of law and the sanctity of the Orders of this Court that the prayers sought are granted.

This application is opposed by the Defendants and **Jigisha P. Jani** swore a **Replying Affidavit** dated **11th September 2015**, in opposition to the Notice of Motion. She averred that this application is a gross abuse of the process of this Court as it seeks orders identical or similar to those sought in the **Notice of Motion** dated **6th August, 2014**, which application is still pending. Further that this application is barred under the provisions of Section 6 of the Civil Procedure Act.

She contended that the Defendants were entitled to levy distress against the Plaintiffs for non-payment of rent by virtue of the Court Order dated **14th December 2011**. She also contended that the auctioneers levied distress for rent and did not evict the Plaintiffs on **6th July 2015**. Further that **Ms Muhatia Pala Auctioneers** duly and properly obtained the break-in Order from the Resident Magistrate's Court following the applicable procedure and rules of the same and the said Order is therefore valid. The Defendant/Respondent urged the court to dismiss the Plaintiffs Notice of Motion dated **13th July 2015**.

The 3rd Notice of Motion is dated **14th August 2015**, and is brought by the Plaintiffs herein against the Defendants. The application is anchored under Sections 1A, 1B, 3A of the Civil Procedure Act and Order 51 of the civil Procedure Rules. The Applicants have sought for the following orders.

1. Spent

2. THAT the Honourable Court do order the Respondents' Agents Muhatia Pala Auctioneers to deliver up and or return the Plaintiffs'/Applicants goods distrained and removed from the premises comprised in LR. No.7741/249 Kitisuru.

3. THAT costs of this application be provided for.

The application is premised on the grounds stated on the face of the application and on the Supporting Affidavit of the 2nd Plaintiff herein. These grounds are;

1. That on the 19th April 2010 the Hon Lady Justice Sitati, in presence of the respective Counsels made an order for status quo to be maintained and further ordered that the plaintiffs do make payments of Kshs.181,500/=as monthly rent pending the hearing and determination of this suit. This effectively adjusted the agreed monthly rent of Kshs.150,000/=.

2. That the orders issued by Hon. Lady Justice Sitati clearly stipulated in clause 4 thus, "any other disputed arrears be canvassed at the hearing".

3. That the break in order was obtained exparte without serving the Applicants with any demand for rent or any notice as required by the Distress for Rent Act (Cap 293 Laws of Kenya).

4. That acting on the said orders which were null and void, the Auctioneers raided the subject house on the 6th July 2015 and proceeded to vandalize the house and commit acts of wanton destruction and waste.

5. That the orders obtained from the Magistrate Court on 18th June 2015 were null and void as the same were inconsistent with the consent order issued by the High Court on 19th April 2010, which clearly stated that any other dispute for arrears had to be canvassed before this Honourable Court.

6. That due to the actions of the auctioneers who were and still under instructions of the respondents, the Applicants livelihood and welfare of his minor children has been and continues to be greatly affected.

7. That the attempt by the Auctioneers to hold onto the applicants items and goods for their alleged auctioneers fees is illegal, without any basis and not supported by the Distress for Rent Act.

In his Supporting Affidavit, the 2nd Plaintiff averred that he resides in the premises comprised on **LR.No.7741/247, Kitisuru** by and under virtue of a purchase agreement entered into between himself as the Purchaser and the Defendants/Respondents as Vendors.

Further that pending the completion of the transaction which was delayed due to circumstances beyond the control of the parties, it was agreed that the 2nd Plaintiff was to take possession of the house at an agreed monthly rent of **Kshs.150,000/=** which sum was to be credited to his account for the purchase of the subject property. That a dispute arose and the Plaintiffs/Applicants filed this suit against the Defendants. Further that on **19th April 2010**, a **Consent Order** for maintenance of *status quo* was recorded in court and further the 2nd Plaintiff was ordered to pay **Kshs.181,500/=** monthly rent pending the hearing and determination of the suit.

That on **18th June 2015**, the Respondents instructed **Ms Muhatia Pala Auctioneers** who through its proprietor, **Nathan Pala** appeared before the **Chief Magistrate's Court** at **Milimani** and obtained Orders through misrepresentation and concealment of material facts and fraud. He also averred that the said orders were obtained *ex parte* and the said actions by the auctioneers, were in total violation and disregard of the Order of the Court issued on **19th April, 2010**. It was his contention that the Defendants actions and those of their agents, the auctioneers are an affront to the dignity, power and authority of the court and should not be allowed to stay. He urged the Court to allow his application.

