REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA AT NAIROBI

CIVIL CASE NO. 18 OF 2009

POWER PACK HYDRAULICS LIMITED.....PLAINTIFF

VERSUS

JACINTA M. NDEGWA

T/A JARMAT ENTERPRISES LIMITED.....DEFENDANT

JUDGMENT

The plaintiff herein moved the court by way of a plaint dated 19th January, 2009 which was amended on 7th day of August, 2009 and further amended on 28th March, 2013. In the said plaint, the plaintiff has sought for damages for wrongful eviction, mandatory injunction to be issued compelling the defendant to reinstate it to premises known as LR 209/4879, an injunction restraining the defendant by herself or her agents and/or servants from interfering with its quiet enjoyment of the suit premises known as LR 209/23879, plus costs of the suit and interest.

The defendant is described as the registered owner of plot number LR 209/4879 situated along Enterprise Road and built on LR 209/4879 Nairobi.

The plaintiff avers that it had leased out the premises as a protected tenant since the year 1985 occupying an area of 2230 square feet and paying rent of kshs. 45,000/= per month but in November, 2008, the defendant forcefully took over half of the plaintiff's rented premises of approximately 1115 square feet and was insisting on being paid increased rent of kshs. 51,500/= in the remainder of the premises.

It averred that on 31st July 2009, the defendant locked the said premises thereby forcibly, unlawfully and illegally evicting the plaintiff notwithstanding that it had faithfully paid all the rent and had been willing and able to continue doing so. That the defendant proceeded to levy illegal distress for rent despite the issue of reversion of the premises and/or rent having been settled in full. The plaintiff prayed for judgment against the defendant as set out hereinabove.

In an amended defence filed on 19th September, 2016, the defendant admitted being the registered owner of the suit premises but denies having leased the premises to the plaintiff as a protected tenant. She stated that the plaintiff entered the suit premises as a tenant of S.A.M Company Limited for a lease term of 5 years and 1 month and thereafter remained in the premises as an unprotected tenant.

The defendant denied that the plaintiff has been faithfully paying rent as alleged and stated that the plaintiff failed to pay rent on time and had outstanding arrears thus necessitating levying distress against it. She avers that the eviction of the plaintiff from the suit premises was both lawful and legal as the plaintiff was not a tenant of the defendant as it refused to sign a formal lease with her after it had became

the registered owner of the suit premises. She asked the court to dismiss the suit with costs.

When the matter came up for hearing, Noel Juma Nawajamba a director of the plaintiff, testified as PW1. She adopted her witness statement filed in court on the 20th day of September, 2016 as her evidence in chief. She stated that at the core of the dispute between the parties herein, is a lease agreement executed on or about the 28th March, 1981 to lease an area of 2230 square feet of all that property situated and built on LR 209/4879. That the said lease agreement granted the plaintiff exclusive possession of the demised property and it was for a fixed term of 5 years, 1 month commencing on 1st October, 1981 at an initial monthly rent of Kshs. 7,600/= which was revised to Kshs. 45,000/= when the term of the lease was extended.

She stated that in November, 2008, the defendant arbitrarily and in blatant breach of the tenancy agreement increased the rent from the agreed Kshs. 45,000/= to kshs. 51,500/= without any notice to the plaintiff.

That when she protested, the defendant threatened the plaintiff with eviction which eventually culminated into the defendant forcefully taking approximately 1115 square feet of the initial 2230 square feet. That on 31st July, 2009 the defendant levied distress in the guise of offsetting outstanding unpaid rent when the plaintiff was not in arrears of rent. She averred that the vicious levying of distress and eviction were done without following the due process of the law and was a ploy to repossess the demised premises by frustrating the quiet possession of the plaintiff and as a result, the plaintiff suffered substantial loss of earnings, business, clients and its strategic operation base. She produced documents in support of the plaintiffs' case.

