

REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA AT NYERI

CIVIL CASE NO. 31 OF 2002

MUKURWEINI INVESTMENT CO-OP SOCIETYPLAINTIFF

VERSUS

STEPHEN KARURI NDERITU DEFENDANT

RULING

On 8/2/2002 Providence Auctioneers went to Land Reference Number 9862 commonly known as Woodland Farm. Their mission was to levy distress for rent which is allegedly due from the defendant to the plaintiff. The auctioneers had, on 7th February 2002, received instructions from the lawyers for the plaintiff. The proclamation attached to the application indicates that a number of moveable assets were distrained. These included growing wheat.

The proclamation specifies that if the rent due to the plaintiff, which then stood at Kshs.5,576,000.00/- was not paid within seven (7) days from the date of the proclamation the attached assets would be sold by public auction. It is apparent that the auctioneers could not carry out the instructions this is explained by a letter dated 20/2/2002 from N.W. Waruingi the auctioneer to counsel for the plaintiff. The letter is attached to the affidavit and marked NWW3.

The ground for the application is that the defendant is disposing and removing the proclaimed property. The defendant filed a replying affidavit in which he denies the allegation by the plaintiff. He denies having any relationship with the plaintiff and contends that the firm he dealt with was MUKURWEINI FARMERS COOPERATIVE SOCIETY LIMITED

I find the application lacks in merit for a number of reasons. Firstly the plaintiff's locus standi has not been explained. The agreement between the defendant and Mukurweini Farmers Cooperative Society and which appears to have been duly executed is attached to the defendant's affidavit. The lease agreement relied upon by the plaintiff is not properly executed and cannot be used as a basis for enforcing their alleged lease between the plaintiff and the defendant. The plaintiff claims to be an assignee of the rights and obligations of Mukurweini Farmers Cooperative Society which appears to be under liquidation. No deed of assignment or any other evidence to confirm the assignment has been exhibited by the plaintiff. Its locus standi in the matter therefore remains questionable.

Secondly, it has not been demonstrated by the plaintiff the period for which the alleged arrears of rent relate. Although the lease agreement is expressed in the plaint to be for ten years the particular months in which the defendant defaulted has not been shown.

I find that this application is meant to assist the auctioneers execute the plaintiff's instructions. Having failed to execute they found it expedient to use the court machinery to auction the defendant. There is no provision in the auctioneers Rules 1997 made under the auctioneers Act 1996 where an auctioneer can be granted an order of court before it can carry out his or her duties. This application is a clear abuse of the process of court. I dismiss it with costs to the defendant. The interim orders granted on 28/2/2002 and 22/3/2002 are hereby vacated.

Dated this 18th day of April 2002.

J.K. MITEY

JUDGE