



REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA AT NAIROBI

CIVIL SUIT NUMBER 2849 OF 1995

BABER ALIBHAI MAWJI. PLAINTIFF/APPLICANT

VERSUS

SULTAN HASHAM LALJI. 1ST DEFENDANT/RESPONDENT

GREENFIELDS INVESTMENT LTD..... 2nd DEFENDANT/RESPONDENT

AND

WATTS ENTERPRISES. INTERESTED PARTY

RULING

This honourable court has been called upon to determine two applications both brought by way of Notice of Motion, dated 19th day of April, 2013 and 16th September, 2013.

The application dated 19th April, 2014 by the Plaintiff/Applicant is brought under Sections 1A, 3A of the Civil Procedure Act and Order 22 Rule 24 of the Civil Procedure Rules and all the enabling provisions of the law. It seeks the following orders: -

1. Spent.
2. That Newton M. Mwangi Advocate be granted leave to come on record in this case on behalf of the Plaintiff in place of Mr. Satish Gautama Advocate (deceased) who was previously on record for the Plaintiff.
3. That this court be pleased to order that the property of the Plaintiff attached by Watts Enterprises in purported distress for rent be unconditionally released to the Plaintiff as directed in Civil Appeal No. 269 of 2001.
4. That the property attached be inspected before being released to the Plaintiff to assess inter alia the extent of loss damage, breakage.
5. That the costs of this application be provided for.

The application is premised on the grounds set out on the body of the same and it's supported by the annexed affidavit of Baber Balibhai Mawji sworn on the 19th April, 2013.

The summary of the facts in this application as captured in the supporting affidavit are that the applicant's goods were illegally and irregularly distressed by Watts Enterprises on instructions from the Defendants. After a protracted litigation that culminated in the case going on appeal in Civil Appeal No. 269 of 2001, the Plaintiff's application to have his goods released to him was allowed by the Court of Appeal and his application dated 13th September, 1995 was allowed. The Plaintiff has since then tried to get his goods

from the auctioneers (the Interested Party) but they have refused to release the said goods demanding payment of storage charges from the Plaintiff.

The Applicant avers that there is already a finding that the distress of the Plaintiff's goods was irregular and illegal and therefore, he is not liable for the costs of such illegal and irregular distress. That the Plaintiff continues to be denied the use of his items by reason of the Auctioneer's refusal to release the goods.

Regarding the Notice of Motion dated 16th September, 2013 by the Interested Party/Applicant the same is brought under Order 51 Rule 1, Order 22 of the Civil Procedure Rules and Sections 1A, 1B, 3 and 3A of Civil Procedure Act and all the enabling provisions of law.

The application seeks the following orders: -

1. The interested party applicant be granted leave by this honourable court to be enjoined in the suit.
2. That the firm of Okwemwa & Co. Advocates be granted leave to enter appearance on behalf of the Interested Parties/Applicants.
3. That the present application be heard and disposed off simultaneously with the Plaintiff's application dated 19th April, 2013.
4. That this honourable court do give directions on liability of storage costs and attachment entitled to the interested parties.
5. Costs be provided for.

The application is premised on the grounds set out on the body of the same and on the annexed affidavit sworn by Onesmus Macharia on the 16th September, 2013.

In this application, the Applicant avers that the distress levied against the Plaintiff was not irregular and/or illegal as proper instructions were issued by the Defendants through their Advocates and that in discharge of their professional duties in carrying out the distress, the applicant has incurred costs which have not been satisfied. The interested party is genuinely apprehensive that orders and directions of the court from the application dated 19th April 2013 will seriously prejudice them without being given an opportunity to be heard unless the court makes orders on liability. It is in the interest of justice that the interested party is enjoined in the proceedings to protect its interests.

In the supporting affidavit by Onesmus Macharia, he deposed that on or about 1st September, 1995, they received instructions from the firm of Mohammed Muigai Advocates to levy distress against the Plaintiff. That upon receiving the said instructions they proceeded to levy distress on 4th September, 1995. According to him, after the court of appeal heard the matter, it did not make a finding that the distress was illegal as alleged though the court ordered for release of the goods.

The Applicants herein have sought directions on who should pay the storage charges in the circumstances. They are apprehensive that if storage charges are not satisfied, they will be exposed to the risk of litigation by the owners of the warehouse where the said goods are stored.

