

REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA AT KISUMU

CIVIL APPEAL NO. 73 OF 2003

CHARLES OBANGE.....APPELLANT

VERSUS

LUKE LAWRENCE MUMA & ANOTHER.....RESPONDENTS

J U D G M E N T

The appellant according to the pleadings in the lower court was a tenant to the 1st respondent paying a monthly rent of Kshs. 12,000/=. He fell into arrears of Kshs. 69,000/=. The 1st respondent then instructed the 2nd respondent to levy distress. The appellant's goods including the motor vehicle were allegedly proclaimed.

However, the appellant stated that while he was settling the debt the 2nd respondent attached the motor vehicle Reg. No. KUF 294 which was not part of the attached property. The appellant was further coerced to sign an undertaking to pay the sum of Kshs. 174,000/= which included rent collected from two other tenants who were living in the 1st respondent's premises.

The appellant then moved to court to seek injunctive reliefs and the said application was dismissed prompting this appeal. The appellant in his Memorandum of Appeal has set several grounds. The main ground is that the ruling by the trial court substantially determined the suit yet what was before it was simply an application for injunction. Further that the court failed to appreciate the reasons and circumstances which made the appellant sign the undertaking or the commitment.

I have perused the entire proceedings together with the court ruling. I have also read the parties submissions and the attendant authorities.

There is no dispute that the appellant was the 1st respondent tenant. It is not disputed that he fell into arrears of Kshs. 69,000/=. However, what is in dispute is how the vehicle was attached. Was it in a garage as deponed by the 2nd respondent? Was it being driven by the appellant? Did the appellant attempt to hide the vehicle? These are questions that called for adduction of evidence and cannot necessarily be determined by mere affidavits.

Equally, what was the rent arrears? Was it Kshs. 69,000/= or Kshs. 174,000/= ? At least from the proclamation it can be deduced as Kshs. 69,000/=. Where did the 2nd respondent get Kshs. 174,000/= ? The answer would be deemed to be that there were other two tenants Agatha Christine Onyango and John Muwangi Mulambula. But whose tenants were they? Were they the appellants sub tenants or the 1st respondent's? The appellant said that they were his. If so why did he receive rent from them and not the 1st respondent? Apparently the said tenants did not swear any affidavits to buttress the appellant or 1st respondent's assertion.

While on this the other critical issue to determine is the circumstances under which the appellant signed the undertaking. The respondent deponed that he voluntarily signed whereas the appellant said that he signed under duress. Whichever way the same was signed, there is need to have oral evidence to determine. The proclamation read Kshs. 69,000/= why then sign for Kshs. 174,000/= ? was the appellant coerced as he claims?

I find that the trial court as much as it appreciated the tenancy relationship between the parties went further to actually determine the issues as though it was a full trial. The questions which I have posed

above sufficiently convinces me that the court ought to have determined only the validity of the injunctive reliefs sought. It ought not to have gone to the extent of confirming the validity of the document termed as undertaking as it was being disputed.

The appellant raised a fundamental issue of whether the 2nd respondent was duly registered court bailiff. Again this was a criminal matter taking into account that if for any reason the answer was negative then it was going to impact on the entire proclamation exercise.

As discussed above I have not seen any proclamation issued to the other two tenants who apparently were in arrears. There is no evidence that they were in arrears or not. If that is the case why attach the appellant's vehicle as though the arrears formed part of Kshs. 69,000/=?

Suffice is to say that this appeal is meritorious. I shall allow them as follows:

1. **Motor vehicle Reg. No. KUF 294 be released to the appellant upon payment of Kshs. 69,000/= to the 1st respondent.**
2. **The auctioneer's cost to abide the outcome of the main suit.**
3. **½ Costs of this appeal to the appellant.**

Dated, signed and delivered at Kisumu this 30th day of June, 2014.

**H.K.
JUDGE**

CHEMITEI