



REPUBLIC OF KENYA
IN THE HIGH COURT OF KENYA

AT NAIROBI

CIVIL SUIT NO. 1740 OF 2002

PAUL OJIGO OMANGA T/A VICTORIA VIEW HOTEL.....PLAINTIFF

V E R S U S

1. JAPHETH ANGILA 1ST DEFENDANT

2. GHZ ADUDA OTUEYO T/A ADUDA AUCTIONEERS2ND DEFENDANT

J U D G M E N T

The plaintiff in this suit claims special and general damages against both defendants jointly and severally from unlawful distress of his goods and eviction from the suit premises.

The 1st Defendant did not file any appearance after the due service of summons of the suit and an interlocutory Judgment was entered against him in the sum of Kshs.5,369,480/= together with interest at the court rates from the date of filing the suit till payment in full. The award of costs of the suit was ordered to await the hearing of formal proof.

I presume the said judgment was entered as per prayers (1)(a) & (b) of the plaint and only the issues of costs and general damages for unlawful eviction, distress as well as loss of business reputation and good will was left for formal proof against the 1st Defendant.

The 2nd Defendant appeared and has filed a statement of Defence which largely concedes or admits the averments made in the plaint but denies the liability of the 2nd Defendant on the ground that the 1st Defendant retained the attached goods and also evicted the plaintiff by locking the premises using his locks.

The undisputed facts of the suit can be stated in short as under: The plaintiff was a protected tenant of a building owned by the 1st Defendant Known as L.R. No. 1430/Plot 177, Homabay Township (hereinafter referred to as 'the suit premises'). The plaintiff filed a reference in Business Premises Rent Tribunal being BPRT No. 43/2000 to challenge the validity of the Notice of Termination issued by the 1st Defendant. There is also another civil suit filed by the plaintiff against the 1st Defendant being H.C.C.S No. 1823 of 2000 at Nairobi. In the latter case, an interim injunction was issued ex-parte restraining the 1st Defendant from evicting the plaintiff from the suit premises which was confirmed by a consent order between the parties who agreed to maintain status quo till determination of the suit.

While the said order was in operation, the 1st Defendant obtained an order dated 12th February, 2002 in an ex-parte hearing of the Tribunal case aforesaid and obtained an order of distress and eviction against the plaintiff. However, the order of eviction was to take effect on 31st March, 2002.

Now the claim against the 2nd Defendant comes and certain facts are disputed which require consideration by me. The 2nd Defendant in company of the 1st Defendant entered the suit premises and without giving statutory Notice of proclamation, proclaimed and attached goods from the suit premises and locked the same. It is also shown that the Defendants carried out the execution of the order of the tribunal without first complying with the provisions of section 14(1) of the Landlord and Tenant (shops, Hotels and catering Establishments) Act (Cap 301 of Laws of Kenya). The said section stipulates:

“14. (1) A duly certified copy of any determination or order of a Tribunal may be filed in a competent subordinate court of the first class by any party to the proceedings before such Tribunal or by the tribunal, and on such copy being filed and notice thereof being served on the Tribunal by the party filing the same such determination or order may, subject to any right of appeal conferred by or under this Act be enforced as a decree of the court .”

It is also in evidence and the truth thereof is not denied that the 2nd Defendant was disqualified to hold an auctioneer’s licence for a period of six months from 22nd January, 2002 under Section 24(9) of the Auctioneers Act of 1996 (No. 5 of 1990). It was conveyed to the 2nd Defendant by a letter dated 7th February 2002, from Auctioneers Licensing Board (DEX 2). The contention of the 2nd Defendant that he had no notice of its contents on 27th February, 2002 cannot be accepted.

First of all even if the letter was posted the law presumes its delivery within seven days and secondly the 2nd Defendant has not substantiated his contention by any further evidence. The demeanours of the 2nd Defendant was not very convincing as to the veracity of his contention. There is a gap of 20 days between the date of the letter and the date of execution by the 2nd Defendant. His absence from previous proceedings before the Auctioneers Licensing Board as specified in its letter also shows the careless and indignant attitude of the 2nd Defendant towards the legal process. A purported stamp of receipt by him as shown on the letter (D EX 2) does not satisfy me as to its true picture, without showing the court what was the date of stamp of posting from the Board at Nairobi.

I also note that despite the knowledge of the letter at the time of filing the statement of Defence, the 2nd Defendant has denied that he was not authorized to attach goods as pleaded in the plaint (see paragraph 7 of the Defence). Similarly his denial that he was served with the notice of demand flies flat on the face of its reply from him (P. Ex. 14). In that letter of 8th March, 2002 he specifically refers to the letter of demand and denies his liability.

