



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

Civil Case 1541 of 2005

BUSTRACK LIMITED.....
.....PLAINTIFF

VERSUS

CITY COUNCIL OF NAIROBI.....
.....DEFENDANT

RULING

The plaintiff brought this Chamber Summons under Rule 3 of the High Court (Practice and Procedure) Rules Distress for Rent Act Order 39 Rule 1 and 3 of the Civil Procedure Rules seeking orders:

1. That a temporary injunction do issue restraining the defendant whether by itself, its servants and/or agents from trespassing on to the plaintiff's motor vehicles and other properties/goods and/or attaching, removing or distressing against the plaintiffs motor vehicles and other properties whenever situated pending the hearing and determination of this suit.

The application is based on the grounds:-

1. That the purported distress is irregular and illegal.
2. That a land lord/tenant relationship does not exist between the parties.
3. That the plaintiff is a separate legal entity and the defendant is not entitled to distress for rent against the plaintiffs movables as the plaintiff is not its tenant nor is it in rental arrears.
4. That the buses the defendants agents have purported to proclaim were not at the premises during the purported proclamation.

The application is also supported by an affidavit sworn by Edwin Masimba Mukabanah the plaintiff's Managing Director sworn on 22nd December 2005 in which he avers that on or about 2nd November 2005 the defendant purported to instruct M/S Ideal Auctioneers to distress against the plaintiff which auctioneers purported to issue a Notice of Proclamation for attachment on 6th December 2005; that the purported attachment is illegal and irregular and is not available to the defendant for the reason that the parties do not have a land lord/tenant relationship either by formal lease or otherwise nor is the plaintiff in any sort of arrears for rent with the defendant; that the motor vehicles (buses) and other movables that the

defendant has purported to proclaim for attachment belong to the plaintiff absolutely and are not available for attachment; that to defeat the ends of justice and to achieve their earlier objective of selling the suit premises to a 3rd party an action which was restrained by court, the defendant by a letter dated 20th march 2002 purported to revise the ground rent for the suit premises from Shs.531,000/- p.a. to Sh.21,500,000/= pa and back dated to the effective date to 1st January 2002, an increase of 5000%; that the purported revision was done without any consolidation or notice and they instructed M/S Musalia Mwenesi Advocates to object to the purported revision; that the purported revision has been in dispute and is the subject of several meetings between them and the defendant; that the plaintiff is a separate legal entity from M/S Kenya Bus Services Ltd and is not responsible for its debts though they are in a loose subsidiary relationship and believes that the defendant is harassing the plaintiff for ulterior motives and that the plaintiffs buses were not proclaimed at the suit premises which is a fundamental requirement, the breach whereof makes the purported distress irregular and illegal.

The application is opposed by the defendant who have filed a replying affidavit sworn by Mary Ngethe who avers that the defendant is the registered lessee of the suit property L.R. NO. 209/6085 which it now let to KBS for a fee for purposes of using the same as a dripping and packing point for passengers respecting of its fleet of Public Transport Vehicles; that KBS defaulted to meet its rental obligations and the respondent on 2nd November 2005 instructed Ideal Auctioneers to levy distress for rent against KBS Chattels and goods; that the said auctioneer proceeded as instructed on 6th December 2005 and proclaimed KBS Chattels; that among the Chattels proclaimed were a fleet of buses which were enjoying use of the suit premises and which were presumed to belong to the Tenant (KBS) and are liable for attachments unless the contrary is proved by any person claiming ownership of the same and that the applicants herein have failed to satisfy the court that the attached vehicles belong to them and not KBS the tenant herein, and that in the premises the aforesaid attachment is regular and in accordance with the law and ought to proceed.

My understanding of the said replying affidavit is that the said vehicles were attached presumably that they belonged to the KBS the tenant to the KBS the tenant of the defendant and that if the plaintiffs proved ownership of the said vehicles the same could be released.

In that regard the plaintiff through a supplementary affidavit sworn by its Managing Director on 23rd December 2005 produced a complete list of the log books to prove ownership of the attached buses.

Mr. Singh Gitau counsel for the plaintiffs submitted that the plaintiffs having proved ownership of the attached buses, the defendant has no business in continuing retaining the said buses. Mr. Omati for the defendant objected to par. 4, 9, 10, 11, 12, 13, 14 and 15 of the affidavit in support of the application as matters of fact when the deponent does not disclose source of information. A party must confine to facts within his personal knowledge.

The objection was opposed by Mr. James Singh on the ground that the same cannot be raised at this stage. I agree with Mr. Singh that such objection ought to have been raised before the matter proceeded to hearing. And in any case the only issue is whether or not the attached buses belong to the plaintiff. The plaintiff has proved that the attached buses belong to it and has produced logbooks to that effect.

As I had said earlier in the replying affidavit sworn by Mary Ngethe on behalf of the defendant she had deponed in paragraph 10 that the plaintiff had failed to satisfy the court that the said attached buses belong to it and now that the same has been proved by production of log books then there is no concetious issue and the plaintiffs application must succeed.

The application is allowed in terms of prayer 3 of the chamber Summons dated 22nd December 2005. I further order that costs be costs in the suit.

Dated and delivered at Nairobi this 14th day of September 2006.

J.L.A. OSIEMO

JUDGE