



REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA AT NAIROBI

CIVIL SUIT NO. 649 OF 2005

PROFESSOR WASHINGTON

JALANGO OKUMU.....PLAINTIFF/APPLICANT

-VERSUS-

BOFFAR LIMITED.....DEFENDANT/RESPONDENT

RULING

The plaintiff's application dated and filed on 26 May, 2005 was brought under s.3A of the Civil Procedure Act (Cap.21), and Orders XXXIX and L, rule 12 of the Civil Procedure Rules. The prayers in this application were as follows:

(i) THAT, a mandatory or a temporary injunction be issued compelling the defendant/respondent, its servants and agents to return forthwith to the plaintiff and restore to the plaintiff all the goods and chattels set out in the plaint, *ex debito justitiae*

(ii) THAT, a mandatory or temporary injunction be issued compelling the defendant/respondent, its servants and agents to restore or return to the plaintiff forthwith the computers described in the plaint, complete with all their equipment and information which computers are the plaintiff's tools of trade containing the plaintiff's scholarly innovations and classified communication with several Heads of State.

(iii) THAT, the costs of the application be born by the defendant.

The application is premised on the grounds, firstly, that the suit premises is a business premises used by the plaintiff both as an office and as a residence, whereof the plaintiff has been in occupation since 1997. Secondly it is stated that there is no rent in arrears and due to the defendant, for which the defendant is entitled to levy distress. Thirdly it is stated that the distress effected by the defendant is illegal and void. Fourthly it is stated that the plaintiff is a protected tenant under the Landlord and Tenant (Shops, Hotels and Catering Establishments) Act (Cap.301). And lastly it is stated that the computers which were attached by the auctioneer and removed from the plaintiff's business premises are part of the plaintiff's tools of trade and contained classified communication between the plaintiff and several Heads of State, as well as the plaintiff's scholarly innovation stored therein, and such innovation was exposed to the risk of being plagiarized , as it is currently in the hands of auctioneers and third parties.

Evidence to support the application is in the affidavit of the plaintiff of 26th may 2005. He avers that he has been in occupation of the suit premises since 1997 and has regularly paid the rents due. He had, sometime in *April, 2005* entered into negotiations with *Mrs. Waiganjo*, the director of the defendant

company, who agreed to purchase his motor vehicle, Peugeot 405 Saloon registration No. KAD 226G at the price of Kshs.1.2 million, and this would be credited for two years of rent in advance, as well as to clear any outstanding rent which may have been in arrears in respect of the suit premises. Since **Mrs. Waiganjo** took the said motor vehicle on those terms, the deponent now believes that the defendant can no longer demand any arrears of rent from him, nor levy distress on his goods in respect of any rent arrears. But the defendant proceeded to file at the Magistrate's Court at the Milimani Commercial Courts, against the plaintiff, Civil Case No.5037 of 2005, and subsequently instructed Domicile Services Ltd Auctioneers to levy distress on his goods. The said auctioneers then moved to levy distress, without first issuing a proclamation on the plaintiff's goods and chattels. The deponent avers that the auctioneers took away his valuable computers which are also his tools of trade and which contain all his scholarly works and classified information exchanged between himself and several Heads of State. The plaintiff apprehends that one of his computers in the hands of the auctioneers and possibly within the reach of third parties, is at great risk of being the subject of plagiarism and piracy of precious personal information. He depones that the distress upon his goods, effected by the defendant, has kept him out of his trade, as he is unable to access his scholarly works, his innovations, his articles and contacts which had been continuously stored in his computers over the last ten years or so.

The deponent believes the impugned distress by the defendant to have been unwarranted, because: (i) there is *no rent which is in arrears* and due to the defendant since the defendant had accepted and taken away the plaintiff's motor vehicle, Peugeot 405 Saloon, Reg. No. KAD 226G pursuant to an *oral rent-payment agreement*. (ii) the plaintiff is a protected tenant, and so the defendant, before distraining, should have obtained an order from the Business Premises Rent Tribunal; (iii) the auctioneer had given no proclamation notice against the plaintiff's goods, chattels and tools of trade, and did not satisfy the plaintiff that he, the auctioneer, was authorized to act as a bailiff by certificate issued under s.18 (1) of the Distress for Rent Act (Cap.293); (iv) the auctioneers failed to list the *value of the goods and chattels* removed from the suit premises, in the schedule of movable property; (iv) the value of goods and chattels removed from the suit premises was substantial.

