



REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA

AT NAIROBI

CIVIL APPEAL NO.286 OF 2011

AHMED O. BACHANI.....APPLICANT/APPELLANT

-VERSUS-

ZUBEDA NANJI.....RESPONDENT

RULING

1. There are two applications by the appellant herein coming for determination before this Court. Notice of Motion dated 2nd December 2013 and Chamber Summons dated 30th January 2014. The Notice of Motion is brought under section 1A,1B, 3A and 63(e) of the Civil Procedure Act Cap 21 and order 40 Rules 1,2,3 and 4 of the Civil Procedure Rules, 2010 and Section 16 of the Distress for Rent Act CAP 293 seeking temporary injunction against Wiskam Auctioneers from disposing off the Motor Vehicle Registration number KBN 241Y Toyota NZE and motor vehicle KBH 307L and declaration that the attachment by Wiskam Auctioneers of the said motor vehicles illegal as the same are the appellant's tool of trade. The applicant also claims damages for loss of business income due to the illegal attachment. On 20th December 2013, the Court ordered the release of the attached motor vehicles and reserved its ruling for 30th January, 2013.

2. The application is based on the grounds:-

- i. That on 15th November 2013 at 9.20 a.m. at the behest of the respondent's did issue a proclamation notice to the appellant over disputed rent arrears.
- ii. On 27th November 2013 Justice Onyancha granted injunctive orders restraining the respondents from levying distress over the alleged rent arrears pending the determination of the application dated 28th May 2013
- iii. The proclamation notice was to lapse on 29th November, 2013 at 9.30 a.m.
- iv. Despite the said orders Wiskam Auctioneers in blatant disregard to the order attached Motor Vehicle Registration number KBN 241Y Toyota NZE and motor vehicle KBH 307L
- v. That unless the said orders are granted Wiskam Auctioneers shall sell, auction, dispose off Motor Vehicle Registration number KBN 241Y Toyota NZE and motor vehicle KBH 307L within 7 days i.e. 5th December 2013.

3. The application is supported by an affidavit by Ahmed O. Bachani sworn on 2nd December 2013 in which he reiterated the grounds on the face of the application and proceeded to give a history of the matter culminating to the current application. From the application this is what I gathered is that the applicant is a lessee operating "Heltz driving school at Seikh House Tom Mboya Street. A dispute arose when the respondent purported to increase his monthly rent from Kshs. 60,000/- to Kshs. 203,000/-. The matter was adjudicated on by the Rent Tribunal and a judgment rendered on 10th May, 2013 where the new rent was re-assessed at KShs.153,000/- and the same was backdated to the date of the said Notice. The applicant dissatisfied with the tribunal's decision lodged this appeal. Justice Waweru on 18th July, 2013 granted him a stay of execution on condition of him furnishing the Court with security of Kshs.1,362,000/- a condition which he complied with. On 15th November 2013 he was served with a Proclamation Notice over the disputed rent in arrears; on 27th November the Hon. Justice Onyancha ordered that the disputed Kshs. 93,000/- be deposited in Court within 10 days and which the applicant did; that Order was served on the 2nd respondent Wiskam auctioneers at 7.49 a.m. and Wiskam Auctioneers attached the said vehicles at 7.15 a.m.; that the said attachment was illegal and in utter most bad faith for the following reasons;

- i. The 14 days notice given in the proclamation lapsed on 29th November 2013 at 9.20 a.m. and at 7 a.m. when the auctioneers attached the said vehicle notice had no lapsed.

ii. That attachment should be done during business hours as provided for under the Auctioneers Rules 1997.

iii. The Auctioneers were aware of the said order and had agreed to receive the same at 8.a.m.

iv. Section 16(g) of the distress for rent Act Cap 293 encapsulates that the tools and implements of trade shall be exempted from levying distress.

4. The application was opposed. The 1st respondent filed a replying affidavit sworn by Zubeda Nanji on 2nd December, 2013. She reiterated the grounds on the face of the application and further deponed that the auctioneers were only served with the Court order long after the applicant's goods had been attached; that she was agreeable to release the vehicles if the applicant paid the rent in arrears; that the applicant was not diligent in paying his rent and only paid KShs.60,000/-; that the ex-parte orders obtained by the applicant on 27th November, 2013 were never served upon the respondent nor the auctioneers until 29th November, 2013 and stated that the applicant is yet to serve the said application upon the respondent and that the attachment was done regularly and within the law.

