



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

**Civil Suit 329 of 2008**

**JOHN AMENA AMENDI**

**T/A AMENA AMENDI J. & CO ADVOCATES.....PLAINTIFF/APPLICANT**

**VERSUS**

**EDITH NYABOKE AMORO.....1<sup>ST</sup> DEFENDANT/RESPONDENT**

**YOBESH AMORO.....2<sup>ND</sup> DEFENDANT/RESPONDENT**

**PETER N. KAHURA**

**T/A INVERTEBRASS AUCTIONEERS.....3<sup>RD</sup> DEFENDANT/RESPONDENT**

**RULING OF THE COURT**

1. By his application dated 18/07/2008, brought by way of Chamber Summons under Order XXXIX rules 1, 2, 5 and 9 of the Civil Procedure Rules, Sections 3A and 63 (E) of the Civil Procedure Act, Section 3 of the Distress for Rent Act and all other enabling provisions of the Law, the Plaintiff seeks **ORDERS:-**

1. ***THAT this application be certified urgent and heard ex-parte in this first instance.***
2. ***THAT there be a temporary stay of execution of the distress for rent by the 1<sup>st</sup>, 2<sup>nd</sup> and 3<sup>rd</sup> Defendants.***
3. ***THAT the Defendants be ordered to return all the goods belonging to the firm of Messrs. Amena Amendi J. & Company Advocates which were carted away on 10<sup>th</sup> July 2008 as shown in the NOTIFICATION OF SALE dated 7<sup>th</sup> July 2008 at their own cost.***
4. ***THAT the Defendants be restrained either by themselves or their agents, and or employees from removing, selling whether by public auction or otherwise of the office equipment belonging to the firm of Messrs Amena Amendi J & Company Advocates.***

2. The application is premised on three grounds on the face thereof, the main one being that the Applicant is the victim of a dispute involving the 1<sup>st</sup> and 2<sup>nd</sup> Defendants with Bureau For Development Support Services of whom the Plaintiff is a Director, and also that the Plaintiff's goods consist of

computers, clients' files and information in the computers. The affidavit in support is sworn by the Plaintiff who says that he is an advocate of this Honourable Court with offices at Court Number 9 Raphtha Road Westlands (the suit premises). He says that the said premises were owned by a Non-Government Organization (NGO) known as Bureau For Development Support Service of which the Plaintiff is a Director and that he had been sub-let part of the premises.

3. The Plaintiff goes on to say that on 10/07/2008 at about 7.00 p.m., the suit premises were invaded by the landlord with the help of a rowdy mob who violently carried away office equipment including the Plaintiff's clients' files contained in locked cabinets. The Plaintiff also says that the items carried away by the landlord were his tools of trade and also contained highly confidential documents relating to clients' files which must be safeguarded at all costs. It is the Plaintiff's contention that the distress carried out was a sham and amounted to a backdoor attempt to defeat validly subsisting court orders. By an order dated 14/04/2008, issued pursuant to an application filed by **Bureau For Development Support Services** against **Yobesh Amoro Edith and Nyaboke Amoro in BPRT Case No. 436 of 2008 at Nairobi**, the landlord was ordered to open the offices of the tenant/Applicant and was also restrained from evicting the tenant/Applicant from the suit property and from threatening, harassing, intimidating or in any way interfering with the tenant/Applicant's staff. The landlord was also restrained from selling the distrained goods pending interpartes hearing on 10/09/2008.

4. It is on the basis of the above order that the Plaintiff says the landlord had no authority to levy distress and that the whole process by the landlord was carried out purposely aimed at forestalling the case at the BPRT between the landlord and Bureau For Development Support Service; that the distress cannot be a cover for eviction and hence these proceedings.

