

REPUBLIC OF KENYA
IN THE HIGH COURT OF KENYA AT NAIROBI
COMMERCIAL DIVISION, MILIMANI

Civil Suit 408 of 2005

MAJI NA UFANISI.....PLAINTIFF

VERSUS

SIMON G NGOMONGE T/A DOLLAR AUCTIONSDEFENDANT

RULING

The plaintiff seeks by its chamber summons dated 20th July 2005, for an injunction to stop the defendant from selling its goods attached as a consequence of distress for rent or for a mandatory injunction compelling the defendant to release those goods. The plaintiff has come to court under Order 39 of the Civil Procedure Rules, and Section 3A of the Civil Procedure Act.

It seems that the plaintiff, as a result of some internal wrangling amongst its official an order was issued by the court in HCCC No. 453 of 2004 restraining one group of officials from operating the plaintiff's bank account at Barclays Bank. As consequence of that order of the court, Barclays bank froze the plaintiff's bank account, which led to the plaintiff falling into rent arrears.

The landlord instructed the defendant to effect distress of rent upon the plaintiff. The landlord has to date received the rent arrears, and plaintiff's counsel submitted that indeed also received rent in advance. The defendant who is an auctioneer on the other hand it was argued that at first it was agreed that he should be paid kshs 100,000 and the defendants, plaintiff's counsel argued, that he agreed to release the attached goods on such payment.

Plaintiff's counsel argued that on the cheque being made available the defendant refused to release the attached goods and claimed a further sum was due and payable as fees. Plaintiff's counsel submitted that the goods attached are valued at kshs 10 million, which include equipment, fridges, tools of trade and date document. That the attachment was in March 2005 and since then the plaintiff has been inoperative for lace of these equipments and further that the plaintiff has been unable to account to the donors for funds donated to it.

Plaintiff's counsel submitted that the defendant has threatened to sell the attached goods by auction yet the plaintiff is of the view that the defendant should tax his costs before any further action. Plaintiff's counsel stated that the plaintiff is willing to deposit into court kshs 1 million to be held pending the taxation of the defendant's costs and on such deposit counsel prayed that the court would order the release of the attached goods.

In opposition defendant's counsel by submitting that Rule 7 of the Auctioneers Rules 1997, the plaintiff was obligated to pay the defendants fees. Counsel further submitted that under Rule 8 (1) of the Auctioneers Rules, the defendant was obligated to ensure that the good were attachéd were safe; for that reason the defendant had incurred storage charges which the defendant wanted the plaintiff to pay. Defence court submitted that the defendant had not refused to accept kshs 100,000 as his fees but also required the plaintiff to pay the storage charge's defence counsel stated that, that is where the dispute was.

I have listened to the opposing arguments. I note that the goods attached seem to be all the equipment the plaintiff requires in order to operate. That being the case I am of the view it is unjust to continue so holding them. I do however recognize that the defendant, was not on the wrong when he attached those goods, because as it is accepted by all parties, the plaintiff was in rent arrears. I am of the view that the interest of justice can only be served if those goods are released, and in regard to the defendant's costs,

which are in dispute, the same ought to be taxed.

The orders of the court are as follows: -

(1) That the plaintiff will deposit in court kshs 500,000 pending the defendant's taxation of the disputed costs or until further orders of this court.

(2) That the plaintiff will pay the defendant kshs 100, 000/-

(3) That on the plaintiff depositing in court kshs 500, 000 (as provided in (1) above) and on payment to the defendant kshs 100, 000, (as provided in (2) above, the defendant will release all the goods of the plaintiff.

(4) Costs of the application dated 20th July 2005 shall be in the cause.

Dated and delivered this 22nd day of August 2005.

MARY KASANGO

JUDGE