In the replying affidavit of **Joyce Ronnie Waiganjo**, a director of the defendant company, dated 9th June 2005, it is deponed that the plaintiff's motor vehicle, Peugeot 405 Saloon, Reg. No. KAD 226G had not been taken by the defendant as part of a negotiated rent-payment arrangement, but had been *attached by auctioneers* and sold. The deponent has attached copies of auction documents, of March and April, 2005 — and these refer to distress for rent in respect of “L.R. No. 1/ 677 — **Prof. & Mrs. Washington Okumu.**”

The deponent avers that the plaintiff owes the defendant rent which currently stands at Kshs.500,000/=. She depones that the tenancy in question is residential only — and not residential-cum- business. In this regard the deponent refers to the tenancy agreement which is annexed to the supporting affidavit and marked “WJO1”. It is deponed that “the plaintiff's failure to access his own work as alleged in his affidavit is of his own making as he is the one who has failed to pay rent as per the tenancy agreement”.

The deponent avers that the plaintiff is not a protected tenant. She believes to be true the information received from the auctioneers, that they had duly made a proclamation before carrying out distress, and that the items listed in their proclamation are the only effects they had taken away.

Elam Lumwaji who trades as Domicile Services Ltd, the auctioneers referred to in this application, swore an affidavit, filed on 13th June, 2005 in which he avers that he had received instructions from the defendant's advocates on 27th April, 2005 to levy distress against the plaintiff, to recover rent arrears amounting to Ksh.400,000/=. On 28th April, 2005 the deponent proceeded to the suit premises on L.R. No. 1/677 Lavington and attached the plaintiff's property in his presence. The deponent's affidavit carries an annexure, which bears the heading “PROCLAMATION” and is dated 17th May, 2005. The proclamation lists in a schedule of movable property the following:

- (i) sofa set – 7 pieces;

- (ii) one carpet;
- (iii) coffee table
- (iv) dining table and 9 chairs;
- (v) three stools;
- (vi) two arm-chairs;
- (vii) one executive chair
- (viii) small table.

It is noted on the schedule that the said effects were removed to the auctioneer's yard, and that they were to be valued at the time of sale.

The deponent avers that he had on *18th May, 2005* obtained breaking orders from the Subordinate Court, as he had realised that the plaintiff was determined to block the attachment of the goods and effects in question. The deponent then returned to the suit premises on *20th May, 2005* and, in the presence of Police Inspector **Mr. Langat**, effected attachment of the plaintiff's goods and effects. He avers that he attached no more than the goods and effects itemised from (i) – (viii) hereinabove.

On *20th July, 2005* the plaintiff swore a further affidavit, which mainly addresses the averments made by the auctioneer. He deposes that there was between him and the defendant, "no written agreement on rent", he avers further that "I am not in rent arrears, the defendant's managing director having accepted my said motor vehicle Reg. No. KAD 226G and it does not matter to me whether it was under-valued and sold provided the same was accepted by the defendant under our oral agreement"

The deponent avers that the auctioneer had not served him with a copy of the proclamation of attachment. He avers that to the auctioneer's affidavit filed on *13th June, 2005* two different proclamations were attached — one dated *28th April, 2005* and giving no list of goods to be attached; and the other dated *17th May, 2005* and listing 8 items as the goods attached. The proclamation dated *28th April, 2005* is a faint carbon copy which so far as is readable, runs as follows:

" All goods in the said premises are hereby attached. We were denied access to the premises. We proceeded to obtain breaking orders to goods and motor vehicles enough to meet the distress for rent and other charges"

This faint version of the proclamation indicates under "Debtors/Agent" that the recipient "refused to sign".

The plaintiff depones that the auctioneer's first proclamation, of *28th April, 2005* neither specifies the goods which were attached, nor describes their condition, nor states their value. He further depones that the 2nd proclamation of attachment dated *17th May, 2005* and purporting to have been received by the plaintiff's agent, also does not state the condition and value of the distrained goods.

It is deponed that the proclamation which purports to have been served on *17th May, 2005* was in any case not followed by the distrained goods and chattels being left in situ for 10 days in accordance with the Distress for Rent Act (Cap. 293).

It is deponed further that the second proclamation of attachment served on *17th May, 2005* did not list all the goods and chattels removed from the suit premises on *17th May 2005* and on *20th May 2005*. The deponent avers that whereas the second proclamation was served on his agent, the first proclamation was

not.

The deponent avers that the defendant's auctioneers had attached, and carried away his computers which the auctioneers knew or should have known, were the deponent's tools of trade. It is averred that the said tools of trade have been so crucial to the ordinary life of the plaintiff, that he perceives their seizure as an injury to his dignity and esteem as a scholar and an international mediator. The deponent suspects that his innovative works which had been stored in the distrained computers have been exposed to plagiarism and piracy, and he apprehends that he will suffer stupendous harm and loss not compensable in damages.

