



REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA AT NAIROBI

MILIMANI LAW COURTS

MISC CASE NO. 864 OF 2010

JESSEE MBURU GITAU..... APPLICANT

VERSUS

BEVAJ FURNITURE LIMITED.....RESPONDENT

RULING

The Motion before me is the one dated 7th July, 2011 brought under Rule 55 of the Auctioneers Rules, 1997 seeking an order that the Auctioneers Charges be assessed. The issue before me is that of liability that is, who is liable to pay the costs of the Auctioneer in the circumstances of this case?

The facts are that the Defendant was a tenant of Velos Enterprises Ltd (hereinafter “the landlord”) at the latter’s property known as Gateway Business Park LR No. 209/10272, Block 1A Ground Floor (hereinafter “the premises”). On 11th May, 2010, Ms Taibjee & Bhalla, Advocates for the landlord issued instructions in writing to the applicant, who is an auctioneer by profession, to levy distress against the Respondent for Kshs.542,116.50 being alleged rent arrears as at 30th April, 2010. The said sum included rent of Kshs.376,925/- and VAT for January and February, 2008 of Kshs.52,441/75 for each month and Kshs.60,308/- being VAT for April, 2010.

Pursuant to those instructions, the Applicant proceeded to the premises on 13th May, 2010 and served upon the Respondent the proclamation which was duly signed by the Respondent’s agent on the same day. That copy of the proclamation was sent to the landlord’s Advocate on 14th May, 2010 under a covering letter dated the same day and produced as (“GAIV”). After expiry of the statutory period of 14 days, the Applicant visited the premises with a view to remove the proclaimed items but was informed by the Respondent that it had cleared the arrears and that he should forward his fee note which he did vide fee note No.4 of 4th June, 2010. Thereafter, the Applicant received a letter dated 8th June, 2010 from the Respondent’s Advocates informing him that as at the time of proclamation, the Respondent was not in arrears. On informing the Landlord’s Advocates, the latter sent the Applicant an email from the Landlord to the said Advocates dated 14th May, 2010 advising that the Respondent had paid on the said date Kshs.1,311,699/- being rent for April, May and June, 2010 plus the VAT thereof. The Applicant thereupon wrote that the Respondents Advocates advising them that the Respondent had paid the arrears after the proclamation of its assets and therefore demanded that his fee note be paid. The Respondents Advocates responded and advised the Applicant to pursue his costs with his instructing client and not the Respondent. This then provoked the application before me.

The Applicant filed his submissions dated 24th November, 2010 which were highlighted by Ms. Lele, his learned Counsel. It was argued on the Plaintiff's behalf that the costs follow the event, that under Rule 7 of the Auctioneers Rule, it is the debtor who pays the auctioneers charges. Counsel referred to the decisions of **K.T.D.A –vs- Kimani Kinyanjui, Kingsway Tyres & Automart –vs- Richard Muchai T/a Richard Muchai Auctioneers & Another** and **Maji ya Ufanisi –vs- Simon Njomonge t/a Dollar Auctioneers** in support of that proposition. Counsel further submitted that costs are payable upon proclamation and not attachment and cited the cases of **NIC –vs- Majani Mingi Sisal Estate Ltd and NIC –vs- S.K. Ndegwa Auctioneer** in support of that proposition. Counsel further submitted that since there was no communication whatsoever before proclamation that the Respondent had no arrears the Applicant was within the law to proclaim and demand for his charges. That in any event, the Applicant is not duty bound to take steps to establish if the arrears had been settled or not.

The Applicant further argued that since the arrears were paid after he had proclaimed, he is entitled to his charges and that, in any event, it is as a result of his proclamation that the arrears were paid. Ms Lele, for the Applicant argued that since the issue in the tribunal matter, BPRT No. 283 of 2010 between the parties which the Respondent was raising was that of water and electricity, the court should not be distracted therewith and the application should be allowed.

The Respondent did file a Replying Affidavit of Rosyline Wambui Otieno, sworn on 18th October, 2010 and the written submissions dated 23rd November, 2011 that were ably highlighted by Mr. A. Ndambiri learned Counsel for the Respondent. He contended that the Application was brought in bad faith, and it was frivolous and vexatious and therefore an abuse of the court process, that the Respondent never gave the Applicants any instructions to render any services for him to raise a bill of costs against it, that the instructions came from the Landlord's Advocates, that the Respondent had informed the Applicant that it was not in rent arrears and neither the landlord nor its advocates has any rights to levy distress, that the issue of whether or not the Respondent was in rent arrears was the subject of BPRT No. 283 of 2010 between the parties, that since the Applicant was retained by Taibjee & Bhalla Advocates, the Respondent was clearly under no obligation to settle the fee note of the Applicant.

Counsel for the Respondent further submitted that the cheques for the rent were dated 12th May, 2010 and were received, that since rent was paid before distress was levied costs for the distress should be borne by the landlord, that in the Advocates letter dated 10th June, 2010 "GAX" the Advocates had indicated that the cheques were received by the landlord on 13/5/2010 at 9.30 a.m. He submitted that since the Respondent had raised the issue of rent in BPRT No. 283 of 2010, it was abuse of the Court process for the landlord's Advocates to have given instructions for distress of rent and finally that since the issue of the bill of costs and rent had been settled by consent without the Auctioneers costs being settled, the motion was misconceived and should be dismissed.

