



REPUBLIC OF KENYA
IN THE HIGH COURT OF KENYA
AT NAIROBI (NAIROBI LAW COURTS)
Civil Case 786 of 2004

JOSEPH KOTONYA AKETCH.....PLAINTIFF

VERSUS

JOHN NGARUIYA.....1ST DEFENDANT

ROSEMARY NJERI NDENDERU.....2ND DEFENDANT

RULING NO. 1

There is an application on record dated 15/1/2009, brought by way of chamber summons under section 3A of the CPA order XXXIX rule 1, 2 and 3 of the CPR and all other enabling provisions of the law. Five (5) prayers were sought namely:

1. *spent*

2. *A temporary injunction be granted stopping or restraining each and all the defendants, their agents, servants, representatives from claiming, demanding rent and or purchase price for the suit property known as LR. No 172/173 situate at Mountain view estate in Nairobi for the plaintiff and or levying distress for rent against the plaintiff or taking steps to evicting the plaintiff from the said property.*

3. *That the court file of this suit be reconstructed.*

4. *That the injunctive orders which were issued in favour of the applicant and which orders are still subsisting be confirmed.*

5. *That cost s of this application be provided for.*

The grounds in support are set out in the body of the application and supporting affidavit, annexures and oral submission in court. The sum total of the same are:-

- That the applicant had moved to this court, in the first instance by filing a plaint simultaneously with an application dated and filed the same date of 20th July 2004 seeking an injunctive relief. These documentations were duly served upon the defendant/respondents who entered appearance and filed defence through counsel after filing a replying affidavit in response to the injunctive relief.
- Interim orders in respect of the said interim application were first granted by justice Kariuki Kihara and later confirmed by Mugo J on the 31st day of January 2007.
- Thereafter the original file went missing and the plaintiff/applicant was thus prevented from preparing and setting down of the suit for hearing and final disposal.
- The plaintiff/applicant came back to this court, because despite the existence of the confirmed interim relief the defendants have threatened the applicant with levying of distress for rent hence the need for protective measures by way of reconstructing of the file first, followed by confirmation of the injunctive order which had in fact been confirmed.

A perusal of the court, record reveals that on 17/2/2009 parties appeared before this court, and endorsed a consent on record granting prayer 3 of the application subject of this ruling, which sought an order for the reconstruction of the court file. It was agreed by consent that the said prayer be allowed to the effect that the file then currently in use to be treated as being properly reconstructed.

Oral highlights were made on 18/05/2009. All that the applicant stressed were the following:

- That interim orders were granted on 15/1/2009 and all they need is confirmation in terms of prayer 4.
- The replying affidavit of the defendant to their application confirms that indeed justice Mugo granted orders of injunction against the defendants from levying distress for rent against the plaintiff or taking steps to evict or evicting the plaintiff from the suit property.
- Deny that they themselves or their advocates on record compromised the court, order as per the letter Jn1 and annexed to the said replying affidavit. The applicant did not sign the said letter, neither did their counsel on record. They contend the said letter is therefore a fraud because it does not show which advocate in the firm signed it.
- There was no justification for writing of that letter in view of the fact that there were court, orders on the record.
- It is not clear whether the same is a letter or an agreement.
- Maintain the court, orders confirmed herein, are still in place because no letter of agreement out side the court, record can set aside a court, order unless if the court, itself is moved for that purpose.
- Maintain that the defendants moved to levy distress illegally when the orders were still in place.
- Deny concealing any material facts when obtaining the injunctive relief on 15/1/2009 as the application was presented in good faith since there was a really threat.
- Having admitted that there were valid orders in place, the respondents committed contempt of those orders by levying distress.
- Since there is no opposition to the applicants application for reconstruction, this court, should confirm those orders.

In opposition there is a replying, further replying affidavit and oral highlights. The replying affidavit sworn by one John Ngaruiya on 3rd February 2009 and filed the same date. The salient features of the same are as follows:-

- There is no objection to the construction of the court, file.
- Confirm that indeed justice Mugo on 31/1/2007 did grant an injunction against the defendant from levying distress against the plaintiffs goods. However the plaintiff compromised the orders of 31/1/2007, in that by his lawyers letter of 9/10/2008, he agreed to pay the outstanding rent arrears and auctioneer charges by 20/10/2008 failing which execution would proceed.
- That the applicant failed to pay the outstanding rent and his goods were advertised for sale vide Kenya Times Newspaper of 15/11/2008 marked Jnn2&3.
- The outstanding rent was Kshs 1,710,000/= and the goods sold only realized a paltry 200,000.00
- They respondents are prejudiced by the applicant's non payment of rent because they too have to pay rent to NSSF to which they are tenant purchasers in respect of the said property.
- Contend the applicant has concealed material particulars to this court.