The said application is contested and again **Jigisha P. Jani** swore a Replying Affidavit on **15th December 2015**, and averred that this application is defective and gross abuse of the process of the court as it seeks similar orders that were sought in a **Notice of Motion** dated **17th August 2015**, filed at the **Chief Magistrate's Court** at **Milimani Commercial Court** being **Miscellaneous Application no.495 of 2015**. Therefore this application is barred under Section 6 of the Civil Procedure Act.

She further averred that the Plaintiffs have failed to refer the Court to the subsequent Order of the Court given on **14th December 2011**, to the effect that in default, distress for rent to be levied. She also averred that **Ms Muhatia Pala Auctioneers** conducted the attachment and distress of the property on **6th July 2015**, duly and properly and in accordance with the law. The deponent urged the Court to dismiss the said Notice of Motion.

The Court directed that the **three Notices of Motion** be canvassed together by way of Written Submissions. In compliance of the above directives, the parties herein filed their respective written submissions on diverse dates.

The Court has perused the Court file and has seen the Written Submissions by the 1st Plaintiff herein, filed on **28th April 2016**. The 1st Plaintiff submitted only on the Notice of Motion dated **13th July 2015**. It was submitted that the Plaintiffs herein leased the suit premises vide a **Lease Agreement** dated **12th February 2005**, but the said Lease Agreement was **Novated** by the **Sale Agreement** dated **26th June 2005**, which sale was to be completed on **26th September 2008**. The 1st Plaintiff further submitted that before the completion date, the Defendants refused and/or frustrated the sale and hence the claim for specific performance in the Plaint herein. It was also submitted that by the time the sale was due to be completed, the Plaintiffs had spent a considerable amount of money on renovations and improvements thereon with the belief that they were going to be the proprietors of the suit property on the completion of the sale transaction. Further it was submitted that the Defendants herein both by words and conduct led the Plaintiffs to believe that the proprietorship of the suit property was to pass to the Plaintiffs upon completion of the sale transaction and therefore the Plaintiffs are protected by **proprietary estoppel**.

Further that the Plaintiffs have incurred considerable expenditure with the knowledge and acquiescence of the Defendants and they acquired property through the doctrine of **equitable estoppel**. The 1st Plaintiff relied on the case of **White Head ..Vs.. White Head**, where the Common law frowned upon a party who had encouraged another to expend funds on a property in the expectation that a property is to be transferred to them and therefore such a party was estopped from going back on their representations.

The 1st Plaintiff further submitted that the Consent Order of **19th April 2010**, was very clear, unequivocal and unambiguous reserving all matters regarding rent arrears until the hearing and determination of the suit. Therefore the Defendants' action through **M/S Muhatia Pala Auctioneers**, of filing an application

in the Subordinate Court on **18th June 2015**, was a blatant Contempt of the Court Order dated **19th April 2010**. It was further submitted that the **breaking in Orders** obtained vide the application filed on **18th June 2015**, were obtained fraudulently and through misrepresentation with an aim of evicting the Plaintiffs herein. It was therefore submitted that the Defendants were in Contempt of Court.

The 1st Plaintiff on this aspect relied on various decided cases. The 1st Applicant relied on the case of **Basil Criticos ..Vs.. Attorney General & 8 Others (2012) eKLR**, where the Court relied on the case of **Hadkinson ..Vs ..Hadkinson (1952)** and held that:-

“It is the plain and unqualified obligation of every person against or in respect of whom an order is made by a court of competent jurisdiction to obey it unless and until that order is discharged”.

The 1st Application also relied on the case of **Teachers Service Commission ..Vs.. Kenya National Union of Teachers & 2 Others (2013) eKLR**, where the Court held that lack of personal knowledge and existence of an order supersedes personal service”. The 1st Plaintiff/Applicant urged the Court to allow the Plaintiffs application date **13th July 2015**.

Further the 2nd Plaintiff filed his written Submissions on **11th May 2016**, and further Supplementary Submissions on **13th September 2016**. He submitted that though he had entered a lease agreement dated **12th February 2008**, with the Defendants, the said lease was **extinguished** and **novated** by a sale agreement dated **26th June 2008**, which was willingly and voluntarily entered into by both parties herein. He relied on various decided cases, such as **Commercial Bank Ltd Vs Kukopesha Ltd 2008 (eKLR)** where the Court quoted in approval the definition and meaning of **Novation** as provided in **Halsburys Laws of England, 4th Edition Volume 9(1)** to mean:

“Novation has been judicially defined as being where there is a contract in existence and some new contract is substituted for it, either between the same parties or different parties, the consideration usually being the discharge of the old contract.....”

