



**REPUBLIC OF KENYA**  
**IN THE HIGH COURT OF KENYA**  
**AT NAIROBI**  
**CIVIL APPEAL NUMBER 358 OF 2009**

**ISAIAH GICHU NDIRANGU. .... APPELLANT**

**VERSUS**

**KENNEDY M. MUSEKA. .... 1<sup>ST</sup> RESPONDENT**  
**BALLON NANGALAMA. .... INTENDED 2<sup>ND</sup> RESPONDENT**  
**T/A NEBRO TRADERS**

**R U L I N G**

Before me is an application by way of amended Notice of Motion dated 11<sup>th</sup> June 2010 and amended on 15<sup>th</sup> July 2010. The application was filed under Order 6A rule 1(1) and rule 5(1), Order 42 rule 2 and 3, Order 41 rule 4(6) of the Civil Procedure Rules, as well as section 3A 3(e) and 75 of the Civil Procedure Act (Cap 21 Laws of Kenya).

The prayers in the application are as follows: -

- 1. That this application be certified urgent and service of the same be dispensed with in the first instance.**
- 2. THAT this Honourable court do issue an order restraining the Respondent whether by himself, his services (should be servants) and or agents in particular Hebros Traders Auctioneers or otherwise howsoever from selling, offering for sale transferring and or disposing of the appellant/applicant attached movable property (household goods) pending the hearing and determination of this application and or further order of court.**
- 3. THAT this Honourable court do issue an order restraining the respondent whether by himself, his servants and or agents, in particular Hebros Traders Auctioneers from selling, offering for sale, transferring and or disposing of the applicants movable property (household goods) pending the hearing and final determination of this appeal.**
- 4. THAT this Honourable court do issue an order for the return of the applicant's goods unconditionally.**
- 5. THAT this Honourable court do grant any other relief it may deem fit.**
- 6. THAT the costs of this application be provided for.**

The application has grounds on the face of the Notice of Motion. The grounds appear to be brief, and I will reproduce them hereunder. They are as follows: -

- a) *Despite the pendency of an appeal the Respondent has gone ahead and purported to distress for arrears of rent.***
- b) *The ruling of the court, subject of the appeal had ordered parties to adhere to the Tenancy agreement dated 1<sup>st</sup> August 2007 which had fixed monthly rent at Ksh.6500/-.***
- c) *The respondent has refused to accept rent when it is tendered to him.***
- d) *The purported arrears of rent are exaggerated as the appellant did not have any arrears outstanding by the month of December 2009.***
- e) *It is just and fair that the continuation of the breach of the Tenancy Agreement by the respondent be stopped.***

The application was filed with a supporting affidavit sworn by the applicant on 15<sup>th</sup> July 2010. It was deponed in the said affidavit, inter alia, the Chief Magistrate had ordered parties to comply with the terms and conditions of the Tenancy Agreement dated 1<sup>st</sup> August 2007. That the applicant had filed an appeal against some aspects of that ruling. That the landlord had from January, 2010 had completely refused to accept rent and insisted on payment of Ksh.10,000/- per month; and that the landlord on 9<sup>th</sup> June 2010 sent Hebros Traders Auctioneers who carried away the applicant's household goods.

The applicant also filed written submissions on 16<sup>th</sup> November, 2010. It was contended that the auctioneers, M/s Hebros Traders Auctioneers, had lied. It was contended that the preliminary objection herein was filed in bad faith. It was contended that Rule 44(1) (sic) of the Civil Procedure Rules was applicable. A number of court cases were relied upon.

The application was opposed. A Notice of Preliminary Objection was filed. It was contended that the 2<sup>nd</sup> respondent was not a party to the suit. The respondents also filed written submissions on 29<sup>th</sup> November, 2009.

On the hearing date, the applicant appeared in person. Mr. Koskei appeared for the respondents. They all relied on documents and submissions filed.

Having considered the application, documents filed, submissions and the law, I am of the view that the application will not succeed.

The applicant himself admits that there is a court decision, which the respondents are trying to enforce. He says that he has filed an appeal. He now comes to this court asking for restraining injunctive orders pending appeal. He has not applied for stay of the decision of the subordinate court. In my view, execution of an order of the court cannot be stopped on the basis of an injunction. It can only be stopped by way of a stay of execution, if granted. In my view, the applicant has come to this court under the wrong provisions of the law, seeking wrong orders. The prayers sought cannot be granted in an attempt to stay execution of an order of the court pending appeal. I will therefore strike out the application.

Consequently, I strike out the application. The applicant will pay the respondents the costs of the application.

Dated and delivered at Nairobi this 17<sup>th</sup> day of March, 2011.

.....  
**GEORGE DULU**  
**JUDGE**

**In the presence of**

Applicant present in person

C Muendo – court clerk