

**THE REPUBLIC OF UGANDA
IN THE COURT OF APPEAL OF UGANDA
AT KAMPALA
CIVIL APPEAL NO. 38 OF 1997**

**CORAM: HON.MR. JUSTICE C.M. KATO, J.A.,
HON.LADY JUSTICE A.E.MPAGI-BAHIGEINE, J.A. &
HON.MR. JUSTICE J.P. BERKO, J.A.**

**JOY TUMUSHABE & ANOTHER..... APPELLANTS
VERSUS**

- 1. M/S. ANGLO AFRICAN LTD.)**
- 2. FREDDIE M. KASOZI)..... RESPONDENTS**

**(Arising from the judgment and Decree of the High Court of
Uganda at Kampala by The Hon. P.J. Mr. J.N. Ntabgoba,
dated the 6th March 1996 in HCCS No. 79 of 1995.)**

JUDGMENT OF J.P. BERKO, J.A.: This is an appeal by the Plaintiffs from the judgment and decree of the High Court in an action instituted by the Plaintiffs against the defendants for unlawful distress.

In order to epitomize the contest between the 30 appellants and the respondents it will be convenient to set out briefly the undisputed facts. Joy Tumushabe, the **1st** plaintiff, occupied Flat No. 13 upstairs whilst she carried on business in the shop downstairs under the name and style of Nyaburisa Enterprises Ltd. I will hereinafter refer to as the flat and the shop as the suit premises. The suit premises were owned by Hirji and Laximidas Dalia. The two were Asians and had to leave Uganda following their expulsion by the then Government in power. The suit premises had

been rented to the Plaintiffs by The Departed Asians Property - Custodian Board which had taken charge of the suit property following the expulsion of the owners. Dalia obtained repossession of the suit premises on April, 1993 pursuant to the provisions of The Expropriation Properties Act 1982. Because he lived outside Uganda, Laximidas Dalia appointed Rene Richardson of Anglo — African Ltd. (the 1 respondent) to manage the suit property.

The Departed Asians Property Custodian Board notified all the tenants of the suit property of the repossession by Laximidas Dalia and advised them to deal with him. Subsequently, the plaintiffs were introduced to the 1st defendant as the attorney of Laximidas Dalia and the manager of the suit property. The plaintiffs, on the advice of their lawyer refused to pay rents to the 1st defendant and challenged the title of Laximadas Dalia to the property. The plaintiff in fact instituted H.C.C.S. No. 459 of 1993 against Laximidas Dalia and the **1st** Defendant seeking for an order to cancel the repossession certificate and obtained an order of Interim Injunction preventing them from evicting them from the suit premises. The interim injunction was later vacated by the High Court, but the plaintiffs persisted in not paying the rents.

On the 1 August, 1994 M/s. Anglo — African Ltd. authorized, in writing, M/s. Security Auctioneers whose employee was the 2nd Defendant, to levy distress and evict the plaintiffs from the suit premises. The bailiffs were to levy for sum of Shs. 23,742,024/= in respect of rent for the shop and Shs. 2,972,075/= in respect of rent for the flat. Consequently, the Court Bailiffs gave vacation notices to the plaintiffs. The notices were dated 9th August 1994. The execution was carried out on the 17th August 1994.

It was the contention of the plaintiffs that the defendants' actions were illegal firstly, that the notices given to them to vacate was inadequate, in that they were not given time to vacate the premises or settle the rent due; Secondly, the 1st defendant did not have capacity to instruct the **2nd** Defendant to detain for rent or evict Lhe plaintiffs because the power of attorney, granted to him to act on behalf of Laximidas Dalia had expired; Thirdly, the **2nd** defendant was not a person authorized to carry out distress under the provisions of the Distress for Rent (Bailiffs) Act, (Cap 68) . In the alternative, it was contended that if the 1 Defendant had the lawful capacity to act on behalf of Laximidas Dalia, his act of appointing an authorized person to detain for rent was unlawful.

By reasons of the illegal acts committed by the defendants, the plaintiffs suffered loss and claimed general and special damages.

It was pleaded on behalf of the **2nd** Defendant that at the material time he acted as an employee and under the direct supervision and control of one Charles Rwija, who was a licensed Court Broker and proprietor of Security Auctioneers. The defendants denied that their actions were illegal.

The trial Court found that both the eviction and the distress for rent were lawfully done and dismissed the plaintiffs' claim.

