



**REPUBLIC OF KENYA**

**IN THE HIGH COURT OF KENYA AT MERU**

**CIVIL SUIT NO. 9 OF 1997**

**MERU MEDICAL STORES COMPANY LIMITED.....PLAINTIFF**

**VERSUS**

**STANLEY KABIRA MWITHIMBU .....1<sup>ST</sup> DEFENDANT**

**FRANCIS MUNG'ORI IMANENE .....2<sup>ND</sup> DEFENDANT**

**GEORGE M. MARANGU T/A SHELTER AUCTIONEERS .....3<sup>RD</sup> DEFENDANT**

**JUDGEMENT**

The plaintiff by plaint dated 11<sup>th</sup> February 1997 sued Stanley Kabira Mwithimbu Francis Mung'ori Imanene and George M'Marangu T/A Shelter Auctioneers seeking that the court declares:-

- a) That his eviction was illegal.
- b) That an order issues reinstating the plaintiff into the suit premises and/or any other better relief suitable to meet the ends of justice.
- c) Compensation for loss and damages as stated in paragraph 8(a) (b) and (c) of plaint.
- d) Costs of suit.
- e) Interest on (c) and (d) at court rate of 14% P.A from 24<sup>th</sup> February 1994 until payment in full.
- f) Restoration of plaintiff's goods taken away by defendants.

The plaintiff claimed special damages of Kshs 8,059,939.20 on paragraph on paragraph 8(a). This included Kshs 698,000/= being money paid out for hire of private security from 24.2.1994 to 15.3.95

- Rent paid when not in occupation of premises between February 1994 to September 1994;
- Cost of application form for 1994 Trade licence.
- Water and Electricity standing charges – March 1994 – March 1995.
- Fitting damages
- Valuation Report for damaged property.
- Furniture and equipment
- Stock in trade
- Lost profits per year

- Cash stolen
- Padlocks and Electric
- Sign boards
- Photographs and other related documents
- Lost stationery
- Lost car engine
- Loss of profit on stock in trade.

At paragraph 8(h) the plaintiff seeks General damages which was particularized as:-

- i. Loss of interest on anticipated earnings
- ii. Loss of good will
- iii. Loss of anticipated earnings from new business and opportunities
- iv. Embarrassment, humiliation, ridicule, distress, inconvenience, frustrations etc
- v. Loss of user on equipment, furniture etc
- vi. Wasted efforts and resources.
- vii. Lost business records correspondences, cheque book etc.

At paragraph 8(c) the plaintiff company sought exemplary and aggravated damages. To support its case the plaintiff called 3 witnesses.

PW3 the Director of Plaintiff Company claimed that plaintiff company which was lawfully trading in animal medicine leased premises from the 1<sup>st</sup> and 2<sup>nd</sup> defendants. He claimed that the 1<sup>st</sup> and 2<sup>nd</sup> Defendants locked the plaintiff's business premises unlawfully and thereby occasioning it loss and damage.

The defendants on the other had contended that the plaintiff was not their tenant rather it was PW3 in person who was their tenant. They said that they didn't attach, auction or confiscate the plaintiff goods.

The plaintiff's case was supported by the evidence of PW1 Cyprian Property and Kirera Riungu a Land Valuer. He sought to produce valuation Report prepared by Gideon Maitina Gitonga Aritho and Stephen Ole Nchoki on 25<sup>th</sup> May 1995. The report in reference to valuation conducted at Meru Municipality Block 2/173 – fittings, Partitions and fixtures in the business premises were valued at Kshs 355, 000/= by 1995. He said the valuation was requested for by Meru Medical Stores Ltd, Maua supermarket and Mrs Lucy Mwanthi. PW1 said he was a partner at Gitonga Aritho and Associates between 1987 to 1992 and the makers of the Report were known to him. He said Stephen Oronchoki who signed report was a trainee.

Millicent Ithiru relied on her statement dated 7<sup>th</sup> November 2017. She said the plaintiff company employed her from 1979. She said her letter of employment remained in an envelope at her place of work when the business premises was locked. She said Dr Mwanthi was the Director of plaintiff company.

She said she was not aware of any other directors to Plaintiffs Company. She said she didn't know when the business was started. She said the premises where Dr Mwanthi operated belonged to Stanley Kathera and she used to pay for rent to him monthly. She said they used to pay Kshs 4500 per month. She said receipts of cheques for rent was acknowledged in a delivery note. She said she was not issued with receipts for rent paid.

