



**REPUBLIC OF KENYA**

**IN THE HIGH COURT OF KENYA**

**AT NAIROBI**

**CIVIL CASE NO. 142 OF 2019**

**ELIZABETH WAIRIMU NDUMIA.....APPLICANT**

**VERSUS**

**EDWIN MWANGI WAIRAGU T/A TRADEWIND AUCTIONEERS ..... 1<sup>ST</sup> RESPONDENT**

**HALIFAX ESTATE AGENCY LTD/ RAMESH CHANDRA PATEL..... 2<sup>ND</sup> RESPONDENT**

**RULING**

1. On 2<sup>nd</sup> July 2019, the plaintiff instituted suit against both defendants herein seeking *inter alia*, a declaration that the distress and attachment on 3<sup>rd</sup> June 2019 and purported auction of the plaintiff's movable property on 12<sup>th</sup> June 2019 is null and void and a permanent injunction restraining the defendants, their servants or agents or anybody claiming under them from trespassing into, interfering with or doing anything whatsoever to disturb the plaintiff's quiet and peaceful enjoyment of her tenancy in House Number C3, ACME flats at Riverside within Kileleshwa Estate in Nairobi.

2. Contemporaneous with the filing of the suit, the plaintiff filed a Notice of Motion dated 28<sup>th</sup> June 2019 in which she sought the following orders:

**i. Spent**

**ii. Spent**

**iii. That pending the hearing and determination of this suit, this honourable court be pleased to issue an order of stay of execution of the proclamation of attachment/repossession/distrainment of movable property by Tradewind Auctioneers dated 26<sup>th</sup> June 2019.**

**iv. That pending the hearing and determination of this suit, the defendants/respondents be restrained from harassing, interfering with the tenancy and/or evicting the plaintiff/applicant from house no. 3 ACME apartment on land reference number 205/83 Kileleshwa Nairobi.**

**v. That pending the hearing and determination of this suit this honourable court do grant stay of and/or set aside the sale purported to emanate from the unlawful and or unprocedural auction conducted on 10<sup>th</sup> June 2010 by the defendants/respondents, their agents or servants.**

**vi. That pending the hearing and determination of this suit this *honourable court do grant an order of stay of sale, transfer***

*and/or any other dealings with motor vehicle registration KCH 400P Land Cruiser V8 Sebt purported to emanate from the unlawful and or unprocedural auction conducted on 12<sup>th</sup> June 2019.*

vii. That the 1<sup>st</sup> defendant/respondent be compelled to return all items/goods distrained from the plaintiff's/applicant's house but not included in the list the purported proclamation and notification of sale dated 1<sup>st</sup> January 2019 and 3<sup>rd</sup> June 2019 respectively.

viii. That the 1<sup>st</sup> defendant/respondent be compelled to produce the proceedings of the auction conducted on 12<sup>th</sup> June 2019.

ix. That the 1<sup>st</sup> defendant/respondent be compelled to produce and surrender a statement of account of the auction conducted on 12<sup>th</sup> June 2019.

x. That the Officer Commanding Station Kileleshwa Police Station to ensure compliance of the orders of court.

xi. That costs of this application be provided for.

3. The application is supported by the grounds stated on its face and the depositions made in the supporting affidavit sworn by the applicant on 28<sup>th</sup> June 2019. Briefly, the applicant contends that she is a tenant in the 2<sup>nd</sup> respondent's property and despite having cleared all her rent arrears, the 2<sup>nd</sup> respondent served her through the 1<sup>st</sup> respondent a proclamation notice dated 7<sup>th</sup> January 2019 for recovery of alleged rent arrears in the sum of KShs.2,130,600 which proclamation was stayed in Nairobi RRT Civil Suit No. 91 of 2019 which is still pending; that despite stay of the proclamation, the 2<sup>nd</sup> respondent filed CMCC Misc. Application No. 451 of 2019 seeking police assistance to enter into her house and seize all proclaimed goods and furniture for recovery of rent arrears amount to KShs.1,830,600 which orders were granted without giving her an opportunity to be heard; that the distrained goods were unlawfully auctioned on 10<sup>th</sup> June 2019 and despite the fact that the 1<sup>st</sup> respondent had not accounted for the items sold in the auction, he served her with a 2<sup>nd</sup> proclamation on 26<sup>th</sup> June 2019 claiming arrears of rent in the sum of KShs.1,968,952 and auctioneers fee of KShs.250,000; that it was in the interest of justice that the orders sought be issued.

4. The application is opposed through grounds of objection dated 25<sup>th</sup> July 2019 and a replying affidavit sworn on behalf of the 1<sup>st</sup> and 2<sup>nd</sup> respondents by *Kunal Pattni*, a director of *Halifax Estate Agency Limited*. In the grounds of objection and in the replying affidavit, the respondent asserted that the application amounts to an abuse of the court process and ought to be dismissed. It is their case that the applicant is a serial rent defaulter and that the application, which in their view is full of falsehoods, was meant to aid her to continue occupying the 2<sup>nd</sup> respondent's premises without paying rent.

