



**REPUBLIC OF KENYA**

**IN THE HIGH COURT OF KENYA**

**AT KITALE**

**CIVIL APPEAL NO. 81 OF 2018**

**(Being an appeal from the ruling of Hon. M. N. Osoro Resident Magistrate**

**in Civil Case No. 403 of 2018 at Kitale)**

**ALFRED ODIALA KIBAIRU.....APPELLANT**

**VERSES**

**DOUGLAS WANDAU NDIRANGU.....1<sup>ST</sup> RESPONDENT**

**PAWABA AUCTIONEERS.....2<sup>ND</sup> RESPONDENT**

**JUDGEMENT**

1. The Appellant was a tenant to the 1<sup>st</sup> Respondent. According to the proceedings from the lower court he fell into some rent arrears of Kshs. 34,500. The Respondent issued him with a notice and was followed thereafter with a proclamation by the 2<sup>nd</sup> Respondent. He then filed suit at the lower court with an accompanying application for injunction. The trial court did not find merit in the said application and dismissed it.
2. Being aggrieved by the said ruling he filed this appeal seeking several grounds, namely, that the trial court erred when it awarded costs to the respondent upon dismissing the application, that there was no need to issue distress notice and that the proclamation was improper.
3. The parties were then directed to file submissions which apparently the Appellant did file and not the Respondent despite the adequate time given.
4. What is not disputed from the pleadings is that the Appellant was a tenant to the 1<sup>st</sup> Respondent. He was then issued with a 7 day notice dated 11<sup>th</sup> September, 2018 to pay the rent arrears of Kshs. 34,500. He proceeded to pay the said arrears and the last payment of kshs. 1000 was on 6<sup>th</sup> October, 2018.
5. The 2<sup>nd</sup> Respondent carried out proclamation on 4<sup>th</sup> October, 2018. That proclamation gave the Appellant 14 days to pay up or the goods will be attached and sold to recover the rent arrears. This prompted the appellant to file the suit and the application for injunction.
6. Was the proclamation then necessary? In my view the proclamation was necessary for the simple reason that as at 4<sup>th</sup> October, 2018 there was arrears of kshs. 19,500 since he paid Kshs. 18,500 on 5<sup>th</sup> October, 2018 and Kshs. 1000 on 6<sup>th</sup> October, 2018. Nonetheless he had 14 days from 4<sup>th</sup> October, to pay the arrears or risk attachment of the goods.
7. It appears further that the proclamation notice would have been for the sum of kshs. 19,500 and not the entire sum of Kshs. 34,500 since he had paid kshs. 15000 as at 28<sup>th</sup> September 2018.
8. The court has perused the defence by the Respondent and paragraph 9 thereof acknowledges this fact. The appellant rushed to pay upon the proclamation being effected. This did not deter him from filing the application in court.
9. In my view, there was no need to file the suit since the 2<sup>nd</sup> Respondent in any event presumably would not have attached the goods as the 14 days would have lapsed by around 24<sup>th</sup> October, 2018 or thereabouts and by then the whole amount had been cleared.

10. The only payment that I find necessary from the appellant should be the auctioneer's fees for proclamation. The same should have been pegged at Kshs. 19,500 and not Kshs. 34,500.

11. Taking the totality of the evidence as summarised above, this court does not fault the decision of the trial court. The Appellant was in arrears as at the date of the proclamation as rightly found by the said court and thus he had gone before the court with unclean hands. It would have been different if the attachment had been effected by the 2<sup>nd</sup> Respondent as at 24<sup>th</sup> October 2018 as that would have been the expiry of the 14 days' notice.

12. Was the appellant entitled to cost as he has prayed in his appeal? The trial court did not find it necessary to award him. This is a discretion given to a trial court. I do not see any fault by the said court. The appellant in my view was guilty of not clearing the arrears before the proclamation was done.

13. In the premises, I do not find any merit in this appeal. The same is hereby dismissed with no order as to costs.

**Dated signed and delivered in open court at Kitale this 23<sup>rd</sup> day of July, 2019.**

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**H. K. CHEMITEI**

**JUDGE**

**23/7/19**

**In the presence of:-**

**Nakitare for the ppellant**

**Teti for the Respondent**

**Court Assistant – Kirong**

**Judgment read in open court.**