



**REPUBLIC OF KENYA**

**IN THE HIGH COURT AT NAIROBI**

**CIVIL CASE NO. 115 OF 2014**

**WAFULA SIMIYU & CO. ADVOCATES ..... APPELLANT/APPLICANT**

**VERSUS**

**DR. BERHANG WOLDEMICHEAL ..... 1ST RESPONDENT**

**ASFAHA GENETTESU.....2ND RESPONDENT**

**GITU WA MUNIU T/A GIRMAT AUCTIONEERS LIMITED ..... 3<sup>rd</sup> RESPONDENT**

**RULING**

Before me is a Notice of Motion dated the 20/5/14. The application is brought under Order 42 rule 6, Order 50 rule 1 of the Civil Procedure Rules 2010. The applicant is seeking a temporary injunction restraining the respondent and their agents Girmat Auctioneers from distressing, selling or disposing off the attached property of the appellant which are his tools of trade pending the hearing and determination of the appeal with or without conditions.

In his supporting affidavit the applicant argues that he was dissatisfied with the lower court orders of 18<sup>th</sup> March 2014 and filed the current appeal 115 of 2004. He states that unless the injunction is ordered he stands to suffer substantial loss as the applicant's firm stands to lose its tools of trade and its business reputation and undertakes to make efforts to sort the matter out of court; that the 2<sup>nd</sup> respondent attached the applicant's tools of trade and is in the process of selling them and this will take away the substratum of the appeal.

The respondent opposed the application and filed grounds of opposition dated 27<sup>th</sup> May 2014 where he depones that the applicant had concealed material facts and as such is not entitled to the discretionary orders sought, further that the applicant has not advanced any grounds for grant of an injunction as provided for under Order 42 rule 6, further that the applicant has already conceded to being in rent arrears amounting to millions and no plausible ground has been advanced by the applicant to warrant the court's intervention and that the goods have already been distressed and advertised and an injunction would not serve any useful purpose.

The application came for hearing on 30/5/2014 and parties made oral submissions. The applicant argued that the application was made without undue delay and that the relationship between applicant and respondent is landlord tenant; that the proclamation carried out on 4/9/13 and attachment made on 6/5/14 was illegal and this necessitated the applicant's current application and advertised for sale on 3/6/14; that the attached goods are the applicant's tools of trade if the sale were to proceed he will suffer substantial loss; that he offered security of Kshs. 1million and that should the tools of trade be sold the same would at most fetch Kshs. 300,000 or Kshs.400,000. The applicant relied on the case of **Butt –vs- Rent Restriction**

**tribunal and New Stanley Hotel Ltd vs Arcade** the terms of security should not be harsh to disentitle the appellant from its right of appeal also in the case of **Erinford Properties Ltd –vs- Cheshire Count Council** in support of the Court’s discretion to grant an injunction.

Mr. Kioko for the respondent reiterated the grounds of opposition counsel referred the Court to the memorandum of appeal in that the lower Court refused to grant an injunction and the rent in arrears were admitted; that since September 2013 when the firm was distressed the rent has remained unpaid; further that the applicant seeks an injunction and not stay and for the same to succeed the applicant has to show it has prima facie case; that the application for stay in the lower court was dismissed on 10/4/14 and the applicant brought the application for more than a month before filing the current application and this the applicant claims there was inordinate delay on the applicant’s part and no plausible grounds have been advanced by the to warrant the stoppage of a lawful distress. Counsel further argued that there is no law that bars attachment of office furniture and the respondents have not received any rent from June 2014 and the scales of justice tilts in its favor.

Mr. Simiyu for the applicant in reply sought to clarify that what took place on 6/5/14 was an attachment and not proclamation and that the proclamation carried out on 2013 was not carried out by an auctioneer as the person who carried it out Douglas Kiwa was not a registered auctioneer.

On 30/5/14 the court ordered stay of sale of proclaimed goods pending the delivery of its ruling on this application on condition that the applicant paid to the respondents Kshs.1.2 million within 21 days in default of which the respondents would proceed with execution. The matter was mentioned on 24/6/14 and the applicant were yet to comply with the courts orders reasons advanced by the applicant’s counsel was that the conveyance the source of the applicant’s money had been misplaced during the lock down at the Ministry of Lands by the Cabinet Minister on this they sought further extension of 14 days which the Court granted and slotted the matter for a further mention on 9<sup>th</sup> July 2014. When the matter came up for mention the applicants were yet to comply with the Court’s orders and subsequently the condition stay granted by the Court was lifted.

I have read and considered the parties affidavits and their oral submissions made in Court. Am guided by the provisions of Order 42 rule 6 of the Civil Procedure Rules. The decision in the lower Court was made on the 18<sup>th</sup> March 2014. The appellant filed a memorandum of appeal on 28<sup>th</sup> March 2014 and the application for the injunction was filed on 20<sup>th</sup> May 2014 and therefore the same was filed without undue delay. On the issue of substantial loss I find that the applicant has failed to explain the loss that he will suffer. It is evident that the respondent is the one who continues to suffer as the applicant has not been paying rent since June 2014 a matter the applicant does not refute. Further after having been given an opportunity on several instances to deposit security he has failed to do so. I therefore decline to exercise my discretion in favour of the applicant and dismiss the application with costs to the respondents.

Dated, signed and delivered this **12<sup>th</sup>** day of **September** **2014**.

**R.E. OUGO**

**JUDGE**

In the presence of:-

.....**For the Appellant/Applicant**

.....**For the 1<sup>st</sup> & 2<sup>nd</sup> Respondent**

.....**Court Clerk**