5. In the plaint that was filed contemporaneously with the instant application the Plaintiff alleges that the Defendants purported to levy distress on the Plaintiffs office equipment without giving any notice at all; that there was no proclamation and that the notification of sale purported to have been made on 7/07/2008 was a mere sham. The Plaintiff prays for judgment against the Defendants jointly and severally for:-

(a) **Damages**

(b) **Costs and interest on (b) above (sic)**

(c) **Any other relief Honourable Court may deem fit and just to grant (sic)**

6. In his Further Affidavit dated 22/07/2008, the Plaintiff avers that he had been an under-tenant to Bureau For Development Support Services from 24/12/2006 at Ole Odume road house No. 39 until October 2007 when the Plaintiff's firm known as **Amena Amendi J & Company Advocates** continued the tenancy at LR No.1870/146/VII Rhapta road, gate No. 9 Westlands. The Plaintiff also says that on 8/10/2007, he paid Kshs.800,600/= to Bureau For Development Support Service being rent for October 2007 to June 2010 at the rate of Kshs.24,260/= per month. It is also the Plaintiff's contention that when the landlord levied distress, he backdated a proclamation on the material day and left it with the 1<sup>st</sup> and 2<sup>nd</sup> Respondent's employee; that the property carted away does not belong to the head tenant and finally that the inventory left at the suit premises does not list all the items taken from the offices occupied by the Plaintiff.

7. On the 29/07/2008, M/s Nyachoki & Co. Advocates for the Defendants filed Notice of Preliminary Objection to the application on the grounds:-

1. **THAT the prayers sought in the Application have not been sought in the Plaint in blatant disregard of Order VI Rule 6 of the Civil Procedure Rules.**

2. **THAT the Orders for stay of distress for rent prayed for by the Plaintiff/Applicant are not available to the Plaintiff/Applicant for want of locus standi and cannot be granted under Order 39 on which the Application is predicated.**

3. ***THAT the Orders sought by the Plaintiff/Applicant cannot be granted under Order XXXIX Rules 1,2,5 and 9 of the Civil Procedure Rules and as such cannot therefore be brought by way of a Chamber Summons.***

4. ***THAT the Supporting Affidavit sworn by the Plaintiff/Applicant on 18<sup>th</sup> July 2008 is not compliant with the provisions of the Oaths and Statutory Declarations Act and Order XIII Rules 3 and 4 of the Civil Procedure Rules.***

Order VI Rule 6 of the Civil Procedure Rules provides as follows:

***“(6) (1) No party may in any pleading make an allegation of fact, or raise any new ground of claim, inconsistent with a previous pleading of his in the same suit.***

***(2) Subrule (1) shall not prejudice the right of a party to amend, or apply for leave to amend, his previous pleading so as to plead the allegations or claims in the alternative.”***

8. The above Preliminary Objection was not prosecuted since there was no appearance of the Defendants and/or his advocate and there was no indication as to whether the Defendants intended to proceed with the Preliminary Objection. The Preliminary Objection notwithstanding the Defendants also filed Grounds of Opposition to the application. The grounds, dated 30/07/2008 were filed in court on the same day, the main grounds being that:-

***(a) The Plaintiff/Applicant has no reasonable cause of action against the Defendants/Respondents due to illegal sub-letting***

***(b) The Plaintiff/Applicant has no interest or any sufficient interest in the matter***

***(c) The application is an abuse of the process of this Honourable Court for reasons that***

***(i) The Plaintiff/Applicant has not complied with Section 19 of the Distress for Rent Act, Cap 293 Laws of Kenya***

***(ii) The Plaintiff/Applicant is making attempts to irregularly and improperly frustrate a lawful distraint***

***(iii) The Plaintiff/Applicant is in breach of Section 6 of the Civil Procedure Act***

***(d) The application has been brought under the wrong procedure***

***(e) The Plaintiff/Applicant cannot approbate and reprobate at the same time***

***(f) The facts forming the basis of this case are drawn from an entirely different case***

***(g) The Plaintiff/Applicant has not come to court with clean hands.***

9. At the hearing hereof, neither the Defendants nor their advocates were present though it is clear that they were served on the 19/11/2008 at 3.50 p.m. The service was effected in accordance with this court's order dated 19/11/2008 which order also fixed the instant application for hearing on 21/11/2008. Mr. Wangalwa, learned counsel duly instructed by the firm of Wangalwa Oundo & Co. Advocates appeared for the Plaintiff and reiterated the grounds contained on the face of the application and in the Supporting Affidavits. He also relied on the case of **Njagi Kanyunguti alias Karugi Kanyunguti & 4 Others –vs- David Njeru Njogu – Court of Appeal at Nairobi Civil Appeal No. 181 of 1994** (unreported). I wish to observe that the facts of that case are distinguishable from the present one, save for the fact that as in that case, the Plaintiff herein seeks a discretionary order although such an order is not prayed for in the plaint. The case is however important for reiterating the principle that the exercise of any discretion of the court must be exercised judicially – see **Pithon Waweru Maina –vs- Thuku Mugiria (Civil Appeal**

