



REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA
AT NAIROBI (NAIROBI LAW COURTS)

Civil Suit 649 of 2005

PROF. WASHINGTON

JALANGO OKUMU.....PLAINTIFF/APPLICANT

VERSUS

BOFFAR LIMITED.....DEFENDANT/RESPONDENT

RULING

By chamber summons dated 11.02.08 stated to be brought under Order XXXIX rules 1, 2, 2A(1) and 3 of the Civil Procedure Rules as well as under sections 3A and 63(e) of the Civil Procedure Act, Cap. 21, the plaintiff applied, *inter alia*, for the following orders:?

3. That the court be pleased to grant a temporary injunction restraining the respondent whether by itself, its agents and/or servants from dealing, interfering, alienating or otherwise disposing of all the plaintiff's goods listed in the Notification of Sale of Movable Goods from Target Auctioneers dated 01.02.08 pending the hearing and determination of this application.
4. That the court be pleased to grant a temporary injunction restraining the respondent whether by itself, its agents and/or servants from evicting, dealing, interfering, alienating or otherwise plaintiff's household goods in L.R. 1/677 Dennis Pritt Road, Nairobi pending the hearing and determination of this application.
5. That the court be pleased to grant an injunction restraining the respondent whether by itself, its agents and/or servants from evicting, dealing, interfering, alienating or otherwise disposing of all the plaintiff's goods in L.R. 1/677 Dennis Pritt Road pending the hearing and determination of this case.
6. That the court be pleased to grant an injunction compelling the respondent whether by itself, its agents and/or servants to return the plaintiff's goods seized from L.R. 1/677 Dennis Pritt Road.
7. That the costs of this application be provided for.
8. That the honourable court be pleased to make such further or other orders as it may deem just and expedient in the circumstances of this case.

The grounds upon which the application is based are:?

- i. That the plaintiff/applicant is the owner of the goods.

- ii. That the respondent has purported to instruct his agents Messrs Target Auctioneers to attach and auction the said goods unlawfully in an attempt to evict the plaintiff without a court order and in the pendency of this suit.
- iii. That the said eviction is unlawful and aimed at frustrating the outcome of this suit.
- iv. That the respondent's agents Messrs Target Auctioneers have unlawfully seized the plaintiff's goods and given notice of their intention to dispose of the same by auction on 11.02.08 and unless restrained, will proceed to sell the goods thereby causing the plaintiff/applicant irreparable damage.

The application is supported by the plaintiff's affidavit sworn on 09.02.08.

The plaintiff/applicant has regularly been represented by learned counsel, Mr. E. Rombo while the defendant/respondent has generally been represented by learned counsel, Mr. S. Nduati.

Plaintiff's/applicant's counsel relied on the grounds on the face of the application and on the plaintiff's supporting affidavit sworn on 09.02.08. Counsel told the court that there exists a court order by Ojwang, J made on 16.12.05 restraining the defendant from distressing for rent which the learned Judge found not to have been specified; that in his ruling delivered on 16.12.05 the Judge ordered the defendant to proceed to court and ascertain the rent payable but that the defendant did not do so, neither did he return the goods seized in 2005. Plaintiff's/applicant's counsel added that the defendant/respondent took no steps and that it is the plaintiff who has several times made application to court seeking enforcement of Ojwang, J's orders. Plaintiff's/applicant's counsel drew attention to the notification of sale of movable property annexed as 'WJO-2' to the plaintiff's supporting affidavit sworn on 09.02.08 and submitted that no prior proclamation was done as required by law and that the notification was unlawful. Plaintiff's/applicant's counsel also submitted that the distress for rent was illegal, that the defendant had constructively evicted the plaintiff and that the eviction was illegal as there was no order for eviction. Counsel relied for the above submissions on the following cases:?

- 1. Court of Appeal Civil Appeal No.160 of 1995 ?

M/s Gusii Mwalimu Investment Co. Ltd. &

M/s Nico Auctioneers Ltd.....Appellants

M/s Nakuru Computers Ltd.....Interested Party

Versus

M/s Mwalimu Hotel Kisii Ltd.....Respondent

- 2. High Court Civil Case No. 4522 of 1992 ?

The Ripples Limited.....Plaintiff

Versus

Kamau Mucuha.....Defendant

Plaintiff's/applicant's counsel said that the essence of both of the above cases is that the procedure on distress for rent has been defined in section 4 of the Distress for Rent Act, Cap. 293 and submitted that the laid down procedure was not followed by the defendant. Plaintiff's/applicant's counsel urged this court to find that the actions of the defendant/respondent amount to unlawful eviction and grant the orders sought, especially prayers 5 and 6.

On the other hand, defendant's/respondent's counsel opposed the application. Initially he intimated his

intention to rely on the defendant's/respondent's grounds of opposition dated 13.02.08 as well as the replying affidavit of Njokki Waiganjo, Director of the defendant/respondent company sworn on 27.02.08. However, when his attention was drawn to Order L rule 16(1) to the effect that he has to choose one or the other but not both, he abandoned the replying affidavit and sought to rely on the grounds of opposition.

