



**REPUBLIC OF KENYA**  
**IN THE HIGH COURT OF KENYA**  
**AT NAIROBI (NAIROBI LAW COURTS)**  
**Civil Appeal 257 of 2008**

**VENUE COMPANY LTD .....APPLICANT**

**VERSUS**

**MADATALI CHATUR.....1<sup>ST</sup> RESPONDENT**

**K. WANJOHI T/A KINDEST AUCTIONEERS.....2<sup>ND</sup> RESPONDENT**

**R U L I N G**

1. This appeal arises from a ruling which was made by a Resident Magistrate in Milimani Civil Case No. 1787 of 2008. The ruling was in respect of an application for an injunction brought by Venue Company Ltd., hereinafter referred to as the appellant. In the application, the appellant had sought to restrain Madatali Chatur and K. Wanjohi trading as Kindest Auctioneers hereinafter referred to as 1<sup>st</sup> and 2<sup>nd</sup> respondents respectively, their servants or agents from proclaiming, attaching, or in any other way dealing with the appellant's property and business, pending the hearing and determination of a suit, which the appellant had filed against the respondents.
2. The appellant's suit which was filed on the same day as the application, sought judgment against the respondent for a permanent injunction restraining the respondent from proclaiming, attaching, or in any other way interfering with the appellant's business. The appellant also sought damages for unlawful attachment and costs of the suit. The appellant's application which was supported by an affidavit sworn by its director, one Dr. Rueben Mutiso, was based on the grounds that the purported proclamation of the appellant's goods by the 2<sup>nd</sup> respondent on instructions from the 1<sup>st</sup> respondent was illegal, unlawful and fraudulent.
3. In his affidavit, Dr. Mutiso deponed that the chattels mortgage relied upon by the 1<sup>st</sup> respondent to proclaim the appellant's goods, was not valid as the document was not dated, did not bear the appellant's company seal, was unregistered, did not disclose the company director who executed the document, nor was the document supported by any company resolution authorizing the execution of the document. It was further claimed that the instrument was invalid as it purported to mortgage property belonging to a limited company. Amongst the documents annexed to Dr. Rueben's Mutiso's sworn affidavit were a copy of the proclamation and the undated chattels mortgage. The appellant's application was certified as urgent on 26<sup>th</sup> March, 2008 and an order of temporary injunction granted pending the *inter partes* hearing.

4. In response to the application, the 1<sup>st</sup> respondent filed a replying affidavit in which he contended that the application lacked merit, was frivolous, vexatious and vitiated by material non-disclosure of key facts. The 1<sup>st</sup> respondent maintained that the proclamation of the plaintiff's goods was lawful and did not offend the provisions of the Chattels Transfer Act. He further averred that the application was based on a misconception of the law on the registration of the chattels mortgage. The 1<sup>st</sup> respondent maintained that registration of the chattels mortgage was not a requirement of law in the year 2004 when the chattels mortgage under consideration was executed. The 1<sup>st</sup> respondent further swore that the chattels mortgage was properly executed by the directors of the appellant's company following a director's resolution, copy of which he annexed to his affidavit. He further deponed that the chattels mortgage was executed to secure a debt due from the appellant to the 1<sup>st</sup> respondent in respect of which the appellant had issued dishonoured cheques in purported payment.

5. The respondents also filed a joint statement of defence in which they denied the appellant's claim and maintained that the appellant and the 1<sup>st</sup> respondent had executed a chattels mortgage on the appellant's movable assets to secure a debt of Kshs.2,000,000/= and therefore the respondents were entitled to enforce and execute the chattels mortgage. The respondents maintained that the appellant had no legitimate cause of action against them and the appellant's suit was incompetent and ought to be dismissed.

6. The *inter partes* hearing of the application took place on 16<sup>th</sup> May 2008 before a Resident Magistrate. The Resident Magistrate delivered a short ruling as follows:

***"I have considered the plaintiff's chamber summons dated 26/3/08 the supporting affidavit and annexures, the replying affidavit and annexures and the rival submissions by learned counsel for the parties.***

***I note that annexure "MCI" in the replying affidavit is a copy of the plaintiff's board of director's resolution to obtain a friendly loan, which was obtained. The plaintiff is truly indebted to the 1<sup>st</sup> defendant and for that reason, the plaintiff's application is dismissed with costs."***

