



**Mukuna v Mutahi (Environment and Land Case Civil Suit
113 of 2020) [2023] KEELC 16868 (KLR) (18 April 2023) (Judgment)**

Neutral citation: [2023] KEELC 16868 (KLR)

**REPUBLIC OF KENYA
IN THE ENVIRONMENT AND LAND COURT AT NAIROBI
ENVIRONMENT AND LAND CASE CIVIL SUIT 113 OF 2020**

AA OMOLLO, J

APRIL 18, 2023

BETWEEN

KENNEDY MUKUNA PLAINTIFF

AND

BENSON MUTAHI DEFENDANT

JUDGMENT

1. The plaintiff brought this suit against the defendant *vide* plaint dated June 23, 2020 which was amended on May 9, 2022 seeking for the following prayers;
 - a. A permanent injunction restraining the defendant /landlord by himself, agents and/or otherwise whomsoever from selling, auctioning or in any way interfering with the plaintiff's household goods stated in paragraph 4 above.
 - b. An order to release to the plaintiff's household goods, business goods and cash stated in paragraph 4 of the plaint herein.
 - c. General damages
 - d. Costs of this suit
2. The plaintiff averred that at all material times prior to this suit he was a tenant at Mukima Estate House No 69B Nairobi County while the defendant was the landlord at a cost of Kshs 121,000 per month he pleaded that on June 20, 2020, without any justifiable reason, the defendant by himself and/or agents broke into his house and took away assorted household items, other office furniture and equipment; 2 beds, 2 mattresses, beddings, assorted blankets and bed sheets, several pair of shoes, buckets and basins, chairs, dining table, assorted number of books, certificates and other personal documents, old tyres and tubes, 2 sets of sofa chairs, 8 board room seats, 5 office seats, 6 swivel chairs and glass tables, 2 tables, 2 executive desks, 1 reception desks, 1 reception bench, 1 board room table, 1 desks, 1 podium, 2



wall clocks, house curtains, desk fittings, 1 pair of pa system,1 speaker,1 speaker radio,1 amplifier,2 microphones, microwave, fridge, utensils, crockery, gas cooker 4 burner,1 meko, cooking gas tank, 2 stoves, 8 units of computer, printer, 50 seaters décor, serving and décor,1 banner, décor fabrics, table décor, toilet bowl, ceiling fixes,6 extension phones, switchboard, 3 routers, electric extensions, clothes, cash and terminated the lease agreement.

3. The plaintiff stated that the defendant locked the premises with a new lock and told him that he intended to lease the house to a third party despite the time specified in the lease agreement having not lapsed and noting that he did not owe the landlord any rent arrears nor service charges. He added that no notice had been given and in fact there was an order from the Rent Restriction Tribunal restricting him from being evicted. As a result of the defendant's action, the plaintiff avers that he suffered immense damages.
4. The defendant filed a defence and counter claim dated June 7, 2022 seeking for the following prayers;
 - a. The amended plaint be dismissed with costs
 - b. The plaintiff be cited for contempt of court for failing to comply with paragraph No 3 of the court order dated June 8, 2020 issued by the Rent Restriction Tribunal at Nairobi and/or
 - c. The plaintiff be ordered to settle the accumulated rent arrears of Kshs 997,200/ due to the defendant as per the counter claim herein.
 - d. Interest on c above court rates
 - e. Any other relief that the honourable court may grant to the defendant.
5. The defendant admitted that the plaintiff was his tenant and that he broke into the house the subject of dispute and took away the household goods listed but cannot vouch for their present condition because they are wasting away due to the passage of time and exposure to natural environment. He contended that the plaintiff had accumulated rent arrears amounting to Kshs 997,200/ in breach of the lease agreement. That he has been holding on to the household goods listed above under lien and further contended that the plaintiff is in contempt for breaching paragraph No 3 of the court order dated June 8, 2020 issued by the Rent Restriction Tribunal. The said paragraph stated that, "that the plaintiff /tenant is to pay the outstanding arrears in installments together with accrued rent so as to have cleared within 60 days."
6. The defendant pleaded that by the time the court order was issued by the Rent Restriction Tribunal, he had already evicted the plaintiff and up to date the plaintiff is yet to clear the accumulated rent arrears of Kshs 997,200/ and that the defendant is willing to return the confiscated household goods as soon as the rent arrears are settled. The defendant raised a counter claim of Kshs 997,200/ constituting the rent arrears owed by the plaintiff as at the time his goods were confiscated.
7. The plaintiff filed a reply to defence and defence to the counter claim dated August 15, 2022 in which he reiterated the contents of the amended plaint and denied the claim brought in the counter claim. He stated that despite the tribunal issuing the order dated June 8, 2020 the defendant in total disregard of the same broke into his house on June 20, 2020 which was before the lapse of 60 days and before the parties could agree on whether he was in arrears. Further, he stated that the defendant's counter claim is defective because it is not accompanied by a verifying affidavit as required by order 4 rule 1(2) of the [*Civil Procedure Rules, 2010*](#) hence it should be struck out.
8. The defendant filed his submissions dated January 17, 2023 in support of his case. He outlined the background of the matter that prior to filing of the instant suit the plaintiff had filed a suit against the defendant at the Rent Restriction Tribunal Cause No 748 of 2020 seeking similar orders as in this suit



