



REPUBLIC OF KENYA
IN THE HIGH COURT OF KENYA AT NAIROBI
CIVIL CASE NO. 224 OF 2011

TUMAC ALLUMINIUM & INTERIOR LIMITED..... ..PLAINTIFF

VERSUS

ELIJAH G KIMANI & ANR DEFENDANTS

RULING

Coram

Mwera J

Omangi for Plaintiff

No Appearance for Defendants

Njoroge Court Clerk

On 12.7.11 the defendants filed a notice of motion dated 6.7.11 under sections 1A, 1B, 3 (a) of Civil Procedure Act with the main prayers:

- i) that there be a stay of execution of orders of 27.6.11;**
- ii) the orders of 27.6.11 which required the defendants to release the goods held by them and also those held at Kayole Police Station be set aside.**

In the grounds it was contended that there had been a similar application in the lower court by the plaintiff in MISC. APPL. No. 283/11.

That the (1st) defendant had been condemned unheard and so this court should do equity to him by correcting what was termed – “absurdities.” That the goods collected belonged to some entity called Fidelity Timber & Hardware Ltd., an entity indebted to the 1st defendant.

The 1st defendant swore an affidavit to the effect that he was aware of the prayers in the plaintiff’s application dated 23.6.11 which gave rise to the orders of 27.6.11 now complained of. That the plaintiff abused the court process by not disclosing that a similar application to this in the lower court, had been dismissed. And the present application is not an appeal to that dismissal order. The goods carted away did not belong to the plaintiff but M/s Fidelity Timber & Hardware Ltd, who was indebted to the 1st defendant. These goods were taken by the 1st defendant to the premises where they were taken from, yet the plaintiff had not demonstrated to the court how it came to occupy premises. The 1st defendant had interacted with Fidelity Timber in the premises for 5 years. So he knew that the goods belonged to that entity. The 1st defendant then attached

documents (Ann EGK 2) to show how he cleared the subject goods as an agent and delivered them to the subject premises. Since there was a dispute as to ownership of these goods which the auctioneer took away, it was only proper that the orders of 27.6.11 be stayed until that issue was determined, with the goods remaining in the custody of the 2nd defendant. That M/s Fidelity Timber gave the 1st defendant a debenture over the subject goods and therefore he had right over them. As at this point if it may be noted, the so – called Fidelity Timber & Hardware Ltd allegedly said to be the owner of the subject goods, is neither a party here e.g. objector, nor has it been shown that Fidelity Timber granted the applicant debenture over those goods.

In the replying affidavit by the general manager of the plaintiff company, it was contested that Elijah G. Kimani (1st defendant) did not swear the supporting affidavit herein because his signature thereto did not compare/tally with another signature to documents of a company called Gachunju Supplies Ltd. If it can be remarked upon before going further, this court cannot be asked to make a finding on such a contention. Signatures are not in issue before it and neither does this court have the capacity to compare and make findings on the same. But the deponent went on to avail evidence from the Registrar of Companies (ann TO 3) that Fidelity Timber & Hardware Ltd on plot LR No. 6/407 Makasembo Rd, Kisumu had no security created by that company, if it may be added, by way of debenture in favour of the 1st defendant. The plaintiff company thus asked the court to dismiss the present application.

When it came to submissions the respondent despite being served to appear in court and also submit in support of the application under review, neither the 1st defendant himself nor his counsel showed up to prosecute that application. The plaintiff remained in opposition to the application by giving the background of the proceedings herein. It added that the premises where the plaintiff operates from were once occupied by Fidelity Timber & Hardware Ltd. On 21.6.11 the 2nd defendant apparently acting on the instructions of the 1st defendant in company of police from Industrial Area Police Station, proceeded to the plaintiff's premises and carried away its goods on the basis that they were recovering a debenture owed to the creditor Elijah G. Kimani by a debtor called M/s Fidelity Timber & Hardware Ltd – for a sum of sh. 12m. The carried away goods solely and entirely belonged to the plaintiff, who has had no relationship with the said Fidelity Timber & Hardware. And that the 1st defendant had no cause of action against the plaintiff to justify that act of taking away the said goods. So the present motion had no merit.

From all the above and with no need to go further in this matter the court decided to determine the plaintiff's application dated 23.6.11 which sought orders to restrain the defendants from taking or keeping its goods, using the 1st defendant's application dated 6.7.11 in opposition.

The end result is that the orders sought by the plaintiff company are confirmed with costs while the defendant's application is dismissed with costs.

Delivered on 31.10.11.

J. W. MWERA
JUDGE