THE REPUBLIC OF UGANDA

IN THE HIGH COURT OF UGANDA AT KAMPALA

CIVIL APPEAL No. 16 OF 2003

(ARISING OUT OF MISC. APPLICATION No. 188 OF 2001)

(ARISING OUT OF MISCELLANEOUS CAUSE No. 83 of 2001 – FOR A CERTIFICATE OF DISTRESS OF RENT)

G.W. LUTAAYA ::APPELLANT

\- VERSUS -

ANIL SHAMJI :: RESPONDENT

BEFORE: HON. MR JUSTICE RUBBY AWERI OPIO

J U D G M E N T:-

This is an appeal from the ruling of the Learned Chief Magistrate of Mengo, which was delivered on the 4th April 2003. The appellant had brought an application by notice of motion under section 4 of the Distress for Rent (Bailiffs) Act, Section 101 of the Civil Procedure Act and order 48 rules 1, 2 and 3 of the Civil Procedure Rules. The application was for orders that special certificate to levy distress against the applicant be cancelled and or declared void and that costs of the application be provided for.

The grounds for the application were that:-

(i) The special certificates of distress issued by the Honourable court was based on false and forged affidavit of Mr Anil Shamji dated 15th May, 2001;

(ii) The applicant had been paying rent for the premises up-to 30/6/2001 and was therefore not in rent arrears;

(iii) The special certificate of distress was therefore issued in error and an abuse of court process by the respondent.

The learned Chief Magistrate ruled that the affidavits in support of the respondent's application for distress were not illegal. On the issue that the applicant was up-to-date with payment of rent, the learned Chief Magistrate found that since the application to levy distress was made ex-parte the above fact could not be ascertained. He accordingly refused to cancel the warrant of distress

and advised the applicant to take an action for appropriate redress if he felt aggrieved in any way. Hence this appeal.

The appellant filed a memorandum of appeal containing five grounds of appeal:-

(1) The learned Chief Magistrate erred in fact and law when he ruled that there was no evidence on record which showed that the affidavit of Mr Anil Shamji the respondent in opposition to the application was a forgery or false.

(2) The learned Chief Magistrate erred both in law and fact when he concluded that the issue of instructions from counsel to the bailiff dated 15/1/2001 coming before the letter of Notice by the bailiff to the appellant on 30/4/2001 was simply a matter of form rather than substance of the application when it was in fact a fundamental principle of law to prove service of Notice against the appellant.

(3) The learned Chief Magistrate erred both in law and fact when he failed to ascertain whether the appellant was in arrears of rent when the court issued a special certificate of distress for rent yet this was the main crux of the application, to cancel and declare the certificate to be void, because there was clear evidence that the appellant was in fact not in arrears.

(4) The learned Chief Magistrate erred both in law and fact when he dismissed the application with costs to the respondent.

(5) The learned Chief Magistrate erred both in law and fact when he failed to appraise or evaluate all the available evidence which if he had done so, he would have come to the conclusion that the special certificate of distress against the appellant was unlawful.

Mr Musoke-Kibuuka who appeared for the appellant dropped grounds 1 and 2 and argued grounds 3, 4 and 5 of the appeal. Mr Lwanyaga appeared for the respondent. Both counsel proceeded by way of written submissions.

On the third ground of appeal Mr Musoke-Kibuuka submitted that to sustain a distress certificate there must be three conditions in place:-

i) there must be a relationship of landlord and tenant;

ii) there must be certainty of rent and;

iii) the rent must be in arrears.

The learned counsel submitted that the fact that the appellant had filed an application to have the certificate revoked and/or cancelled, and raised the issue of not being in arrears meant that the court was supposed to investigate the truthfulness of the appellant's allegations and determine whether rent was in arrears or not. The learned counsel contended that the learned Chief Magistrate did not bother to do the above, and yet it was his duty to determine whether the rent was in arrears.

In regard to the fourth ground, the learned counsel submitted that following the argument put forward for ground three above, it followed that the learned Chief Magistrate had abdicated his duty which was to investigate and find out whether the distress certificate issued out by court was correctly issued or not. That duty was entrusted on him by the distress for rent (Bailiffs) Act, section 4 thereof.

On ground five the learned counsel contended that the learned Chief Magistrate failed to appraise the evidence on record because if he had done so, he would have come to the conclusion whether the rent was in arrears or not.

Mr Moses Lwanyaga in his reply took up a preliminary objection on a point of law and argued that the appeal was incompetent for the reason that the appellant did not extract an order, which was a condition precedent to filing a memorandum of appeal. He relied on the case of **Dr Charles Lwanga Sezi Vs Serinya Erazimus Civil Appeal No. 61 of 1980**.

On the merits of the appeal itself, the learned counsel submitted on the third ground of appeal that according to the appellant's annexture F, it was apparently clear that the applicant was in arrears of rent and therefore the learned Chief Magistrate was right in issuing or granting special certificate of distress. He submitted that the alleged payments could have been made when the order for distress had already been issued by the court.

On the fourth ground of appeal, the learned counsel for the respondent contended that the summary of account prepared by the appellant was not conclusive enough to prove the allegation that he was fully paid up, and was not in arrears since it was not prepared by an expert in the field of accounts such as an Accountant and/or Auditor. Because of that, it was not necessary for the court to cancel the special certificate, as there was no good and sufficient cause to discredit the respondent's affidavit in support of application for issue of special certificate.

In regard to ground five the learned counsel submitted that the learned Chief Magistrate correctly evaluated the evidence on record and found that the sum of shs.13,500,000/= claimed was certain and did not necessitate any investigations. He submitted that the appellant had failed to prove that he was not in arrears of rent by failure to indicate vital dates in the summary of his account. For the above reasons the learned counsel was of the view that grounds four and five should also fail.