5. The 2nd respondent also opposed the application and filed a Replying Affidavit sworn by Wilson M. Kariuki the proprietor of Wiskam Auctioneers on 6th December, 2013. He deponed that he received instruction from N. A Owino & Company Advocates to levy distress against the appellant/applicant; that the legal notice lapsed on 29th November, 2013 and he proceeded to attach the applicant's goods and denied that the said motor vehicles were applicant's tools of trade. He further deponed that he followed the laid down procedure in attaching the applicant's motor vehicles and added that there was no reason why he should pay the applicant for loss of business as the law does not allow such payments or action.

6. The application came up for hearing on 10th December, 2013. Miss Githogori for the applicant sought injunctive orders, prayer 4 and 5. She submitted that prayer 2 and 3 was granted on 2nd December, 2013. The main issue of the application was whether the attachment by Wismak Auctioneers was legal and procedural. She submitted that the attachment was illegal owing to the fact that the Notice of Proclamation hadn't lapsed as the same indicated it was received at 9.30 a.m. She further submitted that the attached motor vehicles are branded Heltz Driving Academy and as such these are prima facie tools of trade of the applicant; that the appellant had motor vehicle KBK 525G but they opted to attach things that generate income for the applicant/ appellant. As a result of this the applicant has suffered loss of a colossal sum since the vehicles were attached by the auctioneers; that they realize a sum of KShs.150,000/- and there for are seeking that the vehicle be released at their costs. She further submitted that the attachment be declared as illegal and un procedural and the applicant be compensated for loss of income.

7. Ms. Owino for the respondent submitted that since the applicant was seeking injunctive orders the test to be met is laid down in the re-known case **Cassman Brown** and that the applicant hasn't met the threshold; that there was in place an appeal from the decision of the Business Tribunal; that the High Court had ordered that the applicant deposits security and they did so late and that they didn't pay KShs.153,000/- as a result the respondent gave instructions to levy distress. She argued that the proclamation was done on the 15th November, 2013 after the Court order of 4th December 2013. Ordering the applicant to deposit rent within 10 days before the 5th of every month which he failed to do prompting the defendant to proceed with proclamation on 15th November, 2013; that the applicant subsequently rushed to Court on 27th November, 2013 seeking orders to stop attachment of the goods and sat on the orders until 29th November, 2013 when the notice period was to lapse.

8. This application seeks an injunction and declaration that the attachment carried out by Wishkam Auctioneers was illegal. It is clear that the auctioneer was served on the last day at 8.40 a.m. when the said notice was to lapse and the auctioneer had already gone for the goods. The applicant knew very well that he was facing danger of attachment of his goods. He sat and waited till the last minute to obtain orders halting the said attachment but even after obtaining the said Orders on 27th November 2013 he waited until the last day to effect service on the relevant parties. In my view the applicant should have endeavored to serve the orders at least a day before the day the said notice was to lapse as such I find that the auctioneer having not received the notice in due time properly proceeded to attach the vehicle as instructed by the landlord. I therefore find that the attachment as carried out by Wishkam Auctioneers was procedurally done and hence lawful. I further find that the applicant herein shall pay the costs incidental to satisfying the auctioneer's fees.

9. The Chamber summons is brought under rule 3 (1&2) of the High Court (practice & procedure) Rules made under Section 10 of the Judicature Act. The same is citing the respondent for contempt of Court for failing to adhere to Justice Ougo's Order of 20th December, 2013 ordering the release of Motor Vehicle Registration Number KBN 241Y and Motor Vehicle Registration Number KBH 307L Toyota NZE and claims damages for loss of business. The applicant's in his supporting and supplementary affidavits sworn by Ahmed O. Bachani on 20th March, 2014 and 3rd January, 2014 respectively reiterated the grounds on the face of the application and deponed that the respondent was duly served through her advocates on 23rd December, 2013 with the said orders and another copy was sent to Wiskam Auctioneers who had attached the said vehicles; that despite service of the Court orders the respondent suffered colossal loss as the subject motor vehicles are his tools of trade and are used in his business known as Heltz driving school whereas each vehicle on average undertakes 11 lessons at KShs. 900/-.

