

THE REPUBLIC OF UGANDA
THE HIGH COURT OF UGANDA AT KAMPALA
(COMMERCIAL DIVISION)

HCT - 00 - CC - MC - 9 - 2009

MEGALIES DISTILLERS (U) LTD 1ST APPLICANT
KEITH BROWN 2ND APPLICANT

VERSUS

DAVID BYENSI 1ST RESPONDENT
MAGGIE BYENSI 2ND RESPONDENT

BEFORE: THE HON. JUSTICE GEOFFREY KIRYABWIRE

R u l i n g

This application is brought by Notice of Motion under S. 92 and 98 of the Civil Procedure Act and O. 52 of the Civil procedure Rules for orders that the applicants moveable property seized by the respondents within the premises at Bujenje in Masinde on 3rd August 2007, as stipulated in the attached inventory be released in good order and condition, and costs.

The application is supported by the affidavit of Keith Brown the Managing Director of the 1st applicant, and the 2nd applicant in this application.

The brief background to this application is that the respondents made an exparte application for an order of distress, in the Chief Magistrates court vide MC MSD 00-CV-MC-044-2007. The order for distress was granted on the 4th October 2007.

In the affidavit in support of the application, Mr. Keith Brown (hereinafter referred to as the 2nd applicant) deponed that; on the 5th of June 2006, the 2nd applicant entered into a tenancy agreement on behalf of the 1st applicant, with the 1st respondent for use of the respondents' premises, to establish a distilling factory and for storage purposes. The said premises included houses for residence for the applicants and their employees. The 1st applicant deponed that the agreed rent was Ushs 500,000/= per month and that the 2nd respondent paid for six months with effect from 1st July 2006. Furthermore, that the 1st applicant made renovations and additions to the existing buildings, worth Ushs 57,000,000/=, fixed expensive machinery in the buildings, and established a distillery and packing plant. The 2nd applicant further deponed that the respondents inspected and acknowledged the renovations and additions on the premises.

The 2nd applicant further deponed that in about August or September 2006, when the applicants demanded quiet possession of the premises, the respondents made the applicants sign a new lease agreement, which the applicants refused to honour, due to its unconscionable nature. Furthermore,

that the respondents made it difficult for the applicants to use and occupy the premises, and that they failed to honour the material agreements such as quiet possession and provision of water on the premises.

The 2nd applicant deponed that the 1st respondent instituted charges of theft against him and on the 3rd August 2007, the 2nd applicant was ordered by the Officer in Charge of the Criminal Investigations Department (O/C CID), Masindi, not to return to the premises. Furthermore, that on that same day, an inventory of the property on the premises was signed by the 2nd applicant and the 1st respondent. The 1st applicant further deponed that the 1st respondent, without notice to the applicants obtained a distress for rent order; upon ex parte proceedings from the Chief Magistrates' Court of Masindi (vide Miscellaneous Cause No. MSD 00-CV-AC-44/2007). This on the allegation that the applicants had abandoned the said equipment at the premises. Furthermore, that consequent to that order some of the said equipment belonging to the applicants was seized. The 2nd applicant further deponed that the said seizure was illegal.

It is the case of the applicants that they are not indebted to the respondent for rent, and that the balance of indebtedness was at all material times in the applicants favour, by virtue of a set-off against the value of the applicants' renovations of the premises. Furthermore, that the respondents, at the signing of the inventory on 3rd August 2007, unilaterally and without notice terminated the contract between the parties and as thus, the land-lord tenant relationship was terminated, hence it no longer existed when the respondents distressed for rent on 27th August 2007.

The 2nd applicant further deponed that the respondents did not follow the procedure of attachment as prescribed by law, in executing the order for distress for rent.

In reply, the 1st respondent deponed that the properties mentioned in the application are in the safe custody of the 1st respondent, under a lawful order of the court that has not been set aside, and that the 1st respondent is in possession of the said properties in exercise of a lien as an unpaid landlord. Furthermore that the applicants have never made any improvements to the premises and that there was a subsisting landlord-tenant relationship before the court granted the order of distress for rent.

This application was forwarded by the Resident Judge Masindi to be heard at this Division as he found it to be a commercial matter.

At the hearing of the application, the applicants were represented by the second applicant Mr. Keith Brown in his personal capacity and that of Managing Director of the first applicant company as they had no legal counsel. The respondents were represented by Mr. Gadala.

The principal Order sought by the applicants is that their moveable property seized by the respondents within the suit premises at Bujenje Masindi on the 3rd August 2007 as shown in the inventory list be released and in good order and condition.