On the first occasion of hearing this application, on 15th June, 2005 learned counsel **Mr. Ngoge** and **Mr. Ochanda**, respectively, represented the plaintiff/applicant and the defendant/respondent.

Mr. Ngoge stated that the applicant was seeking a temporary injunction, compelling the respondent to return the applicant's goods and chattels. In the alternative, the applicant prayed for a mandatory or temporary injunction to compel the respondent to return to him all the computers the details of which were set out in the plaint.

Learned counsel contended that as between the plaintiff and the defendant, there had been *no written agreement* regarding the payment of rent. In those circumstances, it was urged, a landlord may not *levy distress for rent*. To support this contention, counsel cited the High Court decision in **Kenya Oil Co. Ltd v. Fuad Mohamoud Mohammed and Two Others**, Milimani Commercial Courts Civil Suit No.533 of 2003. **Mr. Justice Ringera**, in that case, remarked:

“So the issue is whether I should, as it were, accept that the landlord could levy an illegal distress because the tenant is guilty of inequitable conduct. On a balance, I think not.

“The last issue that weighs in my mind is, against whom the relief should issue. Naturally relief issues against the person who violates or threatens to violate another's legal or equitable right. In this case the 1st defendant, being the landlord claiming arrears of rent, is a sure candidate for an injunction. And the 2nd defendant being the agent or instrumentality of such enterprise is also a fit and proper candidate for similar treatment.

The learned Judge recorded as a fact: “[As] admitted by the 1st defendant itself in the course of argument, there was *no agreement between the parties* for a monthly rent of Kshs.450,000/=.” On this point it was held:

“..... I think that although the landlord has both a common law and statutory right to levy distress for rent in arrears, such right is predicated on there being *an agreed rent*. In the instant matter, it is common ground that there was no agreed rent. What the landlord seeks to recover is what he considers to be reasonable rent. I am afraid that the landlord has not shown any authority for the proposition that the remedy of distress could be invoked were the rent claimed had not been agreed upon.”

While maintaining, in the instant matter, that there was no written agreement between the plaintiff and the defendant, **Mr. Ngoge** noted that there was an agreement annexed to the plaintiff's affidavit. He remarked that the said agreement was effective only during certain dates, and that there was a period when *no rent agreement* had been executed by the parties. For that reason, learned counsel submitted that the levy of distress was illegal, that the landlord-tenant relationship is governed by written agreement, and that the Court would restrict itself to the terms of the written agreement. Counsel cited in support of his argument the Court of Appeal decision in **Chanase Investments Ltd v. Registered Trustees of Kenya Episcopal Conference and Two Others**, Civil Appeal No. 12 of 2002.

Learned counsel submitted that, in the instant matter, there had been an *oral agreement* between the parties, and the plaintiff's saloon car had been accepted by the defendant as representing a value of Kshs.1.2 million. According to counsel, the respondent's claim that the said saloon car had already been

proclaimed in a distress for rent, had no basis — especially as the respondent had not annexed to their affidavit copy of a *proclamation* for distress for rent.

Learned counsel submitted that the applicant had used the suit premises as office and residence since 1997 — and it is in the circumstances not right for the respondent to deny the *office* status of the premises.

Mr. Ngoge submitted that under the Distress for Rent Act (Cap.293) all tools of trade were exempt from seizure whether or not the tenant was in arrears in rent payment, and it had not been denied in the defendant's replying affidavit that the computers in question in this suit, are indeed tools of trade.

Learned counsel submitted that the respondent had not disputed the assertion that there was no agreement for rent payment, as between the plaintiff and the defendant. In that case, it was submitted, the respondent cannot claim to be owed any rent-payment by the plaintiff. Counsel urged that the respondent should have been able to state *when* the first breach of tenancy agreement had been committed by the applicant. The respondent, it was contended, should also have stated what happened to the *proceeds of the saloon* car which the respondent had taken custody of.

Learned counsel submitted that the only agreement in writing between the parties was the one dated 9th March, 2001 and attached to the applicant's affidavit of 23rd May, 2005. This written agreement, **Mr. Ngoge** submitted, had *no evidentiary value*, in the terms of s.19 of the Stamp Duty Act (Cap.480); it was never stamped; it was not registered. In *Credit Kenya Ltd v. John Ogega Nyangweso and Another*, Milimani Commercial Courts Civil Case No. 559 of 1997 *Mbaluto, J* remarked:

“By virtue of Order XXI, rule 56 the burden is placed upon the objector to establish his claim to the attached property. This is to be established by credible evidence and not by unverifiable pieces of paper which can be collected from anywhere in the streets. In this respect it is to be observed that the alleged lease is not registered and has no evidential value...”

