



**REPUBLIC OF KENYA**

**IN THE ENVIRONMENT AND LAND COURT**

**AT MOMBASA**

**ELC APPEAL NO 115 OF 2017(HCCC 85 OF 2013)**

**HEALTH DEVICES (K) LTD..... APPELLANT**

**-VERSUS-**

**BAWAN LIMITED**

**E.M. MAABI t/a MURPHY MERCHANTS..... RESPONDENTS**

**RULING**

*(Being an appeal from a ruling of the Resident Magistrate Hon. Ms. E. Onzere dated 21<sup>st</sup>, 24<sup>th</sup> and 28<sup>th</sup> June 2013, and the order issued pursuant thereto on 8<sup>th</sup> July, 2013 in Mombasa Senior Principal Magistrate's court Civil Suit No. 1057 of 2013. Health Devices (K) Limited –vs- Bawan Limited & E. K. Maabi t/a Murphy Merchants.)*

1. On the 13<sup>th</sup> June, 2013 the Appellant lodged an application in the lower court under a certificate of urgency seeking restraining orders against the Respondent from interfering with the Appellant's quiet possession of the leased premises at Olemanana House (which was the subject of the suit) and/or from levying further distress and receiving any goods belonging to the Applicant.

2. The learned trial Magistrate at the exparte state granted the orders on an interim basis and fixed the application for inter-partes hearing on 21<sup>st</sup> June, 2013.

3. On that date the learned trial magistrate allowed the Respondent herein to file its replying affidavit and declined to grant a mandatory injunction in terms of prayer (2) of the application. She also directed the Respondent's Advocates to appear in court on 24<sup>th</sup> June, 2013, to address her on the question of prayer (2) of the application.

4. On the 24<sup>th</sup> June, 2013 Mr. Magiya Advocate for the Respondent appeared and orally opposed the issuance of prayer No. 2 of the application. The learned trial magistrate then reserved her ruling for 26<sup>th</sup> June, 2013. In her ruling she declined to grant prayer No. 2. She also granted prayer (6) on condition that;

**a) "The Plaintiff does deposit in court the auctioneers charges as per the proclamation dated 14<sup>th</sup> March, 2013 being Kshs192,335/= and storage charges as contained in bill attached to the letter of 28<sup>th</sup> May, 2013 being Kshs.190,000/=.**

**b) The amount to be deposited within 21 days of today's date failure to which order (a) will automatically lapse."**

5. It is against this background that the Appellant has filed this appeal on 22<sup>nd</sup> June, 2013 and an application for stay of the proceedings of the subordinate court proceedings was filed on 2<sup>nd</sup> August, 2013 which was granted by Kasango J. on that date.

6. The Appellant has filed Nine (9) Grounds of appeal and are;

**i. "The learned Resident Magistrate erred in law and infact in failing to hold that the Appellant's application dated 12<sup>th</sup> June, 2013 had merit.**

**ii. The learned Resident Magistrate erred in law and infact in allowing the Applicant's application conditionally after allowing the Respondent's Advocates to make submissions and give evidence from the bar when there was no formal affidavit or grounds of opposition filed by the Respondents to the Applicant's aforesaid application.**

*iii. The learned Resident Magistrate erred in law and infact in directing that he Applicant's application dated 12<sup>th</sup> June, 2013 and the Respondents application dated 24<sup>th</sup> June, 2013 be disposed of by written submissions.*

*iv. The learned Resident Magistrate erred infact in holding that;*

*(a) The Auctioneers charges as at 21<sup>st</sup> December, 2012 were Kshs.192,335/= and no payment had been made therefore;*

*(b) Storage charges of Kshs.190,000/= were due to the Auctioneers,*

*(c) Making an order for the goods to be returned to the Applicant at this stage would be prejudicial to the Respondent.*

*v. The learned Resident Magistrate erred in failing:-*

*(a) To appreciate the significance of various facts that emerged from the affidavit filed in support of the Applicants application in the subordinate court;*

