



**REPUBLIC OF KENYA**

**High Court at Kisumu**

**Civil Case 58 of 2011**

**GRACE AKINYI AJWANG**

**RICHARD OGENDO suing as personal representative of the estate of the said**

**MANASON OGENDO BODO.....PALINTIFFS**

**VERSUS**

**ROSEMARY ATIENO ABUTO.....1<sup>ST</sup> DEFENDANT**

**LEONIDA ACHIENG NYAGWARA alias**

**PHOEBE AATIENO NYAGUDI.....2<sup>ND</sup> DEFENDANT**

**SASAH GENERAL MERCHANTS LIMITED .....3<sup>RD</sup> DEFENDANT**

**NATIONAL BANK OF KENYA LIMITED .....4<sup>TH</sup> DEFENDANT**

**COMMISSIONER OF LANDS .....5<sup>TH</sup> DEFENDANT**

**ATTORNEY GENERAL .....6<sup>TH</sup> DEFENDANT**

**RULING**

The 3rd defendant/applicants Notice of Motion dated 27<sup>th</sup> September 2012 prays for orders that:-

1) **The Honourable Court be pleased to order and or direct the rental income due and or arising from premises situate at L R No. Kisumu Municipality Block 7/319 be deposited in this Honourable Court and or in on Escrow Account in a reputable financial institution so as to safeguard the 3<sup>rd</sup> defendants/applicants interests.**

2) **The Honourable Court be pleased to grant such further directions towards the expeditious hearing and disposal of the instant suit so as to protect and or safeguard the interest of the parties and more particularly the 3<sup>rd</sup> defendant.**

The affidavit of **Samuel A. Odhiambo** sworn on 27<sup>th</sup> September 2012 together with the attendant annexures supports the 3<sup>rd</sup> defendants contention.

What is agreeable from the pleadings herein is that the suit property was sold to the applicant by the 1<sup>st</sup> and 2<sup>nd</sup> defendant. The applicant after having the same transferred to him did mortgage the suit property to the 4<sup>th</sup> defendant for a sum of Kshs. 13,392,000.

Subsequently and after charging the property the plaintiff filed this suit and simultaneously filed an application for injunction which todate remained unadjudicated.

The plaintiffs /respondent on the other hand has argued through the replying affidavit dated 19<sup>th</sup> October 2012 that they are the beneficiaries of the estate and that the 1<sup>st</sup> and 2<sup>nd</sup> defendants who are relatives but not beneficiaries are the real culprits and that this matter should go for full trial for that was the reason they choose not to prosecute their injunction application.

I have gone through the application as well as the rival affidavits. I have further read the submissions by the applicants and the respondent. The basic issue to determine at this juncture is whether the plaintiff / respondents who are enjoying the use of the premises and the rent shall suffer any loss as against the applicants should the rent be deposited in a neutral place.

There is no doubt that the applicant has charged the property to the 4<sup>th</sup> defendant. The sum of Kshs. 13 million is not mince meat. It is a colossal sum. Obviously, and although they did not file any response the 4<sup>th</sup> defendant is an interested player. Should the applicant default in loan payment then the 4<sup>th</sup> defendant shall exercise its statutory power of sale and in my estimation both the plaintiffs as well as the applicants stand to lose. The only persons who stand to benefit and from my preliminary assessment have benefited are the 1<sup>st</sup> and 2<sup>nd</sup> defendant.

Whether the transfer to the applicants was tainted with fraud is for the trial court to determine. Suffice to say that at this juncture what is relevant is to safeguard the interest of both the plaintiffs and the defendant.

The applicant currently is the registered owner of the suit premises whether by fraud as alleged by the plaintiffs or otherwise. Prima facie he has rights over and above any other persons except the 4<sup>th</sup> defendant. As conceded he does not enjoy the rent or the use of the premises. I do not have however the monthly rent accruing from the suit premises. But from the parties written submissions it must be sufficient to enable the applicant repay the loan.

In the interests of justice and fair play, I do not see any injury that either of the parties especially the plaintiffs and the applicant stand to suffer should the rent be deposited in a neutral account. When the case is finalized either of the parties shall be able to access the funds without any let or hindrance.

Further non of the parties shall steal a match against any other. The suit, granted is to be disposed off expeditiously. But as the things stand now justice seem very slow. The wheels are not moving as anticipated and it is not known when the final verdict shall be delivered and what shall follow thereafter.

In allowing the Notice of Motion therefore I make the following orders:-

**1) The parties do agree on a registered reputable estate agent to manage and control the suit premises comprised in Kisumu Municipality Block 7/319. Within the next fourteen 14 days**

from the delivery of this Ruling.

2) If the parties herein do not agree then the Deputy Registrar shall be at liberty to appoint one within seven days thereafter.

3) The said agent to collect the rent and manage the suit property and to deposit the monthly rent less the necessary expenses in an interest earning account at a reputable Commercial Bank. The said bank to be agreed upon by the parties and in default the deputy Registrar to nominate one.

4) The signatories to the said account shall be the counsels for the plaintiff and 3<sup>rd</sup> defendant.

5) The estate agent do provide to the parties and to this court a quarterly report.

6) Each party be at liberty to apply .

7) The costs of this application shall abide the main suit.

Dated, signed and delivered at Kisumu this 5<sup>th</sup> day of December 2012.

**H.K. CHEMITEI  
JUDGE**

**In the presence of:**

Ogutu for 3rd defendant for the appellant

Onyango for plaintiff/Respondent

Mwamu for 5th defendant

Omayya for 4th defendant - absent

*HKC/aao*



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