



REPUBLIC OF KENYA
IN THE HIGH COURT OF KENYA AT NAIROBI

Civil Suit 89 of 1998

ALBERT NYARAMBAPLAINTIFF

VERSUS

NEW AKIKA TRADERS CO. LTD.1ST DEFENDANT

JOSEPH D.K. KIMANI T/A BEKAGO AUCTIONEERS2ND DEFENDANT

J U D G M E N T

This case or suit came up for hearing before me on 29.06.05. The plaintiff was represented by learned counsel, Mr. K. Miano. Learned Counsel, Miss M.M. Mogusu appeared and said she was acting for 1st defendant. There was no appearance for 2nd defendant.

Plaintiff's counsel told the court that the 2nd defendant was served but was not in attendance. Counsel gave a brief history on previous orders for defendants to pay costs and court adjournment fees which defendants never paid, thereby forcing the plaintiff to make the payments in order to enable the suit to proceed to formal proof. Plaintiff's counsel also informed the court that on 16.10.04 the defendants' joint defence was struck out and urged that the suit proceeds to formal proof.

Miss Mogusu acting for 1st defendant applied for adjournment saying she had just been instructed. Plaintiff's counsel objected to the adjournment sought, noting that the defendants' joint defence had been struck out and that the matter was now for formal proof.

The court noted that on 16.09.02 Waki, J (as he then was), inter alia, ordered defendants to appoint another advocate in place of Mr. M.N. Siagi within 30 days but that the defendants never did so. The court saw no good reason for the 1st defendant to make the late appointment of Miss Mogusu and refused the adjournment sought. Additionally, the court noted that on 31.10.04 Ransley, J struck out the defendants' joint defence. Accordingly, this court ordered the suit to proceed to formal proof in the afternoon.

In the afternoon the plaintiff took to the witness stand and started testifying. After a short while Miss Mogusu entered court and started taking notes on behalf of the 1st defendant. When the plaintiff included his examination-in-chief, Miss Mogusu sought to cross examine him. Miss Mogusu

said she had just filed an application under certificate of urgency seeking the setting aside of Ransley, J's order striking out the defendants' joint defence and that the said defence be reinstated. Miss Mogusu's application was opposed by plaintiff's counsel on grounds that the application filed that day, for setting aside Ransley, J's order striking out the defence had not been served on the plaintiff neither had it been heard, which meant that Ransley, J's order striking out the defendants' joint defence still remained and that there was no defence.

This court ruled that the procedure for bringing applications under certificate of urgency had not been complied with; that none of the defendants had *locus standi* in this suit unless the order of Ransley, J striking out the joint defence was reversed through the due process of law; and that Miss Mogusu's application made on behalf of the 1st defendant must be refused. The

court proceeded to refuse the said application.

The plaintiff's evidence may be given broadly as under. He lived in the suit premises, a flat in a block of flats situated at Eastleigh, Nairobi. The 1st defendant company owned the suit premises and in 1991 it charged the plaintiff a monthly rent of Kshs.2,310/=. Plaintiff said he used to pay rent through his then advocates, Messrs Onyango Otieno & Co. Advocates, who issued him with receipts. However, some of the receipts got lost when the plaintiff was mugged along the Kenya Bus Service Garage in Eastleigh. He produced as Exhibit 2 only one receipt, No.24417 of 05.06.95 issued by Messrs Onyango Otieno & Co. Advocates. The receipt is for Kshs.2,310/= being rent for the account of Moses N. Siagi, who was then the defendants' advocate. Earlier on the plaintiff had alluded to a Rent Control Certificate from the Rent Restriction Tribunal which he intended to use as evidence of the rent he had been paying. The certificate was marked for identification as MFI-1 but the plaintiff never referred to it thereafter and never had it formally produced as an exhibit. I ignore the said certificate.

The plaintiff also produced as Exhibit 3 an abstract of 03.08.95 from Pangani Police Station, Nairobi regarding the mugging he alluded to and the abstract indeed shows that the plaintiff lost some documents during the incident, including rent receipts.

The plaintiff told the court that his household goods were detained four times by or at the instance of the defendants as follows:-

(a) 1984

The plaintiff said that in 1984 the said goods, worth Kshs.87,000/= were distrained. He produced as Exhibit 4 unsigned list dated 20.08.94 for that amount indicating various household items. Attached to the list are a receipt of 20.09.89 [Exhibit 4(A)] for a T.V. set for Kshs.21,250/=; a receipt of 03.05.92 from Carlson Ltd. for Kshs.25,000/= [Exhibit 4(B)] being payment on account but it is not clear what was being paid for; a proforma invoice of 30.09.96 for Kshs.20,000/= in respect of furniture [Exhibit 4(c)]; and a document of 15.09.92 addressed to whom it may concern suggesting a figure of Kshs.30,000/= as insurance of a T.V. set.

It was not indicated if the amount of the proforma invoice on the figure suggested for insurance were paid.

(b) 15.06.96

Here the plaintiff said more of his household goods were distrained, being household goods he had purchased after the first distress. He gave the value of Kshs.132,333/= and again produced an unsigned list as Exhibit 5. The plaintiff said that after this second distress he went to the Rent Restriction Tribunal and obtained an order restraining auctioneers from selling his goods [Exhibit 6(a)] and a second order for the auctioneers to release his goods and also for the landlord, ie 1st defendant to pay auctioneers charges [Exhibit 6(b)]. However, neither of the two orders were complied with. Plaintiff produced two receipts, one dated 18.07.96 for Kshs.3,000/= [Exhibit 7(a)] and the other dated 09.07.96 for Kshs.15,000/= [Exhibit 7(b)], being the auctioneers charges he had to pay himself following non-payment of the said charges by the landlord, contrary to the Tribunal order.

