



**REPUBLIC OF KENYA**  
**IN THE ENVIRONMENT AND LAND COURT OF KENYA**  
**AT MOMBASA**  
**ELC CASE NO.108 OF 2017**

**1. GITONGA DANIEL MBAABU**

(Suing as the Administrator of the Estate of JuliusMbaabu).....**PLAINTIFF**

**VERSUS**

**1. WAMBUI WAINANA**

**2. EVANS MAABIT/A MURPHY MERCHANTS**

**AUCTIONEERS.....DEFENDANTS**

**RULING**

1. The applicant/plaintiff moved this court vide his application dated 30<sup>th</sup> March 2017 and brought under the provision of Section 1A, 1B, and 3A of the Civil Procedure Act and Order 40 and 50 of the Rules. In the application the following orders are sought:

1. **THAT** the matter herein be certified as urgent, service be dispensed with and the same be heard *ex parte* at the first instance.

2. **THAT** pending the hearing inter-parties of this application o prohibitory order be issued restraining the Defendants by themselves, their agents and/or servants from in any way whatsoever and howsoever dealing, and/or transacting relating to **BLOCK MOMBASSA XVI/154.**

3. **THAT** pending the hearing and determination of this suit, a prohibitory order be issued restrainingtheDefendants by themselves, their agents and/or servants from in any way whatsoever and howsoever dealing, and /or letting and/or parting with possession or in any further dealings/transactions relating to **BLOCK MOMBASSA XVI/154.**

4. **THAT** Pending the hearing of this application interparties, a temporary mandatory injunction do issue compelling the 1<sup>st</sup> Defendant to reinstate the Plaintiff’s tenancy on the tenancy premises **BLOCK MOMBASSA XVI/154** on the same terms as before the unlawful and illegal eviction carried out on the 27<sup>th</sup> March 2017.

5. **THAT**pending the hearing and determination of this suit, a mandatory injunction be issued compelling the 1<sup>st</sup> defendant to reinstate the plaintiff tenancy on the tenancy premises **block Mombasa XVI /154**

**6. THAT pending the hearing of this application interparties, a mandatory injunction be issued compelling the 2<sup>nd</sup> Defendant to return the Plaintiff's goods to the suit premises.**

**7. THAT costs of this application be provided.**

2. The application is supported by the grounds on the face of it inter alia that the defendant has proceeded to unlawfully evict the Plaintiff from the suit premises while using a break-in order to open and levy distress for rent. Secondly that the 2<sup>nd</sup> Respondent does not have a licence to operate for 2017. Further ground is that the death of the Plaintiff does not presume his tenancy ceased to exist.

3. The application is also supported by the affidavit of Gitonga Daniel Mbaabu sworn in support of the application. He reiterated the contents of his plaint stating that by law he is deemed to be a tenant of the suit premises as was his late father. Mr. Gitonga deposed that the 1<sup>st</sup> defendant issued a termination notice on 20<sup>th</sup> December 2013 which was not contested by the plaintiff in BPRTC Case No.4 of 2014 and which is still pending in appeal. This case was determined on 9<sup>th</sup> September 2016 and the plaintiff being unhappy with the decision filed an appeal in ELCA no.22 Of 2016 from which appeal he obtained an order of stay.

4. Mr. Gitonga deposed further that fearing being evicted by the 1<sup>st</sup> defendant; his father-deceased again filed BPRT case on 50 of 2016 seeking prohibitory orders and which case is still pending. That while these matters were pending the defendants filed an application seeking to distress for rents vide Misc App No.79 of 2017 where break-in orders were granted. On learning of this, the applicant also proceeded to obtain orders of stay of execution. Meanwhile in spite of being served, the defendants proceed to levy distress for non-existent rent arrears carrying away the plaintiff's goods and in the process locked up the premises. That this action has resulted to an unlawful eviction and direct loss of about Kshs.5,577,000. That this court has inherent powers to issue orders in favour of the plaintiff so as to maintain its dignity and preserve the rule of law as the actions of the defendants were null and void abinitio.

