



REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA

AT NAIROBI (NAIROBI LAW COURTS)

Civil Appeal 90 OF 2007

KING PRIME INTERNATIONAL LTD.....1ST APPELLANT

JAMES MWAURA.....2ND APPELLANT

VERSUS

MUMBO AUCTION SERVICES.....1ST RESPONDENT

KENYA RAILWAYS CORPORATION.....2ND RESPONDENT

R U L I N G

On the 21st of December, 2007 J. Were Resident Magistrate, dismissed an application brought by King Prime International Limited and James Mwaura (hereinafter referred to as the 1st and 2nd applicants respectively,) seeking to restrain Mumbo Auction services (hereinafter referred as the 1st respondent) and Kenya Railways Corporation (hereinafter referred to as the 2nd respondent), from alienating, selling, disposing off or parting with possession of goods attached by the 1st respondent in distress for rent including motor vehicle KZJ 95–00203364. (hereinafter referred to as the Toyota Landcruiser). The applicants thereafter sought review of the order of dismissal. In a ruling delivered on 25th February, 2008, the Resident Magistrate dismissed the application for review.

The applicants have now come to this court by way of appeal against the ruling delivered on 25th February, 2008. A memorandum of appeal was filed on 27th February, 2008. Filed simultaneously with the memorandum of appeal, is a notice of motion dated 26th February, 2008 in which the applicants seek an order of temporary injunction, restraining the 1st and 2nd respondents, their agents, servants or employees from selling or disposing of the appellants' movable property which were attached on 6th June, 2007, pending the hearing and determination of the appeal. The applicants also seek a mandatory order compelling the 1st and 2nd respondents, their agents, servants or employees to release the Toyota Landcruiser to the 2nd appellant pending the hearing and determination of the appeal.

The application is supported by an affidavit sworn by Paul Njoroge Kimani, a director of the 1st applicant. There is also a second affidavit sworn by James Mwaura the 2nd applicant. The

1st applicant who is a tenant of the 2nd respondent contends that the distress for rent was wrongful and irregular as there was no rent in arrears. And, that the 1st respondent who levied distress for rent had no authority from the 2nd respondent. It is further contended that the 2nd appellant who is the owner of the Toyota Landcruiser has no interest in the 1st appellant's business or tenancy, but was merely a customer of the 1st appellant, and had left the Toyota Landcruiser with the 1st appellant for purposes of sale. The appellants contend that the trial magistrate erred in dismissing the application for review and therefore urged the court to grant the mandatory order for release of the Toyota landcruiser.

In response to the application two replying affidavits were filed. One was sworn by Eunice Kiumi the legal officer of the 2nd respondent and another was sworn by Kenneth Sikinyi Omuoma the proprietor of the 1st respondent. It was contended that the 1st applicant was in arrears of rent and that the 2nd applicant is one of the proprietors of the 1st applicant.

The respondents maintained that the 2nd applicant was the same person as the "James Mwaura" referred to as a business partner of Paul Njoroge Kimani. Kenneth Sikinyi Omuoma who claims to know Paul Njoroge Kimani and the 2nd applicant well, swore that the two were business partners. Referring to an affidavit which was sworn by Paul Njoroge Kimani in High Court petition No. 10 of 2007 it was contended that Paul Njoroge Kimani had sworn in that affidavit that the 2nd applicant is actually his business partner.

It was further contended that the applicants had failed to show any evidence of payment of outstanding rent in respect of which demand was made. It was submitted that the 2nd applicant had failed to prove that the Toyota Landcruiser belonged to him and not to the 1st applicant. It was argued that if the Toyota Landcruiser was released, the 2nd respondent was likely to suffer irreparable loss as no security for damages has been given. Relying on **H.C.C.C. No.214 of 1997 (Msa) Malindi Air Services Ltd Vs Prestige Air Service** and **HCCC. (Milimani) No.1753 of 2001** the court was urged to dismiss the application for stay.

In response to the submissions made on behalf of the respondents the applicants' counsel urged the court to find that no evidence of any partnership agreement has been produced. It was also submitted that the affidavit referred to in High court petition No.10 of 2007 only describe the 2nd applicant as a sales manager of Prime Motor Ltd and not as a partner. The court was therefore urged to find that the 2nd applicant cannot be held liable for rent due in respect of the 1st applicant.

The application before me is one for stay of execution under Order XL1 Rule 4 of the Civil Procedure Rules. Therefore, in order to succeed, the court must be satisfied that there is sufficient cause to order the stay. The court must also be satisfied: that substantial loss may result to the applicant unless the order of stay is made; that the application has been made without unreasonable delay; and that the applicant is able to provide such security as the court may order for the due performance of the decree or order.

Under Order XL1 Rule 4(6) of the Civil Procedure Rules the court has power in exercise of appellate jurisdiction to grant a temporary injunction on such terms as it thinks just, provided the procedure for instituting an appeal from a subordinate court or tribunal has been complied with.

In this case the applicants have already filed a memorandum of appeal which raises various grounds. Issues have also been raised in this application regarding the legality of the distress for rent, the relationship between the 1st and 2nd applicant, and the ownership of the Toyota Landcruiser. At this stage, I cannot go into the merits of these issues except to state that the applicant has shown that there is sufficient cause to justify granting the order for stay of execution.

The distress for rent which is subject of the complaint leading to the appeal was for a sum of Kshs.1,183,946.20. Apart from the landcruiser the applicants have not identified the attached goods or their value. However, it is apparent that the effect of the order made on 25th February, 2008 dismissing the application for review, is to allow the Respondents to proceed with the sale of the distrained goods. Therefore, if the order of stay is not granted the attached goods will be disposed off and the applicant will suffer substantial loss as it may be difficult to retribute the goods to the applicants if they are successful on appeal. Moreover this application was made timeously as it was made only two days after delivery of the ruling subject of the appeal. Although the applicant has sought a mandatory injunction for release of the Toyota Landcruiser Order XL1Rule 4(6) of the Civil Procedure Rules only empowers the court to give temporary injunction. The mandatory order sought by the applicants not being of a temporary nature is not available under that provision.

For the above reasons I will grant the order for stay of execution pending appeal and order that a temporary injunction do issue restraining the 1st and 2nd respondents, their respective agents, servants, employees, assigns or assessors from selling or disposing of the appellants' property which was attached on or about 6th June, 2007 pending the hearing and determination of this appeal. The sum of Kshs.125,000 deposited in court by the applicants shall remain in court pending further orders. The applicants shall further take appropriate action to have the memorandum of appeal which has been filed, served on the respondents and the record of appeal duly filed and served within 3 months from the date hereof.

Dated signed and delivered this 24th day of April, 2008

H. M. OKWENGU

JUDGE