REPUBLIC OF KENYA

High Court at Mombasa

Civil Appeal 15 of 2004

1. N. W. REALITE LIMITED

2. M. A. JAGANI & SONS LTD……………………..…..…….APPELLANTS

VERSUS

MOSES OCHIENG SAKWA..……….………………………..DEFENDANT

Coram:
Mwera J.
Munyithya for Appellants
Oguk for Respondent
Furaha Court Clerk

JUDGMENT

The record of appeal herein was lodged in court on 10th June, 2005. The appeal to be determined followed a ruling by the Chief Magistrate (Mombasa) on 4th December, 2004. The grounds of appeal advanced were to the effect that the learned trial magistrate failed to consider the grounds the appellant had raised in opposition to an unstated application; that the respondent had failed to demonstrate that an injunction was deserved; the goods distrained did not belong to the respondent as per documentary evidence tendered; the learned trial magistrate should have found that an award of damages would have been sufficient; the injunction order was prejudicial to the appellants particularly that it did not provide for an undertaking for damages. And finally, that the learned trial magistrate wrongly exercised her discretion in issuing the subject injunction.

The chamber summons which gave rise to the ruling, now under appeal was dated 2nd December, 2003. It was brought by the present respondent under Order XXXIX rules 1, 2 of Civil Procedure Rules with two main prayers. One, for a **temporary** and another for a **mandatory** injunction against the defendants/appellants:

(i) that the defendants be restrained from levying distress over the plaintiff/respondent’s goods or selling the same by public auction (the goods were listed).

(ii) that the appellants/defendants do release and return the subject goods to the plaintiff/respondent.

It was stated in the grounds that the auctioneer/2nd appellant (Jagani) had illegally distrained the respondent’s goods and advertised the same for sale on 4th December, 2003. That the respondent had made part payment to the 1st defendant/Pem Subash (described) as a co-owner and so had not breached their agreement. That goods leased/rented to a tenant could not be distrained. By moving to the

respondents' supporting affidavit probably the content of these grounds will become clearer.

The respondent stated in his supporting affidavit that in March, 2003 he entered in a sale agreement with 1st defendant (Subash) to buy items in Hard Rock Bar & Restaurant for Shs. 1,557,000/=. The respondent paid Shs. 850,000/= leaving a balance of Shs. 707,000/=. A formal agreement was signed on 14th May, 2003 (MOS1). The purchase sum balance would be paid on 14th December, 2003. In the meantime Subash could pay a monthly rental of Shs. 20,000/=. No payment was made and in November, 2003 the restaurant was closed with a notice to distress for rent pinned on the door (annexure MOS2). The respondent went to the auctioneers (3rd defendant, Jagani) to explain that the distrained goods were his but that firm proceeded to remove the goods which were later advertised for sale. That in the meantime the 1st defendant (Subash) became elusive. So if the sale proceeded, the respondent would suffer loss. This chamber summons appears in the supplementary record of appeal. It does not contain any replying affidavit by Subash (1st defendant) in the original or supplementary record of appeal. But the record of appeal contains a replying affidavit by the auctioneer (Jagani) dated 12th January, 2004, seemingly, to the chamber summons in issue. He deponed that in November, 2003 he received instructions to levy distress for rent upon Subash for Shs. 900,000/= in arrears. Jagani did just that on the goods of Subash in his Hard Rock Bar (above), and proceeded to advertise the same for sale. Jagani exhibited copies of the levy for distress in SRMCC 5790/98. The attachment was followed by Subash filing objection proceedings. This court was not able to trace in the two records of appeal, any affidavit sworn by the 2nd defendant/1st appellant (N. W. Realite Limited) or does that entity appear to be described in any way. It shall be noted that Subash is not an appellant here.

By the time the learned trial magistrate was crafting the ruling subject of this appeal on 4th February, 2004 (not 4th December, 2004) she noted that the 1st defendant (Subash) had not entered appearance or filed defence to the suit before her. It has already been observed that this court did not readily come by any replying affidavit by Subash to the subject chamber summons. Not from the 1st appellant (N. W. Realite Limited) either. The learned trial magistrate however observed that Realite and Jagani (2nd and 3rd defendants) objected/opposed the summons. She proceeded to find that the respondent herein, having sued the appellants jointly and severally, had made out a *prima facie* case and so both orders of injunction were granted (prayers 2 & 3).