The defendant called two witnesses in support of her case. She adopted her witness statement filed in court on the 24th November, 2016 as her evidence in chief. It was her evidence that she is the registered proprietor of LR No. 209/4879 having purchased the same from S.A.M Company Limited in May 2008, by which time the plaintiff was a tenant in the said premises. She told the court that she was aware of the existence of a lease agreement between the plaintiff and S.A.M Limited dated 1st October, 1981 which was for a term of 5 years and 1 month and which had already expired but the plaintiff had remained on the premises as an unprotected tenant of S.A.M Limited occupying 2230 square feet.

It was her further evidence that though several meetings were held between the plaintiff and herself with the intentions of agreeing on new terms of tenancy, no formal tenancy agreement was signed between them but parties agreed to increase the rent payable by the plaintiff and the plaintiff decided to surrender half of the premises it was occupying on the basis that the new rent was costly. That she rented out the premises that were surrendered by the plaintiff to a third party and the plaintiff remained on part of the premises as a licensee pending the signing of a formal lease.

She testified that sometime later, the plaintiff defaulted in paying the agreed rent and she levied distress with the intention of recovering the rent arrears. She stated that she has a new tenant in occupation of the suit premises and averred that the distress for rent was done legally. She referred to BPRT cases Nos. 20 of 2009 and 275 of 2010 involving the parties herein and produced documents in support of her case.

Moses Kariuki Macharia testified as DW2. He adopted his witness statement dated 22nd November, 2016 as his evidence in chief. He is an Auctioneer carrying on business under the names of Prodigy Auctioneers previously known as Prodigy Commercial Agencies. He stated that on 18th December, 2008, he received instructions from counsel for the defendant to proclaim for distress for rent against the plaintiff with a view to recovering kshs. 25,920/= following which, he made a proclamation on 5th January, 2009. However, he did not attach the goods as he was served with a court order issued on 19th January, 2009 prohibiting him from carrying out the distress.

That on 8th July, 2009, he received further instructions to proceed with recovery of rent against the defendant amounting to Kshs. 161,280/= and on 9th July, 2009, he did a further proclamation of their

goods. That on 30th July, 2009, he was instructed to remove the goods that he had proclaimed on 9th July, 2009, after he was assured by the advocate for the defendant that there were no legal impediments to the attachment. He proceeded to the plaintiff's premises on the 31st July, 2009 and managed to remove the proclaimed goods with the help of police officers from Industrial Area Police Station as there was stiff resistance from the plaintiff and it's workers.

He further stated that, on the 7th August, 2009, he was served with a court order restraining him from selling the distrained goods pending the hearing and determination of an application dated 7th August, 2009, but he was informed by the defendant's advocate that the application had been dismissed following which he advertised the goods for sale which took place on the 6th April, 2010. The sale was successful and the goods fetched Kshs. 237,000/=. He stated that he was not aware and had not been served with any order or pleadings in BPRT no. 275/2010 whether prior or after advertising the goods for sale.

He averred that the plaintiff filed a complaint against him before the Auctioneers Licensing Board being disciplinary cause no. 30/2011 claiming that he had been served with a court order but the complaint was heard and dismissed on the 13th October, 2011 by the Board.

He testified that the decision has never been appealed against by the Plaintiff and therefore, the plaintiff's assertions that the distress for rent and public auction were carried out unlawfully are erroneous.

Parties filed written submissions in support of their respective cases.

From the pleadings and the evidence on record, the following are the issues for determination;

1. Whether the plaintiff was a lawful tenant of the defendant at the time of the alleged eviction from the premises and if so, the type of tenancy that existed between them.
2. Whether the distress for rent levied by the defendant was lawful.
3. Whether or not the plaintiff was evicted from the suit premises.
4. Whether or not the goods attached and sold by the auctioneer were tools of trade.
5. Whether the plaintiff suffered any loss and damage as a result of the alleged distress and eviction and if so, the quantum of damages.

I now proceed to consider the issues as set out hereinabove.