He also relied on the case of **Edokpolo Osamwonyi ..Vs ..John Patrick Machira & Another (2009) eKLR**, where the Court held that:

“it is trite law that a Court order is as binding to all parties as a Judgement or order pronounced by the court”

Further, he relied on the case of **Flora N. Wasike....Vs....Destimo Wamboko (1982-88) KLR 635**, where the Court of Appeal held that:

“It is now settled law that a consent judgement or order has a contractual effect and can only be set aside on grounds which would justify setting aside or if certain conditions remain to be fulfilled which are not carried out”

On the issue of Contempt, the 2nd Plaintiff relied on various cases among them the case of **Mutitika ..vs.. Baharani Farm Ltd, Civil Appeal No 24 of 1985**, where the Court of Appeal held that:

“A person who knowing of an injunction or an order of Stay, willfully does something or causes others to do something to break the injunction or interfere with the Stay, is liable to be committed for contempt of Court as such a person has by his conduct obstructed justice”.

It was his Submissions that the Defendants knowingly caused their agent and/or hired goons to drive out the 2nd Plaintiff from the suit premises and thus interfere with the *status quo* orders of **19th April 2010**.

On the doctrine of *lis-pendens* he relied also on various cases among them the case of **Olympic Company ..**

Trading Ltd & Another..vs..Said Mohammed & 4 Others (2014) eKLR where the Court quoted in approval the case of *Fredrick Joses Kinyua & Another ..Vs.. G N Baird, Nairobi HCCC No. 4819 of 1989* where the court held that:

“The doctrine of lis-pendens intends to prevent not only the Defendant from transferring the suit property when the litigation is pending but it is equally binding on those who derive their title through the Defendant whether they had or had no notice of pending proceedings”.

It was therefore submitted that since the case herein concerns property dispute wherein the rights and ownership of the subject property are in serious contention, then the Court should invoke the doctrine of *lis-pendens* .

The Defendants also filed their written submissions in respect of the **three Notices of Motion** applications. In respect of the Notice of Motion dated **6th August 2014**, the Defendants submitted that it was erroneously brought under Order 22 Rules 51 and 52 of the Civil Procedure Rules and therefore the said application is defective. Further that the prayers sought are sought pending the hearing and determination of the application. Therefore once the Court delivers the ruling, the prayers will be spent. The Defendants also submitted that they were allowed by the Court vide Court Order of **14th December 2011**, to levy distress against the Plaintiffs should the Plaintiffs fail to pay rent of **Kshs.181,500/=** per month. The Defendants therefore submitted that with the Court Order of **14th December 2011**, which authorized the Defendants to levy distress, they could certainly not be in Contempt of Court. Further that the Order of **19th April 2010**, did not restrain the Defendants from levying distress against the Plaintiffs.

The Defendants further submitted that though the Plaintiffs sought to vary the Consent Order of **19th April 2010**, by seeking to have the monthly rent of **Kshs.181,500/=** paid in court instead of the Defendants, it is trite law that **Consent Orders** may only be varied by consent of all the parties. Defendants urged the Court to dismiss the Notice of Motion dated **6th August 2014**, with costs to the Defendants.

In respect of the Notice of Motion dated **13th July 2015**, the Defendants reiterated that the Court Order of **14th December 2011**, allowed the Defendants to levy distress for rent against the Plaintiffs should they fail to pay the rent as directed by the Court. It was therefore submitted that the Court had specifically ordered the Defendants to levy distress in the event the Plaintiffs failed to pay rent as ordered.

Further that the Defendants were within their rights to levy distress against the Plaintiffs and no injunction restraining them should be granted. It was their further submissions that granting the injunction as sought by the Plaintiffs would effectively insulate them (Plaintiffs) for their breach of the Court Order directing them to pay rent. It was also submitted that the Orders sought herein are similar to the prayers sought in **Notice of Motion** dated **6th August 20**, which is still pending. This is contrary to the provisions of Section 6 of the Civil Procedure Act which provides that:

“No court shall proceed with the trial of any suit or proceedings in which the matter in issue is also directly and substantially in issue in a previously instituted suit or proceeding between the same parties...”

