



IN THE COURT OF APPEAL

AT NAIROBI

CIVIL SUIT 611 OF 2009

BEST FREIGHTERS LTD..... 1ST PLAINTIFF/APPLICANT

LYKEN HOLDINGS LTD..... 2ND PLAINTIFF/APPLICANT

-VERSUS-

SPORTS STADIA MANAGEMENT BOARD..... DEFENDANT/RESPONDENT

R U L I N G

Before me is a Chamber Summons dated 9th November, 2009 filed by M/s JA Guserwa & Company advocates for the plaintiffs/applicants **BEST FREIGHTERS LTD** and **LYKEN HOLDINGS LIMITED**. The respondents are **SPORTS STADIA MANAGEMENT BOARD**.

The application was filed under order XXXIX Rule 1,2,3,5 & 9 of the Civil Procedure Rules and Section 3A of the Civil Procedure Act (Cap. 21 Laws of Kenya). The application has 5 prayers, one of which has been spent, as follows-

1. *(spent).*
2. *That there be an order restraining the defendant and/or their authorized agents or servants from claiming non-existent rent arrears from the plaintiffs nor levying distress against their goods or any other property.*
3. *That there be an order restraining the defendants/respondents by themselves and/or through their authorized servants and/or agents from levying distress against the applicants, and/or evicting the plaintiffs/applicants from their business situated at LR No. 209/6347-Nyayo Stadium, Uhuru Highway/Langata Road pending the full hearing and determination of the instant matter.*
4. *That the defendants/respondents by themselves and/or their authorized servants agents be restrained from harassing, intimidating and/or interfering with the plaintiffs business operations at the suit premises in any way whatsoever.*
5. *That the costs of this application be paid by the respondents.*

The application has grounds on the face of the Chamber Summons. It is also filed with a supporting affidavit sworn by Charles Ndolo. The grounds of the application are as follows-

(a) That the plaintiffs/applicants are the lawful tenants and occupants of the suit premises situated on LR No. 209/6347 – Nyayo Stadium, Uhuru Highway/Langata Road since 3rd August, 2009.

(b) That the plaintiffs/applicants have paid all their rent due for the premises they occupy as well as effected an overpayment.

(c) That the defendant/respondent has caused the plaintiffs/applicants goods to be unlawfully proclaimed by the defendant/respondents servants or agents by the name of Restorers Consult without any justifiable cause and/or reason whatsoever.

(d) That the plaintiffs/applicants stand to suffer irreparable loss should the defendants/respondents levy distress or their proclaimed goods.

It is deponed in the supporting affidavit that the applicants had been operating the suit premises since 1992 when they entered into a lease agreement with the defendant/respondent which was formalized on 3rd August, 2009 and was due to expire in January, 2014; that the respondent by letter dated 26th March, 2008 issued a notice to the applicants for rent arrears which the applicants responded to by denying that they owed rent; that on 29th October, 2009 the respondent through M/s Restores Consult proclaimed the goods of the applicants in the suit premises without any justifiable cause; and that the applicants would suffer irreparable loss and damage if the defendant sells the said properties by auction. A supplementary affidavit was also filed by the applicants.

The applicants also through their counsel M/s JA Guserwa & Company advocates filed written submissions on 24th May, 2010. It was submitted inter alia, that the intended auction of the applicants goods was not justified as the M/s. Mwangei & Associates certified Public Accountants Nairobi had done an audit of the rent accounts and found that there was an

Overpayment of rent by the applicants to the respondent in the sum of Kshs.541,696/= as at 30th November, 2009; therefore the applicants did not owe the respondent any money to justify the intended auction of the applicants goods.

The application is opposed and a replying affidavit sworn on 17th November, 2009 by **WILBERFORCE CHEBET NAIBEI** described as Assistant Director Property Services of the respondent was filed. It was deponed that the applicants were indebted to the respondent in rent arrears – that is Lyken Holdings Ltd Kshs.572,772/= as at 1st September 2009 and Best Freight Ltd Kshs.304,290/= as at 1st September 2009. It was also deponed that the statement of accounts annexed to the affidavit of the applicants as “CKN4” was a product of the applicants and could not therefore constitute evidence of payment.

