



Sudi Chemical Industries Limited & 2 others v Shaima Investments Limited (Civil Suit 185 of 2008) [2023] KEHC 21504 (KLR) (Civ) (28 July 2023) (Judgment)

Neutral citation: [2023] KEHC 21504 (KLR)

**REPUBLIC OF KENYA
IN THE HIGH COURT AT NAIROBI (MILIMANI LAW COURTS)**

CIVIL

CIVIL SUIT 185 OF 2008

CW MEOLI, J

JULY 28, 2023

BETWEEN

SUDI CHEMICAL INDUSTRIES LIMITED 1ST PLAINTIFF

AUTO CURE LIMITED 2ND PLAINTIFF

KHUSH FURNITURE 3RD PLAINTIFF

AND

SHAIMA INVESTMENTS LIMITED DEFENDANT

JUDGMENT

1. By a plaint dated May 13, 2008 Sudi Chemical Industries Limited, Auto Cure Limited and Khush Furniture (hereafter the 1st, 2nd and 3rd plaintiffs) sought against Shaima Investments Limited (hereafter the defendant) several reliefs including general damages, special damages in the sum of Kshs 55,000/-, and a permanent injunction restraining the defendant whether by itself or through its servants/agents and/or employees from levying distress, evicting the plaintiffs or in any manner interfering with the plaintiff's quiet possession and enjoyment of the suit premises known as LR No 209/8604 situated at Industrial Area, Lunga Lunga Road in Nairobi (hereafter the suit premises).
2. It was pleaded that the defendant was at all material times the registered proprietor of the suit premises comprising of godowns and offices, whereas the plaintiffs were at all material times tenants occupying the suit premises; that in the months of February and March 2008 the plaintiffs presented their monthly rent cheques to the defendant but later discovered that the cheques had not been banked; whereupon the plaintiffs issued bankers cheques in favour of the defendant which the defendant rejected; and that subsequently, and without notice, the defendant on April 26, 2008 instructed auctioneers to levy distress for unpaid rent against the 1st plaintiff resulting in the seizure of the 1st



- plaintiff's goods and financial loss estimated at Kshs 6,000,000/- due to disruption of its business operations.
3. The plaintiffs averred that the rent payable was remitted to the defendant through the auctioneers but that the defendant failed to acknowledge receipt and on May 7, 2008, the defendant by the letter dated April 30, 2008 demanded that the plaintiffs vacate the suit premises purportedly to make way for refurbish works. All contrary to the provisions of the *Landlord and Tenant Act (Shops, Hotels and Catering Establishments) Act* (hereafter the Act).
 4. The defendant entered appearance and filed its statement of defence on June 22, 2011, therein denying the key averments in the plaint. In its defence, the defendant stated that no landlord-tenant relationship existed between the parties herein since the plaintiffs were tenants under the tenancy with a previous owner, which tenancy lapsed upon the purchase of the suit premises by the defendant.
 5. The defendant further stated that if at all a tenancy agreement existed between the parties, then such tenancy was on a month-to-month basis. The defendant denied having instructed auctioneers to levy distress for rent against the plaintiffs, stating that it only issued a notice to the 2nd plaintiff indicating its intention to renovate the suit premises and therefore requesting the plaintiff to temporarily vacate to facilitate commencement of the renovation works.
 6. On February 3, 2020, the 2nd and 3rd Plaintiffs withdrew their respective claims against the defendant. The matter therefore proceeded between the 1st plaintiff and the defendant. During the hearing, the 1st plaintiff, and the defendant each called one (1) witness.
 7. Hemanshu Roy Pattni who was PW1 stated that he was the managing director of the 1st plaintiff and proceeded to adopt his witness statement filed on November 14, 2012 as his evidence-in-chief. He also produced his bundle of documents filed on even date as P exhibits 1-12. The witness testified that the 1st plaintiff was at all material times a tenant occupying the suit premises and paying rent regularly in the sum of Kshs 40,000/- per month to the Defendant. The witness further testified that in February 2008 the 1st plaintiff's representative contacted the defendant requesting to collect cheques in respect of rent payment but that the former later discovered from its bank statements that the defendant had not banked the cheques.
 8. That subsequent attempts at reaching the defendant proved futile. That the 1st plaintiff therefore engaged the services of a courier company to deliver the cheques for the months of February, March and April, 2008 to the defendant, however, the cheques were soon returned by the courier. That consequently, the 1st plaintiff's advocate wrote to the defendant's advocate, but the letter was similarly returned to the former advocates with no response to their queries.
 9. This, according to the witness, was followed on April 28, 2008, by the defendant's instruction to auctioneers to levy distress for alleged rent arrears in the sum of Kshs 240,000/- with effect from January 2008. He stated that when the auctioneers commenced removal of the 1st plaintiff's goods from the suit premises he persuaded them, and eventually entered into an arrangement with the 1st plaintiff's representatives for the latter to settle auctioneer's charges in the sum of Kshs 55,000/- and upon payment, the 1st plaintiff's goods were returned, albeit with some damage.
 10. In cross-examination, the witness testified that the 1st plaintiff was still in occupation of the suit premises at the time of his testimony and that the defendant had purchased the suit premises sometime in the year 2006/2007. The witness also testified that the 1st plaintiff had never been served notice to vacate and hence the distress for rent was illegal. That in any event, the 1st plaintiff had issued the requisite cheques to the defendant being rent payment, but which cheques were not banked. He



