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

Civil Case 481 of 2007

1. PONANGIPALLI VENKATA RAMANA RAO

2. KOLLURI VENKATA SUBBARATA KAM SASSTRY…..…..PLAINTIFFS

(Suing as the receivers/managers of MUHAMMAD KARMALI & SONS LIMITED)

V E R S U S

1. MANDEV LIMITED

2. SAMUEL M. GATHOGA (t/a VALLEY AUCTIONEERS) .....DEFENDANTS

R U L I N G

The Plaintiffs herein have pleaded that they are the duly appointed receivers/managers of **MUHAMMAD KARMALI & SONS LIMITED** (hereinafter called "the Company") said to be in receivership. They have brought this suit as such receivers/managers. The 1st Defendant is the Company's landlord in certain premises within Nairobi. The 2nd Defendant is an auctioneer who was instructed by the 1st Defendant to levy distress for rent against the Company.

By plaint dated 14th June, 2007 the Plaintiffs sought two main releifs against the Defendants jointly and severally:-

1. A mandatory injunction to compel the Defendants to forthwith and unconditionally release all the distrained goods set out in the notification of sale dated 12th June, 2007 and return the same to the Company's premises. In default the order to be enforced by the officer commanding Embakasi Police Station.

2. Damages for illegal distress and loss of business.

The Plaintiffs' case as set out in the plaint is that the distress for rent levied by the 1st Defendant is illegal in that:-

(i) No notice or demand was issued against the Plaintiffs at the Company's premises or at all.

(ii) No proclamation of the said distress process was ever carried out prior to the 12th June, 2007 or at all.

(iii) No rent is in arrears to the tune of KShs. 10,632,000/00 or at all.

(iv) The law prohibits attachment of tools of trade.

(v) In any event, pursuant to the floating debenture dated 22nd July, 2004, the debenture-holder obtained priority rights and interests over any other unsecured creditors as regards the Company's assets, plant and machinery.

(vi) Provisions of the Distress for Rent Act, Cap 293, have been blatantly breached.

Together with the plaint the Plaintiffs filed an application by notice of motion dated 14th June, 2007. They sought the very same mandatory injunction that was sought in the plaint. The same grounds as constitute the cause of action in the plaint are also advanced in this application. The application is supported by an affidavit sworn by the 1st Plaintiff. I have read the same and have also perused all the documents annexed thereto. The application is brought under section 3A of the Civil Procedure Act, Cap. 21 (hereinafter called "the Act"). There is also a further affidavit sworn by the same 1st Plaintiff and filed on 19th June, 2007 which I have also read.

The Defendants have opposed the application as set out in the replying affidavit sworn by one **ARVIND MANEKCHAND SHAH**, a director of the 1st Defendant, filed on 1st June, 2007. The grounds of opposition emerging therefrom are as follows:-

1. That the Company was in huge arrears of rent, and the 1st Defendant was entitled under the law to levy distress.

2. That the distress was a resumption of an earlier distress, and not a fresh distress; therefore, no notice of the same was required. Even if such notice was required, it was duly given.

3. That the application (and indeed the suit) is an abuse of the process of the court.

4. That there is a previous pending suit over the same subject-matter, i.e., arrears of rent, being **Nairobi HCCC No. 511 of 2006**, filed by the Company against the 1st Defendant in respect to the previous distress for rent.

5. That the Company is still in arrears of rent, and more arrears are accruing from month to month.

I have considered the submissions of the learned counsels appearing. This being an interlocutory application, I am not required to decide, and indeed I should avoid the temptation to decide, with finality any of the various issues raised, lest I prejudice the trial; more so as the application seeks the same relief as is sought in the plaint. The grant or refusal of the interlocutory mandatory injunction sought may have the practical effect of putting an end to the action. I must therefore approach the case on the broad principle of what I can do in my best endeavour to avoid injustice to either party. I should bear in mind that to grant the injunction sought by the Plaintiffs may mean giving them judgment in the case against the Defendants without permitting the Defendants the right of trial. See the case of **CAYNE AND ANOTHER V GLOBAL NATURAL RESOURCES PLC [1984] 1 All ER 225.**

The court would issue the equitable relief of interlocutory mandatory injunction in exercise of its inherent jurisdiction. It is a discretionary power. In our jurisdiction the law relating to interlocutory mandatory injunction is now well settled. See for instance the case of KENYA

RIES LTD. –VS- OKEYO, [2002] I EA 109 where the Court of Appeal held:-

"A mandatory injunction ought not to be granted on an interlocutory application in the absence of special circumstances, and then only in clear cases, either where the court thought that the matter ought to be decided at once, or where the injunction was directed at a simple and summary act which could be easily remedied, or where the defendant had attempted to steal a match on the plaintiff."