It was therefore submitted that this application is a gross abuse of the court process for being a duplicate of the Plaintiffs application dated **6th August 2014**, and should be struck out with costs.

In respect of **Notice of Motion** dated **14 August 2015**, it was submitted that this application is also a gross abuse of the court process as it seeks orders which are identical or similar to those obtained by the Plaintiffs in **CMCC Misc.Appl. No.495 of 2015**. It was submitted that the **2nd Plaintiff** herein is the **Applicant** in the said Misc. Application in the Chief Magistrate’s Court. Therefore the Plaintiffs have already obtained the same orders that they are seeking in this application. It was further submitted that the instant application is contrary to Section 6 of the Civil Procedure Act. Further the court had on **14th**

December 2011, allowed the Defendants to levy distress in case the Plaintiffs defaulted in payment of rent. It was also submitted that by the time of levying distress, the sum of **Kshs.3,168,850/=** was due and owing to the Plaintiffs in rent arrears. The Defendants further submitted that this application dated **14th August 2015**, is without merit and should be dismissed with costs.

This Court has now carefully considered the **three Notices of Motion** applications and the annexures thereto. The Court has also considered the Pleadings in general, the written submissions, the cited authorities and the relevant provisions of law and the court renders itself as follows:

There is no doubt that the Plaintiffs herein filed this suit against the Defendants **on 13th January 2009**, seeking for various orders. Among the orders sought are orders of injunction to restrain the Defendants from carrying certain actions against the Plaintiffs such as distressing for rent and/or evict them from the suit property which is **LR. No.7471/269** owned by the Defendants herein. The Plaintiffs have also sought for a declaration that the Sale Agreement executed between the parties on the **26th June 2008**, is binding upon the parties and that an order be issued compelling the 2nd Defendant to execute the said Sale agreement to enable due performance and completion.

Simultaneous to this Plaintiffs also filed Notice of Motion application dated **12th January 2009**, and sought for various temporary orders against the Defendants. It is evident that the said application for injunction was vehemently opposed by the Defendants. What is also not in doubt is that the suit property is owned by the Defendants and the 2nd Plaintiff herein is a tenant in the said suit premises vide a Lease Agreement dated **12th February 2008**, between the parties herein. There is also no doubt that the Defendants had offered to sell the suit premises to the Plaintiffs at the cost of **Kshs.45 million** under a Letter of Offer to the Plaintiffs written by 1st Defendant on **13th February 2008**. The Plaintiffs have alleged that after accepting the said Letter of Offer, that altered or novated the Lease Agreement. However, it is evident that the said issue is contested and that is a matter to be determined after calling of witnesses in the full trial. There is also no doubt that vide the Lease Agreement dated **12th February 2008**, the Plaintiffs were supposed to pay a monthly rent of **Kshs.150,000/=** to the Defendants.

There is also no doubt that after the signing of the Lease Agreement, and the offer by the 1st Defendant and acceptance by the Plaintiffs, the 2nd Plaintiff took possession of the suit property and has been living therein with his family. There is no doubt that there are various correspondences between the 2nd Plaintiff and the 1st Defendant over the state of repairs of the suit property.

It is also evident that on **19th April 2010**, the parties herein did record a Consent before **Sitati J.** and a Consent Order was drawn to the effect that:-

- 1. That all the pending applications be withdrawn and further.**
- 2. That status quo be maintained with the Plaintiffs paying monthly rental of Kshs.181,500/= by the 15th day of every month until the hearing and determination of this suit or until further orders of the court.**
- 3. That any other disputed arrears be canvassed at the full hearing.**
- 4. That a hearing date for the main suit was to be granted on priority basis.**
- 5. That parties be at liberty to apply.**

It is also evident that as at **14th February 2011**, the parties were still haggling over the issue of rent payment and compliance with Order 11. From the court record, it is clear that the court directed that the Plaintiffs should continue to pay the monthly rent of **Kshs.181,500/=** and in default, the Defendants to levy distress. Further the court observed that the Plaintiffs had not complied with discoveries and they

were allowed **30 days** to comply with Order 11 of the Civil Procedure Rules.