It is interesting to note paragraph 7 of the said letter which was in response to paragraph 4 of the letter of demand dated 15th March, 2002 (P Ex. 13) which refers to his lack of authority due to non-licencing and suspension.

I shall quote the said paragraph:-

“ 7. That at the time when I was carrying on with the attachment I had already applied for the 2002 (sic) Licence which was still being processed by the Auctioneers Licensing Board. The normal procedure is when the Licence is still being processed the Auctioneers are allowed to continue working.”

I quoted the above passage to stress that he has totally avoided to respond to the averment of his suspension. This, as a matter of fact furthers my observations that his defence of late receipt is nothing but an afterthought and cannot be accepted.

The facts of attachment without Notice of proclamation and eviction are not disputed by the 2nd Defendant. He has also not disputed the list of attached goods as shown in the schedule of the plaint. The value thereof as averred in the plaint is also not disputed by him.

What he contends is that he executed an order from the Business premises Rent Tribunal which was handed over to him by the 1st Defendant. It is really surprising that he executed the order without any application of the execution and issuance of warrant of attachment by the court in his favour. He

pompously just relied on the order of the Tribunal as an authority for him to execute. (P EX 8) On the other hand, the proclamation which is produced by him (D EX 1) does specify that he is executing a decree under a warrant of attachment.

Be that as it may, the goods are attached and removed on the same day and the premises is locked in his presence, despite the specific order in that respect that the vacant possession was to be handed over by the tenant on or before 31st March, 2002. Then he states that the 1st Defendant refused to keep the attached properties in his store and took away the goods.

I need not reiterate all the facts to observe that none of the actions taken by the 2nd Defendant complied with the provisions of the Auctioneers Act, 1996 and Rules made thereunder.

His defence that he is not liable for the damages because the goods were forcefully taken from him does not enure to him, firstly he obtained the acknowledgment of the goods from the 1st Defendant and Manager of Nasco Security Guards (DEX 1B), and secondly he acted contrary to Rule 8 (1) of the Auctioneers Rules 1997 namely:

“8 (1) Subject to these Rules, the auctioneer seizing or repossessing goods under a court warrant or letter of instructions shall be responsible for the safe custody and insurance of any moveable property seized or repossessed by him until it has been sold or the seizure or repossession is withdrawn.”

2nd Defendant to say the least, went hand in hand with the 1st Defendant in unlawful distress and eviction of the plaintiff from the suit premises. He was unable to return the goods to the plaintiff as per the later court order. The withdrawal of the disciplinary complaint against him by the plaintiff does not absolve him from the liability in any civil action against him by the plaintiff which is the present suit. He cannot escape the liability under the cover that he did not keep the goods. He was not an agent of the 1st Defendant but a Court official while carrying out auctioneer's duties.

The goods were attached under the wrong procedure and while he had no authority in law. He joined the 1st Defendant in carrying out an absolute unlawful and outrageous act of dispossessing a citizen of his properties and business premises. He has to face its consequences.

I do find as a result of the premises aforesaid that 2nd Defendant unlawfully carried out attachment and eviction as alleged by the plaintiff in the plaint and is liable for the loss suffered by him as a consequence thereof. There is already a judgment against the 1st Defendant in the sum of Kshs.5,369,480/=. It is not challenged. 2nd Defendant also has not disputed the attachment and value of the goods and thus he is liable to pay jointly and severally with the 1st Defendant a sum of Kshs.2,519,480/= as pleaded and prayed in prayer (a) of the plaint.

Furthermore, no challenge was made against the evidence produced by way of stock book (P Ex 20) to prove the loss of income. Thus I shall also enter Judgment against the 2nd Defendant in the sum of Kshs.2,850,000/= being loss of business profit as pleaded, proved and prayed.

However, the plaintiff did not adduce any evidence as to loss of business reputation and goodwill. As for the damages for unlawful eviction, in my view, the award of damages for loss of profits has adequately catered for this head of damage as the plaintiff has been restored to his original position before the unlawful action and which is also awarded as general damages. I shall refrain from duplicating the award under the same heading.

I shall thus finally order that the Judgment be entered in favour of the plaintiff in the sum of Kshs.5,369,480/= against both the Defendants jointly and severally with costs and interest at court rates.

Dated and delivered at Nairobi this 20th day of May, 2003.

K. H. RAWAL

JUDGE.