The 2nd applicant submitted that the applicants were not indebted to the respondents for rent because the rent was set off against the improvements made by the applicants on the premises, on the basis of an oral agreement between the parties. The 2nd applicant in this regard submitted that with the permission of the respondents, the applicant had spent in excess of Ushs 40,000,000/= to upgrade the premises and this would be the basis of the set off.

The second applicant submitted and denied that he had ever been served with any notice/demand to pay rent in South Africa or at all as alleged in the application made by the respondents to distress for rent.

The second applicant also submitted that the applicants were forced to execute a second lease agreement for the same premises on the 4th September 2006, which this was illegal because there was a subsisting agreement dated 5th June 2006, upon which the applicants had paid rent. He thus submitted that the 2nd agreement was signed by the applicants under duress, undue influence and misrepresentation and was therefore void ab initio, and any payments made under this agreement should be calculated on the first agreement.

In addition to this, the 2nd applicant submitted that the inventory showed that the respondents had terminated the lease on 3rd August 2007, and therefore, the landlord-tenant relationship was no longer subsisting at the time of distress. He submitted that the existence of a landlord-tenant relationship was required for there to be distress for rent and he relied on the case of **TUMUSHABE v. ANGLO AFRICA LTD** (SCCA No. 7 of 1999). He further noted that some of the items seized were not included in the distress order, and therefore, the same were seized illegally.

Furthermore, the 2nd applicant submitted that the procedure for attachment is clearly provided under O.22 of the Civil Procedure Rules and that the same was not followed when the respondents executed the order for distress.

The 2nd applicant further submitted that the order for distress was defective because the application was made ex parte without notice to the applicants contrary to O.52 r 2 of the Civil Procedure Rules.

On the other hand Mr. Gadala, counsel for the respondents submitted that the matters in dispute in this application were already dealt with by the Chief Magistrates Court in Masindi, which issued an order for distress and that the said order has never been set aside. Furthermore, that the 1st applicants filed objector proceedings in the same court vide MA No. 64 of 2007 and the 2nd applicant filed MA No 102 of 2008, in the same court, seeking to set aside the orders of that court.

Counsel for the respondents further submitted that at the time the order for distress was granted by the lower court, the trial magistrate was satisfied that there was a landlord-tenant relationship existing between the applicants and the 1st respondent. Furthermore, that the 1st applicant signed two tenancy agreements on different dates, for different premises and different users. Counsel for the respondents submitted that the 1st respondent has a lien on the property in dispute as an unpaid landlord, and that the distress was lawful.

Counsel for the respondents further submitted that proceedings for distress for rent are not provided for under O. 22 of the Civil Procedure Rules and therefore, the procedure set out for execution there under was inapplicable in the execution of the order for distress.

I have carefully considered the Motion and the submissions of the parties for which I am thankful.

I need to point out at the outset that the prosecution of this application by the applicants was complicated by the absence of a retained counsel on their behalf as the second applicant had to

handle the case by himself as a litigant. Whereas there is nothing illegal about this given the subject matter this was not the best option and significantly slowed the hearing.

Law and Procedure for applying for an Order for Distress for Rent

The Order for Distress for rent date 4th October 2007 was made by Notice of Motion (Ex Parte) pursuant to M. A. 044 of 2007 at the Chief Magistrates Court at Masindi under Section 2 of the Distress for Rent (Bailiff's) Act and Order 52 rules 1 and 3 of the Civil Procedure Rules (CPR). Under Schedule "A" to that Order the following items were attached

1. IVAR VR 140 BOILER
2. BYWORTH BOILER
3. SULZER COOLING TOWER
4. STAINLESS STEEL PROCESSING TANK

The procedure for applying for under for an order for distress for rent under Section 2 of the Distress for Rent Act is not provided for under the said Act and that has been a lacuna in our law for a long time. In the case of **WAMPEWO SERVICE STATION V. ITALIAN GARAGE (PIZZANDI) LTD** [1963] EA 455 (HCU), Jones J found as follows;

"...from my research, there is only one ordinance dealing with distress for rents extant in Uganda i.e. the Distress for Rents (Bailiffs') Ordinance Cap 116 Laws of Uganda) (now Distress for Rents (Bailiffs') Act Cap 76.). That deals with the appointment of bailiffs, the cancellation of their certificates and penalties for acting without certificates. Court Brokers Rules were promulgated under the Courts (Rules) Ordinance of 1956, but they merely elaborate on the subjects dealt with in the Distress for Rent (Bailiffs') Ordinance Cap 116 (now Distress for Rents (Bailiffs') Act Cap 76)

The law applicable to distress would therefore appear to be, by virtue of S.2(b) (i) of the Judicature Ordinance, 1962, the common law and statutes of general application in force in England on 11th August 1902, on this subject." This position I am afraid has not been changed to date and needs urgent legal reform as to how to operationalise applications and Section 2 of the Act.