10. The application was opposed and the respondent filed a replying affidavit and a further replying affidavit sworn by Wilson M. Kariuki on 30th January 2014 and 24th March, 2014 respectively, where he admitted to levying distress against the applicant and taking possession of the motor vehicle KBN 241Y Toyota, NZE and KBH 307L Toyota NZE but denied refusing to release the motor vehicles to the applicant; that the said motor vehicles were kept at Pangani Auction Center an independent grounds that did not in any way belong to him and that the storage charges for goods kept therein were paid on daily basis; that upon receiving the said orders on 23rd December, 2013 he wrote to the applicant's counsel to enable the applicant pick the motor vehicles but she failed to do so despite frequent reminders; that the application for leave to file contempt proceedings against him is misconceived and that the applicant is the author of his own misfortune for failing to pay rent as ordered by the Honorable Court; that he is informed that special damages can only be paid after they are specifically pleaded and proved and cannot be claimed through and application for contempt; He denied that the amount of Kshs. 30,000/- paid to him was his fees and stated that the amount was for storage costs accrued for the two motor vehicles. He indicated that the applicant's application is an abuse of the court process and should be dismissed.

11. The application proceeded in Court on 24th March 2014 and parties made oral submissions. Miss Githongori for the applicant reiterated the contents of the affidavits and further added that the Court was to make a ruling on auctioneer's costs on 30th January, 2014 and that the respondent was aware of the Court order as evidence in the respondents replying affidavit at paragraph 7.

12. Miss Owino for the respondent submitted that the process for citing a person for Contempt of Court are well settled in the Supreme Court Writs of England at Orders 45 and 46 and procedure is laid down in the Halsbury laws of England; that application is to commit Zubeda yet the applicant's affidavit tells of the auctioneer's failure to obey Court orders; that no leave granted for the applicant to file the application and that the Court order and the application had to be served on the agent of the auctioneers; that service was irregular and unlawful and therefore cannot constitute personal service as envisaged under the said order; that the applicant had a duty to prove contempt of Court and that the procedure had been adhered to on this she relied on the case of **Alldean Satellite Network (K) Ltd –vs- The Kenya Anticorruption Commission & another Misc. appl.no. 114 of 2007** it was held that;

“Service which wasn't personal wasn't personal service and therefore the respondent could not be committed to civil jail”

She argued that there was no proof that the respondent was personally served with the application and the orders by 23rd December, 2013 and that they couldn't have known of the orders as they closed their offices for Christmas holiday on 8th December 2013 and opened their offices on 14th January, 2014 when the applicant's Counsel served them. On this she referred the Court to the case of **Maina Kariuki -vs- Minister for Gender Sports and Cultural and social services Misc. Appl. No 389 of 2004**.

She submitted that the law requires that there must be a penal notice which she claimed was missing in the said order and that the Court cannot make the contempt of Court orders as the goods have been released, counsel urged the Court to look at the authorities relied on and the respondents affidavits and dismiss the application with costs.

13. Miss Githongori in reply stated that Justice Havelock granted the applicant leave on 10th January, 2014 to institute contempt proceedings and added that where the applicant has knowledge of a Court order the strict requirement that the order be served is not necessary; that the respondents were in Court when the orders were read; that they paid the auctioneers fees and since the respondent is the principal she should be held liable for the agents actions and urged the Court to allow the application.

14. I have considered the Affidavits on record, the submissions of counsel and authorities relied on. I note that the issues arising for determination are as follows;

- i. Whether the respondent was in contempt of Court and if yes is the applicant entitled to recover the special damages he claims to have suffered from noncompliance of the Court order by the contemnors?

The Black's Law Dictionary (Ninth Edition) defines contempt of court as:-

“Conduct that defies the authority or dignity of a court. Because such conduct interferes with the administration of justice, it is punishable usually by fine or imprisonment.”

The power to deal with contempt of Court is provided for under Section 5 of the Judicature Act (Cap 8). Section 5 of the Judicature Act provides:-

“5.(1) The High Court and the Court of Appeal shall have the same power to punish for contempt of court as is for the time being possessed by the High Court of Justice in England and that power shall extend to upholding the authority and dignity of subordinate courts.”

Miss Owino for the respondent claimed that the applicant did not obtain leave of Court to bring this application the applicant refutes this and indicates that leave was granted by Justice Havelock. I have perused the Court record and it is evident that Justice Havelock granted the applicant leave on 10th January 2014.

