



REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA AT NAIROBI

CIVIL MISC. APPLICATION NO. 156 OF 2020

BEN MBUGUA GATHURI T/A

AUCKLAND AGENCIES AUCTIONEERS.....APPLICANT/RESPONDENT

-AND-

JOHN PETER KAMAU RUHANGI.....CREDITOR

-VERSUS-

JOHN NGUGI KABOTO T/A CLUB SIDAI

OLENG.....DEBTOR/APPLICANT

RULING

1) Ben Mbugua Gathuri T/A Auckland Agencies Auctioneers, the applicant/respondent took out the motion dated 3rd March 2020, in which he sought for an order to direct the officer, commanding Muthaiga Police Station and or the Officer, Commanding Administration Police, Starehe Division to authorise police to escort him for purposes of breaking all doors and locks of all those premises known as Club Sidai Oleng on L.R No. 28177 in Nairobi and maintaining Law and Order while the auctioneers will be removing the proclaimed goods as particularized in the Proclamation Notice attached to the supporting affidavit.

2) This court having perused the application plus the supporting affidavit formed the opinion that the motion is *ex parte* in nature and proceed to grant the orders sought on 20th April 2020.

3) John Ngugi Kaboto T/A Club Sidai Oleng, the Debtor has now taken out the motion dated 7th May 2020, the subject matter of this ruling, in which he sought for *inter alia* the aforesaid orders to be set aside. In the motion, the Debtor avers that the orders were issued on 21.4.2020, but I think he meant the orders issued on 20.4.2020. The motion is supported by the affidavit and a further affidavit deponed by John Ngugi Kabogo.

4) When served, John Peter Kamau Ruhangi, the Creditor and Ben Mbugua Gathuri each filed a replying affidavit, they each swore to oppose the application. When the motion came up for *inter partes* hearing this court gave directions to have the two motions disposed of by written submissions.

5) I have considered the grounds stated on the face of the motion plus the facts deponed in the affidavits filed in support and against the application. I have also considered the rival written submissions. It is the submission of the Debtor/applicant that the applicant/respondent obtained the *ex parte* order issued on 20.4.2020 by concealing material facts therefore he did not deserve to be granted the orders. The debtor pointed out that the applicant/respondent lied that he had visited his premises to proclaim goods particularized in the proclamation form.

6) The debtor stated that he was never served with the Proclamation notice which was served upon his guard. He further averred that the applicant/respondent lied when he stated that he visited his premises and found the same deliberately locked to prevent him from accessing the premises to remove the proclaimed goods.

7) He stated that all restaurants in Kenya had been closed by the time the applicant/respondent alleged to have visited his premises due to the Covid 19 pandemic. It is also pointed out that the alleged proclamation notice is defective for want of form as it fails to specifically identify and quantify the goods proclaimed as a requirement of the Auctioneers Act, 1996 and the Auctioneers (practice) Rules 2009.

8) It is also argued that the letter of instructions issued to the applicant/respondent by the Creditor dated 3rd March 2020 is defective as it fails to adhere to the mandatory requirements of Section 10 of the Auctioneers Act, 1996 which is to the effect that the letter indicate the

exact amount the auctioneer should recover and not an estimate.

9) The applicant/respondent opposed the Debtor’s application arguing that the Debtor approached this court with dirty hands. He pointed out that the debtor’s goods were proclaimed as stated in the proclamation notice dated 10th March 2020. He further averred that the debtor had placed several guards at the premises and that his attempt to attach the proclaimed goods on 27.3.2020 was frustrated because the same were closed.

10) Having considered the rival submissions, it is clear in my mind that the applicant/respondent, approached this court vide the motion dated 3rd March 2020 to seek for police protection to enable him levy distress for rent as against the debtor to recover rent arrears to the tune of ksh.16,680,000/=.

11) The application is exparte in nature and that is why the Debtor/applicant was never invited to participate at the hearing of the application.

12) The Debtor/applicant denies having been served with the proclamation notice. However, it is admitted that the same was served upon a guard stationed at the Debtor’s premises. This court was not invited to determine the merits of the distress proceedings. However, it is apparent from the material placed before this court that the parties were before the Business Premises Tribunal over the issue and the Tribunal appears to have determined tenancy dispute.

13) The applicant/respondent did not therefore mislead this court into granting the orders in favour of the auctioneers. It is clear from the record that the applicant/ respondent placed sufficient material that convinced this court that it was entitled to the orders sought in the motion of 3rd March 2020.

14) In the end, I find no merit in the motion dated 7th May 2020.

The same is dismissed with costs to the respondent.

Dated, Signed and Delivered virtually via Microsoft Teams at Nairobi this 17th day of July, 2020.

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J. K. SERGON

JUDGE

In the presence of:

..... for the Applicant

..... for the Creditor

..... for the Debtor/Applicant