5. The application is opposed by the defendants by the replying affidavits of Evans Mwangi Maabi and Wambui Wainaina. Mr. Mwangi deposed that he levied distress as per the instruction given to him by the 1<sup>st</sup> defendant. He says that he conducted the distress in accordance with the Auctioneers Act and did not disobey any order as alleged. Mr. Mwangi deposed that under their licensing rules, once an application for renewal of a licence is made to the board, then he is authorized to carry on his activities. He deposed that he has incurred losses as his fee has not been fully settled from the sale of the distressed goods. He urged the court to dismiss this application.

6. The 1<sup>st</sup> defendant admits that Julius Mbaabu Mwiti-deceased was his former tenant. That the plaintiff herein has not come to court with clean hands for failing to inform the court that the former tenant had illegally and unlawfully sublet the premises to third parties who were commercial sex workers. That this illegal subletting was a source of shame to herself and her other tenants running legitimate business. She deposed that she lodged a complaint with Makupa Police Station. Ms. Wambui deposed that the existing cases show the deceased an accomplished vexatious litigant.

7. The 1<sup>st</sup> defendant deposes that the applicant is a stranger to her since a tenancy cannot be "deemed" but it is a written contractual relationship. Further that if the applicant has any complaints, the same should be handled within the existing cases. That when the auctioneers got re-enforcement, the sex workers ran away leaving the premises exposed to misuse by street urchins and therefore she secured the premises. She denied the loss attributed to the levying of distress. She also denied receiving any rents for February and March 2017. That she used the premises to borrow a loan and is therefore entitled the benefit from her investment. She urged the court to dismiss the application as the same is misconceived and unsubstantiated.

8. The parties advocates thereafter made oral submissions. Mr. Omwenga submitted that the defendants did not have a right to levy distress hence they ought not to have filed the application. Secondly that the 2<sup>nd</sup> respondent is not licensed to practice in 2017 as he never attached his licence before lower court. He

contends that the defendants did illegal things as the stay order was served on Mr. Mwaniki advocate on 24<sup>th</sup> March 2017. Further that once a reference is filed under Section 6 of Cap 301 then it is an automatic stay. That the break-in order should not have been used to evict the plaintiff. That this court has powers to issue orders of reinstatement. The counsel relied on the following cases which discussed the effect of a null and void order:

**1. MACTOY VS UNITED AFRICA CO LTD (1963)3 ALL ER 119**

**2. OFFICIAL RECEIVER AND PROVISIONAL LIQUIDATOR NYAYO BUS CORPORATION VS FIRESTONE EA LTD COURT OF APPEAL NO172 OF 1998**

9. Mr. Mwaniki advocate stated that they relied on their pleadings filed. He submitted that this court lacks jurisdiction for the reason of the other pending matters. That the applicant has not complied with the court order directing him to have his appeal heard within 120 days. Further that this suit is subjudice and that there was no stay of attachment of the proclaimed goods. That the BPRT also has powers to punish and reinstate a tenant who is unlawfully evicted. Mr. Mwaniki also submitted that no tenancy agreement was annexed and no communication was shown from the auctioneers licensing board that the 2<sup>nd</sup> respondent did not have a valid license for 2017. Lastly that the 1<sup>st</sup> respondent took over the premises after it was left unoccupied. That the applicant did not apply for stay of sale even after seeing the advertisement therefore application has been overtaken by event.

10. Taking the pleadings and submissions rendered, the question I seek to answer is whether the orders of mandatory injunction sought can be granted at this interlocutory stage. The applicant has submitted the same should be granted because the whole exercise undertaken by the defendants were illegal, null and void. It is not in dispute that the 1<sup>st</sup> respondent has taken over possession of the suit premises as gleaned from the pleadings. The possession was taken apparently after the 1<sup>st</sup> respondent carried out the distress for rent said to be in arrears. The applicant in his affidavit annexed letters enclosing bankers' cheques for payments of rents of February and March respectively.

