

REPUBLIC OF KENYA

IN THE ENVIRONMENT AND LAND COURT AT NAIROBI
ELC APPEAL NO. E041 OF 2020

ITAL-PLASTICK AFRICA KENYA LIMITED.....APPELLANT

AND

C & S PROPERTIES LIMITED.....RESPONDENT

RULING

The Appellant brought the application dated 2/10/2020 seeking stay pending appeal of the attachment of any of its goods for auctioning until the appeal is heard and concluded. The application was made on the basis that the appeal would be rendered nugatory unless the orders sought were granted. The Appellant claimed that the Learned Magistrate in the ruling in **Chief Magistrate Civil Case No. 2308 of 2020** failed to consider that the windows and machines were tools of trade.

The application was supported by the affidavit of Winnie Daah Nyakiti sworn on 2/10/2020 as well as her further affidavit sworn on 29/10/2020. She deponed that when the Learned Magistrate dismissed the Plaintiff's application with costs, the Appellant filed the instant application in this court without delay. She contended that the Respondent had unlawfully auctioned the Appellant's goods and kept its machines and thereby underestimated the cost of the highly specialised machines. She averred that the Respondent had not adduced any evidence to show that the Appellant owed it rent of Kshs. 6,000,000/= and pointed out that in the magistrates court it was demanding Kshs. 4,000,000/=. She further averred that the Respondent could not have sold the machines 8 days after the ruling without extracting the decree. She attached copies of the certificate of sale dated 29/9/2020 and a purchase order for 2015 for the sum of Euros 168,600.00 for different machines. She also attached a copy of the replying affidavit which she swore on 30/11/2020 and averred that this court had jurisdiction to determine the dispute and maintained that the sale of the Appellant's machine and tools of trade was not done in accordance with the laid down procedure.

Sadhu Singh Devgun, a director of the Respondent swore the affidavit in opposition to the application. He attached a copy of the ruling vide which the Appellant's application was dismissed by the magistrate's court. He averred that upon receipt of the ruling, he instructed the auctioneers to proceed with the auction and recover their debt and that the auction was held on 28/9/2020 and the sale was confirmed. He relied on a copy of the certificate of sale dated 29/9/2020 prepared by Garam Investments showing that the highest bid at the auction sale was for Kshs. 3,000,000/= together with a copy of a receipt issued by the auctioneers to Olerai Investments on payment of Kshs. 300,000/= being a deposit for the auction purchase of goods at go down number 22.

Parties filed submissions which the court considered. The Appellants submitted that this court had jurisdiction to determine this dispute. Further, that the Respondent had violated the Distress for Rent Act, the Land Act and the Constitution. It submitted that rent was consideration a tenant paid to a landlord for enjoyment of premises let and that when possession was taken away the right to receive rent could not be retained. It maintained that it was the tenant of the Respondent and that its right to respect and the protection or its rights under Articles 21, 28 and 47 had been violated.

The Respondent submitted that it entered into a lease agreement with the Appellant on 1/5/2017 for go down number 22 for 5 years and 3 months. It submitted that the Appellant was granted possession of the go down from May 2017 and had been paying rent quarterly in advance. That it failed to pay rent from October 2019 up to September 2020 and was in arrears of Kshs. 4,680,270/=. It averred that the Appellant sought time to pay the rent arrears but failed to pay the outstanding sum following which the auctioneer levied distress for rent in May 2020. That the Appellant filed **Milimani Case Number 2308 of 2020 – Ital Plastics Africa Limited v C & S Properties Limited** and was granted a temporary injunction. The Respondent submitted that the sale of the goods distressed was completed and that the property passed on to highest bidder at the fall of the hammer. The Respondent submitted that there was nothing to stay and urged the court to dismiss the application.

The issue for determination is whether the court should issue an order of staying attachment of the Appellant's goods for auctioning pending hearing of the appeal and whether the Respondent or its agents should be prohibited from auctioning those goods.

Based on the averment by the Respondent which was not controverted by the Appellant that the Appellant's goods and equipment which were attached had already been sold, the court is not persuaded that it ought to grant orders for stay of execution pending the determination of this appeal as there is nothing to stay.

The court declines to grant the orders sought by the Appellant in the application dated 2/10/2020

Delivered virtually at Nairobi this 7th day of June 2021.

K. BOR

JUDGE

In the presence of: -

Ms. Winnie Nyakiti for the Appellant

Mr. Tony Odera for the Respondent

Mr. V. Owuor- Court Assistant