I will deal with the preliminary objection about the decree/order of the learned Chief Magistrate not having been extracted. I am satisfied with the explanation advanced by counsel for the appellant that the decree/order was indeed extracted but the learned Chief Magistrate did not sign it for unclear reasons. However as soon as the ruling was delivered, the file went missing. It became difficult to file the extracted decree/order, which had already been drawn up. The filed could not be traced by 2/5/2003 when the appeal was finally lodged in the High Court. The file only re-surfaced in July 2003. Order 18 rule 7 (2) provides that the decree shall be drawn up and signed by the judge who pronounced it or his successor. Since the file went missing for unknown reasons the appellant could not be penalized for an act the performance of which he was not to blame. This is a matter, which should be treated under Article 126 (2)(e) of the Constitution where courts should be seen to administer substantive justice without undue regard to technicalities.

Moving to the merits of the appeal, it is my opinion that this appeal raises two issues to be considered and resolved. The first one is whether the learned Chief Magistrate erred both in law and fact when he failed to ascertain whether the appellant was in arrears of rent when he issued a

special certificate of distress and whether the learned Chief Magistrate erred both in law and fact when he failed to appraise or evaluate all the available evidence on record.

It is trite law that to sustain a distress certificate the following conditions must be in place:-

(a) There must be a relationship of landlord and tenant obtaining;

(b) There must be certainty of rent, and

(c) The rent must be in arrears: See **Joy Tumushabe and Another Vs M/S Anglo – African Ltd and Another Civil Appeal No. 7 of 1999** (Supreme Court; Unreported).

There is no doubt that the appellant was a tenant of the respondent on plot No. 6 Nakivubo Road, Kampala when a certificate to levy distress against his property was issued by the learned Chief Magistrate at Mengo. The appellant had been occupying one shop, one flat and two stores for which he was making monthly payments of shs.1,300,000/=, 250,000/= and 300,000/= respectively making a total of shs.1,850,000/=.

He alleged that he had paid rent up to 31/6/2001 and was not in arrears of rent by 17/5/2001 when the certificate of distress was issued to detrain his property in the above three premises. The respondent claimed that the appellant was in arrears of 13,500,000/=. On filing an application to revoke and or cancel the certificate of distress claiming that he was not in arrears, it became incumbent upon the trial court to investigate the truthfulness of the appellant's allegations to determine whether or not he was in arrears. With due respect, the learned Chief Magistrate did not live to that duty when he made the following remarks on page six of his ruling.

> "On the issue of the applicant being up-to-date with payment of rent at the time of issuing the special certificate of distress, this could not be ascertained because the application for the certificate was made ex-parte by the bailiff. It is the view of this court that should the applicant feel wronged legally, he is at liberty to bring an action against the respondent for the appropriate redress".

The appellant was legally wronged by claiming that certificate of distress issued against him was in error because he was fully paid up. It is the duty of the court to determine whether he was in arrears or not. It was irrelevant that the certificate of distress had been obtained ex-parte by the bailiff. What was relevant was the three affidavits on record namely the affidavit in support of the application to revoke by the appellant, the affidavit in reply by the respondent and the affidavit in rejoinder by the appellant. In addition to that there was the submissions of the appellant's counsel. It is worth noting that counsel for the respondent never appeared to oppose the application. There was therefore adequate material for the trial Chief Magistrate to decide the application one-way or the other. The learned Chief Magistrate acted perfunctorily in dismissing the application without considering the relevant issues before court. The evidence on record was enough for him to investigate and find out whether the distress certificate he issued was well grounded.

The next issue is whether the learned Chief Magistrate failed to evaluate all the evidence on record. Flowing from the above findings it is very obvious that the learned Chief Magistrate did not evaluate evidence on record in this matter. I was amused by the submissions of counsel for the respondent when he stated that the learned Chief Magistrate had evaluated the evidence on record and found that the appellant was in arrears and so there was no need to investigate any further. All I can say is that the trial learned Chief Magistrate failed to make a finding as to whether the appellant was in rent arrears or not. He erred by stating that he could not ascertain that because the application for distress had been made ex-parte by the appellant. If that was the case, it should have been all the reason for him to look at the applicant's evidence of payments, which was laid before him. I was further shocked by counsel for respondent's submissions from the bar that the appellant's statement of accounts could not be relied upon because it was not prepared by an accountant. Was that necessary and how did he know that it was not prepared by an expert? In any case that type of contention should have come during the prosecution of the application, which he absconded.

The next question is what next? The answer is in **Trevor Price and Another Vs Raymond Kelsal [21957] EA 752** where it was stated that:-

> "where it is apparent that the evidence has not been subjected to adequate scrutiny by the trial court before expressing a view it is open to an appellate court to find that the view of the judge is ill founded. It is the duty of an appellate court to evaluate evidence itself".
>
> The above authority was cited with approval by non other than Prof. Kanyeihamba JSC in the case of **Joy Tumushabe & another Vs M/S Anglo African Ltd and another** (supra)

In the instant case, the appellant had tendered evidence that at the time of the distress he was not in arrears because he had paid a total of shs.38,850,000/= whereas the amount due was only 37,000,000/=. The above position was not challenged by any contrary evidence or submissions.

It is therefore, apparent from the above evidence that the certificate of distress which was issued on 17/5/2001 was issued when the appellant was not in arrears. The certificate was therefore unlawful and ought to have been cancelled and it is hereby cancelled. For the above reasons the appeal is allowed with costs.

RUBBY AWERI OPIO
JUDGE
21/9/2004.

Katongole present for Musoke-Kibuuka for appellant.
Moses Lwanyaga for respondent.
Judgment read in open court.

RUBBY AWERI OPIO

JUDGE

21/9/2004.