The memorandum of appeal contained six grounds, namely:

- (a) That the learned Judge erred in fact and in law in failing to find that the respondent carried out the eviction of the appellants illegally;
- (b) That the learned Judge erred in fact and in law in failing to find that the respondents had illegally destrained the appellants' property;
- (c) That the learned Judge having found that the respondents had taken the **1st** appellant's property erred in refusing to order that the respondents to return the 1st appellant's property or pay to the 1st appellant the value of the property so taken;
- (d) That the learned Judge erred in fact when he failed to find that the respondents had taken from the shop property belonging to the **2nd** appellant;
- (e) That the learned Judge erred in fact and in law in failing or refusing to find that the appellants had proved the special damages claimed; and
- (f) That the learned Judge erred in law in admitting Exh D1 in evidence.

Mr. Babigumira, who appeared for the appellants, argued grounds (a), (b), and (c) together and grounds (d), (e), and (f) together.

Grounds (a) and (c) were argued under six segments. Under the first segment, it was argued that under the provisions of The Distress for Rent (Bailiffs) Act, Cap 68 only the landlord, or his attorney or the legal owner of the reversion or a person authorized to act as bailiff by a certificate

/ in writing under the hand of a certifying officer, (can levy distress for rent. It was contended that the 1st defendants were neither landlords nor attorneys of the landlord. They were also not the legal owners of the reversion. They also did not have a certificate in writing under the hand of a certifying officer authorizing them to act as bailiffs. It was further contended that the authority given to the **1st** Defendants to manage the property (Exh P1> by the landlord had expired when they evicted the plaintiffs.

The Second segment was that the instructions to levy the distress were issued to a firm called Security Auctioneers who were not court bailiffs. The proprietor of Security Auctioneers was one Charles Rwija who is a Court Bailiff, but the instructions to levy the distress were not given to him.

The third segment was that Freddie M. Kasozi, the 2nd defendant, who levied the distress, was not a court bailiff. Besides, the instructions to levy the distress were not given to him.

The fourth point was that the assertion by the 2' Defendant that he could not levy distress on the properties he found in the flat because they were old and valueless could not be true. His reason was that the **2nd** Defendant admitted in his evidence in chief that he took properties from the flat and sent them to a store in Bauman House. It was the submission of learned counsel that, in those circumstances, the **2nd** Defendant did levy distress in the flat.

Learned counsel challenged the finding of the trial Judge that the **2nd** Defendant did not remove properties from the shop on the ground that the plaintiffs led sufficient evidence to prove that properties were taken from the shop. He relied on the case for **Kampala City Council v Nakaye. (1972) EA 446.**

Finally, learned Counsel contended that the learned judge was wrong when he ordered that the **1st** plaintiff should collect her properties taken from the flat from the defendants. According to counsel, the Judge ought to have ordered the defendants to return the properties or pay their value.

On behalf of the defendants, Mr. Nkurunziza, submitted that the Judge was right when he found that the **1st** Defendant was the authorized attorney of the owner of the suit property and therefore

had the right to levy the distress. Consequently the provisions of Section 3 of the Distress for Rent (Bailiffs) Act were not breached.

Secondly, he submitted that the **2nd** Defendant, as an employee of the firm of Security Auctioneers whose sole proprietor is Charles Rwija, a licensed Court Bailiff, was qualified to levy the distress.

He further contended that the Plaintiff failed to prove that properties were taken from the shop.

Mr. Nkurunziza finally submitted that the eviction was legal as the defendants, on the evidence on record, were trespassers.

The determination of the issues raised in grounds (a) (b) and (c) requires a consideration of the provisions of The Distress for Rent (Bailiffs) Act, Cap. 68. Section 3 of the Act provides:

“3. From and after the commencement of this Act no person, other than a landlord in person, his attorney or the legal owner of the reversion, shall act as bailiff to levy any distress for rent unless he shall be authorized to act as bailiff by a certificate in writing under the hand of a certifying officer, and such certificate may be general or apply to a particular distress or distresses.”

A “certifying officer” has been defined to mean a magistrate of the first class, a Chief Magistrate and a Magistrate grade one.

Persons authorized under the Act to levy distress for rent are therefore:

- (a) the Landlord himself,
- (b) an attorney of the landlord,
- (C) the legal owner of the reversion, and
- (d) any person authorized to act as bailiff by a certificate in writing under the hand of magistrates.

There is undisputed evidence on record that the Plaintiffs were unlawfully occupying the suit premises. They failed to recognize the title of the undisputed owner of the property and refused

to pay rent to him when the Departed Asians Property Custodian Board informed them that the property had been repossessed by the former Asian owner, Laximidas Dalia.

