

REPUBLIC OF KENYA

1 Barry Scutt & Another v Hitesh Jethwa & 2 Others

High Court of Kenya at Nairobi June 29, 2000

Milimani Commercial Courts

T Mbaluto, Judge

Civil Case No 937 of 2000

June 29, 2000 T Mbaluto, Judge delivered the following ruling.

This ruling relates to the issue as to who between the applicants who are the plaintiffs in this suit and the 3rd defendant/respondent should bear the costs of the application filed by the plaintiffs herein.

The circumstances giving rise to the dispute, the subject matter of this ruling, are that on May 30, 2000, the plaintiff instituted the suit against the defendants claiming among other things that the latter had levied an illegal distress on their residence. Together with the application, they lodged an application under a certificate of urgency for an injunction to restrain the defendants from interfering with the suit property or levying any distress thereon. By the time the matter came up for hearing on June 6, 2000, the issue of distress had been resolved and what remained outstanding was the question of costs of the application. It is the plaintiffs' contention that the auctioneer, who is the third defendant in the suit, should bear the costs of the application because according to them, the distress he purported to levy was illegal. The auctioneer, on the other hand, claims that the distress was proper and legal, in which circumstances, the plaintiffs' complaints against him have no substance. He therefore says that they and not he should bear the costs of the application.

The basis of the plaintiffs' complaint against the 3rd defendant is that the proclamation was not in accordance with rule 12 of the Auctioneers Rules. In that regard, the 2nd plaintiff, who has sworn the affidavit in support of the application, depones that she and her husband were out of the country on the date the purported proclamation was made and there was therefore no way the auctioneer could have gained access to the plaintiffs' house in order to proclaim the items appearing in the proclamation.

The third defendant concedes that both plaintiffs were indeed out of the country and does not therefore seek to say that he entered the house for the purposes of the proclamation. In his affidavit, he acknowledges that he had to peep through the window in order to have a glimpse of the inside of the house.

Rule 12 of the Auctioneers Rules provides:-

“Upon receipt of a court warrant or letter of instruction the auctioneer shall in case of movables other than goods of a perishable nature and livestock prepare a proclamation in Sale Form 2 of the Schedule indicating the value of specific items and the condition of each item, such inventory to be signed by the owner of the goods or an adult person residing or working at the premises where the goods are attached or repossessed, and where any person refuses to sign such inventory the auctioneer shall sign a certificate to that effect”.

The proclamation prepared by the 3rd defendant was in very general terms and appears to be based more on the 3rd defendant's imagination rather than what he actually saw. It is for that reason, I think, that he fails to show in the proclamation the value of the specific items listed therein or to indicate the condition of each. The proclamation merely refers to furniture including sofa sets, dining tables, video cassette, video machine, T/V sets and any other attachable items. How the 3rd defendant was able to see and identify all those items of furniture without entering the house, only he can tell. Even then, the 3rd

defendant did not attempt to satisfy the Auctioneers Rules with regard to the condition of the proclaimed goods for it was only with reference to the attached motor vehicle that he indicated the value. The condition of the other items was not indicated.

In the case of *Lakeland Motors Limited v Harbhajan Singh Sembi* , (Court of Appeal, Civil Application No 24 of 1998) the Court of Appeal stated:-

“There does not appear to be any provision in the Auctioneers Rules 1997 for dispensing with rule 12. Yet the respondent proceeded to execute the decree and physically attach the applicants’ movable goods without complying with the said rule. The flagrant disregard of the provisions of this rule smacks of gross irregularity ...”.

I would adopt those words of the Court of Appeal in this matter. The Auctioneers Rules were not made in vain. They are supposed to be obeyed. It is plain that the 3rd defendant did not comply with Rule 12 of the Auctioneers Rules in connection with his proclamation of the plaintiffs goods. The proclamation was therefore irregular and illegal and the plaintiffs were in those circumstances justified in coming to court to stop the attachment of their property on the basis of that irregular proclamation.

For the above reasons, I find that they are entitled to recover their costs of the application from the 3rd defendant.