The practice now adopted by the Bar and seems to have been accepted by the lower Courts is to apply for a distress Order under Section 2 of the Distress for Rent (Bailiff's) Act by way of Notice of Motion Ex Parte under Order 52 rules 1 and 3 of the CPR. I have gathered that the application is made ex parte to prevent the tenant spiriting away his property on notice being given to him or her. This is what was done in this case.

I think the time has come in the absence of direct legislation to evolve some best practices with regard to Orders made under Section 2 of the Distress for Rent (Bailiff's) Act. I think that when a motion is made under section 2 above a special certificate to distress for rent the order should be made with conditions as to time then the motion served on the respondent to show cause why the Order should not be extended until rent is paid. This would give the respondent an opportunity to the respondent to be heard in the matter.

In the case of **Assist (U) Ltd V Italian Asphalt and Haulage Ltd & Anor** HCCS No 1291 of 1999 I referred to the definition of distress in **The Concise Law Dictionary** (6th Edition) which is in full

"The act of taking moveable property out of the possession of a wrongdoer, to compel the performance on an obligation, or to procure satisfaction on an obligation committed It is a mode of legal "self help" e.g. detaining for rent due. Also, the goods so detained upon. At common law the right was to retain the thing seized until compensation was made and included no right of sale; the landlord's power of sale of distress for rent is statutory... "

Position at common law that the landlord could not sell the items distressed held in the case of **Lyans V Elliot** 1 QBD (1876) 210 at 213. In Uganda the Distress for Rent (Bailiff's) Act does not give the landlord the power to sell distressed items so the common law would still be applicable in Uganda. This is important because the Hon Justice George Kanyeihamba (JSC as he then was) in the Supreme Court of case of **Tumushabe V M. S. Anglo African and Anor** SCCA No 79 of 1999 held

"He who chooses to distress for rent under the Act must do so strictly in accordance with the provisions of that Act"

Prayer to release property that is distressed

The above notwithstanding considering the affidavits and the submissions of the applicants, I find that the grounds upon which the applicant relies in this application can for ease of addressing the issues raised in this application;

1. The order of distress is illegal because no notice of the application was given to the applicants, and that the court relied on an affidavit which contained falsehoods, in granting the said order.
2. There was no land-lord tenant relationship between the parties at the time the order for distress was made because the said relationship had been terminated on 3rd August 2007, when the parties signed the inventory.
3. The second lease agreement is invalid because the same was signed by the applicants under duress, undue influence and misrepresentation, and there was already a valid and subsisting agreement for the premises.
4. The applicants were not indebted to the respondents for rent because the rent was set off against the improvements made by the applicants on the premises, on the basis of an oral agreement between the parties.
5. The items distrained upon were not included in the order of distress.
6. The procedure for attachment is clearly provided under O.22 of the Civil Procedure Rules and the same was not followed when the respondents executed the order for distress.

From the onset it is clear to me that there is a serious rent dispute between the parties. There are even two rent agreements for the same property. From the records of the lower court it appears that the applicant was removed from the suit property following a complaint to the police that there was a case of theft against the applicant by the respondents. This according to the police turned out to be false. It however had the effect of putting the respondents back into possession of the suit property on the 3rd August 2007. The applicant was however not allowed to move out of the suit property with some items that were listed in an inventory made before the police. The Order for distress followed thereafter on the 4th October 2007.

Given the law and practice for distress for rent discussed above I cannot say that the application made Ex Parte for a distress order was illegal. In any event a review the court file shows that the present applicant filed MA 064 of 2007 (arising out of MA 44 of 2007) against the first respondent objecting to the distress. This was the right way to handle this issue but the application was not prosecuted. So the Orders under MA 044 of 2007 that granted the distress order remain in force.

Furthermore even though it could be stated as argued by the applicant that the landlord – tenant relation was brought to an end on the 3rd of August 2007 the fact that the relationship did exist would at common law allow the respondents to distress for rent as long as the applicant's property was still on the suit property.

As to the validity of the second lease and whether the applicant was entitled to a set off on rent on improvements made to the suit premises these are contentious matters that need to be resolved in a regular suit but not in an application of this nature. A review of the court file shows that the respondent sued the present applicant In HCCS 075 of 2007 in which the present applicant filed a counter claim against the present respondents. This suit too is pending. A review of the Court file however shows that a proposal to do a valuation of alleged improvements to the suit property was discussed between the parties on or about the 24th of June 2010 but this came to nothing.