admitted that the particulars of alleged damage and loss had not been set out in the plaint, or evidence tendered in that regard. During re-examination, PW1 stated that the suit was filed after distress had been levied. This marked the close of the 1st plaintiff's case.

11. In defending the suit, the defendant relied on the oral testimony of its director, Shailesh Shah, DW1, who equally adopted his witness statement as his evidence-in-chief. Under cross-examination, the witness admitted the averment in the defence statement that the plaintiffs paid their rent regularly while his written witness statement asserted that the plaintiffs were in arrears of rent for the months of January to April 2008. Further admitting that no notice demanding payment of the rent arrears had been produced as evidence, he confirmed that the defendant had nonetheless instructed auctioneers to levy distress on the 1st plaintiff for outstanding rent arrears. He denied receipt of any of the cheques issued by the 1st plaintiff.
12. In re-examination, the witness reiterated that there is no proof of remittance of the 1st plaintiff's alleged cheques upon the defendant and that from the month of May, 2008 the 1st plaintiff regularized its rent payments. This marked the close of the defendant's case.
13. At the end of the hearing, the parties were directed to make written submissions. On the part of the 1st plaintiff, its counsel submitted that it had demonstrated through evidence that the requisite payments of rent had been made to the defendant as and when they fell due, but that the defendant had declined to receive the same. That consequently, the distress levied by the auctioneers on behalf of the defendant was illegal and unlawful. That the actions by the defendant and/or its agents subjected the 1st plaintiff to ridicule and embarrassment.
14. On quantum, counsel for the 1st plaintiff proposed a sum of Kshs 6,000,000/- as general damages owing to the financial loss and damage visited upon it due to actions by the defendant's agents. Counsel also sought the sum of Kshs 55,000/- being refund of the sums paid in settlement of the auctioneer's/court broker's charges. Counsel also urged the court to award the costs of the suit to the 1st plaintiff.
15. For the 1st defendant, counsel anchored his submissions on the proviso of section 2(1) of the Act to assert that because the tenancy herein was a controlled tenancy, this court lacked jurisdiction to entertain the suit. Counsel urged the court to strike out the suit on that basis. He urged the court, if otherwise persuaded, to find that the 1st plaintiff did not prove that the material cheques were delivered to the defendant as payment of the requisite rental sums. It was also submitted that in any case, the 1st plaintiff eventually made good on its payments and has continued to occupy the suit premises.
16. On quantum, counsel for the defendant cited the decision in *John Richard Okuku Oloo v South Nyanza Sugar Co Ltd* [2013] eKLR to assert that a claim for special damages must be specifically pleaded and strictly proved. That in the present instance, the 1st plaintiff pleaded that it had incurred losses in the sum of Kshs 6,000,000/- but did not include this sum in its prayers/reliefs. Moreover, the losses purportedly suffered by the 1st plaintiff were not proved at the trial. Counsel also urged the court to decline to grant the sum of Kshs 55,000/- in the absence of any clear basis. The court was also urged to dismiss the prayers for general damages and injunctive relief, in the absence of any proper grounds being laid. Ultimately, the court was urged to dismiss the suit against the defendant, with costs.
17. The court, upon considering the evidence placed before this court and the submissions on record, has established the following to be the key issues for determination: -
 - a. Whether the court has jurisdiction to entertain this suit.
 - b. Whether the 1st plaintiff has established wrongful/illegal distress for rent on the part of the defendant



