



REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA
AT NAKURU

Civil Case 238 of 2005

PATRICK K. KIARIE.....PLAINTIFF

VERSUS

MUTATI TRANSPORTERS LTD.....DEFENDANT

RULING

The plaintiff/applicant filed an application seeking orders that the defendant be restrained from retaining and disposing of his tools of trade which included office chairs, desks, typewriter, switchboard, fax machine, calculators, telephone heads, stationery, clients' audit files, audit working files, clients' documents for audit, kitchen equipment and other items pending the hearing and determination of this suit.

In his affidavit in support of the said application, the applicant stated that he is a Certified Public Accountant and has offices at Gate House L.R. No.451/135 Nakuru Municipality which is owned by the respondent. The monthly rent is Kshs.14,430/- which is paid quarterly in advance.

He said that sometimes in September 2005 he issued a cheque to the defendant for Kshs.43,290/- being rent for September, October and November 2005 but the same was dishonoured as credit cheques deposited in his account had not matured. On realising the above, the applicant organised for cash of Kshs.43,290/- and offered the same to the defendant's agents but they declined to accept the money. On 22nd September, 2005 the respondent's agents went to the applicant's office and removed all the items therein as aforesaid in the applicant's absence and left no court order or any letter of instructions or any other document which authorised such an action. The applicant stated that he had partitioned the said office at a cost of Kshs.350,000/- with the knowledge of the respondent and since the time of the said seizure of the said items, the applicant had been unable to do any business therein and stood the risk of being sued by his clients. He said that his tenancy in the said premises was scheduled to expire on 1st December 2008 and expressed his fear that the respondent's action of refusing to accept rent was an attempt to evict him from the premises.

The respondent did not file any replying affidavit but filed grounds of opposition. He stated that the application was fatally defective as there was no prayer for re-opening the premises. Mr. Kariuki for the respondent also stated that one of the provisions under which the application was brought did not exist in law, that is Order XXXIX Rule 81 of the Civil Procedure Rules. He also argued that the application as filed contemplated mandatory and prohibitive injunctions which could not be granted as prayed. He also stated that the verifying affidavit and the plaint were in violation of Order VII Rule 1(e), Civil Procedure Rules in that they did not contain an averment that there was no other suit pending and that there had been no previous proceedings in any

court between the parties over the same subject matter. He said that there was another suit, CMCC Miscellaneous Civil Application No.18 of 2005 which related to the parties herein.

If I may start with the last ground of objection, I looked at the plaint and the verifying affidavit and they both comply with the provisions of Order VII Rule 1(e) as aforesaid. If at all there is in existence such other suit as stated, there is no evidence to that effect and in the absence of a replying affidavit, the court cannot accept a factual statement from the respondent's counsel when the applicant has stated under oath that there is no other suit pending in any other court between him and the respondent.

Turning to the second ground of objection, it is true that the application herein seeks both interlocutory prohibitive and mandatory injunctions although strictly speaking the applicant seeks a return of his office goods and other items and so he should have prayed for a mandatory injunction. Such an application is made by way of a motion on notice under Order 3A of the Civil Procedure Act and not by way of a chamber summons as the applicant did in this matter. In my view, the fact that the applicant cited Section 3A of the Civil Procedure Act but brought the application by way of a chamber summons and not a motion on notice does not in itself invalidate the application. In courts where both chamber summons and motions on notice are heard in open court, the opposing party will not suffer any prejudice if the application is wrongly headed as a chamber summons instead of notice of motion. This is not to say that rules of procedure are not to be complied with, no, but a court of law must take into account all the other relevant factors, the merits of the case, the prejudice (if any) that may be caused to the opposite side and so on.

The respondent did not state in the first place why it removed the applicants goods from his office even after the outstanding rent was tendered in cash. It was not even clear who was instructed by the respondent to carry out the said exercise. Not everybody can lawfully carry out distress for rent; he has to be a duly appointed and licenced court bailiff. It would appear that the respondent's agent, whoever it was, in refusing to accept the cash tendered in payment of rent had another objective, not just recovery of the arrears of rent but perhaps intended to unlawfully terminate the applicant's lease in the said premises. I find that the landlord's levy of distress for rent was illegal. It could not refuse to accept cash and lawfully proceed to distrain the applicant's goods while it does not augur well for a tenant to issue a cheque for payment of rent which is dishonoured upon presentation for payment, the teneant's folly was cured by his apology and/or explanation for the reason of such dishonour of his cheque and replacement of the same with cash of a similar sum as that of the cheque.

In the circumstances, I order that the applicant proceeds to pay the respondent's advocate in cash Kshs.43,290/- and the bank charges for the dishonoured cheque and upon payment of the sum cash, the respondent's advocate shall instruct the respondent and/or its agent to return at its cost all the goods and items which were unlawfully removed from the applicant's office. If there will be any court broker's charges, the same shall be paid by the respondent. The respondent shall bear the costs of this application.

DATED at Nakuru this 1st day of November, 2005.

D. MUSINGA

JUDGE

1/11/2005

Ruling delivered in open court in the presence of Mr. Oumo holding brief for Mr. Ombati for the appellant and Mr. Kariuki for the respondent.

D. MUSINGA

JUDGE

1/11/2005