*(b) To consider or properly consider the evidence before her and/or,*

*(c) To make any or any proper finding on the evidence placed before her.*

*vi. The learned Resident Magistrate erred in law and infact in allowing a part of the Applicant's said application in the subordinate court without property and/or adequately considering the Defendants submissions and/or issues raised in the matter.*

*vii. The learned Resident magistrate erred infact in proceeding with the matter without due consideration and regard for the wrongful conduct of the Respondents and of the substantial losses sustained by the Appellant which it still continues to incur. The learned Resident magistrate infact countenanced the Respondent's acts of extortion.*

*viii. The learned Resident Magistrate erred in ordering the two different applications filed by the Respondents and the Appellant which raised entirely different issues be heard together and by way of written submissions without the application of either party.*

*ix. The learned Resident Magistrate exhibited a clear lack of impartially in dealing with the matter in the subordinate court and excising her discretion in the matter.*

**REASONS WHEREFORE the Appellant prays that:-**

*(a) This Appeal be allowed and the Resident magistrates order dated 26<sup>th</sup> June, 2013 allowing prayer (b) conditionally be set aside;*

*(b) The Honourable Court do allow prayer (b) of the Appellant's said application unconditionally.*

*(c) This Appeal be further allowed and the order of the learned Resident magistrate made on 28<sup>th</sup> June, 2013 be set aside and this Honourable Court do direct that the said application be heard by the court (Presided by a magistrate other than Ms. E. Onzere) separately in the order that they were filed;*

*(d) The Appellant be awarded the costs of this Appel and costs of the suit in the subordinate court.*

7. On the 27<sup>th</sup> October, 2016 the parties were directed to have the appeal disposed of by way of written submissions. They were allocated time within which to file and exchange their respective written submissions. When the matter came up before me on 15<sup>th</sup> June, 2017 and 12<sup>th</sup> July, 2017 the Appellant's advocates sought for more time to come and highlight their submissions. On 5<sup>th</sup> October, 2017, they were absent. Mrs. Ali for the Respondents told the court that she did not wish to highlight and sought a date for ruling.

#### THE APPELLANT'S SUBMISSIONS

8. It is the Appellant's contention that the learned trial Magistrate erred in law and infact in allowing the Appellant's notice of motion dated 12<sup>th</sup> June, 2013 to be opposed on the basis of the Respondents Advocates oral submissions in which he gave evidence form the bar (without any formal affidavit in reply on grounds of opposition being filed by the Respondents.)

That Advocates are barred from giving evidence in matters in which they act. They have relied on the authority of **British American Investments Co (K) Ltd -vs- Njomatha Investments Ltd and another Hc & Admiralty Division Civil Suit No. 57 of 2011.**

9. Further that the learned trial magistrate conduct was "apparent" in bias when she states that Auctioneers charges were Kshs192,335/= as at 21<sup>st</sup> December, 2012 and she could not see any payment receipt for this. That her conduct was clearly tainted in bias and lacked in impartiality and independence. They have put forward the case of **Standard Chartered Financial Services & A. D. Gregory And Manchester Outfitters (suiting divisions) Ltd (now) known as King Woolen Mills Ltd & 2 Others – Nairobi Court of Appeal Civil Appeal No. 224 of 2006.**

10. That the learned trial magistrate erred in allowing the Respondents Advocates to ignore the provisions of Order 51 Rule 14 of the Civil Procedure Rules and give evidence from the bar on contentious matters knowing very well that he lacked audience. They have relied on the case of **Joseph D. Halake –vs- Yunis Malik HCCC No 230 of 2004** Emukule J. quoted the case of **Rev. Jesse Kamau & Others –vs- the A.G. 2013 eKLR** which observed interalia that:-

**“Rules of court both substantive and procedural are a pillar in the dispensation of justice, the non-observance thereof, leads to abuse of the process of court which is a recipe for anarchy and chaos in the process of the court.”**

11. They further submitted that the learned trial magistrate erred in law and infact in failing to hold that the Appellant’s application dated 12.6.2013 had merit in particularly in consideration that the same remained unchallenged as at 24<sup>th</sup> June, 2013.

