



REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA AT NAIROBI

CIVIL SUIT NO 330 OF 2013

**NYAMODI OCHIENG-NYAMOGO, WILLYS NYAMODI NYAMOGO t/a NYAMOGO & NYAMOGO ADVOCATES.....PLAINTIFF/
APPLICANT**

VERSUS

**CHEMUSIAN COMPANY LIMITED.....1ST
DEFENDANT/RESPONDENT**

**REGENT MANAGEMENT LIMITED.....2ND
DEFENDANT/RESPONDENT**

**S.M. GATHOGO T/A VALLEY AUCTIONEERS.....3RD
DEFENDANT/RESPONDENT**

RULING

The applicant has filed a notice of motion dated 12th June 2013 under order 42 rule 6(1), (2) (a), (b), (4) Order 51, rule 1 Civil Procedure Rules 2010 Section 3A & 63 (e) Civil Procedure Act and all enabling provisions of the law, seeking the following orders;

- i. Spent.
- ii. That pending the hearing and determination of this application inter – partes, the respondents, their agents, employees and/or servants be restrained by an order of injunction from interfering with, trespassing, removing furniture from, selling or disposing off any property from, or in any other way whatsoever interfering with the applicant’s peaceful and quiet enjoyment of the suit premises L. R No. 209/5958 NAIROBI.
- iii. That the costs of this application be provided for.

The application is based on the following grounds.

- a. That the applicant is in lawful occupation of the suit premises vide a lease agreement between it and the 1st respondent.
- b. That the suit premises are sued as a law firm and the items wrongfully distrained are for the interest and benefit of clients.
- c. That the distress is illegal as it is contrary to the statute and arrogantly flies in the face of section 16 of the distress for Rent Act Cap 293 Laws of Kenya.
- d. That in view of the foregoing, the respondents have taken the law into their own hands and unless restrained by this honourable court, threaten to continue so to do to the irreparable detriment of the applicant and other third parties.

- e. That the applicant's legal practice is already in a limbo, courtesy of this unhappy conduct of the respondents and the applicant stand to suffer irreparable loss and damage unless an injunction is issued against the respondents.
- f. That it is in the interest of justice that this application be allowed for the ends of justice to be met and be seen to be met.

The application is supported by the affidavit of f Nyamogo Ochieng' Nyamogo dated the 12 June 2013. He deposes as follows; that sometime in June 2012 and on 15th January 2013 the 3rd respondent levied distress purportedly on the instruction of the 2nd respondent and carried away office property despite his protests that the said action was illegal and the figure proclaimed for did not take into account what they had already paid towards the rent account. That he filed a notice of motion application dated 28th January 2013 for grant of injunction to restrain the respondents' wrongful actions. An ex parte injunction was granted against the respondents. On 10th June 2013 the learned Magistrate Hon. Cheruto C. Kipkorir, Resident Magistrate delivered her ruling in favour of the respondents dismissing his application aforesaid with costs to the respondent.

That on 28th February 2013 when the matter came up for interpartes hearing the parties informed the court that they were pursuing a negotiated settlement and once the settlement was arrived at an appropriate consent would be filed in court. That on 17th April 2013 on a day scheduled for mention for purposes of ascertaining if a settlement had been arrived the trial court without notice to the parties proceeded to make an order that it will deliver a ruling based on the affidavit evidence.

That the order of 17th April 2013 denied them a chance to demonstrate to the court grounds upon which he believed that the goods distrained were actually tools of trade plus it scuffled the negotiations process since all parties decided to await the court's decision. That he is aggrieved by the decision of the Honourable Court since it is likely to prejudice my legal practice as it has exposed him to illegal distress. That the Hon. Cheruto C. Kipkorir in dismissing his application dated 28th January 2013 failed to appreciate that the conduct of the respondents in levying distress was illegal, contrary to the express provisions of the Distress for Rent Act Cap 293 laws of Kenya which specifically militates against distress against "tools of trade". That he believes that he has an arguable appeal with high chances of success. That unless this orders are granted he is likely to suffer irreparable loss since his practice of very many years is likely to be ruined. That once distress is due the Auctioneers are likely to sell the distrained goods at throw away price without regard to the market and true value of the goods.

That the respondents claim is for rent which can adequately be compensated in the event the respondents succeeds finally however any loss incurred by his law firm cannot be adequately compensated by an award of damages. That he is apprehensive that the respondents will trespass, remove furniture from, sell or dispose off any property from or in any other way interfere with his peaceful and quite enjoyment in the suit premises L. R. No. 209/5958 Nairobi and that respondents are likely to move into the suit premises to levy distress of rent which action will seriously affect his legal practice and expose clients' confidential files to strangers. That the said action by the respondents would be contrary to section 16 of the Distress for Rent Act as the said suit premises is used as a law firm and the items therein are for the interest and benefit of clients.

The application is opposed.

