



REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA AT NAIROBI

ENVIRONMENTAL AND LAND DIVISION

ELC CIVIL MISC. NO. 515 OF 2013

HENRY MASAKU NGEI.....1ST PLAINTIFF

VERSUS

ANDREW HORACE O. OMONDI1ST DEFENDANT

SIMON KANURE KIBUE

T/A RESTORERS CONSULT AUCTIONEERS2ND DEFENDANT

RULING

On 16th May 2014 this court granted the exparte application brought by M/S Restorers consult Auctioneers seeking the assistance of the police to facilitate their execution of instructions given to them to levy distress against the Plaintiff/Applicant. The plaintiff/applicant by a Notice of Motion dated 27/5/2014 has interalia sought orders that:-

1. That the court do stay execution of the orders of **Hon. Justice Mutungi** made on 16/5/2014 pending the hearing of this application.
2. That the court do set aside the exparte orders of the **Hon. Justice Mutungi** made on 16/5/2014.
3. That the 2nd Respondent be restrained from selling all the goods confiscated from house **NO.MF41/G Makadara Estate** on 26/5/2014.
4. That 2nd Respondent be ordered to forthwith release and return the goods confiscated from the said plaintiff/Applicant's house.
5. That pending the hearing hereof, the status quo as regards the suit property be maintained.

The plaintiff grounds his application on the grounds that the 2nd Defendant procured the orders on 16/5/2014 through misrepresentation and material none disclosure and that no notice had been served on the Applicant prior to 26/5/2014 when the 2nd Defendant confiscated the Applicant's goods. That the plaintiff have never entered into any lease agreement requiring the plaintiff to pay rent to the Defendant and that the distress for rent levied against the Applicant was without any justification. The applicant avers that she has lived in the suit premises for over 30 years and has fully paid for the ownership of the house to the National Housing Corporation.

The plaintiff further avers that even though the Defendant had been registered as the owner of the suit premises he holds the house in trust for the plaintiff who has over the years effected payments for the purchase of the house. The plaintiff states that the 1st Defendant has threatened to evict her from her

house inspite of having consented to the plaintiff's purchase of the house in the 1st Defendant's name. The plaintiff additionally has sworn a supporting affidavit to her application dated 27th May 2014 in which she reiterates the grounds of her application and outlines facts in support of her occupation and payment for the house which she states entitles her to claim ownership of the subject house.

The Advocates for the 1st and 2nd Defendants in response to the plaintiff's application filed a Notice of preliminary objection dated 3rd June 2014 and took the following points of objection:-

1. That the present motion as taken out, drawn and filed is incompetent, fatally defective and unsustainable in law or at all.
2. That the motion offends the principle of Resjudicata as provided in section 7 of the Civil Procedure Act (cap 21 Laws of Kenya) in view of the fact that there were previous applications before this court being,
 - a. Motion dated 14th June 2012 which was dismissed by the court on 29th January 2013 and
 - b. Motion dated 29th April 2013 which was dismissed by the court on 21st March 2014.

In which the subject matter was directly and substantially in issue as in the motion now before the court.

3. That in the earlier applications this Honourable court heard and finally determined the issues now raised in this motion.
4. That in the alternative to 3 above the proceedings herein are barred by virtue of the operation of the doctrine of issue of estoppels.
5. That there is nothing capable of being stayed in the manner sought by the Applicant.
6. That in the whole the applicant herein is a vexatious and frivolous litigant and the proceedings herein an abuse of the court process.

Counsel made oral submissions on the preliminary objection before the court on 5th June 2014. **Mr. Thangei** Advocate for the Defendants submitted that the issue whether or not the Defendant can levy distress on the plaintiff's goods in the suit premises has been the subject of two court rulings in this same court and that **Hon. Justice Odunga** in his ruling on 29th January 2013 declined to injunct the Defendant from levying distress and struck out the plaintiffs Notice of Motion seeking an injunctive relief. In the plaintiff's Notice of Motion dated 14th June 2012 the plaintiff had sought an injunctive order under prayer 3 in the following terms:-

3. The Defendant by himself his servant, agents employees and otherwise however be restrained by an interim injunction from evicting tenants, collecting rent, renting leasing, entering upon, trespassing, charging, mortgaging, selling, transferring, transacting, disposing alienating, taking possession or control dealing in any way whatsoever with the property flat Number MF 41/G, Madaraka Estate pending the hearing and determination of this suit.