That no compelling reasons or evidence had been advanced by the Respondents for the failure to file a replying affidavit. They have relied on the case of **Galaxy Paints Co. Ltd –vs- Falcon Guards Ltd (2000) EA 885.**

12. That the learned trial magistrate chose to ignore the pleadings before court to unseat at the Appellant from the driver’s seat in the wheel of justice by formulating unfounded and unsubstantiated arguments against the application. That the question as to whether or not the auctioneers charges or costs were due and/or unpaid was a matter that ought to have been pleaded and a finding made.

13. That the learned trial magistrate exhibited a clear lack of impartiality in dealing with the matter and exercising her discretion. The court record shows that the Application dated 12<sup>th</sup> June, 2013 was for mention. The date of the application was to be taken. The Respondent’s Advocates confirmed that they had filed a response to the application dated 12<sup>th</sup> June, 2013.

The court record shows that the trial magistrate proceeded to make directions for the hearing of both applications and that they be dispensed by way of written submissions.

That she did this despite neither party moving the court.

14. That the two applications raised different issues to be heard together and the magistrate erred in ordering so. That the discretion exercised by the trial magistrate did not held sound judicial principles under the circumstances. They have relied on the case of **Hintar Trading Co. Ltd –vs- Elf- Oil (K) Ltd Appl No. 6 of 2010.**

15. That the learned trial magistrate erred in proceeding with the matter without any regard for the wrongful conduct of the Respondents, the attempted extortion by the Auctioneer and the substantial loss suffered by the Appellant. The Appellant prays that the Appeal be allowed with costs.

#### **THE RESPONDENTS’ SUBMISSIONS**

16. No Order dated 26<sup>th</sup> June, 2013 can be found in the record of Appeal hence it is unclear what Order the Appellant wishes to appeal against. That the Appeal is vague and lacks clarity as to what exactly the Appellant is seeking from this court.

That the Order being appealed against is not in the court record. They pray that prayers a, b and c of the memorandum of appeal be struck out. They have relied on the case of **Ndegwa Kamau t/a Sideview Garage –vs- Fredrick Tsika Kalumbo HCCA No. 5 of 2013** where Judge Ngaah Jairus quoted **Kyuma –vs- Kyema (1988) eKLR 185**, Also **Municipal Council of Kitale –vs- Nathan Fedha Civil Appeal No. 70 of 1983**, Also **Boy Juma Boy Rashid –vs- County Returning Office, Kwale County And 4 Others.**

17. No leave of court was sought to appeal from the Order of 26<sup>th</sup> June, 2013 hence the prayer must fail.

18. With respect to grounds 1 and 6, the Appellant’s contention is that the trial magistrate erred in failing to hold that the application dated 12<sup>th</sup> June, 2013 had merit. It is the Respondent’s contention that the same was allowed on condition.

The trial magistrate exercised her discretion correctly. The maxim He who seeks equity must do equity applies.

19. With respect to grounds 3 and 8, the Respondents contend that the trial magistrate did not err in law and infact by directing that the applications dated 12.6.2013 and 24.6.2013 be disposed of by way of written submissions. The trial magistrate did not err by directing that the two applications be heard together.

No objections were raised at the time when the Honourable Court issued those directives.

20. With respect to ground No. 4 and 5, it is the Respondents’ contention that the distress was occasioned by the Appellant in failing to pay rent and therefore any consequences arising from there should be borne by the Appellant. There was communication from the Respondents Advocates that the Appellants goods could only be released upon payment of the storage charges to the 2<sup>nd</sup> Respondent.

