



**REUBLIC OF KENYA  
IN THE HIGH COURT OF KENYA**

**AT NAIROBI**

**CIVIL CASE NO. 467 OF 2010**

**SATNAM SINGH BAHRA.....PLAINTIFF**

**VERSUS**

**JOSEPH MUNGAI GIKONYO T/A GARAM  
INVESTMENTS.....DEFENDANT**

**HOUSING FINANCE COMPANY OF KENYA.....THIRD  
PARTY**

**Coram: Mwera J**

**Kandere for plaintiffs**

**Kabaiko for defendant**

**Njoroge, court clerk**

**JUDGEMENT**

On 14.3.03 the plaintiff sued the defendant firm of auctioneers claiming that on 27.11.2000 while at home at LR No. 209/26/22, 1<sup>st</sup> Parklands Avenue, Nairobi, the defendant unlawfully and without proper/prior investigation forced entry into the said premises, harassed the plaintiff and proceeded to proclaim motor vehicles registration no. KAH 751 B , KAL 951Q the property of M/s Didar Construction Co. Ltd where the plaintiff was a director. Apparently this was in execution of a decree in HCCC 210/00. The plaintiff was never a party in that suit nor did he know of the judgement there. That by his action the defendant acted with malice, embarrassed the plaintiff, a prominent businessman, and so he prayed for general damages for trespass, aggravated damages, special damages (sh. 30,000/= legal fees), costs and interest.

In the defence filed in court on 7.5.02 the defendant admitted that he proclaimed the said 2 motor vehicles but denied that that was by a forced entry into the residence of the plaintiff or that he harassed them. It was averred that the entry to proclaim was by virtue of powers conferred on the defendant by the Auctioneers Act, to execute court orders.

In this case it was to execute warrants in a decree in HCCC 210/00. That the defendant's acts were not

malicious and did not humiliate the plaintiff at all. And no type of damage was occasioned to the plaintiff. The defendant pleaded that he would seek leave to join an entity called the Housing Finance Co. of Kenya Ltd as a 3<sup>rd</sup> party. It was his instructing decree – holder.

On 20/2/05 the parties filed 8 agreed issues for determination followed with documents to be relied on at the trial and on 3.11.10 it opened with the plaintiff in the witness box (PW1).

He told the court that on 27.9.00 people went to his residential premises and proclaimed his two motor vehicles reg. nos. KAL 951 Q and KAH 751 B as per the logbooks placed before (Exh P1-11, 13). The vehicles were registered in the name of their company – Didar Construction Company (1986) Ltd. The time was at about 1 pm. The guard opened the gate for PW1 and those who came to proclaim the motor vehicles got in with him. They showed him a court order addressed to one Gucharan Singh Bahra whom PW1 did not know. The papers bore HCCC no. 210/00 – a case PW1 was not aware of nor was he a party in it. He tried to clarify that but those people – they were 3, proceeded to proclaim (Exh P 1-10). Then the plaintiff instructed his lawyers whom he paid sh. 30,000/= (Exh P1 – P4 19) to go to court. The lawyers sent a demand letter (Exh P1 – 18) to the defendant to admit liability. In court a stay was granted to enable the plaintiff file and prosecute objection proceedings (Exh P1 – 1 to 8, 17). The plaintiff claimed that there was a commotion when the 3 people insisted on taking away the motor vehicles and neighbours had to intervene.

In cross examination it was stated that the plaintiff resided on the premises where the 3 auctioneers came. Didar Construction Company Ltd had its offices along Homa Bay road, Industrial Area. The company motor vehicles were parked both at home and in Industrial Area. His father, Didar Singh, another director in Didar Construction Company, was at that time in the UK. The two used to live together in the premises where proclamation took place. The 2 motor vehicles were not registered in the names of the plaintiff. He came to court on the instructions of the company and the co-shareholders and the plaintiff sued because he was embarrassed. As the guard opened the gate for him, the auctioneers also entered the compound. There was no forced entry.