Against this background, counsel urged that a mandatory injunction be granted against the defendant. The High Court's decision, *The Ripples Ltd. v. Kamau Mucuha*, Civil Case No. 4522 of 1992 was relied on as a basis for this submission. In that case *Mwera, J* remarked as follows:

“The next aspect of the prayer in this application [is] whether or not a mandatory injunction should issue. In all the treatises, precedents...whenever an issue of mandatory injunction arises it is clearly understood and accepted that such an injunction should only issue in the clearest and [most] special cases ... It should issue with utmost care and even reluctance...”

“A mandatory injunction will issue not as a matter of course...”

In *Mountain View Transporters Ltd & Another v. Alcon Holdings Ltd*, Milimani Commercial Court Civil Case No. 191 of 2005 *Azangalala, J* also considered the conditions under which a mandatory injunction could be granted. He cited with approval a passage in the English case, *Locabail International Finance Ltd v. Agro Export and Others* [1986] All E.R. 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 has attempted to steal a march 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 has rightly been granted and that being a different and higher standard than was required for prohibitory injunction.”

Mr. Ngoge submitted that the defendant, by levying distress without a written lease agreement, was

attempting to steal a match on the plaintiff — and that in these conditions, grant of a mandatory interlocutory injunction would be appropriate. Learned counsel considered this lack of a written contractual lease document to be a factor holding out the plaintiff's case as one that is well-based, and having an overwhelming chance of success; so on the well-known principles established by the former East African Court of Appeal in ***Giella v. Cassman Brown & Co. Ltd.*** [1973] EA 358 it was urged that this was an apt case for an interlocutory injunction, in favour of the applicant.

During the pendency of this application, the defendant had filed an application by Chamber Summons, dated 11th July, 2005 at the Chief Magistrate's Court, with prayers that rent arrears by the plaintiff be deposited in Court. Counsel **Mr. Ngoge** brought this matter before the Court, urging that as the rent question was contested in ongoing High Court proceedings, the course of action taken by the plaintiff was improper. Learned counsel obtained leave to file a further affidavit, and was allowed to make further submissions on the same. In his further submission, on 24th October, 2005 **Mr. Ngoge** urged that a party who has moved the Court to determine questions regarding rent arrears, now lacks authority to move against the other party by levying distress – because distress on the ground that certain amounts in rent remain outstanding, *presupposes that those amounts are known*. Now that the defendant had moved the Subordinate Court in relation to rent arrears, the Court must be allowed a chance to determine the question. The Court of Appeal had held in ***Gusii Mwalimu Investment Co. Ltd & Two Others v. Mwalimu Hotel Kisii Ltd.***, Civil Appeal No. 160 of 1995 that:

“To obtain possession by levying illegal distress is *per se* wrong. It is also wrong for a Court bailiff...to cart away the tenant's goods under the guise of such distress.”

Learned counsel for the respondent, **Mr. Ochanda**, submitted that the proclamation on the applicant's goods had taken place on 28th April, 2005, but these goods were carried away only on 17th May, 2005.

Mr. Ochanda submitted that when the defendant moved the Subordinate Court, what was being sought was not rent arrears, but an *eviction order*. He stated that “As far as the defendant is concerned, rent is owing”; and this is the reason why the defendant had proceeded on the basis that distress could be levied against the plaintiff.

Mr. Ochanda submitted that the *status of the tenancy* was one of the issues for determination. He relied on the agreement attached to the plaintiff's further affidavit — as confirmation that the premises was exclusively for residential purposes. And counsel then contended: “As a residential premises, the defendant was entitled to levy distress for rent”; and he contended that the unpaid arrears of rent now stand at Kshs.700,000/= . In relation to the proceedings commenced by the defendant in the Subordinate Court, counsel said: “There is no [question] of seeking rent. What is sought is vacant possession.”

Learned counsel contended that the plaintiff's motor vehicle had been attached and sold — and that it realized only Kshs.50,000/= — and this was not enough to offset the arrears of rent then outstanding. In the course of **Mr. Ochanda's** submissions it became clearer still, that the tenancy agreement bringing together the plaintiff and the defendant was a somewhat unorthodox one. Learned counsel contended: “They are asking the Court to allow them to stay [in the suit premises] for free, *without making any payments.*” The logical inference to be drawn from such a statement is that *the level and mode of rent payment is not properly defined in an instrument of definitive, legal character*. It is as if the landlord is only making a plea — an entirely reasonable one — that those who dwell on his property should in good conscience pay something!