It is trite law that the applicant who obtains the order requiring compliance effects service of the said order and a copy of the application to the person or persons to whom he seeks adherence. The applicant claims to have effected service of the said orders to the both the auctioneers and the respondent's Counsel. The auctioneer admits to having been served with the order and claims to have written to the applicant's counsel requesting the applicant to go collect the vehicles from Pangani Auction Center but did not annex the said letters. The respondent however denies being served and indicates that their officers had closed offices for Christmas holiday on 18th December 2013 while the said orders are said to have been given on 20th December, 2014. She further added that the same had been slipped under their door and this did not constitute personal service as required by the rules. Upon perusal of the said Court file I note that when the said orders were issued one Mr. Wayanga was holding brief for Miss. Owino Counsel for the respondent. I believe Counsel was acting on the instructions of Miss Owino. I therefore believe that he must have communicated the outcome of the said application to her. I doubt that the respondent did not have knowledge of the said order as she claims. In the case of **Basil Criticos Vs Attorney General and 8 Others [2012] eKLR** it was held that:-

“...the law has changed and as it stands today knowledge supersedes personal service.....where a party clearly acts and shows that he had knowledge of a Court Order, the strict requirement that personal service must be proved is rendered unnecessary”

15. The standard of proof in matters of contempt of Court is well settled. It must be higher than proof on a balance of probabilities, almost but not exactly beyond reasonable doubt this is because the charge of contempt of Court is akin to a criminal offence see the Court of appeal case of **Ochino & Others –v-s Okombo & Others (1989) KLR 165**, where it was held that:-

“.....the standard of proof in contempt proceedings must be higher than proof on a balance of probabilities, almost but not exactly beyond reasonable doubt.” Also see the case of **Mutika vs. Baharini Farm Ltd [1985] KLR 227.**

The auctioneer claims that the amount of Kshs. 30,000/- paid was storage fees and not auctioneer’s fees as claimed by the applicant. The receipt obtained from Wiskam Auctioneers annexed by the applicant in his application reads that the same was payment for storage charges for the two motor vehicles. The same reads 16th January 2014 going by the auctioneers claim that storage fees attracted each day. In my view it is only logical for the applicant would incur costs in storing the attached motor vehicles and as such the applicant would have had to settle the storage fee before the same are released to him.

16. The respondent argues that the issue that special damages must not only be pleaded but should also be proved but further argued that the application does not constitute pleading and thus the applicant cannot claim damages he claims to have suffered due to the non-compliance of the said Court order given by this Court.

The Black’s Law Dictionary defines pleadings as:

“The formal allegations by the parties to a law suit of their respective claims and defences with the intended purpose of being to provide notice of what is to be expected at trial.”

Further Section 2 of the Civil Procedure Act defines

“pleading” as including “a petition or summons, and the statements in writing of the claim or demand of any plaintiff, and of the defence of any defendant thereto, and of the reply of the plaintiff to any defence or counterclaim of a defendant.”

From the reading of the above section it is clear what amounts to a pleading in my view a Chamber Summons does not fall under the said provision as the same is an interlocutory applications I agree with the respondents argument that the applicant cannot claim special damages in a Chamber Summon as that ought to be raised in pleadings see the case of **MOHAWK LIMITED V LEO INVESTMENT LIMITED & ANOTHER [2012] eKLR** where it was held that;

“The application is neither a *Plaint* nor a *Defence* and neither is it a *reply* to either. Such an application cannot therefore be considered for striking out under any of the grounds stipulated in *Order 2 Rule 15 of the Civil Procedure Rules*”.

17. Having found that the said application does not constitute pleadings the claim for special damages that is enumerated thereon by the applicant unfortunately fails. It is also not in dispute that the two motor vehicles were released on 16th January, 2014 as such I find that the applicant’s prayers cannot be grant as sought. I have also looked at the said order and it is evident that there was no penal notice on the same. The applicant has also failed to prove that the two parties are in contempt of Court as such the applicants application fails. Costs be in the cause.

Orders accordingly.

Dated, signed and delivered this 9th day of **May** 2014.

R. E. OUGO

JUDGE

In the presence of:-

.....For the Appellant/Applicant

.....For the Respondent

.....Court Clerk