REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA AT NAIROBI

CIVIL DIVISION

MISC. CIVIL APPLICATION NO. 138 OF 2020

SIMON NGOMONGE T/A

DOLLAR AUCTIONS....................APPLICANT/RESPONDENT

VERSUS

GEORGE KITHI............................RESPONDENT/APPLICANT

RULING

1. The undisputed background to the motion dated 15th February 2021 by **George Kithi** (hereafter referred to as the Applicant for the purposes of the motion) is as follows. By a letter dated 16th November 2018, the firm of **Kirwa Koskei & Co. Advocates** instructed **Simon Ngomonge t/a Dollar Auctions** (hereafter referred to as the Respondent for the purposes of the motion) to levy distress for rent arrears amounting to Sh. 1,518,959.64 against the firm of **Kithi & Co Advocates** who were at the time tenants at Maendeleo House, the property of Maendeleo ya Wanawake Organization.

2. Although the Applicant appears to dispute service by the Respondent of the proclamation notice dated 21st November 2021 upon one Lilian, an alleged employee of the firm of **Kithi & Co. Advocates,** it is common ground that the said proclamation was brought to his attention soon thereafter, pursuant to which the Applicant moved the Business Premises Rent Tribunal (hereafter the BPRT) in **Tribunal Case No. 943 of 2018** under certificate of urgency seeking interim orders against **Kirwa Koskei & Co. Advocates** and the Respondent. On 23rd November 2018, the matter was certified urgent, and orders issued to restrain the said parties *"from taking, selling or in any way interfering with the goods purportedly distrained and proclaimed…on or about the 22nd off November 2018*" or interfering with the Applicant's quiet possession of the business premises or evicting the Applicant therefrom. The matter was set for inter partes hearing on 28th January 2019. According to the Respondent the Applicant subsequently reached an agreement with **Kirwa Koskei & Co. Advocates** and paid the rent arrears.

3. On 10th March 2020 the Respondent filed the Auctioneer's Bill of Costs herein against **George Kithi** in person**.** The said bill of costs is the subject of the motion dated 15th February 2021 by which the Applicant is seeking that the bill of costs be struck out. The motion is expressed to be brought under Section 1A, 1B and 3A of the Civil Procedure Act, Order 2 Rule 1 of the Civil Procedure Rules, Rule 55 of the Auctioneers Rules and Schedule 4 Part II of the Auctioneers Rules of 1997.

4. The motion is premised on the grounds on the face of the motion, and as amplified in the affidavit of the Applicant who describes himself as the managing partner of the firm of **Kithi & Co. Advocates** hence duly authorized and competent to swear the affidavit. The Applicant deposes that the Respondent's bill of costs is premised on a distress for rent allegedly carried out upon the instructions of Kirwa Koskei & Company Advocates, the purported landlord, as against the firm of **Kithi & Co. Advocates** ; that the firm of **Kithi & Co. Advocates** has been in occupation of the property known as Maendeleo House pursuant to a tenancy agreement with Maendeleo Ya Wanawake Organisation (hereafter MYWO) which owns the property ; that the firm of **Kirwa**

Koskei & Company Advocates is a stranger and no landlord/tenant relationship exists between the two advocate firms; and that the firm of **Kithi & Company Advocates** upon which the proclamation notice was allegedly served is a legal entity capable of suing and being sued as a distinct entity from its directors and shareholders and as such, the Applicant is non-suited in the taxation application.

5. Counsel further disputes service of the purported proclamation notice upon **Kithi &Co. Advocates** through one Miss Lillian stating that no such person had ever been employed as a secretary in his firm but he confirms that he had become aware of the said notice in November 2018. He asserts that prior to receiving the proclamation notice his firm received exaggerated rent demands from various third parties claiming to be managing agents/executive officers of MYWO whereas no notification of increase in rent had been communicated by MYWO; and that at the time of these demands and the purported proclamation, the firm of **Kithi & Co. Advocates** was not in rent arrears. He asserts that the Respondent should recover his fees from the firm that instructed him while purporting to be the landlord and not from **Kithi &Co. Advocates** as neither execution as would attract fees was levied nor proclamation notice served upon his firm and hence the bill of costs is scandalous, vexatious, frivolous and ought to be struck out.