7. Being aggrieved by that ruling, the appellant filed a memorandum of appeal raising seven grounds as follows:

- (i) The Learned Magistrate erred in dismissing the application dated 26<sup>th</sup> March, 2008 without proper grounds.
- (ii) The Learned Magistrate erred in failing to appreciate that an instrument under the Chattels Transfer Act Cap 28 of the Laws of Kenya must be registered for it to have the force of law.
- (iii) The Learned Magistrate erred in failing to distinguish the fact that the suit is not about whether the 1<sup>st</sup> defendant is owed money but it is about the legality of the instrument purporting to create the mortgage regard being had to section 2(c) of the Chattels Transfer Act Cap 28 of the Laws of Kenya.
- (iv) The Learned Magistrate erred in failing to address all the issues raised by both parties.
- (v) The Learned Magistrate erred in failing to find that Venue Company Limited and Aangan Restaurant Limited are two separate legal entities.
- (vi) The Learned Magistrate erred in failing to find that a limited company cannot issue an instrument under the Chattels Transfer Act.
- (vii) The Learned Magistrate erred in failing to find that an entity cannot mortgage that which it does not have title to."

8. Mr. Kariuki who argued the appeal on behalf of the appellant, submitted that the trial Magistrate had erred in law in dismissing the appellant's application. He maintained that the respondents had no authority to attach the appellant's goods. He submitted that the respondents had taken the law into their hands, by purporting to enforce an instrument under the Chattels Transfer Act. Mr. Kariuki further submitted that the instrument not having been registered or stamped could not be relied upon. Counsel further pointed out that under section 2 of the Chattels Transfer Act, the definition of an "instrument" did not include a mortgage or charge granted or created by a company incorporated or registered under the Company's Act or by a Co-operative Society's Act.

9. Mr. Kariuki further pointed out that there was no company seal affixed on the document, and that the document was purported to be signed by director and a shareholder of a company which was irregular. Mr. Kariuki argued that the trial Magistrate failed to appreciate that what was in issue was the illegality of the instrument, and not to ascertain whether the appellant owed the respondent money. It was submitted that the trial Magistrate's finding that the appellant owed the respondent money was not based on the pleadings.

10. In support of his submissions Mr. Kariuki relied on:-

- ***High Court Civil Appeal Nakuru No. 91 of 2002 Simon Muiruri Wanjohi v. Resma Commercial Agencies Ltd. & Another***

- ***High Court (Milimani) Civil Suit 134 of 1999, Nyali Chemicals Ltd. v. Thugi River Estate Ltd. & Others***

Mr. Maluki who appeared for the respondents urged the Court to dismiss the appeal as it lacked merit. He maintained that the trial Magistrate properly addressed his mind to issues of facts and law and properly found that the debt was due from the appellant to the respondent. Mr. Maluki maintained that the amendments to the Act currently in force were not in force then. He urged the Court to find that the appellant had not come to this Court with clean hands. He maintained that there was a chattels mortgage duly executed and there was an amount due from appellant to the 1<sup>st</sup> respondent.

11. I have carefully reconsidered and evaluated the applications and the arguments advanced before the trial Magistrate, the ruling of the trial Magistrate, the grounds of opposition and the submissions made before me. Looking at the content of the short ruling which was delivered by the trial Magistrate, it is evident that the trial Magistrate did not give any due considerations to the application. The trial Magistrate further failed to appreciate that the application before him was an interlocutory application. He therefore made a prejudicial definitive finding without the benefit of hearing the full evidence.

12. The principles upon which an application for an interlocutory injunction is to be determined are well settled. These principles are clearly set out in the old case of ***Giella v. Cassman Brown and Co. Ltd.*** (1973) EA 358 as follows:

***"First, an applicant must show a prima facie case with a probability of success. Secondly, an interlocutory injunction will not normally be granted unless the applicant might otherwise suffer irreparable injury, which would not adequately be compensated by an award of damages. Thirdly, if the court is in doubt, it will decide an application on the balance of convenience. (E.A. Industries v. Trufoods, [1972] E.A. 420.)"***

13. From the plaint filed on 26<sup>th</sup> March, 2008 and the affidavit sworn on the same date, it is evident that the appellant's claim was in respect of the alleged illegal repossession purported to have been done by the respondents pursuant to the provisions of the Chattels Transfer Act. It was the appellant's contention that there was no valid instrument under the Chattels Transfer Act pursuant to which such repossession could be done. The appellant demonstrated their allegation by exhibiting a copy of the purported chattels mortgage instrument which was alleged to have been signed between the appellant and the 1<sup>st</sup> respondent.