Both applications are opposed by the respective parties who agreed to dispose off the applications by way of written submissions. In his submissions counsel for the Plaintiff/Applicant argued that though the Court of Appeal granted orders for the release of the Plaintiff's goods by granting the Chamber Summons dated 13th September, 1995, the interested party has adamantly refused to release the same claiming that the Plaintiff should pay the storage charges before the goods can be released. This issue is the basis of the interested party's application dated 16th September, 2013 wherein they are asking the court to give directions on liability of storage charges and the costs of attachment.

According to the counsel for the Plaintiff the Court of Appeal in Civil Appeal No. 269 of 2001 was unequivocal and no conditions were placed on release of the goods to the Plaintiff. He avers that by interested party insisting on the payment of costs prior to the release of the goods, it purports to exercise a

lien over the goods contrary to the law and in view of the finding by the Court of Appeal that there was no tenant/landlord relationship between the Plaintiff and the Defendants, the Interested Party cannot purport to exercise lien over the goods.

With regard to the Interested Party's claim that the plaintiff was under duty to mitigate the loss, counsel for plaintiff submitted that the alleged settlement proposal for his client to pay a sum of Ksh. 10 million, was made on certain conditions and he was not under any obligation to settle the matter and especially if the settlement was not in his favour.

On his part counsel for the Defendant submitted that this court has no jurisdiction to supervise the orders of the Court of Appeal and that the Plaintiff ought to have sought the orders sought herein, in the Court of Appeal. He argued that the orders sought in the application dated 19th April, 2013 are similar to those sought for in the Chamber Summons dated 13th September, 1995. According to him the Plaintiff has not set out whether he has had difficulties in executing the order and any recourse that the Plaintiff may purport to have, is in the Court of Appeal and not before this court.

That the Plaintiff had already inspected the goods but has failed to carry away the same and has insisted on re-inspecting the goods once more. He avers that the prayer for inspection of the goods sought by the Plaintiff is not available to him having inspected them already.

On his part, counsel for the interested party adopted the submissions made by the counsel for the defendant and in addition submitted on the Interested Party's application dated 16th September, 2013 in which Orders 1, 2, and 3 have been dispensed with. According to him the Interested Party has always been willing to release the goods and if the Plaintiff has had any difficulties in enforcing the order issued by the Court of Appeal, he ought to have approached the court by way of contempt of court proceedings. That there is no evidence that the Interested Party is holding the goods as lien and that it will be unfair and unjust to let the Plaintiff go scot free even when he has been at liberty to collect the goods. He relied on the cases of **Ololo Game Ranch Limited Vs County Council of Transmara [2010] eKLR** and that of **Belmanson Limited Vs Yaya Towers Limited 2225/1992** where the courts held that there should be an end to litigation.

This court has carefully considered the two applications before it, the affidavits in support and in opposition to the same and also the submissions by the learned counsels for the rival parties.

Counsel for the Defendant has raised the issue of jurisdiction of this court to deal with the matters at hand. The jurisdiction of the court to deal with any matter before it, is very crucial and if it finds that it has no jurisdiction, it should immediately down its tools as was established in the case of **Motor Vehicles "Lillian S" Vs Caltex Oil (Kenya) Limited 1989 (KLR)**. The substance of the objection is that this court has no jurisdiction to supervise the orders of the Court of Appeal. I have considered the order the subject matter of this objection and for the sake of clarity it is important that I set out hereunder the relevant part of that order.

"Civil Appeal No. 269/2001 be and is hereby allowed and the ruling of the superior court dated 14th July, 1996 be and is hereby set aside and the order prayed for in the Chamber Summons dated 13th September 1995 be and is hereby granted. Costs of the appeal are hereby awarded to the Appellant"

I have also looked at the grounds of appeal and the Chamber Summons dated 13th September, 1995 which was the subject of the Appeal pursuant to which the order above was issued. The said application did not seek for orders on who was liable to pay the auctioneer's fees and the storage charges and therefore, the Court of Appeal did not address that issue as it was not called upon to do so. Indeed, it was not an issue for determination by the superior Court of Appeal. Simply put, the issue was not adjudicated upon by the court as it was never raised or argued before it. This legal principle was settled in the case of **Chumo Arap Songole Vs David Keigo Rotich (2006) Eklr** where the court held:-

"The law is now settled that parties to a suit are bound by the pleadings in the suit and the court has to

pronounce judgment only on the issues arising from the pleadings unless a matter has been canvassed before it by the parties to the suit and made an issue in the suit through the evidence adduced and submissions of the parties.”