Learned counsel relied on the former East African Court of Appeal's decision in ***Grosvenor v. Rogan – Kamper*** [1974] EA 446 to urge that “where there is a contract between the parties, the Court should apply the same.” The Court in that case stated as follows:

“...the trend of judicial decision in East Africa has been for the Courts to enforce unregistered leases or agreements for leases as contracts *inter partes*, where the contract is one capable of being specifically enforced and does not affect the rights of third parties.”

The principle being urged by counsel, I think, is an entirely rational one, and one which I would have had no difficulty applying; except that counsel has brought little material before the Court, in *proof of the existence of such a contract* which could be given effect *inter partes*. Although counsel urges the legitimacy of the distress action taken by the defendant, because no tenant is to be expected to dwell in a landlord's house without paying rent, he has done little to prove the makings of a *contract*. This renders the exact shape of the defendant's rent claims hazy and blurred, a situation not helped by the plaintiff's broad-textured claim that there had been an *oral agreement* that the defendant would take his saloon car, and apply its value to defray past and future rents falling due. The *amount of that rent* is itself unspecified; there is no agreement about the *value of the said saloon car*; there is disagreement as to the *terms* upon which the defendant took custody of the saloon car; there is *no proper accounting* which matches the value of the car to rents due, or which specifies from what point in time the rent arrears have accrued.

In his rejoinder, learned counsel **Mr. Ngoge** noted that the contract upon which the defendant is relying had *expired in the year 2002*. He submitted that the plaintiff's occupancy of the suit premises at the moment is based on an *oral agreement*, an important element of which is the *plaintiff's saloon car* which he had passed over to the defendant, to apply its value in *defraying rents* accrued, as well as rents to accrue. Learned counsel remarked, from the evidence, that the said saloon car had not been taken by the defendant in attachment for accrued rent arrears, since no auctioneer could have levied such distress without a proclamation — and no such proclamation has been produced by the defendant.

From the content of the application, its prayers, and from the affidavits on both sides and the annexures thereto, and also from the submissions of counsel, it is clear that the defendant and the plaintiff have been in a tenancy relationship which is *not defined by specific legal instruments*. This is quite strange, as a landlord is not required to accord charity to his tenant, just as the tenant is expected to have good value for his money, in the shape of a good and proper habitation. Such interests should be secured in clear and binding legal documents, duly registered, and spelling out the rights and obligations of the parties.

In the absence of legal documents defining the rights of the plaintiff and the defendant herein, there is no basis in law for abrupt and drastic redressive measures such as eviction, or distress for rent, until such time that the *judicial process* has intervened, with normal trial proceedings, *to specify and determine the rights of the parties*, through the medium of *evidence, submissions, and interpretations of law and evidence*. It is not clear *just how much rent* is payable. It is unknown how much the plaintiff *has paid* over the years. The state of *rent accounts* is not known. It is unclear when the tenant stopped paying rent. It is not known to what extent he has fallen into *arrears*. There is no agreement. It is a state of darkness.

In such a state of *uncertainty* there would be no *legal basis for distress for rent*, as the rent itself is in dispute. I therefore would state quite categorically that the defendant had no basis for levying distress upon the plaintiff's goods.

The distress as levied, indeed, has generated a *new sphere of disputes*: there is no agreement on *what had in fact been attached*; the defendant has a list of distrained items which is quite different from that held by the plaintiff. This state of affairs could lead to a major disagreement which ought to be arrested at this point in time. It will be necessary to *set down the main suit for hearing on the basis of priority*.

Against this background, and with regard to the plaintiff's Chamber Summons of 26th May, 2005 I will now make the following orders:

- 1. I hereby issue a *mandatory interlocutory injunction* compelling the defendant, its servants and agents to return forthwith to the plaintiff all the goods and chattels which the defendant had distrained in respect of rent arrears.**
- 2. I hereby issue a *mandatory interlocutory injunction* compelling the defendant, its servants or agents to return to the plaintiff forthwith, and in any case within 21 days of the date hereof, the computers described in the plaint, complete with their equipment and information.**

3. The costs of this application shall be costs in the cause.

4. The suit herein shall *be listed for hearing on the basis of priority – to take place early in the new term beginning January, 2006.*

DATED and DELIVERED at Nairobi this 16th day of December, 2005.

J.B. OJWANG

JUDGE

Coram: Ojwang, J

Court Clerk: Mwangi

For the Plaintiff/Applicant: Mr. Ngoge, instructed by M/s. O.P. Ngoge & Associates Advocates

For the Defendant/Applicant: Mr. Ochanda, instructed by M/s. Ochanda Onguru & Co. Advocates