The respondent also filed written submission on 21st July, 2010. It was contended in the said submissions that the applicants were in breach of the lease agreements by failing to pay rent. It was also contended that the plaintiffs were relying on false information in an attempt to deny their obligation. It was argued that the contention by the applicants that they were not in rent arrears was challenged, as some of the documents on alleged payment of rent relied upon by the applicants were forged.

Reliance was placed on the Distress For Rent Act (Cap. 293 laws of Kenya). Under that Act section 3(1) provides-

“3(1). Subject to the provisions of this Act and any other written law, any person having any rent

or rent service in arrears and due upon a grant, lease, demise or contract shall have the same remedy by distress for the recovery of that rent or rent service as is given by the commons law of England in a similar case”

Under the Act also, section 12(1) provides-

“12(1) – A licenced auctioneer acting on behalf of the lessor or landlord, may take and seize, as a distress for arrears of rent, any cattle or stock of any lessee of tenant.

Reliance was also placed on the case of **MARGARET MURPHY –VS- GODFREY NGURE (t/a Haki Traders) & ANOTHER 2007 eKLR** wherein Waweru J. stated, inter alia-

“...just as in the lower court, the Appellant has not placed before this court any evidence of payment of the arrears of rent demanded by the 2nd respondent..”

I was urged not to grant the orders sought.

Both counsel for the applicants (**Mr. Oiwa**) and for the respondent (**Mr. Otieno**) agreed that the court should make a ruling on the basis of documents filed.

I have considered the application, the documents filed, as well as the submissions filed. This matter has been brought by way of suit filed by plaintiff on 9th November, 2009. The prayers in the suit are for injunction restraining the respondents from levying distress; injunction against repossession and re-allocation of premises; general damages for possible damage to property and loss of business; as well as costs.

The application herein is for restraining orders in the form of interlocutory injunctions. Such can only be granted for the period pending the hearing and determination of suit, which is already pending.

The requirements for the grant of such orders are well settled, as stated in the case of **GEILLA – VS CASSMAN BROWN [1973] EA 358**, wherein the East African Court of Appeal stated, inter alia, that-

- (i)
- (ii)
- (iii)
- (iv) ***an applicant must show a prima facie case with a probability of success.***
- (v) ***an injunction will not normally be granted unless the applicant might otherwise suffer irreparable injury.***
- (vi) ***when the court is in doubt, it will decide the case on the balance of convenience.***

There is a case pending filed by way of plaintiff. It appears to be a case of a tenancy and alleged arrears of rent. The respondents have admitted that indeed a tenant agreement has been in existence between the applicants and the respondent. In my view, whether the case will succeed or not, will depend on evidence to be tendered at the trial. In my view therefore, the case has a probability of success. I find and hold that the applicants have demonstrated a prima facie case with probability of success.

Will the applicants suffer irreparable injury if the auction is effect? The items intended to be auctioned appear to be tools for business. This relates to prayer 3, with regard to levying of distress and evicting the plaintiffs from the premises. In my view, only with regard to this prayer can one say that

irreparable loss will result if the restraining orders are not granted. Prayers 2, and 4 are in my view displaced. They seem to seek to determine the whole case at a preliminary stage. They are not grantable. I however, find merits in granting prayer 3 conditionally.

As for costs, these will be in the cause, to be determined at final determination of the case.

Consequently, and for above reasons, I order as follows-

- 1. I grant prayer 3 of the application provided that the applicants promptly pay rent after the period of the disputed amount as it falls due without fail. If they fail to do so, then these restraining orders will cease to have effect. Liberty to apply.***
- 2. I decline to grant prayers 2 and 4.***
- 3. Costs in the cause.***

Dated and delivered at Nairobi this 1st day of October, 2010.

George Dulu

Judge.