



REPUBLIC OF KENYA

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

Civil Case 436 of 2008

AVANTI LIMITEDPLAINTIFF

V E R S U S

1. JASWANT VOHORA

2. PATRICK MBOGO (t/a Target Achievers Auctioneers)DEFENDANTS

R U L I N G

The Plaintiff was at all material times the 1st Defendant's tenant in some business premises in Nairobi. From the court record and the submissions of the learned counsels the following facts are not in dispute:-

1. In September 2007 the 1st Defendant served the Plaintiff with a notice to terminate tenancy under the Landlord and Tenant (Shops, Hotels and Catering Establishments) Act, Cap. 301.
2. The Plaintiff resisted the notice to terminate by filing a reference with the Business Premises Rent Tribunal.
3. The BPR Tribunal heard the reference and on 21st August, 2008 it dismissed it while upholding the 1st Defendant's notice of termination. The Tribunal further ordered that the Plaintiff vacate the premises within 30 days. It also gave the 1st Defendant leave to levy distress against the Plaintiff for arrears of rent.
4. On 28th August, 2008 the 1st Defendant, through the 2nd Defendant (an auctioneer) levied distress against the Plaintiff.
5. On 4th September, 2008 the Plaintiff appealed against the orders of the BPR Tribunal of 21st August, 2008 vide **Nairobi HC Civil Appeal No. 469 of 2008**. It also applied in the appeal for stay of execution of those orders pending disposal of the appeal.
6. On 9th September, 2008 the Plaintiff obtained in the appeal, *ex parte*, interim stay of execution of the orders of the BPR Tribunal.
7. On 29th September, 2008 the parties in the appeal appeared before Okwengu, J for hearing *inter partes* of the application for stay of execution of the orders of the BPR Tribunal.
8. On the same date, that is 29th September, 2008 the Plaintiff filed the present suit, basically

challenging the distress levied by the 1st Defendant on 28th August, 2008. Contemporaneously with the plaint the Plaintiff filed an application by chamber summons of the same date seeking substantively both prohibitive and mandatory injunctions pending disposal of the suit. It also sought interim orders pending hearing of the application *inter partes*.

9. On 30th September, 2008 the Plaintiff appeared before the Duty Judge and obtained, *ex parte*, conditional interim orders.

10. On 24th October, 2008 Okwengu, J refused the Plaintiff's application in **(HC Civil Appeal No. 469 of 2008)** for stay of the BPR Tribunal's orders of 21st August, 2008.

The Defendants herein have, by notice dated 6th October 2008, raised a preliminary objection to the Plaintiff's chamber summons dated 29th September, 2008. That preliminary objection is the subject of this ruling. Four grounds are given in the notice, but only three were urged. These are:-

1. That the application is fatally defective for seeking both prohibitory and mandatory injunctions in a chamber summons.
2. That the injunctive reliefs sought cannot issue because a statutory remedy is provided for by the Distress for Rent Act, Cap. 293.
3. That the issues raised in the present application have been canvassed and ruled upon in applications in **Civil Appeal No. 469 of 2008**, which appeal is pending disposal.

I have considered the submissions, both written and oral, of the learned counsels appearing, including the cases cited. I will take the three issues raised in turn.

It is now well-established that where an application belongs partly in a chamber summons and partly in a notice of motion, the superior proceeding, that is notice of motion, is to be preferred. Applications for temporary prohibitory injunctions under Order 39 of the Civil Procedure Rules are brought by chamber summons. But that Order does not envisage temporary mandatory injunctions, which therefore can only be sought under the inherent power of the court. Applications for temporary mandatory injunctions thus belong to that category of applications not specifically provided for in the Civil Procedure Rules, and must be brought by way of notice of motion. The Plaintiff's application, which seeks both temporary prohibitory and mandatory injunctions, should thus have been brought by way of notice of motion.

In this regard I wholly agree with the decisions in the two cases cited by learned counsel for the Defendants, that is, **MORRIS & CO LTD –vs- KENYA COMMERCIAL BANK LTD & OTHERS [2003] 2 EA 605** (Ringera, J as he then was) and **FLORENCE MAKOTSI (t/a OUR CONNECTIONS) & ANOTHER, MILIMANI HCCC NO. 353 OF 2006** (unreported) (Azangalala, J). But I see no reason why the entire application of the Plaintiff should be struck out. It is only that part of it that seeks temporary mandatory injunctions that is bad, not the entire application. That bad portion could be removed without affecting the prayers for temporary prohibitory injunction. I would therefore order that prayers (iv) and (v) of the chamber summons dated 25th September, 2008 be struck out. Order 50, rule 12 of the Rules could not save them as the procedure in which the court has been approached in regard to them is fundamentally defective.

The second ground of the preliminary objection is that injunctive reliefs sought cannot issue as the Plaintiff has a statutory remedy available to him under the Distress for Rent Act, Cap. 293. Section 8 of the Act provides as follows:-

“8. If any distress and sale are made under this Act for rent pretended to be in arrears and due, when in truth no rent is in arrear or due to the person distraining, or to the person in whose name or right the distress is taken, then the owner of the goods or chattels distrained and sold or his executors or administrators shall be entitled to recover double the value of the goods and chattels so

distraigned and sold together with full costs of suit from the person so distraining, or his executors or administrators, and the double value and costs of suit may be recovered as a civil debt recoverable summarily.”

That section clearly provides a remedy to the Plaintiff should it turn out that no arrears of rent were due. It has quantified the value of its properties that were distressed. With a statutory remedy available to it, why should the Plaintiff seek discretionary orders? In this regard its application is an abuse of the process of the court and must be struck out.

The third ground of the preliminary objection is that the issues raised in the application have already been litigated in **HC Civil Appeal No. 469 of 2008**. The distress for rent of 28th August 2008 challenged in the present suit was clearly sanctioned by the BPR Tribunal’s orders of 21st August 2008. The Plaintiff has already appealed against those orders vide **HC Civil Appeal No. 469 of 2008** which is pending disposal. The Plaintiff’s attempt in that appeal to stay execution of the orders of the Tribunal failed on 24th October 2008 when its application was dismissed by Okwengu, J.

Although what was sought before Okwengu, J was stay of execution of the orders of the Tribunal, and what is sought in the present application is a temporary injunction in respect to the distress resulting from those orders of the Tribunal, the effect would be the same. If the temporary injunctions sought were to be granted it would have the effect of staying the orders of the BPR Tribunal, something that has already been refused in the appeal. To permit the present application to be canvassed would be to permit a re-hearing of matters already heard and determined in the appeal. That would amount to a gross abuse of the process of the court. It cannot be permitted.

In the event, I will uphold the preliminary objection. The chamber summons dated 29th September, 2008 is hereby struck out with costs to the Defendants. It is so ordered.

DATED AT NAIROBI THIS 25TH DAY OF NOVEMBER, 2008

H. P. G. WAWERU

J U D G E

DELIVERED THIS 28TH DAY OF NOVEMBER, 2008