



**REPUBLIC OF KENYA**

**AT NAIROBI (MILIMANI COMMERCIAL COURTS)**

**Civil Case 490 of 2009**

**PASTOR ISAAC COMMEY.....1<sup>ST</sup> PLAINTIFF**

**LILIAN OFUSUA COMMEY.....2<sup>ND</sup> PLAINTIFF**

**VERSUS**

**ASSORTED PROJECTS LIMITED.....1<sup>ST</sup> DEFENDANT**

**KIOGORA MUTAI.....2<sup>ND</sup> DEFENDANT**

**GLORY KIOGORA.....3<sup>RD</sup> DEFENDANT**

**JULIUS GIKONYO**

**T/A GARAM AUCTIONEERS.....4<sup>TH</sup> DEFENDANT**

**RULING**

The plaintiffs moved the court by motion pursuant to the provisions of **Sections 3A & 63(e)** of the **Civil Procedure Act** seeking orders of the court to restrain the defendants or their agents Garam Auctioneers from selling, alienating or dealing with the proclaimed goods stored at Leakey Storage Ltd pending the hearing and determination of the application. The plaintiffs further prayed for the court's order to attach the proclaimed goods to settle the outstanding rent of Kshs.2,255,301/=. The grounds in support of the application are stated on the face of the application and is supported by the annexed affidavit of Pastor Issack Commey. The application is opposed. Kiogora Mutai, the 2<sup>nd</sup> defendant and the managing director of the 1<sup>st</sup> defendant swore a replying affidavit in opposition to the application.

At the hearing of the application, I heard rival arguments made by Mr. Muriuki on behalf of the plaintiffs and by Mr. Muchoki on behalf of the defendants. I have carefully read the pleadings filed by the parties herein in support of their respective opposing positions. I have also considered the submissions made by counsel for the said parties. It is clear from the application that the plaintiffs are seeking the issue of orders of mandatory injunction. Mandatory injunctions can only be issue by the court where there exist special circumstances. The Court of Appeal cited with approval the English decision of **Locabail International Finance Ltd vs Agroexport and others [1986] 1 All ER 901** at page 901 where it was held:

*“A mandatory injunction ought not to be granted on an interlocutory application in the absence of special circumstances, and then only in clear cases either where the court thought that the matter ought to be decided at once or where the injunction was directed at a simple and summary act which could be easily remedied or where the defendant had attempted to steal a march on the plaintiff. Moreover, before granting a mandatory interlocutory injunction the court had to feel a high degree of assurance that at the trial it would appear that the injunction had rightly been granted, that being a different and higher standard than was required for a prohibitory injunction.”*

In the present application, certain facts are not in dispute. The plaintiffs are the registered owners of a property in Karen Nairobi known as LR. No.2259/430. The plaintiffs entered into a lease agreement with the 1<sup>st</sup> defendant on 1<sup>st</sup> December 2007. The 1<sup>st</sup> defendant leased the said property for a period of ten (10) years with effect from the said date at an initial monthly rent of Kshs.280,000/= payable quarterly in advance. Prior to the 1<sup>st</sup> defendant taking possession of the suit premises, it was required to pay a deposit of Kshs.840,000/=. The 2<sup>nd</sup> and 3<sup>rd</sup> defendants executed a guarantee by which they agreed to indemnify the plaintiffs in the event that the 1<sup>st</sup> defendant shall default in abiding by any of the terms of the agreement. The 2<sup>nd</sup> and 3<sup>rd</sup> defendants, in my considered opinion, are therefore necessary parties to these proceedings.

It was apparent that from the time the 1<sup>st</sup> defendant took possession of the suit premises, it has been unable to pay the quarterly rent as agreed in the lease agreement. It appears that the business which the 1<sup>st</sup> defendant established in the said premises did not do well as anticipated. In frustration at the 1<sup>st</sup> defendant's failure to pay the rent due and which had fallen in arrears, the plaintiffs did on 9<sup>th</sup> June 2008 issue notice to the 1<sup>st</sup> defendant to pay up the rent and to stop breaching the terms of the lease agreement or in default thereof, the plaintiffs would take steps to secure the eviction of the 1<sup>st</sup> defendant from the suit premises. This letter provoked the 1<sup>st</sup> defendant to file suit before this court. That suit is Nairobi HCCC No.325 of 2008. The suit is pending hearing and determination.