11. Mr. Mwaniki submitted that rent was to be paid upfront and not in arrears. None of the parties annexed a tenancy agreement to indicate due date when rent was payable. Going by the facts and submissions presented by both sides, it is not possible for this court to determine at this stage whether rent was in arrears or not without further substantiation and or evidence. I say so because there would be need for instance to be told when rent was due, who was being paid rent and mode of payment. The issue at hand is to evaluate without going into the merits of the case the manner in which the plaintiff lost possession of the suit premises and if illegal whether the orders sought ought to be granted. It is alleged that a proclamation notice was served on John Mbaabu who happens to have died on 24<sup>th</sup> February 2017. Mr. Mwaniki however stated that the deceased name is merely indicated as a debtor and not the person served. The applicant went further to state that they obtained a stay order in Misc case No.79 of 2017 and served the Respondents' counsel on record on 24<sup>th</sup> March 2017.

12. The applicant submitted that the Respondents did not use the break-in order but used the distress process to unlawfully evict them. From the record and as is submitted by the Respondents, there was no court order barring them from distressing for rent. Whether the distress was illegal is a question to be answered once proof is made that no rent was due. I am proceeding on the premise that the order of stay in Misc Civil Application No.79 of 2017 stayed the break-in process not the levying of distress itself. The applicant submitted that the referenced filed vide BPRT No.50 of 2016 did operate as a stay therefore the Respondents could not levy distress for rent. I have looked at the reference but it is worded to prohibit eviction. In any event the appropriate court to interpret whether the reference acted as a stay should be the Tribunal that issued the order. It is that court that is empowered to punish for contempt if at all and probably then make an order ante of the execution process.

13. In his pleadings, the applicant explained the actions of the Respondents were unlawful based on the existing cases which he specified in paragraph 4-8 and proceeded to annex the pleadings from these cases and submitted on the nullity of the orders issued. The applicant pleaded that the 1<sup>st</sup> defendant did not

execute the orders of 22<sup>nd</sup> March 2017 but instead proceed to destroy the plaintiff's goods, remove the goods without taking inventory and close the suit premises by welding the main entrance with a permanent metal door which amounts to eviction without lawful court order. The defendants on their part said the suit premises were left vacant after the commercial sex workers ran away under mistaken belief that the 1<sup>st</sup> defendant was a police officer on 1<sup>st</sup> March 2017. The 1<sup>st</sup> defendant said he proceeded to finalize the execution process on 27<sup>th</sup> March 2017 for the rent arrears.

14. The applicant does not in his affidavit in support of the application explain to the court who was in charge of the premises on the 27<sup>th</sup> March when the 1<sup>st</sup> Respondent carted away their goods. Could the Respondents' explanation that the premises was left unattended be true after the "commercial sex workers" took off in fear? It is now well settled in case law that for orders of mandatory injunction to be granted the circumstances of each case must be clear. This was the position taken in **BELLE MANSION LTD VS YAYATOWERS LTD CASE NO. 225 OF 1992** where the court stated that it offends public policy to flagrantly disobey the law. The evidence before the court in that case was that the applicant was evicted in total disregard of the clear provisions of the law. In the present case there was distress for rent carried out and goods said to have been sold because there was no stay order. The 2<sup>nd</sup> Respondent has deposed that she only locked up the premises to secure it after it was left abandoned. I am therefore not satisfied that by the applicant's averment that eviction took place. He is at liberty to challenge the levying of the distress process to its logical conclusion.

15. The burden of showing the 2<sup>nd</sup> Respondent was not authorized to carry business was upon the applicant. It is trite law that he who alleges a fact must prove as laid out in Section 107-109 of the Evidence Act Cap 180. The applicant did not annex any documentary evidence from the Auctioneers' Licensing board to state that the 2<sup>nd</sup> Respondent was not authorized to conduct the distress. Again, these are issues he can deal with during the main trial of this case. In light of my observations above, the only prayers I can grant at this stage are prayers nos. 3 and 5 of the motion. I also make an order that each party to bear their respective costs.

**Dated and signed this 13<sup>th</sup> day of June 2017**

**A. OMOLLO**

**JUDGE**

**Delivered at Mombasa this 14<sup>th</sup> June Day of June 2017 by**

**C. YANO**

**JUDGE**