On the first issue, the plaintiff submitted that it had a lease with the erstwhile owners of the premises and after expiry of the same in the month of April, 1988, the plaintiff continued to occupy the premises as a result of mutual consent between the parties save that the rent payable was gradually increased to kshs. 45,000/= as at July, 2008. The plaintiff relied on the case of ***Kenya Tea Development Authority vs. Samuel Kanogo Ritho (2005) eKLR*** in which the court stated;

> ***This being the case, the defendant was entitled to levy distress for rent under clauses 15 and 16 of the memorandum of agreement as well as under the provisions of Section 3(1) of the Distress for Rent Act (CAP 293) which, as rightly submitted by the plaintiff's advocate gives the same rights for distress as obtains under the English Common Law".***
>
> The said Section provides as follows;
>
> ***"Subject to the provisions of this Act, any person having any rent or rent services 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;***

The common law position in cases similar to the present one is clearly spelt out in the case of ***WALSH vs LONDSDAIE*** as follows;

"A lessee in occupation under an executory lease is subject to the same right of distress as if a lease had been granted and if ------ under the terms of the lease rent would have been payable then distress is lawful"

"In light of the above, I find that the defendant was entitled to distrain for rent due in accordance with clause 16 of the Memorandum of Agreement."

The defendant further submitted that it purchased the suit premises in 2008 subject to the existing tenancies. Counsel for the defendant contended that the lease between the plaintiff and the previous owner of the suit premises being for more than 5 years was not a controlled tenancy. He further submitted that the plaintiff and the former owner of the suit premises were in a periodic tenancy from December, 1986 after their registered lease expired and they continued with the arrangement until the premises were sold. Counsel contended that when the defendant purchased the premises, she found a periodic tenancy in place and the plaintiff continued paying rent to the defendant.

The court has cautiously considered the submissions of the parties in regard to this issue. Both parties are in agreement that there was no lease agreement between them as the tenancy agreement between the plaintiff and the previous landlord (owner) of the suit premises had long expired by the time the defendant purchased the premises.

However, the plaintiff and the previous owner (S.A.M) continued with the same relationship as if the tenancy agreement was still in force. The plaintiff continued being in occupation and possession of the premises paying monthly rent to S.A.M. Upon purchase, the defendant took over the relationship as it was but expressed her intention to enter into a formal relationship with the plaintiff and the other tenants who were also in occupation of the premises but the parties herein never entered into a formal agreement.

According to the defendant, the parties were in a periodic tenancy but the plaintiff thinks otherwise. In regard to periodic tenancies, ***Megarry & Wade, 7th Edition***, (the law of Real Property) has this to say;

"A tenancy from week to week, month to month, quarter to quarter or other period less than a year, can be created in a similar way to a yearly tenancy, namely;

i. *By express agreement.*
ii. *By inference, such as that arising from the payment and acceptance of rent measured by reference to a week, month, quarter or other period in circumstances where the parties intended there to be a periodic tenancy and not a mere tenancy at will or a license or*
iii. *By an express provision that the tenancy is to be determinable by some specific period of notice.*

Going by this definition, and by inference arising from the payment and acceptance of rent measured by reference to a month, the parties herein were in a periodic tenancy and not a mere tenancy at will or a licence and therefore, the plaintiff was a lawful tenant of the defendant.

On whether the distress for rent was lawful, the plaintiff submitted that the same was not. It averred that it had been making rent payments to the defendant and it was not in arrears as alleged by the defendant. It was further submitted that the arbitrary increase in rent from Kshs. 45,000/= to Kshs 51,000/= did not result in arrears as the purported rent increase was not effected with the requisite notice to the plaintiff. Counsel for the plaintiff relied on the case of ***Cyo Owayo vs. George Hannington Zephania Aduda T/a Aduda Auctioneers & Another (2007)*** on what constitutes illegality of distress for rent.