6. The Respondent opposed the motion through a replying**.** Therein, he deposes that having been instructed by **Kirwa & Koskei & Company** Advocates to levy distress for rent, he had proceeded to proclaim the Applicant's goods and as per practice the proclamation notice was served upon the secretary of **Kithi & Company Advocates** who introduced herself as Lilian. He asserts that the Applicant cannot claim to be a stranger to the firm of **Kirwa & Kosgei Company Advocates** and the Respondent, as he had subsequent to the proclamation moved the BPRT for injunctive orders against the said parties in Tribunal case No. 943 of 2018. Moreover, that the firm of **Kithi & Co. Advocates** is not a duly incorporated entity and therefore the Applicant was properly enjoined in his capacity as the sole proprietor and or partner therein. Finally, citing the Auctioneers Practice Rules he contended that a debtor is liable to pay auctioneers' fees after a proclamation notice is served upon them and that the subject bill has been outstanding since 2018 and ought to proceed to taxation.

7. The motion was canvassed by way of written submissions. The Applicant reiterated his affidavit material concerning the Respondent's asserted instructions to argue that only the landlord, in this case the MYWO or a person acting under their instructions could properly instruct the bailiff to levy distress and that the Respondent herein had not demonstrated that he was duly instructed to levy distress against the firm of **Kithi & Co. Advocates**. He cited the case of **Royal Gardens Hospital v Ebrahim Omenyi Ambwere & Another (2018) eKLR** to support his submissions.

8. Counsel contended that for the foregoing reason, the fact that no proclamation was properly served on his firm and that the firm was not in rent arrears at the time, the distress for rent was illegal and further that, because no execution was carried out, there was no basis for the auctioneers' bill of costs. Counsel cited the case of **C.Y.O Owayo v George Hannington Zephania Aduda t/a Aduda Auctioneers & Another [2007] eKLR** in this regard**.** Following up on the foregoing, counsel relied on the case of **Ahmednasir Adbikadir & Co. Advocates v National Bank of Kenya Limited [2006] eKLR** to submit that the bill of costs herein was founded on an illegality and could not be sustained.

9. Regarding joinder, the Applicant invoked the provisions of Order 1 Rule 10 of the Civil Procedure Rules and called to his aid the decisions in **Diamond Trust Bank Kenya Limited v Richard Mwangi Kamotho & 2 Others [2017] eKLR** and **Skair Associates Architects v Evangelical Lutheran Church of Kenya & 4 Others [2015] eKLR** to assert that that the firm of **Kithi & Company Advocates** is a separate legal entity from the Applicant. He urged the court to allow his motion.

10. On the part of the Respondent, it was asserted citing **Halsbury's Law of England 4th Edition Volume 1(2)** paragraph 19 and 20 that a principal/agent relationship can be created by express appointment made orally or in writing or can be implied from conduct or through ratification by the principal of the agent's actions on his behalf. Counsel submitted that the Respondent having received express instructions from **Kirwa & Koskei Co.** Advocates who acted on behalf of MYWO lawfully acted as the landlord's agent in levying distress for rent. And that the action prompted the cause filed by the Applicant in the BPRT. Restating the provisions of Rule 7 and 55 of the Auctioneers Act, counsel submitted that a proclamation notice having been served, the Respondent is entitled in law to raise the itemized bill of costs for taxation in view of the dispute arising herein. The court was urged to consider that the bill has remained unsettled since 2018 and that the application if allowed will work injustice and prejudice against the Respondent. Counsel urged that the motion be disallowed so that taxation of the bill of costs could proceed.

11. The court has considered the rival affidavit material and submissions of the parties in respect of the motion. In my opinion, two broad issues arise for determination, namely, whether the distress for rent was legal and whether the Applicant herein was properly enjoined in this matter. The first issue encompasses three sub- questions, namely whether the proclamation notice was duly served

upon the Applicant's firm, whether the Respondent was properly instructed and whether the firm of **Kithi & Co. Advocates** was in arrears of rent at the material time. I propose to deal with the sub-issues arising under the first issue in the order in which they are set out.

12. The dispute arises from the asserted proclamation upon the firm of **Kithi and Co. Advocates** on or about 22nd November 2021, and while the Applicant claimed at paragraph 14 of the supporting affidavit that the service of the proclamation was upon a stranger to his firm, in his depositions at paragraphs 7-10 of the said supporting affidavit, the Applicant all but admits that the proclamation was indeed served on the firm. The exhibited copy of the notice states at the bottom that a secretary by the name Lilian signed the notice. Indeed, there is what appears to be a signature at the bottom of the Respondent's copy exhibited as annexure **SN2** to his replying affidavit.

