



REPUBLIC OF KENYA
IN THE HIGH COURT OF KENYA
AT NAIROBI (NAIROBI LAW COURTS)
Civil Suit 834 of 2006

HASMUKH SUMARIA 1ST PLAINTIFF
J. P. CHAVDA 2ND PLAINTIFF
SURYAKANT SANGHRAJKA 3RD PLAINTIFF
MOHAMMED OSMAN 4TH PLAINTIFF
JAYESH JAYANTLAL T/A MULCHAND BROTHERS 5TH PLAINTIFF
RAMESH KHARWA 6TH PLAINTIFF
HARISH KHARWA 7TH PLAINTIFF

VERSUS

GUT VENTURES LIMITED DEFENDANT

RULING

In this application, brought under Order 39 Rules 1, 2 and 3 of the Civil Procedure Rules, the seven applicants, who are tenants of the Respondent Company, seek an injunction to restrain the Respondent from levying distress for rent in respect of the suit premises.

At some point, the 3rd and 5th Plaintiffs/Applicants, discontinued the suit against the Respondent, leaving the other five tenants to proceed with the same.

Essentially, their case is that there are no rent arrears due and owing, and that the proclamation is contrary to the Auctioneer's Act. In a supporting affidavit sworn by the 1st Applicant, Mr Hasmukh Sumaria, the Applicants say that the respondent has in fact been overpaid by Kshs.4,971,694/= as per Exhibit "HS 3". He has annexed several documents of accounts to support his claim.

Relying on the same exhibit, that is "HS 3" in the supporting affidavit of the Applicant, the Respondent has shown in paragraph 7 of the Replying Affidavit, that the balance outstanding and unpaid as of 31st July, 2006 is Kshs.3,820,000/=, even without adding any interest charges for late payments. The calculations shown in paragraph 7 of the Replying Affidavit stand to reason, and have not been disputed

by the Applicants. Indeed, they are based on the Applicant's own figures summarized in "HS 3".

I am, therefore, satisfied on a balance of probability that the Applicants owe the Respondent rent arrears of Kshs.3,820,000 as of 31st July, 2006.

However, the Applicant's second ground for seeking an injunction based on a defective proclamation must succeed. The Proclamation, exhibited as "HS 5" in the supporting affidavit, shows that the proclamation is in respect of **"All distrainable goods within this premises"** without itemizing the goods, and indicating the value of each item, contrary to Rule 12 (b) of the Auctioneers Rules, 1997. That rule states:

"Upon receipt of a court warrant or letter of instruction the auctioneer shall in case of movables other than goods of a perishable nature and livestock –

prepare a proclamation in Sale Form 2 of the Schedule indicating the value of specific items and the condition of each item, such inventory to be signed by the owner of the goods or an adult person residing or working at the premises where the goods are attached or repossessed, and where any person refuses to sign such inventory the auctioneer shall sign a certificate to that effect."

In its interpretation of that Rule, the Court of Appeal, in the case of Lakeland Motors Ltd vs Habhajan Singh Sembi (C. A. Nairobi No. 24 of 1998) said:

"There does not appear to be any provision in the Auctioneers Act, 1996 nor in the Auctioneers Rules, 1997 for dispensing with the foregoing rule. Yet the respondent proceeded to execute the decree and physically attach the applicant's movable goods without complying with the said rule. The flagrant disregard of the provisions of this rule smacks of gross irregularity in the respondent's execution process of the decree of the superior court in Civil Case No. 227 of 1997. It would be an abuse of the process of this Court if we were to countenance such an execution."

This Court, too, cannot countenance such action. The proclamation is invalid in law, and is hereby set aside.

Based on my findings here, I do not find it necessary to deal with several other points of objection raised by Mr Rach, Counsel for the Respondent, as those issues are only academic, and would not alter the decision I have reached.

So, in summary, the Applicants have failed to establish that they owe no rent arrears to the Respondent, and are therefore not entitled to the Orders sought. The interim Orders in their favour are hereby vacated. However, the proclamation having been struck out, the Respondent is hereby barred from proceeding to execution **based on that proclamation**. Nothing prevents the Respondent from initiating fresh execution if the rents are still in arrears.

The application is therefore dismissed with costs to the Respondent.

Dated and delivered at Nairobi this 29th day of November, 2006.

ALNASHIR VISRAM

JUDGE