21. The Respondent had no comment to make with respect to ground No. 5 and 9 as the Appellant had failed to file and serve their written submissions in good time as ordered by the court.

22. With respect to ground No. 2 and 7 no evidence was given by the Respondent’s Advocates from the bar and submissions were not made from the bar. No objections were raised by the Appellant’s advocate who was present.

Further that ground No. 7 cannot stand as the Appellant admitted to being in rent arrears amounting to over Kshs.1 million. They pray that the appeal be dismissed with costs.

23. I have considered the grounds of Appeal, the written submissions of both counsels and the authorities cited. The Respondents preliminary point that the order dated 26<sup>th</sup> June, 2013 is not in the record of appeal is not true.

I have perused the record of Appeal and in pages 116-117 is the said Order. The objection on this ground is therefore overruled.

24. I have seen the said Order. The said Order being appealed against is that the Application dated 12<sup>th</sup> June, 2013 was allowed on condition:-

**a) "That the Plaintiff does deposit in court the Auctioneers charges as per the proclamation dated 14<sup>th</sup> March, 2013 being Kshs192,335 and storage charges as contained in bill attached to a letter of 28<sup>th</sup> May, 2013 being Kshs.190,000/=.**

**b) The amounts shall be deposited within 21 days of todays dated failure to which Order (a) will automatically lapse."**

25. I have gone through the court record with respect to the proceedings before the learned trial magistrate on 24.6.2013. Mr. Siminyu for the Plaintiff was present while Mr. Magiya appeared for the Respondent.

Mr. Magiya told the court that he opposed the grant of prayer (2) of the application on the grounds that the Auctioneer levied distress and was entitled to costs. He further informed the court the arrears had been paid but Auctioneers fees had not been paid.

I believe Mr. Magiya addressed the court with leave of the court.

26. On 21.6.2013 the matter was adjourned to 24.6.2013 so that Mr. Magiya could address the court with regard to prayer (2) of the application. Mr. Siminyu for the Applicant in the subordinate court did not oppose this directive.

In exercise of judicial discretion the court ought to hear and consider the case for both parties.

27. I find that the learned trial magistrate exercised this discretion properly by allowing the Respondent's Advocate to address the court. Infact this was after she had granted the Respondent seven days to file their response.

28. I find all the grounds of Appeal to be intertwined and that is why it will be cumbersome for me to deal with them one by one. I will therefore deal with them together.

29. Order 51 Rule 14 of the Civil Procedure Rules states;

**i) "Any Respondent who wishes to oppose any application may file any one or a combination of the following documents;**

**a) a notice of preliminary objection and/or;**

**b) replying affidavit and/or**

**c) a statement of grounds of opposition.**

**ii) The said documents in Sub-rule (i) and a list of authorities if any shall be filed and served on the applicant not less than three clear days before the date of hearing;**

**iii) Any application upon whom a replying affidavit or statement of grounds of opposition has been served under Sub-rule (1) may with the leave of the court file a supplementary affidavit.**

**iv) If a Respondent fails to comply with Sub-rule (1) and (2) the application may be heard exparte."**

30. Rule 16 states that; "the court may in its discretion limit the time for oral submissions by the parties or their Advocates or allow written submissions."

I find that the learned trial magistrate did not offend the rules by directing that the Application dated 12<sup>th</sup> June, 2013 and the one dated 24<sup>th</sup> June, 2013 be disposed of by written submissions. It was within her discretion in order to manage the judicial time well.

31. The learned trial magistrate also directed that the two applications be heard together. This has been faulted by the Appellant who claim the two applications raised different issues and could not be heard together.

I find that the learned trial magistrate ordered so, to give effect to the overriding objective envisaged under Section 1A and 1B of the Civil Procedure Act.

Section 1A of the Civil Procedure Act states;

1. “The overriding objective of this Act and the rules made herein under is to facilitate the just, expeditious proportionate and affordable resolution of the civil disputes governed by the Act.”