5. Further, the respondents contend that the 2<sup>nd</sup> respondent lawfully obtained breaking in orders in Misc. Application No. 451 of 2019 and lawfully levied distress on the applicant for recovery of rent arrears amounting to KShs.2,130,600 since the stay orders issued in Nairobi RRT No. 91 of 2019 were vacated on 12<sup>th</sup> February 2019 after the applicant failed to comply with the condition requiring her to pay rent for the first quarter of the year 2019 within 14 days of the order and after she failed to attend the tribunal on the date scheduled for *inter partes* hearing of her application.

6. The respondents also claim that the subsequent sale of the distrained goods by public auction was regular and lawful; that after the auction, the applicant was given a credit of SKhs.501,648 but she still had rent arrears of KShs.1,989,952 which was the subject of the 2<sup>nd</sup> proclamation. A statement of account from the 1<sup>st</sup> respondent accounting for the sale of the applicant's goods by public auction on 12<sup>th</sup> June 2019 and the applicant's current rent account statement were annexed to the replying affidavit. It is the respondents' case that the applicant had come to court with unclean hands and is not deserving of the orders sought.

7. The application was argued orally before me on 23<sup>rd</sup> October 2019. Learned counsel *Mr. Mogire* appeared for the applicant while learned counsel *Mr. Nyamu* represented the respondents. In their submissions, both learned counsel buttressed the positions taken by their respective clients in support and in opposition to the motion as summarised above.

8. Having carefully considered the application, the affidavits on record together with their annexures as well as the oral submissions made on behalf of the parties, I find that though the applicant has consistently claimed that she was upto date with her rent payments, the respondents have annexed evidence in the form of a rent account statement reflecting all the rents received from the applicant and the balance outstanding. The statement shows that by February 2019, the applicant had rent arrears amounting to

KShs.2,130,600.

9. Although the applicant claimed in paragraph 30 of her supporting affidavit that she had annexed cheques and receipts issued by the 2<sup>nd</sup> respondent's agent proving that she did not have any rent arrears and that she had in fact overpaid, the court record does not show that the applicant annexed such evidence. There are no cheques or receipts annexed to her support affidavit. The respondents have however exhibited evidence confirming that the applicant drew two cheques in favour of the 1<sup>st</sup> respondent which were returned unpaid for lack of sufficient funds.

10. In view of the foregoing, there is no doubt that by the time the proclamation notice dated 1<sup>st</sup> January 2019 was issued, the applicant had rent arrears in the sum of KShs.2,130,600. The exhibit marked KPI annexed to the 1<sup>st</sup> respondent's replying affidavit confirms that the stay orders issued by the tribunal on 22<sup>nd</sup> January 2019 were discharged on 12<sup>th</sup> February 2019. The subsequent distress for rent and sale of the distrained goods by public auction on 12<sup>th</sup> June 2019 was therefore justified and lawful since the 2<sup>nd</sup> respondent was entitled to recover the rent arrears owed by the applicant.

11. Contrary to the applicant's claim that the 1<sup>st</sup> respondent flouted the law by not giving 7 days' notice of the intended auction, there is evidence annexed to the 1<sup>st</sup> respondent's replying affidavit showing that the auction was advertised on 4<sup>th</sup> June 2019. A statement accounting for the goods sold in the said auction has also been exhibited. Given the material placed before me, I find nothing to prove or suggest that the said public auction was conducted contrary to the law.

12./ Having found that the applicant had rent arrears by the time she instituted this suit, I agree with the respondents' submissions that the applicant approached this court seeking equitable reliefs with unclean hands. It is apparent that the applicant wanted to have her cake and eat it which is practically impossible. I say so because she had obviously failed to fulfill her main obligation as a tenant by paying rent when it fell due but she still expected protection of the law in the form of having her landlord restrained from distressing for rent. In my view, the applicant is undeserving of the exercise of the court's discretion in her favour.

13. In any event, the applicant has failed to provide any basis for the grant of any of the orders sought in the application as she has not availed any evidence to establish that the proclamation and subsequent auction of the distrained goods was unlawful. It is also worth noting that a statement accounting for the goods sold in the auction has already been provided by the 1<sup>st</sup> respondent in the replying affidavit sworn on his behalf by his principal *Mr. Kunal Pattni*.

14. For all the foregoing reasons, I am satisfied that the Notice of Motion dated 28<sup>th</sup> June 2019 is devoid of any merit and it is hereby dismissed with costs to the respondents.

It is so ordered.

**DATED, SIGNED and DELIVERED at NAIROBI** this 28<sup>th</sup> day of November, 2019.

**C. W. GITHUA**

**JUDGE**

**In the presence of:**

Mr. Asinuli for the respondents

No appearance for the applicant

Mr. Salach: Court Assistant



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