According to the defendants, the court restrained the plaintiffs from terminating the lease and therefore upheld their continue occupation of the suit premises. The plaintiffs conceded that the court gave the orders alluded to by the defendants but denied that the order barred them from distressing for rent in the event that the 1<sup>st</sup> defendant defaulted in paying rent subsequent to the said proceedings in the suit. On my part, having evaluated the evidence on record, it was clear that the 1<sup>st</sup> defendant took advantage of the order that was granted in its favour and thereafter refused to pay the rent as and when it became due. During the hearing of the application, counsel for the defendants conceded that the defendants had failed to pay the outstanding rent to the tune of Kshs.646,792.50. The 1<sup>st</sup> defendant however denied owing to the plaintiffs the sum of over Kshs.2 million. It was apparent to this court that there was dispute in regard to the exact amount that was owed in respect of the tenancy.

On 23<sup>rd</sup> June 2009, the plaintiffs instructed Virmir Auctioneers to distress for the outstanding rent, and which according to the plaintiffs, was at the time amounting to Kshs.2,051,500/=. The said auctioneers proclaimed the 1<sup>st</sup> defendant's properties in the suit premises on 25<sup>th</sup> June 2009. The said auctioneers notified the 1<sup>st</sup> defendant that it would collect the proclaimed goods on 10<sup>th</sup> July 2009 if the 1<sup>st</sup> defendant failed to settle the outstanding rent arrears. According to the plaintiffs, on 6<sup>th</sup> July 2009, without their permission, the 1<sup>st</sup> defendant instructed the 3<sup>rd</sup> defendant to collect the proclaimed goods from the suit premises. On their part, the defendant argued that the 3<sup>rd</sup> defendant took possession of the said goods after the 1<sup>st</sup> defendant had repudiated the lease. The plaintiffs denied the defendants' assertion that there was such repudiation. According to the plaintiffs, the defendants removed the said goods from the suit premises to frustrate them from levying distress for the then outstanding rent. The issue as to whether the 1<sup>st</sup> defendant was entitled to repudiate the lease shall be determined by the court that will hear the case. What is not disputed is that upon taking possession of the goods from the suit premises, the 3<sup>rd</sup> defendant transferred them for storage at Leakey's Storage Ltd.

The issue for determination by the court is therefore who between the plaintiffs and the defendants is entitled to the said goods. As stated earlier in this ruling, the 1<sup>st</sup> defendant admitted that it owed to the plaintiffs at least the sum of Kshs.646,792.50. In my view, the plaintiffs were within their right to levy distress for rent. The defendants challenged the proclamation issued by Virmir Auctioneers on 25<sup>th</sup> June 2009 on various grounds. I have considered the said grounds in objection to the proclamation and find them to be without merit. It was evident that the said auctioneers complied with the law when they proclaimed the 1<sup>st</sup> defendant's properties in the suit premises. The defendants acted unlawfully when purported to remove the proclaimed goods from the suit premises. It was clear to the court that the defendants removed the said goods in a bid to frustrate the levying of distress by the plaintiff on the said goods.

Taking into consideration the entire circumstances to this application, I am convinced that the plaintiffs established a prima facie case to entitle this court grant the mandatory injunction sought. Special circumstances were proved by the plaintiffs. It was evident that the defendants removed the said proclaimed goods from the suit premises with a view to frustrating the plaintiffs from levying distress. I hold that the plaintiffs were entitled to the said goods once the same were proclaimed by the auctioneer. At the conclusion of the hearing of the application, the court ordered the defendants to pay to the plaintiffs the admitted sum of Kshs.646,792.50 within seven (7) days of 7<sup>th</sup> October 2009. The court further directed that the goods held at Leakey's Storage Ltd be sold by the defendants if they paid the sum ordered by the court.

It was apparent that the defendants did not comply with the said order. They filed an application seeking to review the said order of the court. This court dismissed the application on 26<sup>th</sup> October 2009. If the defendants have not paid the said sum of Kshs.646,792.50 as directed by this court, the plaintiffs are hereby authorized to take possession of the 1<sup>st</sup> defendant's goods stored at Leakey's Storage Ltd and sell the same pursuant to the proclamation issued by Virmir Auctioneers on 25<sup>th</sup> June 2009. If the plaintiffs have paid the said sum of Kshs.646,792.50, then the earlier order issued by the court on 7<sup>th</sup> October 2009 shall be apply. The plaintiffs were successful in this application. They shall be paid costs of the application.

**DATED AT NAIROBI THIS 13<sup>TH</sup> DAY OF NOVEMBER 2009**

**L. KIMARU**

JUDGE