From the available evidence, it is not in doubt that Defendants did levy distress against the Plaintiffs herein on **18th June 2015**, through **M/s Muhatia Pala Auctioneers** after obtaining breaking in orders from the subordinate court. It is also evident that the Plaintiffs herein filed a **Misc. Appl. No.495 of 2015** at the Subordinate Court and obtained orders against **M/s Muhatia Pala Auctioneers** to return the distrained goods to the suit premises **LR. No.7741/249 Kitsuru**. It is against the above background that the Plaintiffs herein have filed the instant Notices of Motion applications.

The three applications are vehemently opposed by the Defendants/Respondents. The question for determination here is whether the Plaintiffs/applicants three Notices of Motion, are merited or not.

The Notices of Motion dated **6th August 2014** and **13th July 2015**, are all seeking similar orders. I will determine them together. It is instructive to note that while highlighting the written submissions, the 1st Plaintiff relied wholly on the written submissions which are dated **28th April 2016**. The 2nd Plaintiff only concentrated on the Notice of Motion dated **6th August 2014**. It was not clear whether he had abandoned the other two applications. However this court will determine the said three applications in this ruling.

The Court will first deal with the issue of whether the Notice of Motion dated **6th August 2014**, is defective and/or gross abuse of the Court process for having been brought under the wrong section of law as submitted by the Defendants. Indeed this application is deemed to have been brought under Order **22 Rules 51 and 52 of the Civil Procedure Rules** which deals with objections to attachment conducted in execution of decree. However, the 2nd Plaintiff in his Submissions invoked the provisions of Section **100 of the Civil Procedure Act** and Order **51** of the Civil Procedure Rules to cure the defect. Indeed Order **51 Rule 10(2)** provides that:

“No application shall be defeated on a technicality or for want of form that does not affect the substance of the application”.

Further the court is bound by the provisions of **Article 159(2)(d)** of the Constitution which provides that:

“In exercise of Judicial authority, the Court----- shall be guided by the following Principles---

(d) Justice shall be administered without due regard to procedural technicalities”

On its part, Section 100 of the Civil Procedure Act provides:-

“The Court may at any time and on such terms as to costs or otherwise as it may think fit, amend any defect or error in any proceeding in a suit; and all necessary amendments shall be made for the purpose of determining the real question on issue raised by or depending on the proceeding”

This Court therefore finds that failure to invoke the correct provisions of the Civil Procedure Rules has not affected the substance of this application and therefore the Court declines to find and hold that this application is defective for stating the wrong Sections of law.

On the Substance of the Notice of Motion dated **6th August 2014** and **13th July 2015**, the Court finds that the two applications are basically seeking the same kind of prayers to restrain the Defendants from interfering with the Plaintiffs possession and occupation of the suit property **LR 7741/267**. Further an Order be issued restraining the Defendants from levying distress for rent or evicting the Plaintiff for the suit premise. That the Defendants be found in contempt of the Court Order issued on **19th April 2010**.

Indeed the Defendants submitted that the Plaintiffs are barred by the provisions of **Section 6** of the Civil Procedure Act from filing an application which is similar to a matter pending in Court over the same issue. This Court has considered the provisions of Section 6 of the Civil Procedure Act which provides

that:

“No Court shall proceed with the trial of any suit or proceeding in which the matter in issue is also directly and substantially in issue in a previously instituted suit or proceeding between the same parties or between parties under whom they or any of them claim, litigating under the same time, where such suit or proceeding is pending in the same or any other Court”.

It is evident that the Notice of Motion dated **13th July 2015**, is seeking the same prayers as the prayers sought in the Notice of Motion dated **6th August 2014**. Therefore as provided by **Section 6** of the Civil Procedure Act, this Court will have no option but direct that the Notice of Motion dated **13th July 2015** be stayed as issues raised therein will be determined in the Notice of Motion dated **6th August 2014**.

This Court will now deal with each of the prayers sought in the Notice of Motion dated **6th August 2014** and make a determination thereof. From the 2nd Plaintiff's Written Submissions, it is clear that he has indicated that prayers numbers **(a) to (d)** of the said application are spent. Therefore the Court will not make any determination on the spent prayers.

Further, it is evident that the Defendants herein did withdraw the Notice of Motion dated **12th June 2014** vide a **Notice of withdrawal** dated **15th December 2015** and filed in court on **16th December 2015**. That being the Case, prayer **No.(f)** of the instant Notice of Motion is also spent.

Accordingly, this Court is now left with two prayers for determination being prayer No **(e)** for contempt and **(g)** for variation of the Consent Order.