See also the case of **Chalicha FCS Limited Vs Odhiambo & 9 Others (1987) KLR 182** where the court stated: -

“Cases must be decided on the issues on the record. The court has no power to make an order unless by consent, which is outside the pleadings. In this instance, the issues raised by the judge and the order thereon, was a nullity.”

And lastly, on the same point see the case of **Antony Francis Wareham & Others Vs Kenya Post Office Savings Bank, CA 5 and 48 of 2002** where the Court of Appeal held that a court should not make any findings on matters not pleaded or grant any relief which is not sought by a party in the pleadings.

The Applicant in the application dated 19th April, 2013 seeks unconditional release of the goods as ordered by the Court of Appeal. The order by the Court of Appeal was for the release of goods. This order to me it's different from order Number 3 sought by the Plaintiff/Applicant wherein he has sought unconditional release of the goods. To my mind an order for release of goods is not the same as an order for release of goods unconditionally. While I am in agreement with the counsel for the Defendant that prayer 4 of the application is re-judicata, I hold a different opinion with regard to prayer 2 and this prayer essentially is the same as prayer 4 of the interested application dated 16th September, 2013. In dealing with the Plaintiff's application, this court cannot be said to be supervising the orders of the Court of Appeal but its addressing a new issue that was not raised by the parties and which the court has now been called upon to determine which is; who is liable to pay storage and attachment costs?

I do not wish to re-open the judgment by the Court of Appeal because this court does not have jurisdiction to do so, but referring to the same, the Plaintiff's appeal was allowed and his goods were supposed to be released to him. It is trite law that costs follow the event and the Plaintiff was awarded the costs of the appeal.

The interested party was under duty to release the goods following the court order. I note that general correspondences were exchanged between the parties herein addressing the issue of the release of the goods before and after the order by the Court of Appeal. The first letter is dated 2nd October, 1997 from Mohammed Nyaoga & Co. Advocates to Watts Enterprises advising them to release the goods but such release was subject to payment of the charges.

On the 24th February, 1999 the firm of Mohammed Nyagoa wrote to the firm of Satish Gautama which letter refers to previous correspondence which states: -

“Your client has up to date refused and/or neglected to collect the goods. He has a duty to mitigate his loss if any.”

On the 20th July, 2011 the interested party wrote to the Plaintiff's advocate M/s Oraro & Co. Advocates informing them that they are ready and willing to have the goods inspected and reminding them that the goods continue to attract storage charges and requested the Plaintiff to make arrangements and settle the storage charges at the earliest.

What I am able to gather from the said correspondences is that the interested party has been reluctant to release the goods and has insisted on the Plaintiff paying the storage charges and their fees before they can release the goods.

It is important to note that court orders are not given in vain and they should be obeyed. In failing to release the goods, the Interested Party has gone against the court order. They ought to have released the goods first, then go back to court to claim their charges and in any event the court having found in favour

of the Plaintiff, he cannot be liable to pay the storage or the auctioneers charges whether before or after the order by the court of Appeal. The Interested Party cannot hide behind the Defendants to escape liability. He is liable to pay the storage charges. His recourse if all, is in seeking indemnity from the Defendants as the instructing clients.

In the upshot, the following orders are made: -

1. ***Prayer 2 of the application dated 19th April, 2013 is hereby granted.***
2. ***Prayers 1 and 2 of the application dated 16th September, 2013 are granted as prayed.***
3. ***The interested party do pay all the storage charges from the date of attachment upto the date of release of the Plaintiff's goods.***
4. ***Each party shall bear the costs of their application.***

Dated, signed and delivered at Nairobi this 9th day of June, 2016.

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L NJUGUNA

JUDGE

In the presence of

..... ***for the Plaintiff/Applicant.***

..... ***for the 1st Defendant/Respondent.***

..... ***for the 2nd Defendant/Respondent.***

..... ***for the Interested Party.***