On her part, the defendant contended that the plaintiff was in arrears of rent and submitted that the evidence produced by the plaintiff in the form of receipts and bank statements shows that payments stopped in November, 2008 as the last payment was made on 30th November, 2008 though the plaintiff continued to occupy the premises until June 2009. The defendant made reference to several authorities being that of ***Royal Gardens Hospital Vs. Ebrahim Omenyi Amwere & Another (Civil Suit Number 10/2018, the High Court Kakamega)*** which reiterates the right of a landlord to distress for rent when a tenant fails to pay rent.

On the contention by the plaintiff that the distress was illegal on the basis that the defendant had increased the rent from Kshs. 45,000/= to kshs. 51,500/= in November, 2008 and without notice, the defendant submitted that the plaintiff continued occupying the premises without paying even the earlier rent before the increment. Counsel, therefore, submitted that the issue of increment of rent as a ground for illegal distress is immaterial. The case of ***J. K. Chatrath & Another vs. Shah Cedar Mart (1967)E.A. 93*** was relied on.

It was also the defendant's contention that in carrying out the distress, the correct legal procedure was followed citing the case of ***John Tomno Cheserem vs. Sammy Kipketer Cheruiyot***, ***Civil Appeal No. 151/2011 eKLR.*** Further, the defendant submitted that the plaintiff filed a complaint against her before the Auctioneers Licensing Board claiming that the auctioneer ignored a court order restraining him from selling the proclaimed goods but the Board dismissed the said complaint. She made reference to the case of ***Ahmed O. Bachani vs. Zubeda Nanji (Civil Appeal No. 286/2011 eKLR).***

In considering this issue, it is important for this court to look at what constitutes illegality of distress for rent. In the case of ***Cyo Owaya vs. George Hannigton Zephania Aduda T/a Aduda Auctioneers & Another (2007)*** the court of appeal held;

"***Under Section 3(1) of the Distress for Rent Act, in looking at what constitutes illegality of distress for rent, the court must not only consider our laws, but must also consider what in England would be considered an illegality in the levy of distress. An illegal distress is one which is wrongful at the very outset, that to say either where there is 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.

On the other hand, Section 15 of Distress for Rent Act provides thus;

> *"Where distress is made for any kind of rent justly due, and any irregularity or unlawful act is afterwards done by the party distraining, or by his agents the distress itself shall not be therefore deemed to be unlawful nor the party making it be deemed a trespasser ab initio, but the party aggrieved by the unlawful act or irregularity may recover full satisfaction for the special damage he has sustained thereby in a suit for that purpose**;"***

i. ***When the plaintiff recovers in that suit, he shall be paid his full costs of suit and have the same remedies for them as in other cases of costs.***
ii. ***No tenant or lessee shall recover in any suit for any such unlawful act of irregularity, if the tender of amends has been made by the party distraining or his agent before the suit is brought.***

With regard to this issue, the court has perused copies of receipts that were produced by the plaintiffs in the name of Jarmat Enterprises. Going by those receipts, the last payment for rent was made on the 30th November, 2008. This has not been disputed by the plaintiff. The Bank Statements produced by the plaintiff also confirms this position.

The plaintiff averred that the defendant locked the premises on the 31st July, 2009. Simple calculation would reveal that the plaintiff did not pay rent from December 2008 to July, 2009. In other words, there is no evidence tendered to court to show that rent for those months was paid.

Though the plaintiff has argued that the alleged arbitrary increment in rent did not result in arrears of rent, it has not brought forth any evidence to proof to this court that it paid the earlier rent before increment for those months between December 2008 – July 2009 yet, it has not denied that it continued occupying the

premises. It would have been a different thing altogether if such evidence was adduced before the court.

