

**REPUBLIC OF KENYA
IN THE HIGH COURT OF KENYA
AT MOMBASA
APPELLATE DIVISION
CIVIL APPEAL NO. 15 OF 2004**

1. N.W. REALITE LTD.

M.A. JAGANI & SONS LTD. APPELLANTS

Versus

MOSES OCHIENG SAKWA RESPONDENT

RULING

The first applicant herein, N.W. Realite Ltd. is the landlord (the Landlord) of one Prem Romuchand Subash t/a Nundoo Enterprises Hardrock Bar and Restaurant (the Tenant) a business carried on on the ground floor of Electricity House on Nkrumah Road Mombasa. In early October 2003 the Landlord instructed the second applicant M.A. Jagani & Son Ltd. (the Auctioneers) to levy distress on the Tenant's premises to recover a sum of Sh. 900,000/= being arrears of rent. The Auctioneers did that on the 7th October 2003. They proclaimed the furniture that was found in the let premises.

On the 8th December 2003 Moses Ochieng Sakwa (the Respondent) filed in the Chief Magistrate's Court at Mombasa a case against the Landlord, the Tenant and the Auctioneers claiming the ownership of the proclaimed good. He stated in that suit that he had on the 14th May 2003 bought the goods from the Tenant for Sh. 1,557,000/= out of which he had paid to the Tenant Sh. 850,000/=. Simultaneously with the filing of that suit he applied under Order 39 for an order of mandatory injunction to compel the landlord and the Auctioneers to release the goods to him. The tenant did not defend that suit. After hearing the Application the Chief Magistrate allowed it on 4/2/2004 and ordered the Landlord and the Auctioneers to lease the goods to the Respondent. Aggrieved by that order the Landlord and the Auctioneers have appealed to this court and have applied for stay of execution of that order pending the hearing of the appeal. The application is brought under Order 41 Rule 4 of the Civil Procedure Rules. The Landlord argued that the Tenant owes Sh. 900,000/= to the Landlord and that is not in dispute. The goods distrained on were in the leased premises and that although there was an agreement for sale between the Respondent and the Tenant the property in the goods had not passed to the Respondent. They were still the Tenant's goods and it was perfectly entitled to attach them. It was further argued for the Landlord that if the goods are released to the Respondent it will not only suffer substantial but complete loss as the Tenant has nothing that the Landlord will attach. The Respondent on the other hand argued that although the goods were still in the premises he had purchased them and the property had passed on to him. If the goods are not released to him he will lose the sum of Sh. 850,000/= he has already paid to the Tenant. It was further argued for him that the Landlord had not complied with Order 41 of the Civil Procedure Rules. In particular it had not shown that it will suffer substantial loss as it has the Tenant to recover its arrears of rent from.

I have read the application together with the supporting and further affidavits as well as the annexures thereto. I have also read the Replying affidavit and considered the submissions made by counsel for both parties.

The main issue for consideration in this matter is whether or not the property in the goods had passed to the Respondent before attachment. To determine this, one needs to look at the Sale of Goods Act and the Agreement between the Respondent and the Tenant. Section 19 of the Sale of Goods Act Cap 31 of the Laws of Kenya provides that:-

“19(1) Where there is a contract for the sale of specific or ascertained goods, the property in them is transferred to the buyer at such time as the parties to the contract intend it to be transferred. (2) For the purposes of ascertaining the intention of the parties, regard shall be had to the terms of the contract, the conduct of the parties and the circumstances of the case”.

There is no dispute that the sale of the furniture in this case was a sale of specific goods. The parties entered into a written contract. Does that contract state when the parties intended the property in the goods to be transferred to the buyer? They did. The relevant part of the contract in clause 2.1 states:-

“The VENDOR hereby, agrees and confirms waiver of all right, title and or interest in the said property and it’s assets, immediately upon payment of the purchase price herein by the purchaser”.

Clause 2.3 also states that:-

“The VENDOR shall duly execute this Agreement AND shall upon receipt of the purchase price in full, by himself, forfeit and relinguish all right, title and or interest in the said PROPERTY to the Purchaser”.

These clauses require no elaboration. They make it quite clear that the intention of the parties was that the property in the goods was to be transferred to the Respondent upon payment of the full purchase price. As full payment has not been made the property in the goods still remains with the seller who is the Tenant. In the circumstances the Landlord was perfectly entitled to have them attached in the distress for the arrears of rent. I therefore allow with costs the Landlord’s application dated the 11th February 2004.

DATED this 19th day of March 2004.

D.K. Maraga

Ag. JUDGE