There is evidence on record that M/s. Anglo African Ltd. were appointed by Laximidas Dalia to manage the suit property. They derived their powers from the Power of Attorney (Exh 03) given to then by Laximidas Dalia. This power of attorney was given on 20/9/93 and was to be in force for a period not exceeding one year. The matters complained about took place on the **17th** August 1994 and were therefore within the one year period. Learned Counsel for the appellants relied on Exh P1 to contend that at the time the distress was levied, the appointment of Anglo African Ltd as managers of the suit property had expired. Exh P1 is dated 15/3/93. It appointed Anglo African Ltd. to manage suit property for 12 months only. Exh P1 was impliedly revoked by Exh D3 which was given after Exh P1. Learned Counsel was therefore wrong to rely on Exh P1. The authority to manage the suit property emanated from Exh D3 and was operative when the instructions to levy the distress for rent were given.

The learned Judge was therefore right when he held that since Anglo African Ltd. were managers of the suit property and were the attorney of the landlord, they were authorized to levy distress for rent on the suit property.

The instructions to evict the plaintiffs were given to a firm known as Security auctioneers. The sole proprietor of this firm is one Charles Rwija who is a court bailiff. The general nature of the business of the firm is to be Court Bailiffs/ Auctioneers. Charles Rwija apparently does business under the name and style of Security Auctioneers as the evidence of **2nd** Defendant shows. The 2 Defendant who carried the actual execution was an employee of this Security auctioneers. The defendant acted on behalf of Security Auctioneers. I am unable to find anything wrong in Anglo-African Ltd. employing court bailiffs to levy the distress.

I agree that both the eviction and distress for rent were lawfully done.

Since I have found that both the eviction and distress for rent were lawfully done, there is no need to consider the grounds that deal with remedies.

But before I take leave of the case I wish to comment on one procedural irregularity that came to my notice. This concerns the manner some trial Judges handle admissibility of documents.

During the trial the 2nd Defendant, Freddie Kasozi (DW 1), testified that he made an inventory of properties taken from the flat and asked the police man A.I.P. Juma Okungo, DW 3, to countersign. When attempt was made to tender it in evidence, learned counsel for the plaintiffs objected to its admissibility on the grounds that it was not attached to the written statement of defense; Secondly, that there was no proof that DW 1 was the author of the document. Learned counsel for the defendants contended that the objection was misconceived as there was no obligation on the defendants to annex to the written statement of defense the documents they intend to rely on.

The learned trial judge, instead of ruling on the admissibility of the document there and then, allowed it to be put in for identification purposes only and indicated that he would rule on its admissibility in his judgment.

With due respect to the learned trial Judge, that approach was wrong. Once the admissibility of document has not been determined, counsel cannot use the document effectively when other witnesses testify on matters relating to the contents of the document. It also prevents Counsel from dealing with the evidential value of the document in their final addresses.

In my view, the correct approach is to rule on the admissibility of the document one way or the other at the time the issue is raised and if the judge, for any reason, felt that he could not give the reasons for his decision immediately, those reasons could be embodied in his judgment. In that way counsel would be at liberty to use the document (if admitted) or forget it (if rejected). That would have prevented what happened in this case. Whilst counsel for the respondents relied on the contents of Exh D1 in his final submission, counsel for the plaintiffs continued to challenge its admissibility in his final submission. The admissibility of the document should not have been in doubt at that stage. What remained at the submission stage is the evidential or the probative value of the content of the document.

In my opinion, the learned Judge correctly directed himself on the question of law applicable to the case and arrived at the correct conclusion and I see no reason why I should disagree with him. I would dismiss the appeal. The respondents should have the costs of this appeal and the

court below.

Dated at Kampala this 5th day of November
1998.

J.P. BERKO

JUSTICE OF APPEAL.

JUDGMENT OF A.E. MPAGI-BAHIGEINE

I agree with the judgment of my Lord J.P. Berko, J.A. and I do not desire to add any observations of my own.

Dated at Kampala this 5th day of November 1998

A.E. Mpagi Bahigeine

JUSTICE OF APPEAL

JUDGMENT OF C.M. KATO, J.A.

I have had the advantage of reading the judgment of Berko, J.A. in draft. I entirely agree with it. The appellants were certainly trespassers on the premises of the first respondent. The first respondent was entitled to have the two trespassers evicted. The eviction was lawful, having been carried out by the second respondent who was 'he authorized agent of a lawfully licensed court bailiffs/auctioneers.

Since Bahigeine. J.A. also agrees, the appeal is dismissed with costs in this court and in the court below to the respondents.

Dated at Kampala this 5th day of November 1998

C.M. KATO
JUSTICE OF APPEAL