



REPUBLIC OF KENYA

High Court at Kisumu

Civil Case 220 of 2011

PAUL GERRIT JASPERS.....1st
PLAINTIFF

CHANTAL HEUTINK.....2nd
PLAINTIFF

VERSUS

DALMAS ODHENGO.....1ST
DEFENDANT

OMONDI OKOYO.....2nd
DEFENDANT

JASPER MALOME3rd
DEFENDANT

RULING

Vide his Notice of Motion dated 29th June 2012 the 1st defendant prays that this court do compel the plaintiff to release to him several assorted items which are his and what were left behind when this court issued the temporary orders in the plaintiffs' favour. When the above application came up for hearing Mr. Okoth for the applicant abandoned the other prayers except number 3.

The affidavit in support of the application sworn by the 1st defendant on 29th June 2012 avers that the plaintiff has advertised for sale his properties and unless stopped he stands to suffer loss and damage. He further argues that his efforts to have him collect the items have always been thwarted by the order issued against him and in favour of the plaintiff.

The plaintiff has respondent vide the replying affidavit dated 12th July 2012. The 2nd respondent avers that as a result of the 1st defendant failure to collect his items they have incurred a lot of costs in keeping them hence the decision to dispose the same under the provisions of the Disposal of uncollected Goods Act.

I have perused the application as well as the reply. There is no doubt that the relationship between the parties herein has irretrievably broken down. The orders of injunction did not include ordering the applicant to collect his items. There was an admission by the plaintiff however that the applicant should collect his goods so that space could be created for the plaintiff to undertake their work.

The plaintiffs contents that before the 1st defendant is allowed to collect the items he should first of all pay the storage charges as well as the auctioneers charges. The 1st defendant however contents that he did not refuse to collect save that the plaintiffs used the order in their favour to stop him from collecting the items.

Taking the totality of the evidence before me it is difficult at this juncture to determine who is telling the truth. It is only through adduction of oral evidence that the issue can be resolved.

I shall consequently, grant the applicant the benefit of doubt and order that he should proceed within the next seven (7) days from the date herein to collect his personal goods and items. The plaintiffs on the other hand should they have any expenditure or monetary claim or costs that they may have incurred against the defendant should proceed to include it in their claim which is already in court. The costs shall be in the cause.

Dated, signed and delivered at Kisumu this 29th day of October 2012

**H.K. CHEMITEI
JUDGE**

In the presence of:

Onsongo for Oluoch for the applicant

Mwamu for the respondent

HKC/aao