



REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA AT KITALE

CIVIL CASE NO. 21 OF 2018

GRANDWAYS VENTURE LTD....PLAINTIFF/RESPONDENT

VERSES

KISII UNIVERSITY.....DEFENDANT/APPLICANT

RULING

1. By its notice of motion dated 5th April, 2019 the Applicant prays for an order that the Respondent be compelled to release to it the following items, namely, documents, computers, students records, library books, furniture among other items which it illegally attached. The sworn affidavit of **Seth Onguti** sworn on the even date supports the application.
2. The Applicant states that all along it has been a protected tenant of the respondent and that without any notice as provided under Section 75 of the Registered Land Act, the Respondent did levy distress and that they were not served with any proclamation. As a consequence of the said illegality the Applicant has been greatly prejudiced and hampered and it cannot carry out its activities as an educational institution.
3. **Suku Elisha Shawin** acting on behalf of the Respondent has sworn a replying affidavit dated 10th June, 2019 in which he has admitted that indeed the Applicant was the tenant of the Respondent. He said that it felt into rent arrears of over Kshs. 17 million. The Respondent then issued notice which was ignored by the Applicant. It then engaged an authorised auctioneer to levy distress which it did and proclaimed the Respondent goods. Despite being granted time to pay, the applicant did not pay and thus the said goods were sold vide a public auction.
4. According to the Respondent the Applicant has itself to blame for not paying the rent arrears despite being given adequate notice.
5. The court then ordered the parties to submit written submissions and as at the date of preparing this ruling the Respondent alone has file the same.
6. There is no dispute that from the evidence on record the applicant was the Respondent tenant as shown by the lease agreement. Did the Applicant felt into rent arrears? In the absence of any other contrary evidence by the applicant it appears that it did so.
7. The annexures to the affidavit in reply of **Suku Elisha Shawin**, have not been controverted. It therefore means that the Applicant did receive the demand notice dated 24th April, 2018, in which the applicant was given 7 days to pay the rent arrears.
8. On the 26th April, 2018, a proclamation was done by M/s Nyaluoyo Auctioneers and several assorted items were proclaimed. The proclaimed goods were to be sold on the 2nd July, 2018 . The letters dated 7th June, 2019 and 13th August, 2018 shows that the items were sold and the amount realised.
9. Where then does this place the applicant? Was the applicant aware of the rent arrears and the subsequent proclamation and the attachment of its goods? I think the answer is on the affirmative. The application has been made almost 10 months later. What happened in between? Why did the applicant which is an educational institution keep silent when the proclamation was done and even when the goods were attached?
10. In my respectful view, the applicant was indolent. The silence of almost one year speaks volumes. It simply slept on its rights. When did it dawn on it that the respondent was holding its goods and thus paralyse its operation? In any case it has never denied the fact that it was in rental arrears.
11. There has never been demonstrated any evidence of any single payment of rent arrears by the Applicant. If that is the case how does it expect this court to assist it yet at the same time it has not demonstrated good faith. Even if the attachment and the proclamation was unlawful , the same would best be litigated at the full trial stage as allowing the application as prayed would be essentially dealing with the suit and the counterclaim at a preliminary stage.

12. In conclusion, he who comes to equity must come with clean hands and must do so within a reasonable time. I find the application belated and the fact that the Applicant has not denied any indebtedness to the Respondent brings it to the category of coming to court with unclean hands so to speak. The application is thus dismissed with costs to the Respondent.

Dated signed and delivered in open court at Kitale this 23rd day of July, 2019.

HK CHEMITEI

JUDGE

23/7/19

In the presence of:-

Wahome for the Applicant

Clive for Respondent

Court Assistant – Kirong

Ruling read in open court