



REPUBLIC OF KENYA
IN THE HIGH COURT OF KENYA
AT NAIROBI (NAIROBI LAW COURTS)
Civil Suit 144 of 2007

ELIJAH MOGERE OMBWORO.....PLAINTIFF/RESPONDENT

VERSUS

SENTRIM KENYA LIMITED.....DEFENDANT/APPLICANT

WAVETEK COMMUNICATIONS SOLUTIONS LTD.....OBJECTOR

RULING OF THE COURT

1. The application before court is the Chamber Summons dated 24/09/2008 by which the Applicant seeks an order that the order stay of execution issued pursuant to the Notice of Execution dated 29/05/2008 be set aside *ex debito justiae*. The Applicant also prays that the Notice of Objection dated 29/08/2005 be struck out *ex debito justiae*. The Applicant also prays for costs of this application. The application, which is brought under Order VI Rule 13(1) (d) Order L rule 17 of the Civil Procedure Rules and Section 3A of the Civil Procedure Act is supported by 6 grounds on the face thereof:-

- a. ***The Notice of Objection dated 29th August 2008 is frivolous, vexatious and an abuse of the court process. This suit is still pending in court and no judgment has been delivered or decree issued.***
- b. ***The Notice of Objection dated 29th August 2008 is thus an abuse of the court process.***
- c. ***On 23rd July 2008, this court made an order that the defendant be allowed to levy distress for rent from the plaintiff in the sum of Kshs.30,000/= per month from September 2007.***
- d. ***The defendant is exercising its rights under the Distress for Rent Act Cap 293, Laws of Kenya and is not executing a decree. Objection proceedings are therefore inapplicable in matters relating to distress for rent.***
- e. ***The defendant is aggrieved by the order of stay of execution. The plaintiff has failed to make rent payments is still in arrears of rent. The Notice of Objection and the Notice of Stay of Execution issued herein are intended to obstruct the course of the distress.***
- f. ***It is in the interest of justice that the orders herein sought be granted.***

2. The application is also premised on the averments contained in the sworn affidavit of **Rajni Shah**

dated 24/09/2008. The deponent says that he is the Chief Executive Officer of the Defendant/Applicant; that on 23/07/2008, the court made an order that the Defendant be allowed to levy distress for rent from the Plaintiff in the sum of Kshs.30,000/= per month from September, 2007; that the order was pursuant to an application by the Defendant dated 28/11/2007 seeking to set aside an injunction order made by this court on 27/07/2007; that on 6/08/2008, the Defendant's advocates instructed the firm of **Keysian Auctioneers** to levy distress for rent; that the said firm of auctioneers was also issued with a letter of instructions for the distress of rent pursuant to the Auctioneer's Act, that the auctioneers proceeded to levy the distress as instructed. The deponent also says that on 1/09/2008, the Defendant's advocates were served with a Notice of Objection to Attachment, a Notice of Appointment and a Notice of Stay of Execution on behalf of the purported Objector herein; that according to advice received from the Defendant's advocates on record, which advice the deponent believes to be true:-

- a. ***Objection proceedings under Order XXI Rules 53-57 are commenced where an attachment is pursuant to execution of a decree. There can be no objection proceedings relating to distress for rent.***
- b. ***This suit has not been heard and there is no judgment. There are no execution proceedings in this matter.***
- c. ***The defendant is exercising its rights under the Distress for Rent Act Cap 293, Laws of Kenya and any claims against distress for rent can only be enforced by filing a fresh suit.***
- d. ***The purported objector is abusing the court's process and should not be allowed to reap benefits from the same.***

3. In its Certificate of Urgency, Mr. George Gitonga Murugara, learned counsel for the Defendant/Applicant that the Objector has no irregularly filed the objection merely to frustrate the Defendant's efforts to levy distress for recovery of the more than Kshs.300,000/= in rent arrears owned by the Plaintiff as at March 2008.