I have considered the Affidavits on record, the written submissions, the oral highlights of learned Counsel and the authorities relied on.

Firstly, the alleged settlement of the issues between the Landlord and Respondent by Consent was never proved. The court was not shown the alleged copy of the settlement or any evidence of a settlement of any of the issues in this matter. Therefore I will not deal with or address that issue.

In the case of **KTDA –vs- Kimani Kinyanjui CA No. 715 of 2001 UR** Hon. Ransley J held that:-

“If the tenant is in arrears of rent, the landlord is entitled to distress and the tenant should bear the costs.”

Also, in **Maji ya Ufanisi –vs- Simon G. Ngomonge T/a Dollar Auctioneer (2005) e KLR**, Kasango J was of the same opinion, that once a tenant is in arrears costs for distress for rent are payable by the tenant.

I am agreeable with that proposition that if a tenant is in arrears, the costs for distress are to be borne by

the tenant. This is so on the principle that costs follow the event. That an auctioneer would not have been instructed to levy distress and his costs incurred thereby were it not for the default of the tenant.

In this case therefore the issue is, was the Respondent in arrears of rent as at 13th May, 2010? One issue that is undisputed is that the instructions to levy distress came from the landlord's Advocates Ms Taibjee & Bhalla on 11th May, 2010. The Applicant has sworn that he proclaimed on 13th May, 2010, but he has not stated what time of the day it was. However, it is clear from "GA III" that the proclamation No. 004 dated 13th May, 2010 was signed for by an agent of the Respondent on 13th May, 2010. It should be noted that, the Respondent has not in the Replying Affidavit denied having received the proclamation, it has also not stated or sworn that its goods were proclaimed after it had paid the rent. It left that fact to be addressed by its counsel Mr. Ndambiri through his letter of 10th June, 2010 produced as "GAX". Also, the Respondent did not produce a copy of the delivery book to show that the rent was actually delivered to the landlord and received at 9.30 a.m. on 13th May, 2010. Surely, Section 107 of the Evidence Act is to the effect that he who alleges must prove it. The Respondent alleged through its Advocates of having paid the rent on 13th May, 2010. It was upon it to produce evidence to prove that fact. In my view, it has failed to do so.

To my mind, the net effect of Sections 107 and 109 of the Evidence Act Cap 80 Laws of Kenya is that, he who alleges MUST prove. It was upon the Respondent to lead evidence to show that actually, apart from having received the proclamation from the Applicant and signed for it on the 13th May, 2010 the cheques for rent arrears had long been paid on 13th May, 2010 at 9.30 a.m!

Further, although the Respondent had in its possession, through the Affidavit of the applicant in support of the Motion, the email of the landlord to its Advocates dated 14th May, 2010 "GA VII(I)" wherein the landlord had clearly indicated that it had been paid the rent for April, 2010 by the Respondent on 14th May, 2010, the Respondent did not in any way dispute that fact. That fact had in any event been brought to the attention of the Respondent through the Applicant's letter of 14th June, 2010 produced as "GAXI" as a reply to the Respondents Advocates letter of 10th June, 2010. This fact was never challenged nor directly denied by the Respondent. The Respondent's Replying Affidavit avoided addressing this issue.

In any event, if as at the time of proclamation the Respondent had paid the rent as alleged, it should have received the proclamation either under protest, without prejudice or as it occurs in many cases completely refused to receive the proclamation! None of these happened.

Accordingly, due to the foregoing reasons, I am persuaded and indeed convinced to hold that as at the time the proclamation dated 13th May, 2010 was served upon the Respondent on 13th May, 2010, the Respondent was in arrears of rent.

Further, I hold the view that if the Respondent was serious in its assertion about having paid the rent by the time it was being proclaimed, it should have joined the Landlord in these proceedings and claimed contribution or indemnity. This it did not and having failed to produce any acceptable evidence of payment of the rent on 13th May, 2010 at 9.30 a.m., loss will lie where it has fallen, upon the Respondent!

On the issue of BPRT No. 282 of 2010 between these parties, I hold the view that the same has no relevance to this matter. I note from exhibit No. "RW02" that that was an injunction application by the Respondent to restrain the landlord from disconnecting water and electricity. The Plaintiff was never produced to show whether or not there was a prayer for a declaration that rent had been paid in full. In any event, as I have already held, the rent for April, 2010 was paid on 14th May, 2010 way after the end of April, 2010 when it should have already been paid.

In view of the foregoing, I do not think Ms. Taibjee & Bhalla Advocates for the landlord acted in abuse of the court process by instructing the Applicants to levy distress against the respondent's goods as has been contended by the Respondent's counsel.

The upshot of the matter is that, the Applicant's application has no merit. The Respondent is liable to pay the costs for the distress of 13th May, 2010. I direct that the Deputy Registrar does assess the Applicants Bill of Costs appropriately as against the Respondent. The Applicant shall have the costs of this application to be assessed and added to his Bill of Costs dated 7th July, 2010.

Orders accordingly.

Dated and delivered at Nairobi this 6th day of February, 2012

A.MABEYA
JUDGE