The court quoted with approval paragraph 948 of Halsbury's Laws of England, 4th Edition, Vol. 24 which states:-

"A mandatory injunction can be granted on an interlocutory application as well as at the hearing, but in the absence of special circumstances, it will not normally be granted. However, if the case is clear and one which the court thinks ought to be decided at once, or if the act done **is a simple and summary one which can be easily remedied, or where the defendant attempted to steal a match on the plaintiff, mandatory injunction will be granted on an interlocutory application."**

The Court of Appeal also quoted with approval the following passage from the case of **LOCABAIL INTERNATIONAL FINACE LIMITED -VS- AGROEXPORT AND OTHERS, [1986] I All ER 901**:-

"**A mandatory injunction ought not to be granted on an interlocutory application in the absence of special circumstances, and then only in clear cases, either where the court thought that the matter ought to be decided at once, or where the injunction was directed at a simple and summary act which could be easily remedied, or where the defendant had attempted to steal a match on the plaintiff. Moreover, before granting a mandatory interlocutory injunction, the court had to feel a high degree of assurance that at the trial it would appear that the injunction had rightly been granted, that being a different and higher standard than was required for a prohibitory injunction."**

Have the Plaintiffs met the parameters set out in the above quotations? Mr King'ara, learned counsel for the Plaintiffs, submitted as follows. Some of the distrained goods, i.e., motor vehicles, did not belong to the Company but to a different person called TECHMARK LIMITED. They were therefore not available for distraint. Mr. King'ara further submitted that with the payment of KShs. 2 million as ordered by the court on 19th June, 2007, no rent was now owing from the receiver/managers to the 1st Defendant for the period that the receivers/managers have been in occupation since June, 2006. Regarding any rent owed by the Company prior to the receivership, the same is not a priority debt payable by the receivers/managers. He pointed out that the 1st Defendant infact has a judgment for those prior rent arrears, and it can execute for the same. He further submitted that under section 95 of the Company's Act, Cap. 486, once a company is placed under receivership, priority debts as defined in section 311 of Cap. 486 aforesaid are payable before all other debts; the previous rent arrears owed by the Company were not such priority debts.

Mr. King'ara further submitted that no notice as required by section 4 of Cap. 293 aforesaid was given. Furthermore, no notice as required by the Auctioneer's Act and the Auctioneer's Rules was given prior to the distress for rent.

The fourth limb of Mr. King'ara's submissions was that the attached goods are exempt from attachment under section 16 (1) (b), (c) and (d) of Cap. 293. They are goods or chattels in the possession of the law in that they are under the legal possession of the receivers/managers after crystallization of the floating charge in favour of the debenture-holder. They are therefore deemed to be goods under attachment as if they had been attached by a court bailiff in execution. They cannot be under another attachment.

Mr. King'ara also argued that the attached goods are in actual use of the receivers/managers. The goods are not for trade but for running the Company. They were therefore not available for distraint.

Mr. Muthui, learned counsel for the Defendants, submitted as follows. This is yet another attempt by the Company to resist lawful distress for rent levied by the 1st Defendant. He cited a previous suit that is still pending. He took the court through material now before the court which clearly shows that before the Company was put under receivership it was in huge arrears of rent over and above the judgment sum that it was awarded to the 1st Defendant in a previous suit. It was also clear that when the Plaintiffs came to court they owed rent for the period since the receivership to the tune of over KShs. 2 million. They paid KShs. 2 million towards these arrears by order of the court herein to enable the present application to

be heard.

Mr. Muthui further submitted that upon appointment of a receiver/manager by a debenture-holder, the receiver/manager is under a duty to meet all the liabilities of the company. More particularly, the receiver/manager is under an obligation to continue paying rent for the premises occupied by the company. In default of such payment, the landlord is entitled to levy distress; the only distress that is void unless sanctioned by court is in cases of appointment of a receiver by court under section 225 of Cap. 486, which is not the case here.

Mr. Muthui further submitted that it would be very unjust for a party to continue to occupy another party's premises without paying rent. The 1st Defendant must be permitted to take advantage of the power to levy distress prescribed under Cap. 293 which is meant to mitigate loss to landlords, financially and in time, occasioned by defaulting tenants. It would not be in the interests of justice, therefore, to stop the 1st Defendant from proceeding with the distress. According to him, it is not the law that once a receiver has come in distress cannot issue against the received property. It is only in cases of liquidation by court where the landlord must seek leave of the court to levy distress. In cases of voluntary liquidation leave of the court is not required. He cited **Halsbury's Laws of** E**ngland**, **4th Edition, Vol. 13 at** paragraphs 724 and725.