The defendant filed a replying affidavit sworn by **Shadrack Mella** the property Manager of the 1st and 2nd respondent companies he deposes as follows; That the appellant was in a tenant/landlord relationship with the 1st respondent in its building known as Trans National Plaza, along Mama Ngina street within the city centre through a lease agreement. That it was an express term of the lease that the appellant was to pay to the 1st respondent agreed rent and service charge for the said rental space on the days and in the manner stated in the lease agreement. That the appellant defaulted on many occasions to pay rent as and when it fell due and particularly from February 2012, the appellant sought to be given one month within which to clear the outstanding arrears. That the appellant failed, refused and or neglected to pay the rent

arrears as well as the rent that became to the 1st respondent prompting the 1st respondent through its managing and letting agent, the 2nd respondents, to instruct the 3rd respondents to levy distress to recover the said rent. That the appellant admitted being in rent arrears in his plaint (paragraph 2), the supporting affidavit to the application before the lower court (paragraph 2) and the correspondences between the appellant and the 2nd respondent that indeed he has defaulted in the payment of rent and service charge.

That to date, the outstanding rent excluding the quarter starting 1st October 2013 and service charge is Kenya Shillings One Million One Hundred and Thirty Five Six Hundred and Sixty Eight (Kshs.1,135,668.00/-). That the appellant is unable to meet his obligations as a tenant and particularly payment of rent for the premises he is occupying and the only option available to him is to yield the premises back to the 1st respondent to mitigate on the losses already incurred. That the action of the 1st respondent opting to levy distress for rent was within its right and the distress was legal in the circumstances. No tools of trade were distressed as alleged or at all. That in the ruling of the honourable magistrate, there was proper finding on the basis of the documents and affidavits filed in court that indeed the appellant did not establish a prima facie case. That there are no more negotiations on-going and none was scuffled by the ruling of the court is alleged. That the injunctive orders granted ex parte be vacated forthwith and the application be dismissed with costs.

At the hearing of this application Mr Wangalwa for the applicant submitted that the respondents are holding the applicants tools of trade after 2 distresses in the applicant's office on the 18/6/12 and 15/1/13. That to date there has been no account given on the goods. That applicant is an advocate of 36 years standing and if the stay is not granted his personal practise will be affected and that he could also be exposed to liability and face the disciplinary committee. That they do not dispute that there is rent arrears. On the issue of security the applicant argued that the goods the respondent is holding is adequate security and they ask the court not to burden him with an order to provide security as the respondents have not given any explanation on the status of the goods catered away on the 2 occasions, that in the interest of justice the application should be granted.

Miss Mungai in response stated that the amount in arrears is Kshs. 1,135,668/= as at 1/10/13. That the applicant has promised to pay rent before but failed. That no tools of trade were distressed. That the applicant has not interested in negotiating when to pay the arrears and the respondent is suffering loss. That the only recourse the respondent has is to distress and to terminate the tenancy. That the application is meant to stop the landlord from levying distress and should be dismissed with costs.

Mr. Wangalwa in reply submitted that there has been no response on the outcome of the 2 distresses. That the provisions of section 18 of the Auctioneers Act are clear. That the issue of value is subjective and that the issue of tools of trade is not an idol claim, that it is an issue that can only be determined at the hearing. That there is a rent dispute and the respondent cannot use that to evict the applicant and that they can only be stopped if the court grants the stay.

I have carefully considered the facts as deposed in the affidavits filed by the parties the annexures and submissions made. The applicant has moved this court under order 42 rules 6 (1) and 2 (a) which provide as follows;

“(2) No order for stay of execution shall be made under subrule (1) unless-

- a. The court is satisfied that substantial loss may result to the applicant unless the order is made and that the application has been made without unreasonable delay; and***
- b. Such security as the court orders for the due performance of such decree or order as may ultimately be binding on him has been given by the applicant”***

Under this order the applicant has to satisfy the court that it will suffer substantial loss if the order is not made. The applicant does not dispute that he is in rent arrears. His contention is that the distress was illegal contrary to section 16 of the Distress for Rent Act Cap 293 Laws of Kenya and that the respondent has taken the law into their hands. He also argues that his tools of trade have been attached and that he

will suffer loss if goods are sold and that his practice shall be in limbo. This could be so but I do note that the amount of rent arrears is quite substantial over one million. The applicant argues that the goods that have been attached are sufficient security . I have looked at the value attached to the goods which were proclaimed and the values attached are very low. For an applicant to be entitled to orders under order 42 an applicant must show some seriousness when seeking an order of stay. The issue of whether the auctioneers attached tools of trade can only be determined at the hearing of the appeal. The applicant does not give a figure of what he owes as rent nor does he offer any security. Having noted that there is a substantial amount of rent owing I will grant the injunction sought on condition that the applicant deposits a sum of six hundred thousand(Ksh.600,000/-) in court within 30 days from the date of this ruling.

The respondents are therefore restrained removing furniture from, selling or disposing off any property from, or in any other way whatsoever interfering with the applicant's peaceful and quiet enjoyment of the suit premises L. R No. 209/5958 NAIROBI. In the event that the applicant does not comply with the condition given the injunction order shall vacate. The applicant shall ensure that the appeal is heard within year 2014. Costs shall be in the cause.

Orders accordingly.

Dated signed and delivered this 27th day of *January* 2014.

R. E. OUGO

JUDGE

In the presence of:-

.....For the Appellant/ applicant

.....For the Respondent

.....Court Clerk