



REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA

AT NAIROBI

CIVIL CASE NO. 138 OF 2010

KIVULINI COMPANY

LTD.....PLAINTIFF

VERSUS

**THE REGISTERED TRUSTEES SHAH RANMAL RAJA CHRITABLE TRUST.....1ST
DEFENDANT**

**DUNHILL CONSULTING LIMITED.....2ND
DEFENDANT**

Coram: Mwera J

Odawa for plaintiff

Kamunda for defendant

Njoroge, court clerk

RULING

The plaintiff company filed a chamber summons dated 27.5.10 under the old Order XXXIX rule 2A, 3A of the Civil Procedure Rules and section 63 of the Civil Procedure Act with the prayer:

(i) that some 5 people – A. R. Raja, A. R. Shah, N.S. Shah, R.D. Shah and Onesmus Peter be committed to civil jail for contempt for disobeying the court orders issued on 25.3.10 and 27.4.10.

It was stated that the orders of 25.3.10 were based on the written consent of the parties in this suit about attaching and taking away the plaintiff's goods in a purported distress for rent arrears. Those orders were followed by other consent orders of 30.4.10. In sum both orders were to the effect that the defendants do open the suit premises and release the attached goods of the applicant. On reopening the premises, the applicant would return in possession on 1.5.10. That despite the fact that the orders were by consent, the respondents had not complied with them at all, prompting this application. One Marion Wakanyi Kamau, a director of the plaintiff company, swore a supporting affidavit elaborating on what was laid out in the grounds. She added that she paid sh. 185,000/= to the respondents so that the premises could be opened

and access to the offices and documents secured. Still the respondents disobeyed the orders and instead imposed extraneous conditions in order to reopen the premises.

In the replying affidavit by Onesmus Peter, the managing agent of the 1st defendant, landlord of the suit premises termed the present application dated 27.5.10 as being bad in law and an abuse of the court process. He in turn condemned the plaintiff for contempt, by not cooperating with the defendant's accountant to reconcile the rent account when the premises were reopened on 30.4.10, after the court had ordered the plaintiff to pay May 2010 rent. It was claimed that the door key was handed to the plaintiff's agent one Mutinda Muhindi (ID No. 7797728) who signed for it. Then the plaintiff failed to collect its goods from the auctioneers where it should pay due charges first. At no time did the court declare the distress unlawful in order to expect the defendants to pay the auctioneer's charges and that the defendants had in fact adhered to the court orders, subject of this application.

The plaintiff did not rebut or refute the facts as claimed by the respondents that they opened the premises and handed the keys to its agent Mutinda Muhindi or if at any time the distress was found to be illegal by the court. And that the premises were opened when, as per the court order, the plaintiff was directed to pay the May 2010 first.

Directed to submit the plaintiff did so in regard to an application dated 9.3.10 which was not the matter under review and also appeared to submit on facts and law covering the whole suit. The application under review is the plaintiff's chamber summons dated 27.5.10 seeking to have the court punish the defendants or their agents for disobeying the consent orders of 25/3/10 and 27.4.10. So the plaintiff's submission in this proceeding was largely, if not all, irrelevant.

The respondents submitted that they had complied with the questioned orders. While the plaintiff had been given premises, it had not gone to collect its goods from the auctioneers then it had failed in the effort to reconcile the rent account. On their part the respondents issued regular rent account statements to the plaintiff. Before determining this application we begin by setting out the consent orders recorded in court which the defendants are alleged to disobey – one of 25.3.10 and the other of 27.4.10 (or is it 30th April 2010?)

(A) The consent orders of 25.3.10: They were extracted by the deputy registrar from the parties signed document.

- “1. That the plaintiff/applicant has paid the defendant/respondents ksh 185,658/=.**
- 2. That the defendant/respondents shall immediately open the suit premises and release the attached goods to the plaintiff /applicant and/or return the attached goods to the suit premises.**
- 3. The parties do reconcile the rent payment account and ascertain the rent if any, due.**
- 4. That upon reconciliation of the rent accounts the party found to owe the other to pay the auctioneer's charges.**
- 5. That the matter be mentioned in a week, or as soon as the court may order, to confirm settlement.”**

Rawal J recorded the above consent. The parties were to mention the matter in 7 days. They did not fix such mention. Instead they came back on 16.4.20. It was recorded by Rawal J that the consent orders had not been complied with. Parties were directed to take necessary steps and return for mention on 27.4.10.

On 27.4.11 a further consent was recorded by the parties to the effect the plaintiff do pay the May 2010

rent on or before 30.4.10 so that the premises are opened. It was added that both parties reconcile the rent account within 7 days from May 1, 2010. It then was found to be rent arrears, the tenant/plaintiff was to pay it in 15 days. But if there was an overpayment the landlord would give due credit and with that an application dated 5214/10 was marked settled. Again it looks both parties did nothing and then on 17.5.10 the plaintiff made such representation to the court and it got leave to file contempt proceedings against the respondents and that is what is before court now. It may be observed that either the consent orders of 27.4.10 were not extracted or that the sealed copy is not on the file. But be that as it may.

From the appreciation of the above the plaintiff had to pay sh. 185,658/= to the defendants after it moved to court for orders to restrain levying distress for rent arrears. In this court's view by making such a payment and then the defendants agreeing to reopen the premises, return the goods with a view to reconcile the rent payment account to find out who owed who, is testimony to the fact that the distress was not unlawful. If the plaintiff honestly held the view that he owed no rent arrears or it had over paid, it must have been the one to take lead to reconcile the rent account within a week as it was ordered on 25.3.10. It did nothing or it has not demonstrated to this court that it moved to have the reconciliation done. Indeed the defendants claim that it has been reluctant to cooperate. The conclusion this court draw is even when the plaintiff was still "uncooperative", reluctant or taking no steps to reconcile the accounts and 15 days were given on 27.4.10 it cannot convincingly urge this court to find that the defendants have not complied with the consent orders of 25/3/10 and 27.4.10. It did not deny that premises were opened on 30.4.10 and handed over to its agent Mutinda Muhindi after paying the May 2010 rents. In fact even as at 29.6.10 Rawal J was still recording the parties consent orders to release the goods and:

“..... If the tenant does not reconcile rent arrears within 15 days rent if due, the tenant shall pay the costs of the auctioneers,”

And with that the matter was again marked settled! And again even to date the tenant has not reconciled the rent account. In that regard it is found by its conduct all along not deserving of the orders sought or further indulgence. It should go over to the auctioneers pay their charges, collect their goods and go back to the offices the respondents opened and handed over to Mutinda Muhindi on 30/4/10. Hopefully the plaintiff is up to date in rent payment or it would meet another hitch.

This application is dismissed with costs.

Delivered on 5/5/11.

J. W. MWERA

JUDGE