In their supplementary replying affidavit the following were stressed:-

- The annexed letter gave clear instructions that the sale of the distrained goods should proceed if the applicant will not have paid the outstanding rent by 20/10/2008, which letter is on the applicants lawyers letter head.
- There is also a mutual agreement where by the applicant has agreed to be paying rent at 50,000/- per month till the determination of the suit herein effective February 2007, which payment continued till he defaulted and upon the said

default, that the respondent sent Auctioneers to levy distress vide JnA. The instructions were given to Dollar Auctioneers who proclaimed the goods, obtained a breaking in order, which was granted, they carted away the goods, and had then sold them and as such, the application has been overtaken by events.

In response counsel for the applicant reiterated the earlier submissions and maintained that:-

- They repudiate the entire content of the alleged letter of compromise.
- They have made out a case for the confirmation of the court orders herein.
- If the respondents have gone contrary to those orders then they are guilty of contempt.

No case law was cited to court. On the courts assessment of the entire content of the rival arguments herein, it is clear that the respondents do not dispute that the orders initially granted by Kariuki J were confirmed by Mugo J on 31/1/2007. There is also no dispute that these orders restrained the defendant/respondents from levying distress on the applicants goods. There is also no dispute that these orders have not been formally discharged by the court, which issued them. There is also no dispute that these orders were confirmed in a file which went missing and is still missing to date, hence the re-construction order entered into by consent.

The reason for confirmation of the said injunctive orders is being sought solely because since the file where the order was confirmed, went missing, the only way a record of the said court order, can be maintained is by having the said orders confirmed herein.

Turning to the respondents, they do not deny the confirmation of the orders by Mugo J but have stated that the said orders were compromised by agreements namely:

- (i) One agreement between the applicant and the 1st defendant mutually agreed in February 2007 where by the applicant allegedly mutually agreed to be paying 50,000.00 monthly as rent.
- (ii) The second agreement is by a letter, on the letter heads of the applicants counsel, whereby the applicant agreed to pay the arrears by a certain date failing which distress could be levied. That the applicant fell into arrears and distresses for rent was levied, goods carted away and sold. Hence the application herein has been overtaken by events.

The applicants response to that is that since the orders were made in court, they could only be varied and or discharged by another court, order but not by agreements by parties.

- (2) That they are strangers to the alleged agreements relied upon by the respondents.

Due consideration has been made by the findings of this court, in the afore set out assessment and the court, proceeds to make the following findings in disposal of the application subject of this ruling:-

- (1) The order on reconstruction agreed upon by consent be and is here by confirmed.
- (2) Since both parties agree that the injunctive orders granted by Kariuki J and contained in the file which went missing, were confirmed by Mugo J on 31/1/2007 as long as they have not been varied, and or discharged by this court, they are still subsisting.
- (3) As long as they subsist, they restrain the defendants from levying distress against, the applicants goods.
- (4) It is now trite law that as long as a court, order stands, it has to be obeyed. The only reprieve a party has against obeying the same is by having the order set aside and or discharged.
- (5) Such setting aside and or discharging has to be done through another court, order by the same court, with competent jurisdiction. As such parties cannot transact out it by mutual agreement.
- (6) By reason of what has been stated in No 1 – 5 above the orders confirmed by Mugo J on 31/1/2007 in the file which went missing be and are hereby confirmed vide prayer 4 of the application dated 15/1/2009 and filed on 20/1/2009.
- (7) Since the confirmed orders are in line with the content of prayer 2 of the same application dated 15/1/2009 and filed on 20/1/2009 which is couched in the same terms as the confirmed order, the same is allowed as prayed.

(8) The confirmation is for purposes of the record in the re-constructed file.

(9) Since the proceedings subject of this ruling were triggered by the respondents move to levy distress in the wake of their knowledge of the existence of the confirmed orders, the applicant will have costs of the application.

(10) Since it is confirmed that the orders confirmed on 31/1/2007 by Mugo J have been breached, the applicant is free to take any remedial measures within the law since a remedy for breach is not one of the reliefs being sought herein.

Dated, Read and delivered at Nairobi this 18th day of September 2009.

R.N.NAMBUYE

JUDGE