

REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA AT NAIROBI

CIVIL SUIT NO. 403 OF 2009

IMPRESSIONS ADVERTISING LIMITED.....PLAINTIFF

VERSUS

1. DIGITAL PRINTING & IMAGING SOLUTIONS LIMITED

2. TIMOTHY NJONJO NGARUIYA

3. SAMMY THUO JUMA

4. ANTHONY GATHURI MWANGI.....DEFENDANTS

RULING

1. There is a landlord-tenant dispute between the Plaintiff and the Defendants for which the Plaintiff filed this suit seeking outstanding rent of KShs. 1,293,018 as at 1st October, 2010 for the unexpired lease in the sum of KShs. 10,816,685/=. The Plaintiff filed this suit together with an application dated 20th September, 2013 seeking that the Defendants' goods be attached and be kept in safe custody by the firm of Eshikoni Agency (***auctioneer***) pending the hearing and determination of this suit.
2. This court Waweru J, granted the orders sought in the application on 26th September, 2013. The court proposed that the said goods be released to the Defendants and an issue has arisen as to who is liable to paying the auctioneers' storage charges and whether an alternative form of security should be granted. The Plaintiff cited Rule 7 of the Auctioneers Rules, 1997 which provides that a debtor shall pay the charges of the auctioneer unless the debtor cannot be found or has no goods which execution cannot be levied on or the sale proceeds are insufficient to cover the charges under Section 4 of the Distress for Rent Act. The Plaintiff submitted that since it is the Defendants who defaulted in rent payment, they are the proper party to pay the auctioneer charges. The Plaintiff in that regard cited **Ahmed O. Bachani v. Zubeda Nanju (2014)eKLR**, where an applicant was ordered to pay auctioneers fees before his motor vehicle which had been attached could be released to him.
3. The Auctioneer on the other hand contended that the Plaintiff persuaded court to proceed ex parte yet the Defendant had not been served with the application. That according to the Defendants, they were not in any arrears and did not have the knowledge of the distress until the suit was filed.
4. I have considered the depositions herein. The Auctioneer has not tendered sufficient evidence to prove that the Defendants were not in arrears as was prima facie found. His allegations are based on the information received from the Defendants. While it is stated that distress was levied before the filing of the Plaintiff, the record reflects contrary picture to the one given by the auctioneer. It is clear from the record that the Plaintiff and the application were filed together and it is from the order of court that the Plaintiff gave the Auctioneer instructions.
5. Considering the fact that the Defendants were prima facie found to be in arrears vis a vis the provisions of Rule 7 of the Auctioneers Rules, 1997, I find that it is upon the Defendants to pay the auctioneers storage fees. In the event the Plaintiff's case fails, the Defendants shall be entitled to payment of the costs therein from the Plaintiff. With regard to security, it is only just that the Plaintiff makes a formal application to be heard on merit. I consequently issue the following orders:-
 - i. The Defendants are hereby ordered to pay the auctioneers fees.

ii. Costs of the application to be in the cause.

Dated, Signed and Delivered in open court this 29th day of May, 2015.

J. K. SERGON

JUDGE

In the presence of:

Miss. Chepkorir h/b for Issa for the Plaintiff

Miss Otieno h/b Mrs. Wanyoike for the Defendant