



REPUBLIC OF KENYA
IN THE HIGH COURT OF KENYA
AT MOMBASA
CIVIL CASE NO. 54 OF 2011

VICKY MONGIPLAINTIFF

VERSUS

ESTHER NGUNA CHANDA.....1ST DEFENDANT
EVANS MAABI t/a MURPHY AUCTIONEERS2ND DEFENDANT

R U L I N G

This is the application dated 15.03.2011. The Court made interim orders on 17th March 2011.

On the returnable date 30.03.2011, the Respondents had not filed his Replying Affidavit. The 1st Defendant is said to be based in Mwingi. She has not bothered to file any Replying Affidavit despite the serious allegations made against her.

The 2nd Defendant, the Auctioneer appeared in court. He was also represented by the same Counsel, Miss Matara, Advocate. The court asked him some questions as an auctioneer and officer of this court when he levied distress under the Distress for Rent Act. He was also the bailiff who got breaking orders from the court.

Mr. Maabi, the Auctioneer confirmed that he levied distress but denied that he evicted the plaintiff. He said that the premises were left in possession of the plaintiff and the person who was present was one Salome.

It was confirmed by Mr. Mwakisha that Salome is the daughter of the plaintiff. It is common ground that there was no eviction order to justify the eviction of the plaintiff. In fact the Auctioneer says that he did not evict. This will be investigated in due course but somehow on the material day the distress was levied on the plaintiff in some cunning and conniving way was dispossessed the suit premises.

It was said that there were some security guards were at hand. I do not find the allegation from the bar that the premises had been leased to a third party to be absurd and unacceptable. There could be no eviction as the one to being distress was not an eviction order and cannot give the 1st defendant the right to repossession.

The tenancy of the plaintiff was still intact and had not been terminated there was no due process. The 1st defendant has stolen a match on the plaintiff. I do hereby apply the principle in **KAMAU MUCUTHA – V- RIPPLES LTD.** Without any hesitation and accepting that the courts do not usually grant mandatory injunction except in very exceptionally cases, I do hereby grant prayer 2 and 3. The Orders shall be

executed by the 2nd Defendant with the assistance of the O.C.S.Makupa Police Station forthwith. The 1st Defendant shall pay the costs of the application.

In order for the plaintiff to re-adjust and to be able to get back on her feet after the devastating eviction, I do order that she withholds payment of rent for the next 5 months. The rent shall be suspended for the said 5 months also as a punishment to the 1st Defendant at this stage. This shall be without prejudice to any other claim that may be proved. The loss and damage suffered by the plaintiff be considered in the suit upon amendment of the plaint.

This should send a signal to all Auctioneers and their clients that it shall not be business as usual when it comes to levying of distress and execution of court orders in Mombasa and at the Coast Province in General.

Dated and delivered at Mombasa this 31st day of March 2011.

M. K. IBRAHIM
J U D G E

Mr. Mwakisha for the plaintiff

Mr. Maabi – present for 2nd Defendant.

No appearance for the 1st Defendant

Ruling delivered in their presence.