

REPUBLIC OF KENYA

High Court at Kakamega

Civil Appeal 167 of 2010

TOBIAS ODHIAMBO APPELLANT

V E R S U S

KAKAMEGA TEACHERS SAVINGS

AND CREDIT SOCIETY LIMITED RESPONDENT

R U L I N G

The application 12.4.2011 is seeking orders that the respondent to return to the applicant all his attached properties or its value and that this court be pleased to compel Eshikhoni Agency to give a full account of all the applicant's attached properties. The application is supported by the applicant's affidavit. The respondent filed a replying affidavit through **PETER VUHYA** sworn on 30th May 2011. Counsels for both parties agreed to rely on the application and the replying affidavit.

The applicant's contention is that an order was issued by the Business Premises Tribunal allowing the respondent to levy distress against him. The applicant filed before this court an application dated 14.12.2010 and was granted an order of stay of execution on 17.12.2010. The order was served upon the defendant and the auctioneer on the same date of 17.12.2010. According to his supporting affidavit, the value of his attached goods was **KShs.19,935,095/=**. He would like the defendant to return the goods or refund its value or the auctioneer file an account.

On its part, the respondent contends that the Business Premises Rent Tribunal issued an order on 10.12.2010. The Tribunal appointed Eshikhoni Agency Auctioneers to be its court bailiff and levy distress. The applicant's premises were locked and the Auctioneers filed Miscellaneous Application number 71 of 2010 and obtained a break-in order. The applicant was evicted from the premises on 17.12.2010 at 9.00 a.m. but the stay of execution order was served after the applicant had been evicted. The respondent further maintains that the orders were overtaken by events and have since lapsed.

The proceedings show that the applicant was the respondent's tenant at **Kakamega Block 2/72 (Mwalimu Centre)** as per the proceedings before the Business Premises Rent Tribunal. The applicant filed a reference before the Tribunal after having been served with a Termination notice. According to the notice dated 6.3.2010, the applicant had accumulated rent arrears totaling **KShs.746,000/=**. By the time the case was being heard, the respondent's manager testified that the rent arrears was **KShs.908,000/=**. The Tribunal allowed the landlord to levy distress and recover the outstanding arrears. The judgment was read on the 10.12.2010 and an order was issued on the same day. Initially the respondent had levied distress on 10.10.2010.

The applicant's contention is that his property was annexed and no account has been made. The respondent maintains that the applicant was evicted from the premises. The Auctioneer, according to the respondent was appointed by the Tribunal. It is a duty of any auctioneer who attaches a debtor's goods to advertise for before the auction is conducted and thereafter prepare a report to the instructing client. The applicant has a right to know whether his goods were auctioned or they are still in the store. Further, there is no evidence that the applicant's premises were opened on 17.12.2010 at 9.00 a.m. before the court order was served. Justice Lenaola granted prayer (c) of the applicant's application dated 14.12.2010. The prayer sought a stay of execution of the decree passed in the Business Premises Rent Tribunal cases Nos. 111 and 36 of 2010 at Kakamega pending the hearing and final determination of the appeal.

Since the judgment and order of the Tribunal was stayed, the respondent cannot take it upon itself that the order lapsed. The respondent is evasive and does not indicate what other goods were taken from the premises, whether the goods were sold and how much they fetched. An initial distress had been done on 10.10.2010 and there is no response as to what happened to those goods. I have seen the list of the items as per the inventory by the Auctioneer dated 10.10.2010. The items might appear to be of low value. However, the law requires that they be sold and a report of the auction be made. The items attached before the Tribunal gave its judgment were not affected by the order of stay as the order was issued on 17.12.2010, almost two months later. I do note that the list of items indicated by the applicant could be doubtful but that is his position and this is a civil claim whose standard of proof is on a balance of probabilities. The respondent cannot simply respond by saying the applicant was evicted and make no reference to the attached goods.

In the end, I am satisfied that the applicant is entitled to an account by the respondent and the auctioneer as to what happened to his properties that were attached on 10.10.2010 and 17.12.2010 respectively. I do grant prayer **two (2)** of the application dated 12.4.2011. I do further order that Eshikhoni Agency Auctioneer and the respondent do give full account of all the applicant's properties attached within **fourteen (14)** days hereof. The applicant shall have costs of this application.

Delivered, dated and signed at Kakamega this 27th day of February, 2013

SAID J. CHITEMBWE
J U D G E