14. The first issue that arises on the face of that document is that the agreement is entered into by the

appellant as a limited liability company. This brings into question the issue as to whether the document signed by the parties qualifies to be an “instrument” under the Chattels Transfer Act in view of the definition of instrument as provided under section 2 of the Chattels Transfer Act which specifically excludes “mortgages or charges granted or created by a company incorporated or registered under the Company’s Act or by a Co-operative Society’s Act.”

15. Secondly, it is evident from the face of the document which was exhibited as a chattels mortgage instrument signed by the appellant and the 1<sup>st</sup> respondent, that no stamp duty was affixed on the document nor was the document registered.

Section 13(1) of the Chattels Transfer Act states as follows:

**“13.(1) Every instrument, unless registered in the manner provided under this Part, shall, upon the expiration of the time for registration or, if the time for registration is extended by the High Court, upon the expiration of the extended time, be deemed fraudulent and void as against –**

**(a) the official receiver or trustee in bankruptcy of the estate of the person whose chattels or any of them are comprised in the instrument;**

**(b) the assignee or trustee acting under any assignment for the benefit of the creditors of that person;**

**(c) any person seizing the chattels or any part thereof comprised in the instrument, in execution of the process of any court authorizing the seizure of the chattels of the person by whom or concerning whose chattels the instrument was made, and against every person on whose behalf the process was issued.”**

***So far as regards the property in or right to the possession of any chattels comprised in or affected by the instrument which, at or after the time of bankruptcy, or of the execution by the grantor of the assignment for the benefit of his creditors, or of the execution of process (as the case may be), and after the expiration of the period within which the instrument is required to be registered, are in the possession or apparent possession of the person making or giving the instrument, or of any person against whom the process was issued under or in the execution of which the instrument was made or given, as the case may be.***

16. Section 19 of the Stamp Duty Act Cap. 480, provides that no instrument chargeable with stamp duty shall be received in evidence in any proceedings. While section 38 of the same Act provides that no instrument shall be registered under the Chattels Transfer Act unless the original duly stamped is produced to the Registrar.

17. The replying affidavit which was sworn by the 1<sup>st</sup> respondent in response to the application neither responded to the issue of registration nor the nonpayment of stamp duty in respect of the purported chattels mortgage instrument. Counsel for the respondent stated from the Bar that the amendments to the Chattels Transfer Act currently in force requiring registration were not in force in the year 2004. Nevertheless he was unable to produce anything before this Court to confirm any amendment to the Chattels Transfer Act with regard to the requirement for registration and payment of stamp duty. *Prima facie*, therefore, the contention that the purported instrument cannot be authority for the respondent to repossess the appellant’s property for want of registration and non payment of stamp duty has been substantiated.

18. Moreover although the respondent contended that the appellant’s board of directors had authorized the mortgage transaction, a copy of the resolution which was annexed to the affidavit sworn by the 1<sup>st</sup> respondent as “MCI” only showed that the director Mr. Kapoor was mandated to approach his friends for financial help. The resolution did not specifically authorize the loan of Kshs.2,000,000/= allegedly given by the 1<sup>st</sup> respondent to the appellants, nor did it confirm that the loan was obtained. Further the letter did

not authorize the creation of the chattels mortgage over the appellant's property.

19. I find therefore, that there was sufficient *prima facie* evidence to justify the complaint of the appellant that the purported repossession made against him was unlawful. Further it is apparent from the proclamation which was attached to the affidavit of Dr. Rueben Mutiso that the appellant will suffer irreparable loss if the respondents are allowed to proceed with the repossession contrary to the law. In the light of the above, I find that the appellant did satisfy the conditions for granting an interlocutory injunction.

20. Accordingly, I allow this appeal, set aside the order of the trial Magistrate dismissing the appellant's application dated 26<sup>th</sup> March, 2008 and substitute thereof an order granting an interlocutory injunction restraining the respondent whether by themselves, their agents or servants or any one acting under their authority from proclaiming, attaching, or in any other way dealing with the appellant's property and business pending the hearing and determination of the appellant's suit filed in the lower Court. The file shall be remitted back to the lower Court for the hearing of the suit to proceed before a Magistrate other than the one who made the ruling subject of this appeal. Costs of this application shall abide the outcome of the suit in the lower Court.

Orders accordingly.

**Dated and delivered this 2<sup>nd</sup> day of July, 2009**

**H. M. OKWENGU**

**JUDGE**

In the presence of: -

Miss Akonga holding brief for Kariuki for the applicant

Advocate for the respondent