As rightly submitted by the defendant, had the plaintiff continued paying the initial rent of kshs. 45,000/= from November, 2008 to July 2009 whilst disputing the increment of rent, then it would have had a claim by stating that it never agreed to the increased rent. In advancing this argument, the defendant relied on the case of ***J. K. Chatrath & Another vs. Shah Cedar Mart, (1967) E. A. 93*** in which the court of appeal in Nairobi held;

> *"The first appellant was justified in carrying out distress for arrears of rent due and the fact that he also wrongly included the amount for site tax would not in my view, affect his liability in this case. The evidence shows that the respondents did not at any time tender to the bailiff the amount of rent which they said was then due. The evidence shows that at no time was a legal tender made of the rent and the costs of the distress. In these circumstances it appears to me that the distress was a legal one properly carried out and having regard to the agreed possession of only one machine, that the distress cannot be said to be excessive. The respondents have failed to show any reason why they should recover damages for an illegal or wrongful distress. I would therefore allow the appeal and order that the claim be dismissed.*

An issue arose as to whether the auctioneer violated the court order and it was alleged that he had been purportedly served with a copy of an order stopping the sale of the proclaimed goods. The evidence available to this court by way of a letter dated 13th October, 2011, from the secretary to the Auctioneers Licensing Board to Moses K. Macharia T/A Prodigy Commercial Agencies, is that the complaint filed with the Board by the plaintiff in that regard, in Disciplinary Cause Number 30 of 2011 was dismissed with costs of kshs. 10,000/= to the auctioneer. This court did not hear any contention by the plaintiff to the effect that there were no such proceedings before the Board, or that it filed an Appeal against that finding.

On whether or not the plaintiff was evicted from the suit premises, the parties herein have taken different positions in that regard. The plaintiff has maintained that it was evicted whereas the defendant has contended that the plaintiff left the premises after distress was levied.

As I have already stated, the last proclamation was done on 31st July 2009. From the evidence, the plaintiff resisted the same and the auctioneer had to seek assistance of police officers for him to carry out the distress. Though the plaintiff contends that the defendant locked the premises on the 31st July, 2009 this evidence was not corroborated by any other evidence. This is not withstanding that on the said date, the plaintiff's business was open and there were employees in the premises. It could have helped its case if one such employee was called in evidence to support its case.

Considering the evidence adduced by both parties in regard to this issue, I find the account given by the defendant more reliable to the effect that, after the plaintiff's goods were proclaimed, it abandoned the premises. It is not therefore true that it was evicted from the premises as alleged.

On whether or not the goods attached by the auctioneers were tools of trade, the plaintiff averred that some of the goods proclaimed and sold by the auctioneer were tools of trade. The defendant has denied that allegation.

Section 16 of Distress for Rent Act lists down Articles that are exempted from distress. For purposes of this case, Section 16 (g) reads;

"***Wearing apparel and bedding of the persons whose goods and chattels are being distrained upon and the tools and implements of his trade to the value of one hundred shillings."***

On its part the plaintiff has relied on the proclamation to support his contention that the goods attached were tools of trade. The defendant on her part contended that the plaintiff's witness did not testify or produce any evidence with regard to the kind of work or profession that the plaintiff was engaged in. Further, the defendant submitted that the proclaimed goods were not sold immediately after the

attachment but remained in storage for 8 months before they were eventually sold in public auction on the 6th April, 2020, yet at no point during that time did the plaintiff complain that any of the goods attached were tools of trade. The case of ***Blackwood Hodge (Kenya) Limited vs. Lead Gasoline Tank Clearing Sam and Chase (K) Limited (Civil Case No. 2735 of 1984) (eKLR)*** on the definition of the use of the term tools of trade in attachment was relied on.