The defendant's/respondent's grounds of opposition are:?

1. That the plaintiff/applicant has refused to pay rent to the defendant/respondent since December, 2005.
2. That the orders issued by Ojwang, J on 20.12.05 did not in any way indicate that the plaintiff/applicant was to live in the defendant's/respondent's house without paying rent.
3. That the distress effected by the defendant's/respondent's agents is lawful as the plaintiff/applicant cannot hide behind a court order which did not specifically prohibit him from meeting his rental obligations.
4. That the application is thus misconceived and a further attempt by the plaintiff/applicant to frustrate the defendant/respondent from collecting their lawful rent.

Defendant's/respondent's counsel said that the issue here is interpretation of Judge Ojwang's orders issued on 20.12.05. Counsel pointed out that the plaintiff has not stated anywhere whether he has paid rent to date. The said counsel conceded that there has been distress all right but that it is lawful *vis-à-vis* Judge Ojwang's orders. Defendant's/respondent's counsel invited this court to have a look at Judge Ojwang's orders and that if it finds that the plaintiff has paid rent from December, 2005, the defendant would have no objection to the orders sought by the plaintiff/applicant being granted. Counsel also invited this court to ascertain if Judge Ojwang's orders absolved the plaintiff from meeting his rental obligations from 20.12.05 and that if this court so finds, then this court may grant the orders sought by the plaintiff/applicant. But if this court finds to the contrary, it should dismiss the plaintiff's/applicant's application and order that this matter be heard on priority basis as Judge Ojwang ordered 3 years back.

In reply, plaintiff's/applicant's counsel said his client did not rely just on the extracted order from Judge Ojwang's ruling but also on the entire ruling. In plaintiff's/applicant's counsel's view, the issue of rent had been comprehensively dealt with in that the plaintiff's car had been given as consideration for rent. Plaintiff's/applicant's counsel submitted that even if the defendant had a right to distress for rent, which the plaintiff denied, the procedure followed was unlawful. Plaintiff's/applicant's counsel reiterated his earlier submissions and urged this court to grant the plaintiff's application.

I have given due consideration to the application and opposition thereto.

The plaintiff's/applicant's affidavit sworn on 09.02.08 in support of his present application acknowledges the defendant as the landlord of the premises subject matter of the suit herein and further depones, *inter alia*, as follows:

'3. That the plaintiff has previously unlawfully attached my goods in a purported distress for rent which culminated in my filing this suit whereupon I made a successful application to this court dated 26.05.05 which was heard by the Hon. Justice Ojwang who issued injunctive orders compelling the defendant herein to return my goods....

4. That despite the said order, the defendant has to this day refused to comply and there is pending in this court an application dated 26.06.07 seeking orders of enforcement and contempt against the defendant.

5. That the defendant has refused to comply with the orders of Hon. Ojwang and instead embarked on a campaign of harassment by frequently sending in auctioneers to threaten me and

my family with eviction.

6. That on 02.02.08 a gang of about twenty men accompanied by seven armed uniformed policemen stormed the premises at Dennis Pritt Road and ordered me out at gunpoint and proceeded to break down all the doors and removed all my household goods outside.

7. That the said thugs had up to this point refused to identify themselves and when I insisted on what the purpose of their mission was, one of them introduced himself as an auctioneer and declared that he had been sent to evict me and sell off all my property.

8. That they then proceeded to load my goods in a truck that they had called in and even towed away my motor vehicle and then left me a notification of sale of my goods which was indicated by auction on 11.02.08....

9. That I had not been served with any court order or prior notice and it is my belief that this attempt at evicting me is to circumvent the orders of Justice Ojwang and prejudice my case herein.

10. That I am counseled by my advocates herein, which counsel I believe to be true, that it is unlawful to evict without a court order.

11. That I have now been effectively ousted from my house as the defendant's agents have broken down all the doors and thrown my things outside while carting away all my valuable goods, which they intend to dispose off unless restrained by this honourable court.

12. That the defendant's conduct shows contempt and disrespect for the court and rule of law.'

As recorded earlier, the defendant/respondent challenged the present application by way of grounds of opposition, not by way of a replying affidavit. There is, therefore, no affidavit evidence to counter the plaintiff's/applicant's above depositions, which in the result remain unchallenged.

