



REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA AT ELDORET

CIVIL SUIT NO.101 OF 2003

KABUITO CONTRACTORS LIMITED PLAINTIFF

-VERSUS

KIPROTICH MAIYO DEFENDANT

RULING

This is an application by way of Chamber Summons dated 21st November, 2003. The applicant seeks for orders that a temporary injunction do issue to restrain the defendant from offering for sale or selling, disposing, alienating, removing, damaging, wasting or disposing of the plaintiff's asphalt plant pending the hearing of the application; and that the defendant be restrained from offering for sale or selling, disposing, alienating, removing, damaging, wasting or disposing of the plaintiffs asphalt plant before the determination of the suit. The application was filed under certificate of urgency. The application is supported by several grounds and an affidavit sworn by Amip Patel dated 21st November, 2003.

Mr. Nyaundi for the applicant submitted before me that the defendant/respondent had vide Kenya Gazette Notice No.7080 of 3rd October, 2003 advertised for the sale of the applicant's asphalt plant on the basis that there are outstanding storage and security charges. The asphalt plant is situated on the defendant's premises, **Kapsabet Block 12/Leserkech/03**. He submitted that there was no contract between the plaintiff/applicant and the defendant/respondent to that effect. He submitted that money due can only be for rent and not for security. The applicant bought the asphalt plant from M. J. Gleeson Int. Limited in early 1999 and took possession of the property in March, 2002 and there was written communication that established the rent payable to the respondent i.e.Kshs.45,000/=. This rent was for one year. Therefore the amount of Kshs.4,420,000/= demanded by the respondent had no basis. Recovery of rent cannot be enforced by right of sale under the Disposal of Uncollected Goods Act, as there are established legal procedures for recovery of rent. Section 3 and Sections 6 and 7 of the Disposal of Uncollected Goods Act govern the way disposal of uncollected goods is to be done under the Act.

This court may grant the injunction under Order 49 Civil Procedure Rules if an injury is likely to occur. As held in the case of **Giella & Cassman Brown** an applicant for an injunction is required to show that there is a prima facie case with probability of success, that he will suffer irreparable injury; and, if there is any doubt, the court is to make a decision on balance of convenience. The respondent has not shown that he will provide adequate compensation to the applicant. Therefore applicant is asking for an injunction to issue until the hearing of the case filed by the applicant.

Mr. Mbugua for the respondent opposed the application. He submitted that the respondent does not own the land referred to by the applicant. He submitted that the respondent owns the land in the Gazette Notice i.e. **Kapsaret/Kapsaret Block 12 (Lesrkech)/03**. If the relationship is that of landlord and tenant as submitted by the counsel for the applicant then the court does not have jurisdiction as the matter would fall under the Rent Restrictions Act (Cap.301) Section 4. Of the letters referred to, the only letter written on behalf of the respondent is the letter written by this firm. The cheque of Kshs.45,000/= was not sent to my client as the original forwarding letter is the letter in the court file marked as "AP2". The letter does not give the box number so it is not clear how it was transmitted.

The owner of the land became custodian of the plant and section 3(1) of the Disposal of Uncollected Goods Act requires the owner of the premises to provide storage and security of the goods. Section 5, 6 and 7 allow the owner to take out notice, and sale will not go on only if the depositor of the goods challenges the amount due – section 6(3) (a) and (b). If injunction is granted, it should be conditional. The applicant has not given any undertaking on the sums due. He referred me to the case of **K.I.G. Grocery & Restaurant Limited –vs- Gatabaki & Another [1972] EA 503** and submitted that in that case the court decided that it was not proper to grant an injunction in negative terms. He submitted that the application of the applicant does not fall within the relevance of the **Giella –vs- Cassman Brown case** . He asked the court to dismiss the application.

I have perused the provisions of the Disposal of Uncollected Goods Act (Cap.38). It is clear that the Act applies to goods in the possession or under the control of a custodian under a contract. Section 3 of the Act lists the types of contracts covered such as repair, valuation, survey, custody or warehousing for reward, carriage, hire of goods and gratuitous deposit or loan of goods. Therefore in order for the Act to apply there must be a contract express or implied between the parties, which must be of the class that is covered in the Act.

In the present case it is not clear whether there is a contract between the parties. The applicant bought the asphalt plant from M. J. Gleeson Int. Limited and not from the respondent. There is correspondence as to whether rent is payable to the respondent for the asphalt plant which is said to be on land that belongs to the respondent. Counsel for the respondent denies that the correspondence that appears to confirm rent payable was emanating from an agent of the respondent. In any case there will be an issue as to whether the respondent can legally proceed under the Disposal of Uncollected Goods Act to recover rent.

On the basis of the reasoning in the case of **Giella –vs- Cassman Brown [1973] EA 358**, I am convinced that the applicant has a prima facie case with a probability of success and that he will suffer irreparable injury if the respondent proceeds with the sale of advertised plant in the Kenya Gazette under the Disposal of Uncollected Goods Act.

I therefore grant an injunction restraining the respondent/defendant from offering for sale or selling, disposing, alienating, removing, damaging wasting or disposing of the plaintiff's asphalt plant pending the hearing and determination of this suit. Costs in the cause.

Delivered and Dated at Eldoret this 15th Day of January, 2004.

**George Dulu,
Judge**

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I certify this a true copy of the Original
DEPUTY REGISTRAR



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