**No. 27 of 1982 – Court of Appeal and Patel –vs- E.A. Cargo Handling Services Ltd. [1974] EA 75).** The case is also important as it sets out the principles for setting aside of ex parte judgments/rulings – see **Shah –vs- Mbogo & Another 1967 EA, 116.**

10. The instant case is a case in which the Plaintiff seeks both mandatory and prohibitory orders of injunction. The law governing the granting of prohibitory injunctions was set out **Giella –vs- Cassman Brown & Co. Ltd. [1973] EA 358**, namely that (a) the Plaintiff must show that he has a prima facie case with a probability of success; (b) that unless the order sought is granted, he will suffer irreparable loss and (c) in case of doubt the court will decide the case on a balance of convenience. It is also trite law that in a case where a Plaintiff seeks an order of injunction in the application, that same prayer should also form part of the reliefs sought in the plaint.

11. In the instant suit, while the Plaintiff prays for injunctive orders in the application, there is no such a prayer in the plaint. The proper procedure is that a prayer of injunction should normally be included as a prayer in the plaint. There are however other factors to be considered. The distress here involves an under-tenant who is also a practicing advocate of long standing. The advocate has adduced evidence to show that up to 2010, there are no rent arrears from him since he paid the sum of Kshs.800,600/= by cheque on 8/10/2007. He has deponed that the items that were carted away by the auctioneers were files, cabinets and computers that are ordinarily used in his professional business as a lawyer. Without these various items the Applicant says he is handicapped as a lawyer. The work of an advocate is a trade that is carried out generally for the benefit of all persons who choose to avail themselves to such an advocate. (see **HILL & REDMAN’S LANDLORD & TENANT** Ed. 11<sup>th</sup> page 314). The Applicant says that the cabinets distrained contained some highly sensitive documents for his client’s and that the computers also contain instructions and other information from his clients. Such information would, as was held in **Khaminwa & Khaminwa v Jubilee Insurance Company Ltd. – Nrb HCCC No.1304 of 1995**, be safeguarded by the law of evidence and in particular by Section 134 of the Evidence Act, Cap 80 Laws of Kenya. It would therefore be dangerous for the Applicants to have the items distrained remain in the hands of the auctioneers as this would severely erode the advocate-client confidentiality. Any exposure of clients’ information can only be by the express consent of the advocate.

12. I now turn to the issue of whether damages would suffice in the instant case. Common law provides for damages as a remedy for any wrongful distress whether such distress is illegal, irregular or excessive but that is only a general principle of law. The instant case involves a law firm whose reputation is at stake and a distress over tools of trade of the said advocate. It is therefore unlikely that any amount of damages would salvage the Applicant’s image unless he is able to get back into business with all his tools of trade. I therefore think that the inconvenience of restoring the Applicant into the suit premises would be much less than locking him out. I also wish to observe that the Respondents did not appear at the hearing hereof to argue their case, so the court cannot fathom whether or not the Defendants would be put to any considerable cost in restoring the Plaintiff into the premises and returning the distrained goods. The Applicant wants the distrained goods returned so that he can continue with his business. The Applicant also prays that the distrained goods should not be sold.

In the above circumstances, I am persuaded that the Applicant has made out a case for the orders sought as per prayers 3 and 4 of the application and also confirm the stay order given herein in terms of prayer (2) of the application. Costs of this application to the Applicants

Orders accordingly.

It is so ordered.

**Dated and delivered at Nairobi this 28<sup>th</sup> day of November 2008.**

**R.N. SITATI**

**JUDGE**

Delivered in the presence of:-

..... For the Plaintiff/Applicant

.....For the Defendants/Respondents