



IN THE COURT OF APPEAL

AT NAIROBI

(CORAM: KIHARA KARIUKI, NAMBUYE AND MARAGA, JJ.A)

CIVIL APPEAL NO. 287 OF 2005

BETWEEN

JOHN GACHUBI KAMENYA.....APPELLANT

AND

SAMUEL NJUGUNA GITAKA & 4 OTHERSRESPONDENT

(An appeal from the Ruling/Order of the High Court of Kenya at

Nairobi (Hon. Mr. Mutungi) dated 4th March 2005

in

HCCC NO. 838 OF 2001)

JUDGMENT OF THE COURT

1. This is an appeal against the ruling of Mutungi J delivered on 4th March 2005 in Nairobi HCCC No. 838 of 2001 dismissing the appellant's suit as against the 2nd, 3rd, 4th and 5th respondents (hereinafter referred to as "the respondents").

2. In his plaint in that suit, the appellant claimed that in or about May 1978, he leased from Gatuthu Njuguna, now deceased (the deceased) a shop on his piece of land known as L.R. No. 4953/478 situate in Thika Municipality. Because the deceased required funds for his medical treatment, the appellant paid to him a deposit of Kshs.200,000/= which, they agreed, would be off set against any future arrears of rent. Thereafter the appellant regularly paid his monthly rent even after the demise of the deceased on 1st January 1988. On 6th October 2000 when the administrators of the deceased's estate demanded arrears of rent of Shs.81,000/=, the appellant advised them to off-set it against the deposit of Kshs.200,000/= that he had paid to the deceased. Despite that advice, on 5th November 2000 the 5th respondent closed the appellants shop on purported distress for arrears of rent and on 2nd December 2000 the 5th respondent carted away the appellant's shop goods. On 22nd February 2001 despite a restraining order of even date from the Business Premises Rent Tribunal, the appellant's shop was leased to a third party thereby

effectively evicting him. Thereafter the appellant filed the said suit and claimed a sum of Kshs.2,221,022/= being special damages he had suffered. He also claimed costs and interest.

3. The 1st respondent is the executor of the deceased's will. He did not enter appearance or file any defence to the appellant's claim. So interlocutory judgment was entered against him. The 2nd, 3rd, 4th and 5th defendants' are widows of the deceased. The 5th respondent is an auctioneer. On their part these 4 respondents entered appearance and filed a joint statement of defence. On the appellant's application, the 2nd, 3rd, 4th and 5th defendants' defence was on 16th May 2002 struck out on account of their failure to serve a copy of it upon the appellant as required by the then **Order 8 Rule 1(2)** of the **Civil Procedure Rules**.

4. After the suit had come up for formal proof on a number of occasions, on 21st January 2004 the 4 respondents applied to strike out the appellant's suit as against them on the ground that the same did not disclose any or any reasonable cause of action against them as the instructions to levy distress upon the appellant's shop had allegedly emanated from Gatuthu Njuguna Estates Limited. After hearing that application, in his ruling of 4th March 2005, Mutungi, J. granted it and struck out the appellant's suit against the 4 respondents thus provoking this appeal.

5. The appellant's seven grounds of appeal can be summarized into three main grounds being that the 4 respondents' defence having been struck out long before they applied to strike out the appellant's suit as against them, their said application had no legal basis and was therefore an abuse of court process; that the affidavit in support of that application was sworn by counsel for the 4 respondents who had no knowledge of the facts of the matter; and that on the material placed before him, the learned judge had no basis for striking out the appellant's case against the 4 respondents.

6. When the appeal came up for hearing before us on 19th June 2014, there was no appearance for the respondents. As they had duly been served, we allowed counsel for the appellant to proceed with the hearing ex-parte.

7. Having perused the record of appeal, we agree with Mr. Muriithi, learned counsel for the appellant that the learned Judge erred in striking out the appellant's suit as against the 4 respondents. On 21st January 2004, when those respondents applied to strike out the appellant's suit against them, their defence had long been struck out on 16th May 2002. Their application had therefore no legal basis and was an abuse of the process of court.

