REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA

AT MOMBASA

CIVIL SUIT NO.567 OF 2001

1. BRIDGEUP CONTAINER SERVICES LTD.

2. JOSEPH GATHITU MUKOMAH……PLAINTIFFS

V E R S U S

ISAIAH MWAI MATHENGE……..DEFENDANT

R U L I N G

The application to be considered and decided is dated 11th March, 2002 and is headed "Amended Notice of Motion". Of the prayers sought therein only two of them remain to be considered. The first one states:-

> *"That the Honourable Court be pleased to vacate all orders made on the 9 th November, 2001 and order that the defendant's distress for rent commenced on the 23 rd October, 2001 be allowed to proceed".*

The second one is on costs.

On 20.4.2002 when the application came up for a hearing, Mr. Gikandi for the original applicant raised what he termed a Preliminary Objection. He however abandoned the objection when he belatedly realized that the application in respect to which he intended to raise the Preliminary Objection had been withdrawn on 12.2.2002. He nevertheless proceeded to object to the fact that the Applicant herein had filed this application amending an earlier one dated 7th March, 2002 without leave of court. It was however shown that the Amended Notice of Motion was served on the same day the original Notice of Motion was served so that in accordance with the rules governing amendments and in particular, Order VIA Rule 1(1), the applicant needed no leave of court to amend. I hold that the said amended Notice of Motion did not need this court's leave to file it. I also wish to point out that even if the amended Notice would be disallowed, the original Motion would nevertheless, be similar to the amended one in so far as the prayers are concerned. It does not matter therefore which of the motions is put before the court. I now must consider the main motion.

> On 9.1.2001, Mr. Gikandi for the Applicant appeared before me and obtained ex parte temporary orders which read as *follows:-*
>
> *1. The application is certified as urgent and has been heard ex parte in the first instance.*
>
> *2. A temporary injunction is hereby issued restraining the defendant by himself his servants*

and/or agents from levying distress and/or selling by public auction plaintiff's properties and/or from in any manner whatsoever and howsoever with the said propertie s inconsistent to the rights of the plaintiffs, pending the hearing and final determination of this application inter -partes".

Mr. Gikandi did not within 14 days fix the application inter partes. Indeed he has never to-date fixed the application for a hearing. But it is not in doubt that his clients failed to pay their monthly rental which, as admitted in their replying affidavit dated 11th April, 2002, has grown to more than Kshs.3.4 million. Failure to pay the accumulating unpaid rent to the extent shown above, appears to me, to say the least, totally unwise. Be that as it may, what is now in question is to interpret my order of 9.11.2001 quoted above.

When the applicants herein, the original Respondents realized that the applicants therein most probably never were eager to fix for a hearing interpartes their application dated 9.11.2001 and noting that the period was long past 14 days, they filed their application now before me dated 7th March, 2002, seeking for orders that this court vacate all the orders dated 9th November, 2001. That would allow the Defendant/Respondent to proceed with the levy of distress that had been halted by my said orders. The applicant's argument is that despite what the order of this court dated 9.11.2001 reads it was in nature an ex parte order whose life span by law is not longer than 14 days; that when it was granted this court had in mind the relevant legal provision which is Order 39 Rule 3(2) which states:-

"An ex parte injunction may be granted only once for not more than fourteen days and shall not be extended thereafter".

Mr. Mabeya arguing for the Respondent therein added that the order stated that it would subsist until the hearing and determination of the application which was expected to be fixed and argued by the applicant not later than the 14 days provided by law. He quoted the case of Omega Enterprises (Kenya) Ltd –vs- Kenya Tourist Enterprises Corporation and 2 Others, Court of Appeal Civil Appeal No.59 of 1993 which I will consider in a while. In reply Mr. Gikandi argued that the order would subsist until the application under which it was obtained would be heard. He argued further that the order was clear and was made intended to subsist as it expressly read.

Order 39 rule 3(2) is very clear. An ex parte order of injunction can only be made to last 14 days and will not be extended except probably by express consent. This court made that order having the above rule in mind. It expected that the applicant (who cannot even for a moment be said to have been unaware of the provision), would fix the application to be heard and determined within 14 days. If however, the order's express interpretation is to the effect that the order could subsist until the application is heard and determined, even if such date of determination occurred beyond the 14 days, then I hold that the order was without jurisdiction beyond the 14 days. In the Omega case above mentioned Tunoi, J.A. considering a similar order made ex parte beyond the 14 days stated on page 11 of his judgment:-

"Thus, the ex parte order made by the Learned Judge was made without jurisdiction since the maximum period for the validity of the interim order of 14 days was exceeded. I think, also, that the said order must be without any legal basis and hence null and void".

A similar issue touching on irregular or illegal order made was considered by an English Court in the case of Macfoy vs United Africa Co. Ltd [1961] 3 All E.R. 1169 at page 1172 Lord Denning, delivering the opinion of the Privy Council, stated:-

"If an act is void, then it is in law a nullity. It is not only bad, but incurably bad. There is no need for an order of the Court to set aside. It is automatically null and void without more ado, though it is sometimes convenient to have the Court declare it to be so …….… You cannot put something on nothing and expect it to stay there. It will collapse".

Applying the same principle in this case, I hold that the order being considered herein was null and void to the extent of its existence beyond 14 days. This application is therefore valid and timely. It is not

misconceived. Its purpose is to declare null and void the order made by me on 9.11.2001.

Accordingly the application under consideration and dated 11th March, 2002 must and is hereby allowed with the following orders:- ORDERS

1. The orders of this court dated 9th November, 2001 are hereby set aside.

2. The Defendant's distress for rent commenced on 23rd October, 2001 is hereby allowed to proceed.

3. The costs of this application are to the Defendant in any event.

Dated and delivered at Mombasa on the 24th day of April, 2002.

D. A. ONYANCHA

J U D G E

Delivered in the presence of:

Mr. Kinyua for Gikandi -for Applicant/Defendant

Abdalla - for Momanyi - for Respondent/Plaintiff