



REPUBLIC OF KENYA
IN THE ENVIRONMENT AND LAND COURT AT MOMBASA

ELC CASE NO 223 OF 2016

WAIS CAPITAL LIMITED.....PLAINTIIF

VERSUS

DHADHO GADDAE GODHANA.....DEFENDANT

RULING

1. The Application under consideration is the Notice of Motion dated 2nd March 2017 brought under the provisions of Sections 1A, 1B, 3A and 63 (e) of the Civil Procedure Act and Order 40 Rule 1 (a) and (4) and Order 51 Rule 1 of the Civil Procedure Rules in which the Defendant/applicant seeks the following orders:

- 1. That this matter be certified as urgent and service be dispensed with in the first instance.**
- 2. That this Honourable Court be pleased to compel the Plaintiff/Respondent and/or his agents to return distressed goods seized from the house in PLOT SUB DIVISION NO.13461 (ORIGINAL NO.13380/82) SECTION 1 MAINLAND NORTH.**
- 3. That specific order be issued to the auctioneers namely Guggu Auctioneers who is an agent of the Plaintiff/Respondent to return goods attached illegally from the said house on 16th February 2017 and the same be returned to the Defendant/Applicant forthwith.**
- 4. That the said orders be executed through the OCS Nyali Police Station.**
- 5. That the costs of the Application be provided for in the cause.**

2. The Application is based on the grounds on the face of the motion and supported by the affidavit of **DHADHO GADDAE GODHANA** sworn on 2nd March 2017 and the Affidavit of Kipkurui Ng'eno Birir sworn on 8th March 2017. Briefly, the Applicant contends that while the dispute over the Suit Premises, PLOT SUB DIVISIONNO.CR.13461 MOMBASA was pending in this Court, the Plaintiff/Respondent went to the subordinate Court in MOMBASA RMCC MISC.APLPLICATION NO.247 OF 2016 and obtained orders to break into the Suit Premises and attached goods on the pretext that the Defendant owes the Plaintiff rent arrears. The applicant depones that there is a contest of ownership of the Suit Premises because the Plaintiff fraudulently acquired it without following the due process. It is the applicant's contention that the Respondent ought to be compelled to return the distressed goods and the status quo be preserved until the matter is heard and determined. The Defendant states that there is pending an Application dated 10th October 2016 in which he seeks to stop the Plaintiff from interfering with his tenancy in HOUSE IN SUBDIVISION NO.13461 (ORIGINAL 13380/82) SECTION I MAINLAND NORTH. It is the Defendants contention that the Plaintiff is doing all he can

to dispossess him from the house and to frustrate the case pending in Court.

3. The Application is opposed by the Plaintiff who filed a Replying Affidavit sworn by James Ndirangu on 3rd April 2017. Briefly, it was deposed on behalf of the Plaintiff that the Plaintiff/Respondent filed this Suit on 16th August 2016 seeking to have the Defendant evicted from the Suit Property. That the Suit Property is registered in the name of the Plaintiff after the Defendant transferred the same to the Plaintiff as collateral for a loan of Kshs.8,260,000.00 advanced by the Plaintiff to the Defendant. According to the Plaintiff the Defendant defaulted in paying the loan and the Plaintiff assumed ownership of the Suit Property and demanded rent, and therefore believed that it had every right to proclaim the Defendant's goods in the said premises. The Plaintiff acknowledges that the Defendant has another Application dated 10th October 2016 for injunction which is pending.

4. Both parties agreed to dispose of the Application by way of Written Submissions but only the Plaintiff/Respondent filed Written Submissions dated 22nd May 2017 in which it reiterated the content of the Replying Affidavit. The Plaintiff further submitted that the manner in which the Suit Property was transferred and acquired by it was lawful and that it was within its right as the owner to levy distress for rent against the Defendant.

5. I have carefully considered the Application herein. It is not disputed that vide a loan agreement dated 16th August 2015, the Plaintiff advanced the Defendant a sum of Kshs.8,260,000.00 which was payable within twelve months and the Defendant transferred his interest in the Suit Property to the Plaintiff as security for the loan. It is also not disputed that the Defendant defaulted in paying the loan and the Plaintiff filed this Suit on 16th August 2016 seeking an order of eviction against the Defendant from the Suit Premises. On his part, the Defendant filed defence and counter-claim, in which he not only denies the Plaintiff's claim but has counter-claimed seeking an order declaring that the transfer of his interest in the Suit Property was illegal and cancellation of the same as well as an order for Permanent Injunction against the Plaintiff. At the time of filing the Statement of Defence and Counter-Claim on 5th September 2016 the Defendant also filed an Application for Temporary Injunction. Both the Plaintiffs' Suit and the Defendant's Application are still pending before this Court.

6. It has come out from the evidence and the submissions herein that on 21st December 2016, the Plaintiff filed **MOMBASA RMC MISCELLANEOUS APPLICATION NO.247 OF 2016** in the matter for distress for rent and obtained an order dated 5th January 2017 allowing auctioneers to break into the Suit Premises and attached the Defendant's goods. It is obvious to this Court that this **MISCELLANEOUS APPLICATION NO.247 OF 2016** was sub judice. The principle of sub judice is defined in Section 6 of the Civil Procedure Act as follows:

“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 title, where such Suit or proceeding is pending in the same or any other Court having jurisdiction in Kenya to grant the relief claimed”

7. This case was filed by the Plaintiff and the same has not been decided. The matter is still pending in Court and is yet to be determined. I hold the view that the Application for distress for rent was sub judice in view of the pendency of this Suit in which substantially the same issues have been raised. The ownership of the Suit Property is under dispute. Having filed this case, the Plaintiff ought to have refrained from filing fresh proceedings in another Court over the same issues.

It is my view that the Plaintiffs conduct in filing the proceedings in the subordinate Court to levy distress during the pendency of this case was clearly an abuse of the process of Court. There is need to have good order in litigation. Any issue touching on the Suit Property, including payment of rent, in my view, ought to have been raised in the Suit instead of filing other proceedings in another Court.

8. Consequently, and upon considering the issues raised herein, I am satisfied that the Notice of Motion

date 2nd March 2017 is merited and the same is allowed as prayed. The Defendant/Applicant shall have costs of the Application.

It is so ordered

Ruling delivered, dated and signed at Mombasa this 26th day of July 2017

C. YANO

JUDGE