4. The Defendant's application is opposed. The Replying Affidavit is sworn by **Elijah Mogere Ombworo**, who says he is the Managing Director of the objector company. He says that the rent arrears are attributed to the fact that the deponent's partner in **Communications Outsource Centre** failed to make contributions towards rent; that the goods proclaimed on behalf of the Defendant are the Objector's goods and that the objector is not the Plaintiff. That the objector ought not to have been attached. That there is no justification for the attachment of the Objector's goods.

5. The application was canvassed before me by the learned counsel appearing, Mr. Murugara for the Defendant/Applicant and Mr. Oyugi for the Objector. Mr. Murugara contended that the proclamation carried out on behalf of the Defendant was pursuant to an order made under the Distress for Rent Act, Cap 296 and also under the auctioneers Act and has nothing to do with Order XXI Rule 54 of the Civil Procedure Rules which provides:-

"54. Upon receipt of a valid notice given under rule 53, the court shall order a stay of execution proceedings and shall call upon the attaching creditor by notice in writing within 15 days or such other period as the said notice may prescribe to intimate to the court and the objector in writing whether he proposes to proceed with the attachment and execution thereunder wholly or in part."

Mr. Murugara also contended that since there is no decree in this suit, the objection filed herein by way of Notice of Motion is liable to being struck out under the relevant provisions of Order VI Rule 13 of the Civil Procedure Rules. Concerning the Replying Affidavit Mr. Murugara submitted that the same does not answer the Applicant's application since the objector has chosen to proceed as if there is execution of a decree when there is no such decree.

6. Learned Counsel Mr. Oyugi who appeared for the objector argued that the objector is a stranger to the matter and therefore that the proclamation done upon the Objector's equipment was unjustified. He urged the court to uphold the stay. Mr. Oyugi also submitted that the Notice of Objection is properly

before the court and that the same should proceed. In his view, if the Defendant wanted to oppose the objection, he should have done so under Order XXI Rule 54 of the Civil Procedure Rules (see above). In reply learned counsel for the Applicant said that Order XXI Rules 54-58 do not apply to orders made under the Distress for Rent Act.

7. I have carefully considered the application as filed. I have also considered the submissions by both learned counsel appearing. I have also considered the affidavits in support and in opposition to the application. It is clear from the above that this dispute relates to a distress for rent order made by this honourable court on 23/07/2008. It is also not in dispute that the Plaintiff herein is a director of the objector company and that the Plaintiff is also a partner of **Communication Outsource Centre** which is in arrears of rent to the tune of over Kshs.300,000/= to the Defendant. All that the Plaintiff says is that his partner in **Communication Outsource Centre** did not make any contributions towards rent payment hence the arrears. In my considered view, this is not an excuse for not paying rent. It is also not an excuse for objecting to the proclamation especially because there is no decree in the instant matter, so that the Defendant did not have to comply with Order XXI Rule 54 of the Civil Procedure Rules. The order allowing distress for rent is quite clear in its terms that the suit is yet to be heard. The Defendant was allowed to levy for distress of rent because the Plaintiff herein had failed to pay the Kshs.30,000/= per month.

8. I have also considered the authorities cited to court by the Defendant/Applicant and from those authorities it is clear that where a party who is the beneficiary of an injunction fails to honour his obligations under the orders, the aggrieved party should be forced from the restrictions placed on him by the same order so that as in this case, the Defendant can levy distress against the Plaintiff to recover rent that has become due.

9. In the premises, I do allow the Applicants application and order that the order of stay of execution issued pursuant to the Notice of Stay of Execution dated 29/08/2008 be and is hereby set aside *ex debito justiae*. I also order that the Notice of Objection dated 29/08/2008 be and is hereby struck out *ex debito justiae*. Costs of the application to be paid by the Objector.

Orders accordingly.

Dated and delivered at Nairobi this 27th day of November, 2008.

R.N. SITATI

JUDGE

Delivered in the presence of:

.....For the Plaintiff/Respondent

.....For the Defendant/Applicant

.....For the Objector