The Plaintiffs applicant have urged the Court to find that the Defendants are in Contempt of Court for defying the Consent Order entered on **19th April 2010** and they should be punished for the said contempt. The Defendants have vehemently denied that they are in contempt of Court and have submitted that it is in fact the 2nd Plaintiff who is in Contempt of Court for failing to comply with the said Consent Order as he has not been paying the monthly rent as directed by the Court.

As was rightly submitted by the 2nd Plaintiff herein, contempt of Court is defined by Black Law Dictionary as:

“Conduct that defies the authority or dignity of a Court. Because such conduct interferes with the administration of justice, it is punishable usually by fine or imprisonment.”

Indeed Courts do frown on cases of Contempt of Court because such actions do undermine the authority and dignity of the Court. In the case of **Johnson Vs Grant 1923 Sc 789 at 790, Lord President Clyde** stated that:

“--- the law does not exist to protect the personal dignity of the Judiciary nor the private right of parties or litigants. It is not the dignity of the Court which is offended. It is the fundamental Supremacy of the law which is challenged”.

Further in the case of **Teachers Services Commission Vs Kenya National Union of teachers and 2 others (2013) eKLR**, the Court held that:

“A Court order is not a mere suggestion or an opinion or a point of view. It is a directive that is issued after much thought and with circumspection. It must therefore be complied with and it is in the interest of every person that this remains the case. To see it in any other way is to open the door to chaos and anarchy----”

From the above findings of the Court, it is evident that Courts do not take it lightly when a party fails to comply with a Court Order or is in contempt of the same. Since the Plaintiffs have alleged that the Defendants are in contempt of Court Order dated **19th April 2010**, and should be cited for such contempt,

this court will analyze the available evidence to determine whether indeed the Defendants are in such contempt and whether they should be cited for contempt.

The Court has considered the **Consent** entered by the parties on **19th April 2010**, and noted that there were 7 issues consented upon. The 2nd Plaintiff has alleged that the Defendants have defied the said Consent Order by instructing auctioneers to levy distress against the 2nd Plaintiffs wherein the Court Ordered that: **“Any other disputed arrears be canvassed at the full hearing”**

Further the Court has noted that the parties were to close their pleadings within 60 days of the date of the said **Consent Order**. It was also consented and recorded as the Order of the Court that: **“Parties be at liberty to apply”**.

The Plaintiffs alleged that they complied with the Court Order by paying monthly rent of **Kshs. 181,500/=** but the Defendants still instructed their agents **Ms Leakey’s Auctioneers** to levy distress and attach the 2nd Plaintiffs goods.

However, the Defendants stated that the Plaintiffs failed to fulfill their obligations of paying monthly rent and as directed by the Court on **14th December 2011**, and therefore the Defendants chose to levy distress against the 2nd Plaintiff who had failed to pay rent and was in rent arrears of **Kshs. 1,508,850/=**.

Indeed the court has perused the Court record and confirmed that on **14th December 2011**, the Court had directed that the Plaintiffs shall continue to pay the monthly rent of **Kshs. 181,500/=** and in default, the Defendants to levy distress. The Defendants have submitted that the 2nd Plaintiff did fail to pay the said monthly rent and that was the reason why they levied distress. Having found that the court had directed that the Defendants may levy distress in the event the 2nd Plaintiff failed to pay the monthly rent, of **Kshs, 181,500/=** then the Defendants were within the confines of the Court Order of **14th December 2011** when they authorized **Ms Leakey Auctioneers** to levy distress against the 2nd Plaintiff herein.

This Court has also noted that **Order 7** of the said **Consent Order** was to the effect that each party was at liberty to apply. The Defendants have submitted that after they realized that the Plaintiffs were in default of payment of monthly rent as ordered by the Court, they chose to apply by authorizing **Ms Leakey Auctioneers** to levy distress. Further that levying distress is not equivalent to evicting the Plaintiffs herein.

For a party to be cited for contempt, there must be evidence of non-compliance with the Court Order. There is no evidence tendered by the Plaintiffs herein to confirm or show that the Defendants did fail to comply with the **Consent Order** of **19th April 2010**. This Court after analyzing the available evidence and the Court records arrives at a conclusion that it is not evident that the Defendants herein are in Contempt of the **Consent Order** dated **19th April 2010**. Consequently, the Court declines to allow prayer **No (e)** of the instant **Notice of Motion**.