The court has considered the parties' submissions on this issue. As submitted by the defendant, the plaintiff did not lead any evidence to guide this court on the business it was involved in at the material time, to enable the court determine whether the goods proclaimed were tools of trade. Infact, there was no mention at all, of the nature of its business. Section 107(1) of the Evidence Act on the burden of proof provides as follows;

> ***"Whoever desires any court to give judgment as to any legal right or liability dependent on the existence of facts which he asserts, must prove that those facts exist."***

Section 108 on incidence of burden of proof provides thus;

> ***"The burden of proof in a suit or proceedings lies on that person who would fail if no evidence at all were given on either side."***

Lastly, section 109 on proof of a particular fact provides thus;

> ***"The burden of proof as to any particular fact lies on the person who wishes the court to believe in its existence, unless it is provided by any law that the proof of that fact shall lie on any particular person".***

However, during the cross-examination of DW2 by counsel for the plaintiff, he stated that items Nos. 1 and 2 in the proclamation dated 5th day of February, 2009 are tools of trade. The two items are a Lathe Machine and a pressing machine. Though he stated that he did not proclaim on the basis of this proclamation, it was his further evidence that the attachment was based on the proclamation dated the 9th day of July, 2009.

The court has perused the proclamation dated 9th July, 2009 and I am able to confirm that among the goods listed therein are a pressing machine and a lathe machine. Further, the court has perused the notice of public auction in the Kenya Times dated 26th March, 2010. There is no doubt that these two items were listed among those scheduled to be sold by public auction. There is no evidence adduced by DW2 to show that the said goods were not sold and that they were returned to the plaitniff.

Going by DW2's own evidence, this court is prepared to find and I hereby do, that, some of the goods attached were tools of trade. However, Section 16(2) of Distress for Rent Act provides a remedy to a tenant whose exempted articles are attached. It states;

> *"A subordinate court, on complaint that goods or chattels exempt under this section from distress for rent have been taken under that distress, may by summary order direct that the goods and chattels so taken if not sold, be restored; or if they have been sold, that such sum as the court may determine to be the value thereof shall be paid to the complainant by the person who levied the distress or directed it to be levied."*

The court notes that the plaintiff did not tender any evidence to guide the court on the value of the two machines. It is not therefore possible for this court to put a value on them. The plaintiff ought to have made a specific prayer claiming the value of the said machines. This was not done. .

Though the court has found that the Auctioneer attached some tools of trade, this is an irregularity but which cannot make the distress for rent unlawful. Section 15 of Distress for Rent Act provides that;

"Where the distress is made for any kind of rent justly due, and any irregularity or unlawful act is afterwards done by the party distraining, or by his agents, the distress itself shall not be therefore deemed to be unlawful nor the party making it be deemed a trespasser ab initio, but the party aggrieved by the unlawful act or irregularity may recover full satisfaction for the special damage he has sustained thereby in a suit for that purpose.'

On the issue of the value of the lorry allegedly attached by DW2, I have carefully perused through the proclamation dated the 31st July, 2009. In his evidence, DW2 stated that it was filed by error. I agree with him for the reason that the name of the tenant which appears on it, is Mobimba Tours and Safaris and not the plaintiff, which means the said proclamation relates to a different distress and not that of the plaintiff herein.

In view of the above, I find that the plaintiff did not proof its case on a balance of probability and proceed to dismiss the same with costs.

Having made that finding, the law enjoins this court to assess general damages that it could have awarded the plaintiff had it succeeded in its claim.

In its submissions, the plaintiff has urged the court to award both special and general damages. On the aspect of special damages, it is trite law that the same have to be pleaded and proven. This has not been done. In the circumstances, none is awarded.

On general damages the plaintiff has suggested a sum of kshs. 400,000/= but the defendant did not address the court on how much they think is reasonable.

Considering the circumstances of this case, the goods alleged to have been proclaimed and the loss of business a sum of kshs. 200,000/- would have been reasonable. This is a conservative figure since no evidence was lead by the plaintiff as to the amount of the business it lost.

In view of the circumstances of this suit, I hereby make no order as to costs.

Dated, Signed and Delivered at **Nairobi** this **30th** Day of **January, 2020.**

…….

L. NJUGUNA

JUDGE

In the Presence of

……. For the Applicant

……. For the Respondents