13. The fact of the service is also confirmed by the Respondent in his affidavit and independently, by the copy of the **BPRT** order dated 23.11.2018 marked **"SN3"** and annexed to the replying affidavit. The order shows the date of the "purported" proclamation to be 22.11.2018, just a day after the proclamation notice date of 21.11.2018 (annexure **"SN2"** to replying to affidavit). If indeed a stranger to the firm had been served, it would be unlikely that the Applicant would have been in possession of the proclamation notice so soon afterwards .

14. The Applicant concedes in his affidavit that the notice came to his attention but does not explain how that happened, and though not disclosing at the time of applying to this court that he had already approached the BPRT, he has in submissions confirmed the proceedings. This court is therefore satisfied that the notice was indeed served upon the firm of **Kithi & Co. Advocates** on 22.11.2018. The question whether such proclamation or distress amounts to attachment or execution under the Auctioneers Act and therefore attracting fees is not a matter for consideration by this court but by the Taxing Master.

15. Regarding the Respondent's instructions, there is no dispute that the property known as **Maendeleo House** in which the firm of Kithi & Co. Advocates were tenants is the property of MYWO and not **Kirwa Koskei & Co. Advocates** who gave instructions to the Respondent. Therefore, under section 3(1) of the Distress for Rent Act, only the landlord, MYWO could distrain for rent either directly or through appointed agents. The Respondent herein has shown that he was duly instructed by the firm of **Kirwa Koskei & Co. Advocates** to levy distress upon the Applicant's firm.

16. The letter of instruction from the said firm and dated 16th November 2021 is exhibited as annexure **SN1** to the Respondent's affidavit. The letter does not name MYWO as the landlord but indicates that the tenancy in question is in **Maendeleo House** and the tenant is **Kithi & Co. Advocates**. Nowhere does the letter describe the firm of Kirwa Koskei & Co. Advocates as the landlord. Indeed, the words ***"C. C Client"*** at the bottom of the letter indicate that the firm is acting on behalf of its client and not in its own right. No evidence has been tendered to show that the said law firm had no instructions from the owners of the building to act as they did. According to the Respondent, subsequent to the BPRT orders the Applicant and the firm of **Kirwa Koskei & Co. Advocates** entered into an agreement and the former settled his rent arrears. This deposition was not controverted.

17. Equally, the proclamation notice is headed **"MAENDELEO HOUSE KIRWA KOSKEI & CO. ADVOCATES"** in the space provided for the landlord and **Kithi & Co. Advocates** in the space provided for the tenant. In an ideal situation, the landlord's name should have been clearly indicated to be **MYWO** and not **Maendeleo House** but these slips and misdescriptions do not without more, invalidate the documents or purport a landlord/tenant relationship between **Kirwa Koskei & Co. Advocates** and **Kithi & Co. Advocates** as the Applicant has claimed. I think to read the documents in that way would be stretching things, especially in this case where the tenant was a law firm with a long-standing tenancy in Maendeleo House, hence aware of the identity of the landlord. It is a fact of notoriety for several decades now and of which this court takes judicial notice that the building known as Maendeleo House has always been the property of MYWO.

18. Considered in this light and reading the proclamation notice in its entirety together with the letter of instruction the notice could not be construed to impute that the firm of Kirwa Koskei & Co. Advocates were passing themselves off as the Applicant's landlord and purporting to issue instructions to the Respondent. In his replying affidavit, the Respondent has clearly indicated how he received instructions from the firm of **Kirwa Koskei Advocates** to levy distress at **Maendeleo House** against Kithi & Co. Advocates , and unless it was demonstrated that the said law firm itself had not been duly instructed by MYWO, which has not been shown, it must be concluded that at best, the said law firm had due instructions from the landlord before instructing the Respondent, or at worst was an ostensible agent of the landlord. The fact that the Applicant had between December 2016 and January 2017 received notifications of the appointment of Messrs. **LLoyd Masika** as managing agents of the building (see Applicant's annexure 3(a) &(b)) does not exclude the involvement of different law firms and auctioneers in the event of default by

the tenant.

