



REPUBLIC OF KENYA
IN THE ENVIRONMENT AND LAND COURT OF KENYA

AT NAKURU

ELC NO 35 OF 2013

RNO (suing as guardian ad-litem And next friend to **DOM).....**PLAINTIFF****

VERSUS

MOSES CHOGE CHESIRE.....DEFENDANT****

RULING

1. The application before me is that dated 9 October 2014, filed by the defendant. The application as drawn, seeks the following orders:-

(a) That this application be certified urgent and service be dispensed with in the first instance.

(b) That pending the hearing and determination of this application inter-parties, this Honorable Court be pleased to order the plaintiff and all tenants of the suit property to pay rent to the defendant's account No. 011***-2 as per the consent order dated 6th August 2014.

(c) That this Honourable Court be pleased to dismiss this suit for want of prosecution.

(d) That this Honourable Court be pleased to issue eviction orders against the plaintiff herein at their own cost.

(e) That costs be provided for.

2. The application is based on the grounds inter alia that the defendant is the registered owner of the suit property; that the property is charged to Co-operative Bank Building Society who financed the purchase and the proceeds are expected to pay the loan; that the loan has gone for five months unpaid and the property risks being auctioned in recovery of the loan arrears; that the loss of the property will be a big loss to the defendant who has paid all the money in the purchase price including Kshs. 1,200,000/= which was owing; that the defendant has not been able to collect the rent from the properties in order to service the loan; that the chargee is demanding the loan arrears; and that if the suit is not dismissed the defendant stands to suffer great prejudice as he will lose the purchase price and the property. The application is supported by the affidavit of the defendant who has expounded the above grounds.

Before I go to the gist of the application, I think it is best that I lay a little background.

3. This suit was filed on 19 April 2012 by R N O on behalf of D O M who is said to be of unsound mind.

R is wife to D. The issue in this case concerns the ownership of the land parcels *particulars withheld* and *particulars withheld*. It is pleaded in the plaint that the defendant lured D O to enter into a sale agreement whereby the said D O sold and transferred the two suit properties to the defendant. It is pleaded that the said D O is suffering from a mental illness and that the two properties are matrimonial properties. In the suit, the plaintiff wants a cancellation of the title of the defendant and a permanent injunction to restrain the defendant from the suit properties. Together with the plaint, the plaintiff filed an application for injunction to restrain the defendant from "...alienating, disposing off, entering into and/or in any way dealing with..." the suit properties. An interim order of injunction was granted pending inter partes hearing of the said application.

4. Through an application dated 13 February 2014, the defendant filed an application seeking orders to have the plaintiff and all the tenants in the premises pay rent to the defendant. The reasons given in the application were that the properties are charged to Co-operative Bank Building Society who financed the defendant to purchase the properties. It was averred that the defendant was reliant on the rent to pay off the loan but that it was the plaintiffs who were collecting the rent. To compromise this application and the one for injunction, the parties agreed to open a joint interest earning account in the names of the counsel for the plaintiff and defendant and the rent be deposited into this account. The parties were later to agree on the possibility of paying off the loan account with the rent proceeds.

5. The defendant in addition to the original supporting affidavit swore two supplementary affidavits. In the first, the defendant has stated that pursuant to the above consent, the defendant attempted to collect rent through Pata Commercial Agencies but the plaintiff violently prevented them from doing so. In the second, he has annexed a list of the tenants and the monthly collection. He has stated that it is only fair that these tenants be ordered to pay the rent into the loan account to avoid the impending sale by chargee.

6. The plaintiff did not file any response to the application but I allowed Mr. Simiyu, learned counsel for the plaintiff, to submit on points of law. Ms. Njeri Muiruri in her submissions was of the view that the application was unopposed and asked for the orders sought. She submitted that the plaintiff has been refusing to pay rent or allow the defendant to collect the same. Neither has she shown any interest to set down the suit for hearing. She however in the course of her submissions abandoned the prayer seeking dismissal of the suit for want of prosecution.

7. Mr. Simiyu, was of the view that prayer (b) of the application only asked for interim orders. He also submitted that the defendant is stopped from arguing the application by dint of the consent order. He was of the view that prayer (d) cannot be allowed as there is no counterclaim seeking eviction orders. On the first point raised by Mr. Simiyu, it is true that the application as drawn appears to be seeking orders only in the interim. But I am prepared to hold that this is a typographical error for it is beyond doubt what the applicant wants in the case, which is to be allowed to collect rent until finalization of the suit. On the second argument, Mr. Simiyu's point, is that there is already an order directing where the rent is to be deposited, which is in a joint interest earning account of both counsels for the plaintiff and defendant. There may be substance in this submission, for what the defendant now wants, is to have the rent deposited into the loan account. It did not come out clearly, whether the joint account was opened or not, for there is no mention of it in either the application or the affidavits in support. If none was opened, I cannot see how the plaintiff can now seek to benefit from her own acts of omission.

8. But would it be wise to have the money deposited into the loan account while there is a dispute as to whether or not the sale of the suit properties to the defendant was proper? I think not, for if the money is paid into the loan account, then the money will be utilized to pay the loan and the plaintiff may never recover the same if she succeeds in this suit. But again the defendant may yet succeed, and if he does so, he will find that he has been saddled with interest on a loan that he has not paid, and which he would have been paying were it not for this suit. I think the best order given the circumstances of this case is to have the parties deposit the rent into a joint account pending hearing and determination of the suit, which monies will be disposed of depending on which party succeeds in the suit. It will be noted that this is exactly what the parties had agreed in the consent of 20 May 2014.

9. As I stated earlier, it is not clear to me whether or not this account has been opened. If it has, let the

rent be collected by an agent and the same be paid to the said account. I will give the counsels one day to open joint account. If no account is opened as ordered, then the rent will be collected by the agent and paid into court. The defendant had appointed M/s Pata Commercial Agencies and I do not see why they should not be entrusted in the collection of rent. I therefore order Pata Commercial Agencies to collect the rent in the suit premises and have the same deposited in the joint account of the counsel for the plaintiff and defendant, if one is opened, and if none is opened, then Pata Commercial Agencies to deposit the same in court. For the duration of the suit, the plaintiff will also pay rent similar to what all other tenants are paying or give security for its payment. If she does not do so, then she will have to vacate the suit properties until the suit is heard and finalized. Either way, the plaintiff ought not to interfere with the collection of the rent by the appointed agent. If she does interfere, then she will be in contempt of court. A notice should also be sent to the tenants that this court has ordered them to pay rent to Pata Commercial Agencies and not directly to the plaintiff or defendant.

Orders accordingly.

Dated, signed and delivered in open court at Nakuru this 3rd March 2015.

MUNYAO SILA

JUDGE

ENVIRONMENT AND LAND COURT

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In presence of:-

Ms. Njeri Muiruri for defendant/applicant

No appearance for M/s B W Mathenge & Co advocate for plaintiff/respondent.

Emmanuel Maelo : Court Clerk.

MUNYAO SILA

JUDGE

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