The grounds of appeal have been recited above. Both sides submitted. After going over the principles/authorities governing temporary and mandatory injunctions, the appellants' side maintained that there was no sufficient evidence before the learned trial magistrate to conclude that a *prima facie* case had been made out by the respondent to the effect that the subject goods had passed from Subash. Or from Subash to him. That as the mandatory injunction was granted the respondent would not lose both the money and the goods or suffer irreparable (not substantial?) loss. That the learned trial magistrate ignored the express provisions of the Distress for Rent Act (Cap 203) and that she should have granted stay of the levy for distress rather than order return/release of the goods. And that the orders in issue were so drastic in the circumstances.

On his part, the respondent urged the court to find that he had placed before the learned trial magistrate sufficient evidence to justify the orders made. Then there was a detour into the area of the Stamp Duty Act which this court could not easily follow. Also Sale of Goods Act was brought in. All ended with the plea that the goods in question belonged to the respondent.

The orders of 4th February, 2004 were made at an interlocutory stage. So the issue of whose property the stated goods were, could only come at the end of hearing the suit itself. Submissions here tended to the position that this or that party had right of ownership to the goods upon which distress for rent was levied. Or that at this point the learned trial magistrate should have proceeded into that aspect. Not so. The respondent sued and filed the chamber summons claiming that by the agreement between him and Subash he was purchasing the goods in question. The agreement was displayed. It was not denied by Subash. That some money towards the purchase was paid to him but the items remained in the restaurant perhaps until the respondent paid the balance. Again, there was no rebuttal as to this state of

things. Further, that in the arrangement between Subash and the respondent, the former agreed to pay rent of Shs. 20,000/= which he did not do. Again this is not denied by Subash by way of affidavit. Jagani may have proceeded properly distress for rent against Subash, owing to the 1st appellant (Realite). But then there was this sale agreement. So whatever rights under the Distress for Rent Act, Stamp Duty Act or Sale of Goods Act, that was not before the learned trial magistrate at the time she delivered the subject ruling. All she required at that point was whether the respondent had made out a prima facie case to deserve the order. The learned trial magistrate delivered herself:

"I have considered the application and the arguments that have been advanced for and against the same. I have considered the authorities referred to which deal with the principles governing the grant of mandatory injunctions at interlocutory stages. On the ground that the plaintiff having sued the respondents severally and jointly appears to have a prima facie case as it is not contested that in the present proceedings that certain monies have been paid towards the purchase of this distressed goods. Further it is noted that the balance of convenience is in favour of the plaintiff who would loose (sic) twice if the goods were sold. Some Shs. 850,000/= is said to have been paid to the 1st defendant should the goods be sold …… The plaintiff will loose (sic) the said money and goods. The 2nd defendant on the other hand can recover the outstanding rent from the 1st defendant throughout (sic) some other means. I have not been shown any evidence that the sale agreement entered into between the plaintiff and the 1st defendant is an attempt to frustrate the distress levied by the 2nd defendant."

From all the foregoing, this court is of the view that the learned trial magistrate addressed herself to the principle whether or not a *prima facie* case had been made out by the respondent at the time of hearing his chamber summons. She concluded that he had by tendering an agreement by which he bought the subject goods from the Subash. She was satisfied that he paid some money to fulfill his part of the bargain and so the goods should not be distrained. Yes. This was at an interlocutory stage and the learned trial magistrate ordered release of those goods to the respondent. She may not have so stated in the ruling, but she was of the view that since there was no evidence that his sale agreement of 14th May, 2003 with Subash was meant to frustrate the distress for the rent he owed, then the goods distrained on 22nd October, 2003 had to be released to him. Perhaps she should have added that the respondent should not dispose of those goods until the suit was finally determined. But no matter. She alluded to the 1st appellant (Realite) having recourse to other means to recover its rents as opposed to letting it sell the goods thereby occasioning double loss of money and goods to the respondent. This was not a proceeding involving stay of the distress and the learned trial magistrate should not be faulted for not ordering that.

In short, this appeal is dismissed with costs.
Delivered on 13th November, 2012.

J. W. MWERA
<u>JUDGE</u>