Defendant's/respondent's counsel invited this court to have a look at Ojwang, J's orders emanating from his ruling delivered on 16.12.05 to ascertain if the Judge absolved the plaintiff from meeting his rental obligations from 20.12.05. The answer may be found in the following excerpts from Justice Ojwang's ruling delivered on 16.12.05, to wit:

'Although (respondent's) counsel urges the legitimacy of the distress action taken by the defendant, because no tenant is expected to dwell in a landlord's house without paying rent, he has done little to prove the makings of a contract. This renders the exact shape of the defendant's rent claims hazy and blurred, a situation not helped by the plaintiff's broad-textured claim that there had been an oral agreement that the defendant would take his saloon car, and apply its value to defray past and future rents falling due. The amount of that rent is itself unspecified; there is no agreement about the value of the said saloon car, there is disagreement as to the terms upon which the defendant took custody of the saloon car; there is no proper accounting which matches the value of the car to rents due, or which specifies from what point in time the rent arrears have accrued From the content of the application, its prayers, and from the affidavits on both sides and the annexures thereto, and also from the submissions of counsel, it is clear that the defendant and plaintiff have been in a tenancy relationship which is not defined by specific legal instruments. This is quite strange, as a landlord is not required to accord charity to his tenant, just as the tenant is expected to have good value for his money, in the shape of good and proper habitation. Such interests should be secured in clear and binding legal instruments, duly registered and spelling out the rights and obligations of the parties.

In the absence of legal documents defining the rights of the plaintiff and the defendant herein, there is no basis in law for abrupt and drastic redressive measures such as eviction, or distress for rent,

until such time that the judicial process has intervened, with normal trial proceedings, to specify and determine the rights of the parties, through the medium of evidence, submissions, and interpretation of law and evidence. It is not clear just how much rent is payable. It is unknown how much the plaintiff has paid over the years. The state of rent accounts is not known. It is unclear when the tenant stopped paying rent. It is not known to what extent he has fallen into arrears. There is no agreement. It is a state of darkness.

In such a state of uncertainty there would be no legal basis for distress for rent, as the rent itself is in dispute. I therefore would state quite categorically that the defendant had no basis for levying distress upon the plaintiff's goods. The distress levied, indeed, has generated a new sphere of disputes: there is no agreement on what had in fact been attached; the defendant has a list of distrained items which is quite different from which is quite different from that held by the plaintiff. This state of affairs could lead to a major disagreement which ought to be arrested at this point in time. It will be necessary to set down the main suit for hearing on the basis of priority.

Against this background, and with regard to the plaintiff's chamber summons of 26th May, 2005 I will now make the following orders:

1. I hereby issue a mandatory interlocutory injunction compelling the defendant, its servants and agents to return forthwith to the plaintiff all the goods and chattels which the defendant had distrained in respect of rent arrears.

2. I hereby issue a mandatory interlocutory injunction compelling the defendant, its servants or agents to return to the plaintiff forthwith, and in any case within 21 days of the date hereof, the computers described in the plaint, complete with their equipment and information.

3. The costs of this application shall be costs in the cause.

4. The suit herein shall be listed for hearing on the basis of priority – to take place early in the new term beginning January, 2006.'

The above ruling by Ojwang, J was delivered on 16.12.05. It is abundantly clear from the said ruling that the Judge had come to the conclusion that evidence on record at the interlocutory stage did not establish the rent arrears due, that the distress for rent embarked upon had no legal basis, that the defendant should return thenceforth all the distrained goods of the plaintiff and that the dispute between the parties should be set down for hearing on priority basis.

It is the plaintiff's case in his present chamber summons application dated 11.02.08 that the defendant/respondent not only failed to comply with the orders made by Ojwang, J vide his ruling delivered on 16.12.05 but also that the said defendant embarked on a fresh distress for similarly unspecified rent from December, 2005 onwards before the suit which was to resolve the issue of quantum of payable rent was heard and determined. These averments of the plaintiff/applicant supported by his affidavit evidence have not been challenged through any evidence by the defendant/respondent, they remain uncontroverted and I accept them.

Plaintiff's/applicant's counsel urged this court to find that the actions of the defendant/respondent amount to unlawful distress for rent and unlawful eviction of the plaintiff/applicant and that the orders sought by the plaintiff/applicant especially vide prayers 5 and 6 of his present application be granted. I find as urged by plaintiff's/applicant's counsel for reasons similar to those advanced by Ojwang, J in his ruling delivered on 16.12.05. There was no legal basis for the defendant/respondent to purport to levy distress for undetermined arrears of rent in the manner described by the plaintiff/applicant from the suit premises. The way forward was for the parties to the suit to take a hearing date for the suit on priority basis as ordered by Ojwang, J in order for the dispute to be resolved through full trial of the issues.

Instead, the defendant/respondent seems to have preferred to try a short-cut. His actions are contrary to the court orders made by Ojwang, J on 16.12.05, they are against the law and this court shall not countenance them.

The upshot is that the chamber summons application dated 11.02.08 is allowed and prayers 5 and 6 duly granted.

The parties should now proceed to take a date at the Registry for hearing of the suit on priority basis as previously ordered by Ojwang, J.

Costs of the application shall be in the cause.

Orders accordingly.

Delivered at Nairobi this 5th day of June, 2008.

B.P. KUBO

JUDGE