As per the affidavit PW1 swore on 25.10.00 the auctioneer visited his house and explained the purpose of his visit. Proclamation was over the 2 motor vehicles only. The auctioneer did not attempt to take them away. The proclamation was left with him stating that the proclaimed property would be with him for 7 days. During that time PW1 lodged the objection proceedings against the attachment. Quite probably after those proceedings the plaintiffs' lawyer demanded sh. 10,151/= on 13.3.01. That was paid on 20.8.01. The sh. 30,000/= cheque to instruct the lawyer in the matter was drawn against Didar Construction Co – account. PW1 then named some of the tenants on the premises on the day the auctioneers came – Shakad Alil Neelam and Popatlal Patel. Gucharan Singh was never a tenant there. At the time of proclamation PW1 did not have the log books of the 2 motor vehicles at home. He simply explained that to the auctioneer with his team with a view that he could believe him. The plaintiff's father died 4 months before the trial and he was in the process of obtaining a grant to administer his estate which included the residence where the auctioneer went.

The plaintiff did not process a power of attorney to proceed in these matters on behalf of Didar Construction.

In reexamination the court heard that the plaintiff did not invite the auctioneer to his premises. He simply went there without seeking permission first. He was in court on his own behalf and not for Didar Construction Company Ltd.

Benard Misoga Kilumbe (PW2) was the watchman at the premises of the plaintiff on the material day. when he opened the gate for him at 1 pm. 3 people followed him in. PW2 tried to stop them without

success. Those people did not give him their names, but they told him that they had a court order. After the plaintiff parked his car, those people went there and there was commotion and noises. Neighbours came out and the visitors went ahead to take registration numbers of the motor vehicles. Then they left.

The visitors were two men plus a woman. They did not knock at the gate. They simply followed PW2's employer into the compound. The plaintiff's father who was in the compound tried to talk to these people. Did the plaintiff say in cross – examination that on that day his father was in the UK? Anyway, the plaintiff's case closed and the defendant got into the witness box (DW1).

A class B court auctioneer licence holder, M/s Ahmednasir & Co. Advocates gave him warrants of attachment and sale to execute in HCCC 210/00 with the Housing Finance Company as the decree holder. (Exh D1 – 1, 2). The defendant got the lawyer to show him where the judgment debtor's movable property was. The lawyer's process server would do that - one Daniel Mang'eli. He led the defendant to 3<sup>rd</sup> Avenue Parklands near HighRidge Shopping Centre and the two, plus Ann Magondu, DW1's assistant, visited the judgement debtor's residence on 27.9.00. At the gate the team acquainted the watchman with the purpose of the visit. That the team consisted of court officers desirous to talk to the residents. The watchman went inside and informed the occupants. Then one Satnam Singh Bahra came out. DW1 showed him the attachment warrants with intention to proclaim. Satnam declined to let the auctioneer in. He took registration number of motor vehicles in the compound from outside the gate. Satnam told DW1 that Gincharan Singh, the judgement debtor, lived there. While referring to Exh D1 – 3 (proclamation) therein it was noted that the auctioneer proclaimed the motor vehicles and left the proclamation with the debtor to wait for 7 days before attaching the motor vehicles by taking them away. There was no attempt to take them away on this day. There was no confrontation between Satnam Singh with his guard (PW2) on one hand and DW1's team on the other. The proclamation was handed over to Satnam Singh Bahra the (plaintiff). Then on 28/9/00, DW1 informed the instructing party (Exh D1 – 4) that the attached goods would be attached for sale in 7 days. Before that period expired, objection proceedings were instituted (Exh D1 – 5, 6) and that was conveyed to the decree holder's lawyers (Exh D1 – 7). On being sued here, the defendant served a 3<sup>rd</sup> party notice on Housing Finance. He had done nothing by malice or ill – will in the whole process.

In cross – examination the court heard that the decree holder's lawyers had told the defendant that their process server had once served papers on the debtor and so he could show the way to his house – whose number was not indicated. But DW1 was sure about the house the process server, Daniel Mang'eli, showed him. The plaintiff on coming out to meet DW1's team, denied that he was the debtor but told him that Gucharan Singh, the debtor lived there.

Satnam did not produce evidence of the ownership for the 2 motor vehicles proclaimed, but this took place because the defendant had information that the 2 motor vehicles belonged to the debtor. There were 3 to 4 houses in the compound and the plaintiff told DW1's team that Gucharan lived there. The process server showed the defendant the premises as belonging to the debtor, but apparently it was a wrong address. The defendant acted on information. He does not and did not carry out investigations before proclamation. That closed the defendant's case.