In regard to prayer **No.(g)** that the monthly instalment of Kshs 181,500/= as ordered in the **Consent Order** recorded on the **19th April 2010**, be paid in Court, the Defendants have vehemently opposed the said prayer. The Defendants submitted that it is trite law that **Consent Orders** may only be varied by consent of all the parties. Indeed the Defendants herein have not consented to the variations of the Consent Order of **19th April 2010**. The Court also finds that the 2nd Plaintiff has not laid any basis for variation of the said consent order. The Court will rely on the case of **Al Jalal Enterprises Vs NIC Bank Ltd & Another (2010) eKLR** where the Court held that:

“The mode of paying the debt then is part of the consent judgment. That being so, the Court cannot interfere with it except in such circumstances as would afford good ground for varying or rescinding a contract between the parties. No such ground is alleged here”.

Having now carefully analyzed the available evidence, the Court finds that no good reason was given by the Plaintiffs herein to warrant this Court to vary the Consent Order of **19th April 2010**, by directing that

the Plaintiffs do pay the monthly Instalments in Court instead of paying directly to the Defendant.

On the issue of novation of the lease agreement, the Court finds that is an issue to be determined by the trial Court after calling evidence at the full trial.

Further on the doctrine of *Lispensens* the Court finds it not applicable at this juncture since there is no evidence that the Defendants have intentions of disposing off or alienating the suit property. The bone of contention is levying of distress and therefore this Court is of humble opinion that *lispensens* is not applicable herein. In the circumstances, the Court finds prayer No. (g) of the instant Notice of Motion is not merited and the Court declines to allow the same.

The next application for determination is the one dated **14th August 2015**. It is instructive to note that the Plaintiffs herein did not submit on the merit of the same. However the Defendants submitted that this application is an abuse of the Court process since the Plaintiffs had filed a similar application in the subordinate Court Misc Application **No. 495 of 2015** and obtained similar orders as the ones being sought herein. The Plaintiffs herein do not dispute or oppose the said submissions by the Defendants. If Indeed the Plaintiffs have obtained similar orders vide Misc. Application **No. 495 of 2010**, then the court finds that the Plaintiffs are barred by the provisions of **Section 6** of the Civil Procedure Act from seeking for similar orders in this matter. The breaking in Orders were obtained vide an application filed at the subordinate Court. It is alleged that the Plaintiffs have obtained favourable orders vide Orders in Misc. Application **No. 495 of 2015**. If there are other issues related to levying of distress, the Plaintiffs herein should make a follow up in the said Misc.

Application **No.495 of 2015** at the Chief Magistrates Court. Having analyzed the Notice of Motion dated **14th August 2015**, the Court finds it an abuse of the Court Process and consequently finds it not merited and accordingly the Court dismisses the said Notice of Motion dated **14th August 2015** with costs to the Defendants/Respondents.

Having now carefully considered the **three Notices of Motion** applications filed by the Plaintiffs/Applicants the Court finds as follows:

i. The Court finds that the Notice of Motion dated 6th August 2014, is not merited and the same is dismissed entirely with costs to the Defendants/Respondents.

ii. Further the Court found the Notice of Motion dated 13th July 2015, was seeking similar Orders or prayer as the ones sought in Notice of Motion dated 6th August 2014. Accordingly the Notice of Motion dated 13th July 2013 was stayed as provided by section 6 of the Civil Procedure Act.

iii. On the Notice of Motion dated 14th August 2015, the Court finds it not merited and similarly, the said Notice of Motion application is dismissed entirely with costs to the Defendants/Respondents.

It is so ordered.

Dated, signed and delivered at Nairobi this 23rd June 2017

L. GACHECRU

JUDGE

In the presence of

Hon Gacheru Judge

Court Clerk - Hilda

1st Plaintiff/Applicant – No appearance though served with Notice

2nd Plaintiff/Applicant – No appearance

Defendants/Respondents – Mr. Sarvia

L. GACHECRU

JUDGE

23/6/2017

Court – Ruling read in open court in the presence of Mr. Sarvia for the Defendants and absence of the Plaintiffs though 1st Plaintiff's advocate was served and 2nd Plaintiff who acts in person could not be traced as per the Ruling Notice filed in court.

L. GACHECRU

JUDGE

23/6/2017

Mr. Sarvia – May the matter be given a priority hearing date at the Registry.

Court – Matter to be set down for hearing on priority basis.

L. GACHECRU

JUDGE

23/6/2017