



REPUBLIC OF KENYA
IN THE HIGH COURT OF KENYA
AT NAIROBI (NAIROBI LAW COURTS)
Civil Appeal 622 of 2005

GILBERT MAINA..... APPELLANT

VERSUS

PURSHOTAM SINGH..... RESPONDENT

RULING

(Interpretation of the orders of 26/6/06)

On 9/10/06, the applicant by way of a Notice of Motion, moved to this court, seeking orders, that the orders of this court, dated 26/6/06 granting temporary injunction restraining the Respondent, his agents, employees from distraining for rent, selling all those goods proclaimed on 30/8/05 pending the appeal herein and also granting leave to the applicant to deposit monthly rent in court, be set aside.

The grounds for the application are that:

1. The appellant has failed to comply with the court orders [of 26/6/06]
2. The appellant is in contempt of court.

To appreciate the grounds of this application, it is imperative to reproduce the appellants application, dated and filed on 9/9/05, the orders prayed and granted thereto, which are said to have been violated, and hence the contempt of court alleged herein.

The Appellant/Respondent's application dated and filed on, 9/9/05, had six (6) prayers, but for the purposes of this application, the relevant ones, and the genesis of the current application are Nos. 2 and 5. These are as follows:

2) That a temporary injunction do issue to restrain the Respondent whether personally or by any agent, employee, or other person from detaining for rent, selling all those goods proclaimed pursuant to the proclamation dated 30/8/05 pending the hearing and determination of this appeal.

5) That the applicant be granted leave to deposit the monthly rent in court.

The above two prayers were granted by this court on 26/6/06.

The applicant's contention in the current application, dated 9/10/06, is that the Respondent has not been depositing the rent in court, as per this court's order No. 5, and that that order No. 5 means depositing in

court monthly rent which should include arrears as on 9/9/05, when he file his application. This is on the basis of the provisions of Order 50 rule 14 of the Civil Procedure Rules.

The Appellant/Respondent **avers** that the order could not have intended to include the arrears, and hence failure to deposit the arrears in court does not, and cannot, constitute violation of the court order.

The question before me is the meaning – interpretation of Order 5, as granted by this court on 26/6/06.

After careful perusal of the pleadings herein, and the submissions by learned counsel for both sides, and after going back in the records starting with the appeal herein, it is clear to me that the order to deposit the monthly rent in court, could not and does not include the arrears. This is on the basis that the arrears are the substantive issue in the appeal. The law is quite clear that the substantive suit/appeal cannot be disposed off by an interlocutory application. Put differently, the court cannot grant a prayer or order, whose effect is to dispose of the substantive suit/appeal through an interlocutory application.

Accordingly, to interpret Order 5 of this court, dated 26/6/06, to mean that the monthly rent to be deposited in court includes the arrears as of 9/9/05, is legally not possible. If that were so, what is left for the substantive appeal? In my view, an empty shell, as the disputed arrears will have been disposed of through an interlocutory application.

For avoidance of doubt, the correct position and meaning of Order 5 is **“deposit the monthly rent in court, other than the disputed arrears, whose substance is the appeal as yet to be heard and determined”** Any other meaning or interpretation of that order makes total nonsense of the law, and renders the substantive appeal a laughing stock. What will the appeal determine if that order means that the disputed arrears are payable, even before the appeal is heard and determined?

The foregoing ruling is limited to the interpretation of Order 5 of this court, dated 6/6/06. However, the Ruling renders the application herein, dated 9/10/06, valueless as the clear implication is that no court order has been violated by the Respondent, and the basis of the application is misconceived; and it cannot stand.

DATED and delivered in Nairobi, this 22nd Day of February, 2007.

O.K. MUTUNGI

JUDGE