



REPUBLIC OF KENYA  
IN THE HIGH COURT OF KENYA  
AT NAKURU

Civil Appeal 182 of 2005

NGOTHO COMMERCIAL AGENCIES LTD. .... APPLICANT

VERSUS

GEORGE WANJUKI GETHI .....RESPONDENT

[Being an appeal against the ruling delivered by his Honor, Mr. H.M. Nyaga, SRM on 18<sup>th</sup> October, 2005 in Nakuru Senior Principal Magistrate's Court Miscellaneous Civil Application No.48 of 2005]

JUDGMENT

The genesis of this appeal can be traced to a matter which was instituted by way of a Notice of Motion by the applicant on 15<sup>th</sup> June, 2005. The appellant who was acting under the auspices of a Power of Attorney dated the same 15<sup>th</sup> June, 2005 applied to court under section 18 of the Distress for rent Act and section 3A of the CPA Act. The appellant sought for an order that the court do authorize in writing a court bailiff or an authorized agent to levy distress on plot **No.Nakuru/Municipality/Block 451/1941 (Milimani)** and recover the arrears of rent in the sum of kshs.106, 000/= being unpaid rent from September, 2004 to June, 2005. The appellant also sought for an order for Mesne Profits accruing until the payment of rent arrears. He also sought for an eviction order and the costs of the application. On the 28<sup>th</sup> June, 2005, the learned senior resident magistrate granted prayers in regard to distress for rent on 3<sup>rd</sup> August, 2005, the respondent filed a chamber summons application seeking for the following principle orders inter alia;

**1. The Honourable court be pleased to set aside all orders**

***Issued in this case and the respondent be restrained to proceed to sell by public auction the household goods and motor vehicle of the applicant through Lifewood Auctioneers pending the hearing and determination of this application.***

**2. Lifewood Auctioneers be ordered to return the Household goods and motor vehicle of the applicant.**

By a ruling delivered on 18<sup>th</sup> October, 2005, the learned magistrate allowed the application and ordered that the attached goods be released to the respondent forthwith. The learned trial magistrate also reserved his ruling on the issue of costs until the application was heard and determined. The appellant being aggrieved by the said order appealed against the whole ruling and set out the following grounds of appeal:

**1. That the learned magistrate erred in law in not finding**

***That his jurisdiction to set aside his earlier orders had not been properly invoked by the applicant***

*therein.*

**2. That the learned magistrate erred in law in failing to f**

*Find that the entire application before him was not properly before the court.*

**3. That the learned magistrate erred in law in setting**

*Aside his earlier orders when no defence on the merits of the claim was demonstrated by the application therein, contrary to established legal principles.*

**4. That the learned magistrate erred in law by basing his**

*Ruling on a ground that had neither been raised nor relied upon by the parties at the hearing of the application without first giving the parties the opportunity of being heard on that issue contrary to the law.*

**5. That the learned magistrate erred in law in not dealing**

*With the issue of costs incurred up to the time of the ruling before ordering the released of the attached goods, which goods had been stored and kept at considerable cost.*

**6. That the learned magistrate erred in law in holding**

*That he could exercise jurisdiction under provisions of law that the applicant in the application before him had earlier cited nor relied upon.*

**7. That the learned magistrate erred in law in failing to**

*Find that the applicant's original application for leave to levy distress was legally superfluous.*

In further arguments, learned Counsel for the appellant submitted that failure by the appellant to indicate the provisions of the law on the application was not fatal. This is a defect which is cured by the provisions of order 50 rule 12 of

CPC rules. Further Counsel argued that the trial court erred by setting aside its own orders when there were no triable issues raised in defence, and there was no substantive defence on merit. In this regard the decision of **Chemwora vs. Kubende KLR (1982 – 1988) page 1038** was quoted. Lastly, Counsel argued that the court did not invite the appellant to make submission on legality of the power of attorney which was tantamount to condemning a party without being heard and contrary to the rules of natural justice.

On the part of the respondent, this appeal was opposed on the grounds that the court duly addressed the issues on points of law which were placed before the court by way of pleadings and submissions. The respondent had pleaded the issue of the validity of power of Attorney and nothing stopped the court from considering this point of law regarding the appellant's locus standing in the matter. Consequently the trial court did not deal with the defence on merit if the substantive matter was brought by a person who had no locus standing. The trial court did not make any mistake in not assessing the costs which is within its discretion and a decision was made by the court that the issue of the costs would be dealt with after the application was heard inter-parties.

The issues that call for determination in this appeal are whether the trial magistrate was justified in setting aside his own orders. This application was brought by a procedure which I

must confess is alien. This was a notice of motion in which the appellant sought for substantive orders including orders of eviction. There was no substantive suit which was filled. This application was brought

pursuant to the provisions of Section 18 of the Distress for rent Act cap 293. According to the provisions of that section:

**1. No person shall act as a licensed auctioneer to levy distress for rent unless he is authorized to act as a licensed auctioneer by a certificate in writing to that effect, and that certificate may be general or apply to a particular distress, and may be granted at any time in such manner as may be prescribed by rules under this Act.**

**2. The Registrar, a Deputy Registrar or a district registrar of the High Court may grant certificates in cases in which they may be authorized to do so by the rules made under this Act.**

The wording of the orders sought was equally confusing. Was the appellant seeking for a license to act as a licensed auctioneer or was he seeking for orders to levy distress on the respondent. According to **Section 3 of Cap 293** any person having a rent arrear can levy distress for the recovery of the same by instructing a licensed auctioneer in accordance with the Act. The procedure adopted by the appellant is not provided for in **Cap 293** or the civil procedure.

In this regard I find justification in the ruling of the trial magistrate that the appellant did not indicate the provisions of the law under which the jurisdiction of the court was invoked. I find in the proceedings that the respondent complained of non service of the application. I find that there were submissions regarding the validity of the Power of Attorney on **page 34** of the record of appeal. I am therefore not persuaded that the trial court erred by making a ruling on that aspect. This is a point of law which can be raised at any time. The trial magistrate exercised his jurisdiction and set aside his own decision. The reasons for setting aside are clearly indicated in the ruling am not persuaded at all that the trial court made an error. For the above reasons, I find no merit in this appeal which I dismiss herewith costs to the respondent.

Ruling read and signed on 25<sup>th</sup> day of May, 2007.

**M. KOOME**

**JUDGE**