19. Concerning the issue of outstanding rent, the proclamation notice and letter of instruction to the Respondent indicate that rent arrears in the sum of Sh. 1, 518,959.64 was due from **Kithi & Co. Advocates** as of 16th November 2018. The Applicant asserts in his affidavit that the said firm was not in arrears at all and claimed in submissions that that was the basis upon which he obtained orders from the BPRT. On his part, the Respondent asserts that after the BPRT orders issued, the Applicant entered into an agreement with **Kirwa Koskei & Co. Advocates** and paid the outstanding rent.

20. The BPRT order relied upon by the Applicant was evidently a temporary one given at the interim stage. It does not state the reasons thereof, and no further proceeding or order from the said Tribunal was furnished by the Applicant to demonstrate the Tribunal's final findings or orders concerning the claimed rent arrears leading to the distress. The Applicant could have but did not obtain any evidence from his landlord to demonstrate to the court that his firm was up to date concerning rents in the material period. The tenant need not have been in arrears amounting to the actual sums stated in the proclamation. The landlord's right to levy distress accrues whenever any amount of rent due from a tenant is in arrears. In **J.K. Chatrath & Another v Shah Cedar Mart (1967) E.A. 93** the Court of Appeal for Eastern Africa in upholding the position in England as applied by section 3 of the Distress for Rent Act stated that the landlord was entitled to distrain for rent if any rent was in arrears and that the mere taking of such goods did not become illegal merely because the value of goods distrained exceeded what was actually in arrears. This court is not persuaded that the Applicant has established that the tenant herein was not in arrears at all at the time of the impugned distress.

21. In the case of **C.Y.O v George Hannington Zephania Aduda T/A Aduda Auctioneers** cited herein by the Applicant the Court of Appeal stated:

Section 3(1) of the Distress for Rent Act states as follows:

"3(1) Subject to the provisions of this Act, any person having any rent service in arrears and due upon a grant, lease, demise or contract shall have the same remedy by distress for the recovery of that rent or rent service as is given by the Common Law of England in a similar case."

Thus, in looking into what constitutes illegality of distress for rent, we must not only consider our laws, but must also consider what in England would be considered an illegality in the levy of distress. In Halsbury's Laws of England, 4th Edition Volume 13 paragraph 368 it is stated:

"368. Circumstances in which distress is illegal

An illegal distress is one which is wrongful at the very outset, that is to say either where there was no right to distrain or where a wrongful act was committed at the beginning of the levy invalidating all subsequent proceedings.

The following are instances of illegal distress; a distress by a landlord after he has parted with his reversion; a distress by a person in whom the reversion is not vested; a distress when no rent is in arrears; or for a claim or debt which is not rent; as a payment for the hire of chattels; a distress made after a valid tender of rent has been made; a second distress for the same rent; a distress off the premises or on the highway; a distress in the night that is between sunset and sunrise ………… a distress levied or proceeded with contrary to the law of Distress…….."

22. Having considered the three grounds upon which the Applicant asserted illegality in respect of the distress for rent, the court is not satisfied that any of them have been made out.

23. Now turning to the second issue, this court readily agrees with the Applicant that, based on the provisions of Order 1 Rule 10(2) of the Civil Procedure Rules and this court's decision in **Diamond Trust Bank Kenya Limited v Richard Mwangi Kamotho & 2 Others (2017) eKLR,** the Applicant is non-suited to the bill of costs. Not because he is a separate entity from the firm of **Kithi & Co. Advocates**, which is evidently a partnership in which the Applicant is the managing partner, but because the process of distress was taken against the firm of **Kithi & Co. Advocates** and not the Applicant as a person, although he did move the BPRT in that capacity. The bill of costs ought to have been made out against the tenant in respect of whom instructions for distress issued and distress commenced.

24. In the circumstances, the Court will invoke the provisions of Order 1 Rule 10(2) of the Civil Procedure Rules and order that the Applicant's name be struck out from the cause, and that the firm of **Kithi & Company Advocates** be enjoined as the Respondent in this matter. Leave is granted to the Respondent to amend the bill of costs accordingly within 14 days of today's date, whereupon taxation shall proceed before the Taxing Master. To that extent only the motion has succeeded. Costs will abide the outcome of the cause.

DELIVERED AND SIGNED ELECTRONICALLY ON THIS 9TH DAY OF DECEMBER 2021

C.MEOLI

JUDGE

In the presence of:

Ms. Katama for the Applicant

Ms. Mungai for the Respondent

C/A: Carol

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