



**REPUBLIC OF KENYA**

**IN THE HIGH COURT OF KENYA AT KISUMU**

***(CORAM: CHERERE-J)***

**CIVIL APPEAL NO. 116 OF 2018**

**BETWEEN**

**ODHIAMBO AMBALA T/A AMBALA COMPLEX.....APPELLANT**

**AND**

**VICTOR OMONDI MIDIGO & ANNE ATIENO ODUNGA.....RESPONDENTS**

**(Being an Appeal from the Ruling and Order in Winam SPMCC 95 of 2018 by Hon. B. Kasavuli (SRM) dated 22<sup>nd</sup> October, 2018)**

**JUDGMENT**

**1. Victor Omondi Midigo and Anne Atieno Odunga (Respondents) on 14.08.18 filed suit against Odhiambo Ambala T/A Ambal Complex (Appellant) in the lower court claiming:**

- 1) A permanent injunction restraining the Defendant from attaching their properties**
- 2) A declaration that the attachment of the Plaintiffs' properties was unlawful and illegal since mandatory notice was not served**
- 3) Costs**
- 4) Any other relief**

**2. Instantaneously with the plaint, the Respondents filed a notice of motion dated 14.08.18 seeking orders THAT: -**

- 1) Pending the hearing and determination of the suit, an order do issue restraining the Defendant, agents and/or employees from repossessing and or in any manner interfering with the Plaintiffs' properties**
- 2) A declaration that the attachment of the Plaintiffs' properties was unlawful and illegal since mandatory notice was not served**
- 3) Costs**

**3. The application was vehemently opposed by the Defendant by his affidavit sworn on 07.09.18 and filed on even date.**

**4. The court heard both parties and by a ruling dated 22.10.18 directed the Defendant, agents and/or employees to unconditionally release the cosmetic products and assorted beauty products proclaimed on 10.07.17 to the Plaintiffs.**

**The Appeal**

**5. The Appellant being dissatisfied with the lower court's decision preferred this appeal and on 16.05.19 filed the Memorandum of Appeal dated 15.11.19 setting out 8 grounds of appeal mainly that the Respondents' case was not proved on a balance of probabilities**

**Analysis**

6. As a first appellate court, the duty of course is to approach the whole of the evidence on record from a fresh perspective and with an open mind. As was espoused in the Court of Appeal case of ***Selle & Another v Associated Motor Boat Co. Ltd & Another (1968) EA 123***, my duty is to evaluate and re-examine the evidence adduced in the trial court in order to reach a finding, taking into account the fact that this court had no opportunity of hearing or seeing the parties as they testified and therefore, make an allowance in that respect.
7. When the appeal came up for mention on 14<sup>th</sup> February, 2019, I directed the parties to canvass it by way of written submission which they dutifully filed.
8. I have considered the evidence contained in the affidavits on record. It is on record that the principal tenant of the suit premises was one Samson Ogola Oyala (***tenant***). It is also on record that the Appellant had knowledge that the said ***tenant*** had sublet the premises to the Respondents. That the Respondents' averments that they had been paying rent to the said ***tenant*** was not controverted.
9. By a letter dated 21.03.17, the Appellant demanded that ***the tenant*** terminates the sub tenancy and demanded rent for March, 2017.
10. By a letter dated 06.05.17, the Appellant instructed his advocate to demand Kshs. 158,500/- being rent arrears and unpaid utility bills from ***the tenant*** and to instruct an auctioneer to levy distress if no payment was made.
11. By a letter dated 10.05.17, the Appellant's advocate instructed Demigen Auctioneers to levy distress for Kshs. 118,500/- against ***the tenant***.
12. By a proclamation dated 10.05.17, the auctioneer proclaimed the Respondents goods.
13. By a notice posted on 03.11.17, the tenant moved from the lease premises and by a letter dated 04.12.17, the Appellant demanded unpaid rent for the month of November, 2017 and restoration of the lease premises which was allegedly damaged which was assessed at Kshs. 267,000/- by letter dated 04.12.17.
14. I have considered the appeal in the light of pleadings, the evidence and submissions on record. The Appellant does not deny that Respondent's goods were attached for non-payment of rent by ***the tenant***. It was within the Appellant's knowledge that the said goods did not belong to the tenant who had indeed already moved from the premises, but to the Respondents.
15. From the foregoing, I find that the Respondents had met the threshold in ***Giella vs Cassman Brown Co. Ltd 1973] EA 358*** for issuance of an injunction having demonstrated that they had a prima facie case with probability of success.
16. The issue of whether or not the attached goods were worthy Kshs. 2 million is a matter of evidence that the Respondent has to prove at the opportune time.

#### **DISPOSITION**

17. In the result, I find that this appeal has no merit and it is disallowed with costs to the Appellant.

**DELIVERED AND SIGNED IN KISUMU THIS 28<sup>th</sup>**