The 3<sup>rd</sup> party's case was opened by Daniel Mangeli (DW2), the process server referred to above and now in private business. Referring to the 3<sup>rd</sup> party Exh. DA – 11, DW2 received summons to serve Gucharan Bahra in May 2000 – the defendant in HCCC 210/00. The witness was also given the defendants' telephone no. 748565 Highridge. Attempts to contact him on it failed and so he went to the post office to get trace of his physical address. DW2 proceeded to Highridge Shopping Centre in that effort and met a certain security man near a hardware close to the defendant's (Gucharan) residence.

This guard told DW2 that Gucharan usually came home by at about 1 pm for lunch. So he waited and the defendant showed up with an African driver. The defendant answered that he was Gucharan Singh Bahra and DW2 served him with a summons to enter appearance plus a copy of plaint. The defendant accepted both but declined to sign for them. He told DW2 to go and serve his lawyer whose name he did not divulge. But DW2 advised the defendant to take the processes (Exh DA – 12 to 14) to go and hand over himself to his lawyer. Later DW2 was given a notice to execute to serve on the defendant. Again he visited the residence and served him. The defendant did not sign for it. On both occasions DW2 filed affidavits of service (Exh DA – 9) and got the defendant to confirm his identity and residence. The residence as informed at the Post office was on 3<sup>rd</sup> Avenue Parklands near Highridge Shopping Centre. There were several houses there. He served the defendant, a tall man wearing spectacles. DW2 was not aware of substituted service through a newspaper (Exh DA – 20) on the defendant. The witness could not recall the house he served Gucharan Singh Bahra at, he has since ceased operating as a process server.

Migui Mungai (DW3), an advocate employed as an assistant manager with Housing Finance Company brought to court a file by which his employer gave a mortgage loan to Gucharan Singh Bahra as per the forms he completed (Exh D (B) on 27.9.95. The borrower started to default wef 15.3.99 and the lender (HFC) moved to sell the property (Exh DA -15) – on LR No. 337/1667, Athi River . It realised sh. 2.6m leaving a shortfall of sh. 5.5 m. So HCCC 210/00 was filed to recover this sum from Gucharan Singh. A default judgment was obtained (Exh DA – 16) followed by a certificate for costs (Exh. DA – 17) M/s Garam Auctioneers, the defendant, was instructed to recover the decretal sum . A proclamation issued on 27.9.00 (Exh D1 – 1) and to execute the decree, a motor vehicle was attached. M/s Kakad wrote to the 3<sup>rd</sup> party's lawyers (M/s Ahmednasir & Co. Advocates) on 9.1.01 (Exh DA – 8) about paying damages for wrongful attachment. The objection proceedings succeeded and M/s Kakad demanded sh. 450,000/= (Exh DA – 46). The sum was settled at sh. 10,151/= and that was paid (Exh DA 49, 50, 52) by the 3<sup>rd</sup> party. The 3<sup>rd</sup> party had instructed Daniel Mangeli (DW2) to serve summons on the borrower, Gucharan. He would also serve notice of entry of judgement. Then the auctioneer (DW1) proceeded to execute the decree.

At no time did the process server deal with the plaintiff herein. Neither did the 3<sup>rd</sup> party. The 3<sup>rd</sup> party had no case with the plaintiff and neither did it instruct the defendant to levy execution of decree on him. This party only paid costs for wrongful attachment and knew nothing about the legal fees of sh. 30,000/=.

In cross examination DW3 said that the 3<sup>rd</sup> party did not have the physical address of their borrower, Gucharan but Daniel Mangeli informed him that he served him at Highridge, 3<sup>rd</sup> Avenue . And the 3<sup>rd</sup> defendant was satisfied that the auctioneer carried out the 3<sup>rd</sup> party's instructions to execute. When M/s Kakad's demand was scaled down to sh. 10,151/= and the same was paid, there was no further demand . The trial closed and parties were directed to submit.