(c) 13.11.96

On this third distress the plaintiff's three motor vehicles were distrained:-

i KRZ 014: The plaintiff produced the vehicle's Log Book as Exhibit 8 and gave the value of the vehicle, a Saloon Car, as Kshs.160,000/=.

ii KRZ 445: plaintiff produced the vehicle's Log Book as Exhibit 9 and gave the value of the vehicle, a pick-up, as Kshs.240,000/=.

iii KQA 614: The plaintiff produced the vehicle's Log Book as Exhibit 10 and gave the value of the vehicle, a Saloon, as Kshs.580,000/=.

The plaintiff said of the three vehicles as follows:-

- That KRZ 445, a pick-up, was for hire business and that it fetched around Kshs.40,000/= per month.
- That KQA 614, a saloon, was also for hire business and that it fetched around Kshs.21,000/= per month.
- The plaintiff claimed loss of income for the two business vehicles.

He also added that about a week after the third distress, he saw the 2nd defendant drive KQA 614 at Kamukunji, Nairobi.

d) 11.12.96

The plaintiff said that on this date he received a telephone call at his office that his flat (suit premises) was being broken into. He rushed there and found police officers surrounding the flat. The police officers told him that the 2nd defendant was taking his (plaintiff's) goods and that the plaintiff could follow the 2nd defendant to see where he was taking the goods. The plaintiff never followed the 2nd defendant but he got the 2nd defendant's business card from him. Later the plaintiff went to the 2nd defendant's office but never found any of the goods there. However, when the plaintiff went to the 2nd defendant's store at Kariobangi, he found some of his goods, i.e utensils, bedding and wearing apparel. The plaintiff produced as Exhibit 11 a list of the goods distrained on that occasion. The list is, once more, not signed. It gives the value of the goods as Kshs.221,867/=.

The plaintiff told this court that after the fourth distress on 11.12.96 his flat was locked up by the auctioneers and he stopped living there. He added that he did not know why the defendants continued to distrain his household goods while he was paying rent. Finally, the plaintiff told the court that he recalled only one occasion when distress was levied on his fellow tenants in the same block of flats.

The plaintiff reiterated the prayers in his plaint, which are as follows:-

- (a) Declaration that the distress herein were wrongful and illegal.
- (b) An injunction restraining the defendants, their agents and/or servants from selling and/or disposing of the plaintiff's motor vehicles Registration Nos. KRZ 445, KRD 014 and KQA 614.
- (c) An order for restitution of the plaintiff's property attached by the 2nd defendant.
- (d) An order that the defendants account for the goods sold as a result of illegal distress on several occasions.
- (e) General and exemplary damages
- (f) Damages for illegal distress for rent, inconvenience and detention of plaintiffs property.
- (g) IN THE ALTERNATIVE an order for the defendants to compensate the plaintiff for the value of the items attached and/or destroyed during the unlawful distress.
- (h) Special damages as prayed for in paragraph 8 [note: there is no prayer for special damages at paragraph 8).
- (i) An order that the accounts be taken between the plaintiff and the 1st defendant.
- (j) Costs of the suit.
- (k) Interest on (e), (f), (g), (h) and (j) at court rates.

I have given due consideration to the evidence given by the plaintiff. Having watched the plaintiff testify, I believe that he told the court the truth as he knew it and that the events he narrated giving rise to this suit did take place as explained by him. The defendants' joint defence was struck out, so the plaintiff's suit remains uncontested. I have formed a very negative impression of the defendants, especially the 1st defendant who seems to have been the instigator of the plaintiff's woes.

Having come to the above conclusion, I find for the plaintiff against the defendants jointly and severally and give orders in plaintiff favour as follows:-

1. Prayer (a) is granted.
2. As prayers (b) – (i) tend to be muddled up and to merge into one another and as there is no precision regarding special damages, I grant the plaintiff awards as general damages in the following manner –

(a) 1st Distress (1984)

- i. Compensation of the amount in Exhibit 4(A) Kshs.21,250/=

ii. Compensation of the amount of Exhibit 4(B) Kshs,25,000/=

(b) 2nd Distress (15.06.96)

i. Compensation against claim of Kshs.132,333/= Kshs.100,000/=

ii. Compensation of auctioneers' charges

[Exhibit 7(a)] Kshs. 3,000/=

iii. Compensation of auctioneers charges

[Exhibit 7(b) Kshs. 15,000/=

c) 3rd Distress (13.11.96)

i. Compensation against claim of Kshs.160,000/=

for KRD 014 Kshs.150,000/=

ii. Compensation against claim of Kshs.240,000/=

for KRZ 445 Kshs.200,000/=

iii. Compensation against claim of Kshs.580,000/=

for KQA 614 Kshs.500,000/=

iv Compensation for loss of user for all

these years of all the three vehicles Kshs.500,000/=

d) 4th Distress (11.12.96)

Compensation against claim of Kshs.221,867/=

for distrained goods Kshs.150,000/=

Kshs.1,664,250/=

I grant the plaintiff interest on Kshs.1,664,250/= at court rate from the date of this judgment until payment in full.

3. I also grant the plaintiff his costs of this suit.

Orders accordingly.

Delivered at Nairobi this 18th day of November, 2005.

B.P. KUBO

J U D G E