The applicant submitted that the following items are being retained by the respondents as indicated in the inventory signed by them but are not part of the distress order namely

Miscellaneous

- 15 boxes with empty 24 x 200ml bottles
- 1 wooden crate 120 x 120 x 120
- 25 bags of rice flour
- 1 bag of lime
- 4 palettes
- 8 x 20 litre jerry cans
- 13 plastic crates
- 6 x 10 litre jerry cans

- 3 plastic buckets
- Cardboard boxes
- 1 contactor for grinding machine replacing faulty one there previously
- 1 chimney section extended on grinding machine

Tools

- 1 sprit level
- 1 chipping hammer
- 2 pressure valves
- 1 pair of pliers
- 2 adjusting spanners
- 1 monkey wrench
- 1 glove (1/2 pair)
- 1 protective glasses
- 1 welding glasses
- 2 plastic 12 water valves with 1 stainless nipple
- 1 hacksaw and extra blade
- 1 control box with temperature control and contractor
- 1 x 1/2" spirax steam trap
- 2 star screw drivers wera
- 3 flat screwdrivers wera
- 6 spanners 20,22,17,15,14, 2 x 13

Piping (loose)

- 1 1/2" steam pipe and fittings also other sizes including valves, flanges, steam trap
- 1 1/2 " steam pipe and fittings, flanges, steam trap
- Steam/water separator

Miscellaneous

- 1 steel stand 140 x 70 x 120
- 1 timber stand
- 1 stand square tubing 1 ½“ fixed on wall
- 1 tripod of galvanized pipe 5m

Plastic plumbing pipes

a. Loose

- 3 x 2” full length
- 2 x 2” half lengths
- 1 ¼ “ 1 full length
- 1 ¼ “ ½ length
- 1” 1 length

b. Installed

Various lengths to transport water to shed Pump to shed Cooling tower to shed

Fittings for steam and water;

- Galvanized 40mm T-piece
- 4 x 40mm nipples (photo taken)
- 1 x 40mm ball valve
- 1 x 40mm elbow
- 1 x 40/20mm reducer
- 1 x 40mm nipple
- 1 x 40mm ball valve
- 1 x 40mm stainless steel elbow
- 1 x 40mm plastic nipple
- 1 x 40mm steam T-piece
- 1 x 40mm steam nipple/connector
- 1 x 40mm steam valve
- 2 x 40mm nipple/connector
- 1 x 40mm elbow
- 1 x 40/32mm reducer bush
- 1 x 32/25 reducer bush
- 1 x 40mm ball valve without handle
- 1 x 40mm nipple stainless/connector
- 1 x 40mm socket plastic
- 1 x 40/25mm galvanised reducer bush

Steel reinforcing bars

- 1 full length
- 1 length in pieces (4)

These items to my mind following the **Tumushabe case** (supra) were not distressed in accordance with the Act and should be returned.

Lastly as to the non compliance with of the distress contrary to Order 22 of the CPR I find that this Order deals with execution of a decree. In this case the proceedings for distress were pursuant to an application made by the court for distress which is different. I therefore agree with counsel for the respondents that the procedure under O. 22 of the Civil Procedure Rules does not apply to distress for rent.

Before I take leave of this application I need to note that this is a very old dispute with a multiplicity of suits and applications. Multiplicity of suits is contrary to section 33 of the Judicature Act. Since most of the issues relating to MA 044 of 2007 have been touched on by this application I order and direct pursuant to the general powers given to the High Court under Section 33 of the Judicature Act to close all miscellaneous applications arising out of MA 044 of 2007 (all at Masindi) if not already disposed of namely but not limited to

- MA 064 of 2007
- MA 065 of 2007
- MA 002 of 2008
- MA 102 of 2008
- MA 078 of 2008
- MA 011 of 2009
- MA 012 of 2009
- MA 097 of 2009

Given the age and nature of dispute each party will bear their own costs in the above applications.

As to the items legally distressed given the passage of time I direct the Chief Registrar to cause a fresh inventory of the items and the condition of their storage. Should the storage not be satisfactory then order appropriate storage of the items at the respondent's costs. I further direct the Chief Registrar to cause the immediate and speedy trial of HCCS No 75 of 2007 (also at Masindi) so that the legal rights of the parties are determined and as a consequence the issue of distressed items is resolved (i.e. whether rent is due or not and how much). The applicant is strongly advised to retain counsel for this purpose.

I further and Order and direct that all items listed above as not being covered by the distress order should be returned to the applicant and or made good within 14 days of this ruling.

Given as stated above the nature of this application I order that each party bear their own costs

Geoffrey Kiryabwire

Judge

Date: 19/02/13

19/02/13

10:17

Ruling read and signed in open court in the presence of;

- M. Wandera for Applicant
In Court
- None of the parties
- Rose Emeru – Court Clerk

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Geoffrey Kiryabwire

JUDGE

Date: 19/02/13