The plaintiff went over the pleadings and the evidence and posited that the defendant's acts to execute the decree exposed the plaintiff to ridicule and odium by raiding his residence in the presence of the public. The defendant did not conduct, with due diligence, investigations to ascertain who the debtor was before proceeding to proclaim the 2 motor vehicles, subject of successful the objection proceedings. The 3<sup>rd</sup> party was thus vicariously liable for the acts of the defendant and therefore the plaintiff was entitled to general damages between sh. 400,000/= and sh. 1.2m as per the authorities that were cited. He had proved his claim.

The defendant similarly went over the pleadings and the evidence before court and quoted the Judicature

Act (Cap 8) that no person acting judicially or discharging a judicial duty should be sued while so engaged. The defendant was a court officer executing a court decree and so should not be liable here. The 3<sup>rd</sup> party supported the defendant that he was instructed to execute the decree that was in its favour. It did not appear correct, but the defendant's submission seemed to incline to the position that the plaintiff had come to court to litigate on behalf of Didar Construction Co. [1986] Ltd. without authority. That was not so.

The plaintiff told the court that he had come to court for himself because the defendant allegedly and unlawfully raided his residence and there caused commotion and noises, embarrassing and humiliating him.

It was added that when sh. 10,151/= was agreed and paid, that was adequate compensation. Trespass was not proved because the act of the defendant to enter the plaintiff's house was not unlawful. And in any event the plaintiff had admitted that he was not the owner of the residence which the defendant visited.

The 3<sup>rd</sup> party did not submit.

In this court's view it has been said on all three sides that the defendant was executing a court order, namely, to serve warrants of attachment and sale regarding the decree issued in HCCC 240/00, following a default judgement. In that regard section 6 of the Judicature Act (Cap 8) applies:

**“6. No judge or magistrate, and no other person acting judicially, shall be liable to be sued in a civil court for an act done or ordered by him in the discharge of his judicial duty, whether or not within the limits of his jurisdiction, provided he, at the time, in good faith believed himself to have jurisdiction to do or order the act complained of; and no officer of a court or other person bound to execute the lawful warrants, orders or other process of a judge or such person shall be liable to be sued in any court for the execution of a warrant, order or process which he would have been bound to execute if within the jurisdiction of the person issuing it.”**

(Underlining supplied.)

The above legal and statutory protection for judicial officers and officers of the court while in good faith, they execute judicial duties or an order of judicial officers is clearly stated and no elaboration is required. It is for the officers protection to facilitate running and administration of justice. If left exposed such officers would fear and refrain from executing court orders. Such would stall or put a brake on the wheels of justice. The officers of the court include auctioneers, process servers bailiffs and all such. They are duty-bound to execute court orders. May the court hasten to add that duty to execute is not covered under section 6 above for acts done outside the bounds of the orders or processes. For instance section 6 does not protect a rogue auctioneer who assaults the debtors or steals or negligently damages property in the name of executing a warrant. An auctioneer who will take an attached motor vehicle and drive it for a holiday in Mombasa cannot seek protection under this section 6. These are only examples. Otherwise a court officer envisaged under section 6 is the one carrying out the duty on behalf of the court in a lawful and, if it can be added, decent manner.

In the present case the defendant acting as a court officer, a licensed auctioneer, was given warrants in HCCC 210/00 to execute and in good faith and on information he believed, he proceeded to do just that. It turned out that the attachment of the 2 motor vehicles was a misstep since it transpired that they belonged to M/s Didar Construction Company. That was resolved in the objection proceedings that took place. While the plaintiff seemed to say that the defendant made a forced entry onto his premises, that was denied. It was also denied that malice or ill- will attended the defendant's acts to execute.

As to whether the defendant trespassed on the plaintiff's residence, the court has already found that he entered the place while on lawful duty to execute a court warrant. In this case the defendant cannot be said to have trespassed there at all. And while engaged in such duty, this court is unable to agree that the "victim" can be embarrassed.

Trespass is defined in Blacks Law Dictionary 8<sup>th</sup> Edition as  
**"An unlawful act committed against the person or property of another especially, wrongful entry on another's real property."**

All in all this court finds that the act of the entry of the defendant on the premises where the plaintiff resided was not unlawful and the entry could not be termed wrongful.

In sum this suit is dismissed with costs.

Judgement delivered on 7.4.11.

**J. W. MWERA**

**JUDGE**