- c. Whether the 1st plaintiff is entitled to the reliefs sought in the plaint
18. On the question of jurisdiction, this matter was raised by the defendant’s submissions and premised on section 2(1) of the Act. The provision states:

“controlled tenancy” means a tenancy of a shop, hotel or catering establishment—

- (a) which has not been reduced into writing; or
- (b) which has been reduced into writing and which—
 - (i) is for a period not exceeding five years; or
 - (ii) contains provision for termination, otherwise than for breach of covenant, within five years from the commencement thereof; or
 - (iii) relates to premises of a class specified under subsection (2) of this section:

Provided that no tenancy to which the Government, the community or a local authority is a party, whether as landlord or as tenant, shall be a controlled tenancy.”

19. The defendant reiterated the ruling delivered in the suit on July 16, 2009 in this case by Sitati J (as she then was) regarding the application filed by the plaintiffs seeking an interlocutory injunction against the defendant, pending the hearing and determination of the suit. The defendant pointed out that in the said ruling, the court determined that the Business Premises Rent Tribunal (BPRM) was the appropriate forum for the hearing and determination of the dispute. This fact is apparent from a reading of the ruling.
20. What the defendant’s counsel omitted to mention is the subsequent ruling by Ougo J concerning the same jurisdictional objection earlier raised by the defendant. In the latter ruling, delivered on June 11, 2013 the court found that it had jurisdiction to deal with this matter. That ruling was not appealed against or otherwise set aside, and this court would be purporting to exercise a jurisdiction it does not possess, by reconsidering the defendant’s jurisdictional challenge yet again. The court declines the defendant’s invitation in that regard.
21. On the second issue for determination, it is not in dispute that the 1st plaintiff was at all material times a tenant occupying the suit premises. It is also not in dispute that the defendant was at all material times the registered owner of the suit premises, having purchased the same in the year 2008. Whereas the defendant denied the existence of any landlord-tenant relationship between itself and the 1st plaintiff, the evidence tendered on both sides coupled with its conduct at all material times suggests otherwise. In their respective testimonies, PW1 and DW1 confirmed that the 1st plaintiff has continued in occupation of the suit property and making the requisite rent payments to the defendant.
22. The *Distress for Rent Act* regulates the exercise by landlords, of the right to levy distress for rent against defaulting tenants. In the case of *CYO Owayo v George Hannington Zephania Aduda T/A Aduda Auctioneers & Anor* (2007) eKLR the Court of Appeal considered instances of illegal levying of distress by landlords. In that case, the landlord had levied distress against the goods of a third party and in premises other than those demised to the defaulting tenant. The court 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.....”

23. The court concluded as follows: -

“In our view, the distress that was carried out by the auctioneer (deceased) on instructions of the respondent together with the sale of the goods distressed was plainly illegal and the respondent cannot escape liability to the appellant for his instructions to the auctioneer to carry out that distress for rent upon the appellant’s goods which should not have been the subject of such levy of distress and in blatant disregard of the legal provisions in place for levy of distress for rent. We hold the respondent liable to the appellant. The appellant had no duty to take the remedial actions enumerated by the superior court as he was not himself in arrears and he had no proper notice of the illegal distress carried out on his properties.”

24. The key question that therefore arises is whether the distress levied against the 1st plaintiff for alleged unpaid rent was lawful. In his evidence, PW1 stated and maintained that the 1st plaintiff had made efforts to pay monthly rent as and when it fell due, by issuing cheques in the name of the defendant, but that the defendant had severally declined to accept and/or bank the cheques from February, 2008 and without giving any reason. The witness also testified that the defendant thereafter instructed court brokers to levy distress against the 1st plaintiff for unpaid rent on April 26, 2008 and without prior notice.

25. On his part, DW1 did not deny that distress was levied on their instructions but denied that the distress was malicious or illegal. The witness further disputed the 1st plaintiff’s allegations that the defendant declined to accept the rent payments made by the 1st plaintiff.

26. Upon examination of the pleadings and material on record, the court noted that the 1st plaintiff had produced as P Exhibit 1 the copies of cheques in the defendant’s favour, issued for the months of February 2008 to May 2008 in supporting the position the rent payments had been timeously made to the defendant. The 1st plaintiff also tendered as P Exhibits 3 and 4 correspondences showing that concerns had been raised by the 1st plaintiff regarding the cheques unbanked by the defendant. There is no evidence that the correspondence elicited a response from the defendant. Correspondence from the 1st plaintiff’s advocate to the advocate for the defendant was also tendered in that respect. This evidence was not controverted by the defendant.