8. The affidavit in support of the 4 respondents' said application was sworn by their counsel, Mr. Jackson Njathi Mwangi. In that affidavit, counsel deposed to disputed factual matters and, to make matters worse, without disclosing the source(s) of his information. It is now trite law that counsel should never descend to the arena and get embroiled on dispute factual matters he has no personal information on. In **Kenya Horticultural Exporters [1977] Ltd v Pape)Trading as Osirua Estate) [1986] KLR 705**, this Court observed that :

“order XVIII rule 3(1) of the Civil Procedure Rules is not to be understood to provide that an affidavit in interlocutory proceedings may be sworn by a deponent who is unable to his own knowledge to prove facts, or that such an affidavit may be confined entirely to statements of information and belief even if the sources and grounds are shown. The words ‘may contain’ suggest that the main body of such an affidavit has to be confined to facts which the deponent is able of his own knowledge to prove”

In **Gerphas Alphonse Odhiambo – Vs – Felix Adiego, Civil Application No. NAI. 352 of 2005** this Court said such an affidavit by counsel should be given no or little weight.

9. On this ground alone, the learned Judge should have dismissed the 4 respondent's application

10. We also agree with counsel for the appellant that there was overwhelming evidence on record to

show that it was the 2nd, 3rd and 4th respondents, simply as the widows of the deceased, who gave the 5th respondent instructions to levy distress upon the appellant's property.

11. In his affidavit, which had been filed in Thika CMCC No. 1088 of 2000 and exhibited by the appellant through his affidavit in support of his application to strike out the 4 respondents' defence, Mr. Samuel Njuguna Gitaka, the Executor of the deceased's will, who was granted probate of the deceased's written will, stated that it was the deceased widows who had, without his knowledge and authority as the Executor of the deceased will, given instructions to levy distress. That is confirmed by M/s Waweru Gatonye & Co. Advocates' letter of 17th October 2000 instructing the 5th respondent to levy distress upon the tenants in the deceased's premises including the appellant. In that letter, those advocates stated that they acted "*for the directors of Gatuthu Njuguna Estates Ltd. who are landladies*" of the premises.

12. In her replying affidavit sworn on her own behalf and on behalf of the other two widows of the deceased, the 3rd and 4th respondents herein, the 2nd respondent deposed that "*being completely unaware of any alleged payment to our deceased husband we were compelled to issue distress instruction against the plaintiff who had fallen in arrears monthly (sic) to Kshs.81,000/=*". She then referred to M/s Waweru Gatonye & Co. Advocates said letter conveying their instructions to the 5th respondent to levy distress. In paragraphs 10, 11 and 12 of that affidavit, the 2nd respondent further deposed that after the sale of the appellant's shop goods fetched only Kshs.14,200/= they leased the appellant's shop to a third party to mitigate their loss.

13. The deceased widows may have been directors of Gatuthu Njuguna Estates Ltd., but M/s Waweru Gatonye & Co. Advocates' said letter instructing the 5th respondent to levy distress was written, not on behalf of that company but, on behalf of its directors "*who [were]the landladies*" of the premises. Other than that reference to Gatuthu Njuguna Estates Ltd., there is nothing on record to show that the instructions to levy distress emanated from that company. At the time of levying distress, the subject property was still registered in the deceased's name.

14. All this evidence was before the learned Judge. We therefore do not understand how the learned Judge could ignore it and find that M/s Gatuthu Njuguna Estates Ltd. gave the 5th respondent instructions to levy distress and proceed to strike out the appellant's case against the 4 respondents. In the Circumstances, we allow this appeal and set aside Mutungi J's said order of 4th March 2005 The appellant's suit against the 4 respondents is hereby reinstated for hearing and final determination by the High Court. Given the age of the case, we directed that the same be heard and disposed of on priority basis. The appellant shall have the costs of this appeal and those relating to the 4 respondents said application to be paid by the four respondents jointly and severally.

DATED and delivered at Nairobi this 31st day of July, 2014

P. KIHARA KARIUKI

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JUDGE OF APPEAL

R.N. NAMBUYE

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JUDGE OF APPEAL

D.K. MARAGA

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JUDGE OF APPEAL

I certify that this is a true copy of the original

DEPUTY REGISTRAR