With the striking out of the plaintiff's said Notice of Motion there was no order restraining the Defendant from collecting rent for the said premises **Hon. Justice Gitumbi** was equally confronted more or less with a similar application dated 29th April 2013 which was substantially the same as the one that was before Honourable **Justice Odunga** as the Notice of Motion virtually sought similar orders as the ones sought in the application before **Hon. Justice Odunga**. **Hon. Justice Gitumbi** in my view correctly held that the application before her was resjudicata the same issues having previously been raised and canvassed in the application before **Hon. Justice Odunga**. It is unclear what became of suit Milimani **CMCC NO. 1713 of 2012** that it was stated before Hon. Justice Odunga that the plaintiff had instituted in the lower court.

In the application before me the plaintiff/Applicant states that the 2nd Defendant went to the plaintiff's house on 26th May 2014 and confiscated the goods that had previously been proclaimed on 29/3/2012 and

provoked the application before Honourable **Justice Odunga**. Thus at the time the plaintiff filed the instant application on 28th May 2014 the 2nd Defendant had executed the order and thus the same is incapable of being stayed. In my view the 2nd Defendant properly approached the court exparte on the application of 16/5/2014 as it was not required to be served on the plaintiff/applicant. The 2nd Defendant had been instructed and authorized to levy distress and as the court observed while making the exparte order that....”**The Auctioneers have been authorised to levy distress and they have proclaimed the tenants goods but have been prevented from accessing them for purposes of collecting the same. There is no order restraining the levy of distress ...**”

As I have observed both **Hon. Justice Odunga** and **Gitumbi** did not injunct the Defendant from demanding and collecting rent and in both applications the Defendant had through the 2nd Defendant proclaimed the plaintiff’s goods for non - payment of rent. This court therefore has no basis to stop the process when the previous Judges did not see it fit to do so. This court as it were cannot sit on appeal on the ruling/orders issued by **Odunga Judge** and **Gitumbi Judge** as it is jurisdiction is concurrent with that of the two judges.

I would agree with the Defendants submission that the issue whether or not the plaintiff ought to pay rent to the Defendant was a matter directly and substantially in issue in the previous two applications handled by my brother and sister Judges. The Defendant was not restrained from collecting rent from the plaintiff. The plaintiff was always aware that the Defendant was demanding rent from her as attested by the proclamation of 29/3/2012 which was also included by the plaintiff in her annexures to the application before **Hon. Justice Odunga**. My view is that once the right to levy distress has arisen no notice is required to be served on the tenant other than the proclamation which serves as the notice.

I however noted the exparte order (2) that I granted extended to the police providing security while the 2nd Defendant accessed the premises for purposes of levying distress and the same ought not to have extended to executing an eviction order. I will review and vary the order to exclude the execution of any eviction order.

At any rate if the plaintiff establishes the levy of distress was unlawful he would be entitled to recover damages from the Defendant and damages would be adequate remedy.

In the premises I uphold the preliminary objection on the basis that there is no order capable of being stayed the same having already been executed. I also hold that the issue whether or not levy of distress ought to have been levied is res judicata to the extent that the previous rulings of the court did not injunct the Defendant from demanding and collecting rent though it was a matter directly and substantially in issue in the previous two applications determined by the court.

I therefore order the plaintiff’s application dated 27th May 2014 struck out. I make no order as to costs and each party will bear their own costs of the application and the preliminary objection.

Ruling dated signed and delivered this...30th.....day of....July...2014.

J. M. MUTUNGI

JUDGE

In presence of:

..... For the Plaintiff

..... For the Defendants