27. In his witness statement, DW1 claimed that a notice to terminate the tenancy was served upon the 1st plaintiff. However, from the material before the court no proof of notice of termination or notice of distress for rent to the 1st plaintiff was served prior to the defendant instructing auctioneers to levy distress for rent, vide the letter dated March 15, 2008 (P Exhibit 2). In any event, no demand for rent had been made, and no notice of distress could have been validly issued by the defendant, having earlier spurned the 1st plaintiff's rent settlement by way of cheques.
28. In *Caledonia Supermarket Ltd v Kenya National Examinations Council* [2000] 2EA 351 the Court of Appeal held that to terminate a controlled tenancy, the landlord was obliged to comply with section 4 of the *Landlord and Tenant (Shops, Hotels & Catering Establishments) Act*. The court expressed itself as follows:
- “But even assuming for the sake of argument only that the appellant had lost its status of a protected tenant...then even in that situation the council was obliged by law to issue a proper notice of termination in accordance with section 106 of the Law of property Act of 1882.”
29. Section 4 of the Act stipulates the manner of terminating or altering the terms and conditions of a controlled tenancy by a landlord, that includes service of a mandatory notice in writing. The 1st plaintiff had regularly tendered payment of due rent to the defendant which rejected the payments and proceeded nevertheless not only to issue a purported notice of termination but also to instruct auctioneers to levy distress against the 1st plaintiff's goods. It appears to the court that the defendant was determined to use underhand means, if necessary, to dispossess the 1st plaintiff of the suit premises; that is the only logical conclusion to be drawn from the defendant's proven and admitted conduct. In view of all the foregoing, the court is satisfied that the 1st plaintiff has proved on a balance of probability that the distress levied by the defendant was illegal.
30. Having found in favour of the 1st plaintiff, the court will now consider the reliefs sought. In the case of *CWO Owayo (supra)* the Court of Appeal having found the respondent liable for illegal distress held as follows: -
- “We are also certain in our mind that the illegal distress amounted to a trespass and the appellant is in law entitled to general damages arising from the trespass upon his premises and his goods. In the case of *Interoven Store Co Ltd vs Hibbard and Another (1) (1936)* 1 All ER at page 270 Hilbery J stated:
- “An illegal distress has always been a trespass and an action would always lie. (See note to *Trespass to Goods*, 1868, Bullen & Leak P 114) And where there is a trespass to goods, though no actual damage results, the law gives a right to recover damages not limited to actual damages sustained, but a right to recover substantial damages even though that is no proof of actual loss.”
31. Although in its pleadings, the 1st plaintiff stated that it suffered damage and/or loss arising from the unlawful distress for rent which disrupted its business operations, it did not tender any cogent evidence to support the claim for Kes 6000,000/- claimed in that regard. Moreover, from the evidence of PW1, the 1st plaintiff's goods though seized in distress were not removed from the premises, pursuant to an understanding reached on the same date between the 1st plaintiff and the brokers/auctioneers, the latter essentially lifting the distress upon payment of their charges. No evidence of alleged damage to the goods was presented. Consequently, the court declines to make any award in general damages.



32. Regarding special damages, the 1st plaintiff sought the sum of Kshs 55,000/- being expenses incurred in settling the auctioneer's charges. The 1st plaintiff through PW1 tendered as P Exhibit 9 two (2) receipts dated April 26, 2008 and April 28, 2008 in support of the payment. In the premises, the court will award the sum of Kes 55,000/- as special damages. The prayer seeking what was described in the plaint as a 'perpetual' injunction against the defendant is novel and cannot be entertained in the circumstances of this case.
33. In the result, judgment is hereby entered in favour of the 1st plaintiff against the defendant in the sum of Kshs 55,000/-, and interest from the date of filing of the suit until payment in full. The 1st plaintiff is also awarded the costs of the suit with interest from the date of judgment.

DELIVERED AND SIGNED ELECTRONICALLY AT NAIROBI ON THIS 28TH DAY OF JULY 2023.

C.MEOLI

JUDGE

In the presence of

For the 1st Plaintiff: Ms. Kimanzi h/b for Mr. Mutemi

For the Defendant: Ms. Kinyua h/b for Mr. Kenneth Wilson

C/A: Carol