and the tribunal issued orders on June 8, 2020. Upon the defendant filing a preliminary objection, the plaintiff withdrew the suit before the tribunal.

9. The defendant submitted that their counterclaim was supported by the necessary supporting affidavit as procedurally required. He also submitted that the plaintiff was in breach of the tenancy agreement and is yet to clear the rent arrears amounting to Kshs 997,200 as ordered by the tribunal hence in contempt of court order. He submitted that the plaintiff issued the defendant with two cheques of Kshs 200,000 each which when presented to the bank was returned unpaid.
10. It is not in dispute that the plaintiff instituted a claim against the defendant in the Rent Restriction Tribunal and during those proceedings, an order was given on June 8, 2020 which *inter alia*, restrained the defendant from levying distress, evicting or harassing the plaintiff. It also required the plaintiff to pay all outstanding arrears in instalments together with accrued rent and clear the same in 60 days. The plaintiff pleaded that on June 20, 2022, the defendant broke into his house and confiscated the household items listed in paragraph 2 herein. On March 5, 2020 and April 5, 2020 the plaintiff had issued to 1st defendant bad cheques that bounced and while cheques were returned on June 7, 2020. The defendant stated that the plaintiff was in arrears and had failed to pay the accumulated rent thus he proceeded to evict the plaintiff and took the household items to hold in lien.
11. I can see that the plaintiff entered into a consent with the defendant on November 30, 2019 for payment of the 7 months' rent arrears which confirms that there was rent owed to the defendant. The question for this court to answer who was in breach of the lease agreement points to the plaintiff. Consequently, the defendant in distressing for the said accrued rent arrears confiscated the household items. The second question arises as to whether the distress and eviction of the plaintiff by the defendant was legal.
12. The court in *Peter Nthenge v Daniel Itumo & another* [1976] eKLR stated that the right of a landlord to distrain for arrears of rent arises at common law and it enables the landlord to secure the payment of rent by seizing goods and chattels found upon the premises in respect of which the rent or obligations are due. The law allowed the defendant to levy for distress in this case where the plaintiff was in rent arrears. The plaintiff averred that the orders dated June 8, 2020 issued by the tribunal restrained the defendant from distressing and/or evicting the plaintiff. While the defendant argued that the eviction was carried out before the orders were issued.
13. He who comes to equity must come with clean hands. This maxim found express as in the case of *Francis Munyoki Kilonzo & another v Vincent Mutua Mutiso* (2013) eKLR where the court held as follows:

“No one is entitled to the aid of a court of equity when that deed has become necessary through his or her own fault...a court of equity shall not assist a person in extricating himself or herself from the circumstances that he or she has created...”
14. By the time the plaintiff filed the reference before the tribunal, he was already in arrears of rent as he admitted issuing the defendant with bad cheques. Based on my evaluation of the evidence presented before this court, the plaintiff failed to settle the accrued rent as was ordered and the defendant in obtaining vacant possession confiscated the household goods which he states he is holding as lien. Therefore, I find the plaintiff's conduct towards seeking for a permanent injunction restraining the defendant /landlord from selling, auctioning or in any way interfering with his household goods contradictory as he does not have clean hands to cry foul. So does the defendant in seeking that the plaintiff be cited for contempt of court for failing to comply with paragraph No 3 of court order dated



June 8, 2020 issued by the Rent Restriction Tribunal at Nairobi as he was aware that case was already withdrawn.

15. Although the plaintiff pleaded that on June 20, 2020 when the defendant carted away his goods he was not in arrears of rent yet when he obtained interlocutory orders on the June 8, 2020, the Rent Tribunal directed that he clears the rent owing within sixty (60) days. It is not clear if the plaintiff paid any part of the accrued rent arrears which according to him was due. The plaintiff being in arrears is corroborated by his letter of commitment dated November 30, 2019 annexed in the defendant's supporting affidavit. In the said letter, the plaintiff admitted he was in rent arrears for seven (7) months. The orders of permanent injunction he is seeking to be granted are equitable reliefs and to earn the order, he must come to court with clean hands.
16. With regard to the plaintiff's distress and eviction, in *Caledonia Supermarket Ltd v Kenya National Examinations Council* [2000] 2EA 351, the Court of Appeal held that in order to terminate a controlled tenancy, the landlord had to comply with section 4 of the *Landlord and Tenant (Shops, Hotels & Catering Establishments) Act*. The court also considered that even if the tenant had lost its status as a protected tenant, the landlord (the council) was still obliged to give notice to the appellant. 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.”
17. Section 4(1) of the *Distress for Rent Act* cap 293 Laws of Kenya provides as follows: -

“ Where any goods or chattels are distrained for rent resolved and due upon a grant, demise, lease or contract, and the tenant or owner of the goods or chattels so distrained does not, within fourteen days after distress has been made and notices thereof (stating the cause of the making of the distress) left on the premises charged with the rent distrained for, pay the rent together with the costs of the distress, with sufficient security to be given to the licensed auctioneer according to the law the person distraining may lawfully sell on the premises or remove and sell the goods and chattels so distrained for the best price which can be obtained for them, towards satisfaction of the rent for which they are distrained, and of the charges of the distress, removal and sale, handing over the surplus (if any) to the owner.”
18. The plaintiff also sought for an order of re-instatement back to the suit premises. The defendant pleaded that by the time the Rent Tribunal granted the interlocutory orders on June 8, 2020, the plaintiff had already been evicted. The defendant deposed in his affidavit that the plaintiff had been invited through the area chief (notice) to vacate the house. On a second invitation to be present when his goods were being removed, he also failed to turn up. The plaintiff has not denied that he was summoned by the local area chief. He was thus aware of the defendant's intention (notice) to take back possession but he did nothing. As at the time of filing these pleadings, he has not told the court reasons why he should be re-instated.
19. On the prayer for an order for release of his goods that were carted away, the court would have been glad to issue such an order if there was evidence of payment of rent. Section 4 of cap 301 quoted above allowed the defendant to distrain and if the plaintiff fails to redeem the said goods, the defendant is at liberty to sell them to recover the rent owing. In conclusion, I find the plaintiff's case is without merit and dismiss it with costs.



20. In conclusion, judgement is entered for the defendant in terms of prayer (c) that the plaintiff is ordered to settle the rent arrears amounting to Kenya shillings nine hundred and ninety-seven thousand, two hundred (Kshs 997,200) only. He also awarded costs of this suit.

DATED, SIGNED AND DELIVERED AT NAIROBI THIS 18TH DAY OF APRIL, 2023

A. OMOLLO

JUDGE