Regarding notice, Mr. Muthui submitted that the distress in this case did not commence on 12th June, 2007 as alleged but on the 5th May, 2006. That distress was temporarily interrupted by an *ex parte* order in **Nairobi HCCC NO. 511 of 2006**. So, no fresh notice was necessary. In any event, the receivers/managers should have taken over that previous case that is still pending instead of filing the present suit; the present suit is therefore an abuse of the process of the court. If fresh notice was necessary for the distress the same was issued on 11th May, 2007.

Regarding the allegation that some of the distrained goods (motor vehicles) belong to Techmark Limited and not to the Company, Mr. Muthui submitted that in that case Techmark Limited would not have rushed to court; there is no application by Techmark Limited before the court. In any event, there is no evidence at all of its alleged ownership of any of the distrained goods.

Regarding the submission that the distrained goods are privileged under section 16 of Cap. 293, Mr. Muthui argued that they are not. They are not chattels in the hands of the law as they were not seized by a court bailiff under execution. He cited **Halsbury's Laws of England, 4th Edition, Volume 13, paras. 230 and 320**. In his view, goods in the hands of a receiver are not in the hands of the law and can be distrained for rent. In any event, the distrained goods were not in actual use of the Plaintiffs or the Company at the time of distress. Besides, there is a limit of the value of goods of trade that are exempted under section 16(1) (g) of Cap. 293, which is KShs. 100/00. The distrained goods are way above KShs. 100/00 in value.

As can be seen from the submissions of the learned counsels, many important issues of law have been raised. But these issues do not commend themselves to any final decision at this stage. Such final decision must await trial of the action. To purport to decide any of these issues in finality at this stage is to sabotage the trial. That must be avoided.

What I am concerned with in this application are the following:-

1. Are there any special circumstances that warrant the grant of the interlocutory mandatory injunction sought?

2. Is this a clear case where to grant interlocutory mandatory injunction, and one which the court thinks ought to be decided at once?

3. Is the distress complained of in this case a simple and summary act which can be easily remedied by the interlocutory mandatory injunction sought?

4. Are there any exceptional circumstances which warrant issuance of the interlocutory mandatory injunction sought? For instance has the 1st Defendant attempted to steal a match on the Plaintiffs?

5. Does the court feel a high degree of assurance that it will appear at the trial that the interlocutory mandatory injunction, if granted, will have been rightly granted?

What emerges here is that the Company, and before it its predecessor in the premises, *prima facie*, appears to have difficulties paying the 1st Defendant rents due. At some point in the past the 1st Defendant got judgment for about KShs. 15 million in arrears of rent against the Company. That decree remains unsatisfied. Over and above that sum, again *prima facie*, the Company owes the 1st Defendant more and substantial arrears of rent. After receivership the Plaintiffs did not keep up with payments of rent. When they came to court they owed the 1st Defendant over KShs. 2 million in arrears of rent for the period since receivership. It took a court order in these present proceedings for them to pay KShs. 2 million towards these arrears. All these are not circumstances that are in favour for the Plaintiffs. They are circumstances that in fact militate against granting the interlocutory mandatory injunction sought. Should the 1st Defendant be prevented from exercising its statutory right to levy distress for rent where it is clear that huge arrears of rent are owed? I think not. There are no special circumstances here that warrant the grant of the interlocutory mandatory injunction sought. This is not a clear case where to grant such relief. It is a case which ought to await trial of the action so that all the issues raised in the application, which obviously will be the same issues to be raised at the trial, can be finally decided. The distress complained of is not a simple and summary act that can be easily remedied by the relief sought; on the contrary it is, *prima facie*, an act done by the 1st Defendant in pursuance of its statutory right to levy distress.

There are not any exceptional circumstances disclosed that would justify an interlocutory mandatory injunction. If I granted one I would not feel a high degree of assurance that it shall appear at the trial that the relief was rightly granted.

In the event, therefore, I must refuse the application. It is hereby dismissed with costs to the Defendants. It is so ordered.

DATED AT NAIROBI THIS 14TH DAY OF AUGUST, 2007

H. P. G. WAWERU

J U D G E

DELIVERED THIS 17th DAY OF AUGUST, 2007