2. The court shall in the exercise of its powers under this Act of the interpretation of any of its provisions seek to give effect to the overriding objective specified in sub-rule (1).

3. A party to civil proceedings or an Advocate to such a party in under a duty to assist the court to further the overriding objective of the Act and to that effect to participate in the processes of the court and to comply with the directions and orders of the court.”

32. Section 1B of the Civil Procedure Act states;

1. For the purpose of furthering the overriding objective specified in Section 1A, the courts shall handle all matters presented before it for the purpose of attaining the following aims;

a) the just determination of the proceedings;

b) the efficient disposal of the business of the court;

c) the efficient use of the available judicial and administrative resources;

d) the timely disposal of the proceedings, and all other proceedings in the court, at a cost affordable by the respective parties; and

e) the use of suitable technology.”

As I stated earlier, the learned magistrate cannot be faulted for giving effect to the overriding objective. She did by ordering that the two applications be heard together in order save on judicial time. She did not offend any of rules.

A look at the Respondents application dated 24.6.2013 shows that the issues touched on the suit premises and the rent arrears.

33. I have looked at the court proceedings culminating in the order of 26.6.2013 and there is nothing to show that the learned trial magistrate misdirected herself.

In the case of Mbogo And Another –vs- Shah EALR 1968 the Court of Appeal held that;

**“it will not interfere with the exercise of the trial Judge’s discretion unless it is satisfied that the judge in exercising his discretion misdirected himself in some matters and as a result arrived at a wrong decision or unless it is manifest from the case as a whole that the Judge has been clearly wrong in the exercise of his discretion and that as a result there has been mis-justice.”**

I am guided by the above authority in finding that there is nothing to show that the learned trial magistrate had misdirected herself.

34. In the case of Karature Networks Limited –vs- Daly & Figgis Advocates, Civil Application NO 293 of 2009, the Court of Appeal held that:

**“The jurisdiction of this court has been enhanced and it’s latitude expanded in order for the court to drive the civil process and to hold firmly the steering wheel of the process in order to attain the overriding objective..... and its principal aims. In our view, dealing with a case justly includes inter alia reducing delay, and costs expenses at the same time acting expeditiously and fairly. To operationalize or implement the overriding objective, in our view, calls for new thinking and innovation and actively managing the cases before court including the granting of appropriate interim relief in deserving cases.”**

I find that the learned trial magistrate did not err by directing that the two applications be heard together and that they be disposed of by written submissions.

35. There is no doubt that the Appellant had defaulted in paying rent hence the levying of distress. This is shown by the several correspondences between the Advocates for the two parties.

The Appellant had occasioned the levying of distress and were to face the consequences arising therefrom.

36. In summary I find that grounds 1, 2, & 3 must fail. The Respondents’ Advocate addressed the court with leave of court. The Appellant was represented by counsel who did not raise any objection. The learned trial magistrate merely gave effect to the overriding objective so she cannot be faulted.

37. As I stated earlier the Appellant had defaulted in paying rent necessitating to the levying of distress and issues of the Auctioneers and storage charges had to be addressed before the goods could be released. Ground No. 4 therefore fails.

38The learned trial magistrate had not considered the Appellant's application fully. The Order granted was in the interim Grounds 5 and 6 also fail.

39. There is no evidence by way of affidavit that the Respondents were extorting from Appellant. The Appellant defaulted in paying rent Ground No. 7 also fails.

40. That learned trial magistrate was seized with discretion she directed how best she could handle the matters before her. Ground No. 8 also fails.

41. I have gone through the proceedings before the subordinate court and there is nothing to show that the learned trial magistrate was biased against the Appellant or had not been impartial.

42. All in all I find no merit in this Appeal and the same is dismissed with costs to the Respondents.

**It is ordered.**

**Dated, signed and delivered at Mombasa on the 22<sup>nd</sup> day of February 2018.**

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**L. KOMINGOI**

**JUDGE**

**22/2/2018**