Dr. Leonard Kimeu Mwanthi – PW3 testified that he was one of the Directors of Plaintiff Company. He said the defendants closed the plaintiff business premises and evicted them on 24<sup>th</sup> February 1994. He sought compensation damage caused to their stock as well as what was scattered away by defendants. He said Plaintiff Company was registered as a Ltd Liability Company. He produced certificate dated 3<sup>rd</sup> March 1989. He produced Form CR 12 as proof he and his wife were Directors of Plaintiff Company. He produced exhibits P1, P2, P3, P4 – P41.

In cross examination he aid Plaintiff Company was tenant to defendants. He said they took occupation in 1979 when the medical stores was a partnership. He said the Tenancy agreement was verbal. He said he found defendants had placed a notice on the door and locked the business premises. He said the plaintiff was initially partnership and in 1989 converted to Ltd Liability company and PW3 said he didn't think there was any big difference between a partnership and Limited Liability Company. He said there was implied agreement between the plaintiff and 1<sup>st</sup> and 2<sup>nd</sup> Defendants because the defendants kept receiving rent.

He said BPRTC. No. 137 of 1992 was still pending between him and the defendants. He said C.C. No. 42 of 1991 was filed by Meru Medical Stores. He said in C.No. 137 of 1992 the defendants claimed he had not paid rent for 34 months. He said he was not personally liable. He said Meru H.C.C. No. 155 of 1988 never existed. He said he made several appeals to the court of Appeal. In civil Appeal No. 13 of 1982 PW3 said the defendants had sued him in respect of the same premises. He said appeal No. 88 of 1983 was still pending before the court and the appellant vs himself. He said receipts issued by defendants were in his own name and he returned them to be issued to the plaintiff company. He said at no time did the defendants issue receipt in the name of the plaintiff company. He said H.C.C. Appeal No. 88 of 1993 is still pending and it arose out of a decision of Business premises Tribunal where the landlord claimed some rent had not been paid. He said the Tribunal allowed the Landlords to levy distress to recover Kshs 205,000/= plus costs of Kshs 10,000/=. He said he appealed against the decision. PW3 said by the time premises were closed defendants had already recovered what he owed then. He said that the defendants attached goods and livestock from his house on 27<sup>th</sup> January 1994. He said there was nothing owing to the defendants when the shop was closed on 24<sup>th</sup> February 1994.

He said in re-examination. It is the plaintiff which issued cheques for rent. He said he was aggrieved by the Tribunals decision and he lodged appeal no. 88 of 1993. He said that appeal related to his personal goods attached by defendants. He said Meru Medical stores objected to decision of Tribunal in Nairobi civil Appeal No. 24 of 1994. He said when he reported to work in the morning he found Auctioneers were distraining for rent in execution of Tribunal case no. 137 of 1992.

He said the Notice didn't indicate when auction was to take place and value of goods attached was not given. He said the cases in court of Appeal and tribunal have no bearing to the current suit. 1<sup>st</sup> defendant on his part said their Tenant was Dr Mwanthi and not Meru Medical stores. He said the receipts produced court of Appeal Judgment on Civil Appeal no. 113 of 1982. H.C.C No. 113 of 1998 and HC.Appeal No.88 of 1993 were all in the name of PW3. He said it is only timber which was attached by Auctioneers from the premises. He said plaintiff locked the premises prior to Auctioneers visiting 1<sup>st</sup> defendant said PW3 used to pay rent by cheques but he could not tell if cheques were in the name of the plaintiff.

He said by the time Auctioneers visited the premises there was no business going on. He said the Auctioneer gave notice prior to evicting the PW3 from the premises and there was no damage caused as there was nothing in the premises. The 2<sup>nd</sup> defendant Francis Mwori Imanene also relied on his statement recorded on 17<sup>th</sup> April 2017. He said Dr. Mwanthi was their tenant and not Meru Medical stores. He said Dr. Mwanthi left the premises on a date he could not remember. He said they directed Auctioneers to close shop when plaintiff failed to pay rent. He said he could not remember if there was court order to open the shop. He said that prior to running down Dr. Mwanthi used to sell medicine until he had nothing remaining to sell. 2<sup>nd</sup> Defendant said it was 1<sup>st</sup> defendants who used to receive rent and handled the premises. 2<sup>nd</sup> Defendant said receipts issued showed who the tenant was he said when shop was broken into he was told there was nothing in it.

The 3<sup>rd</sup> defendant testified and said he handled order in Business premises Rent Tribunal case No. 137 of 1992. He produced certificate authorizing him to levy Distress – Exh D4 (a) (b) and (c). He said when he accessed the premises he found it was empty and didn't therefore execute the order. He said they only found shelves. He said he received instructions in 1994. 3<sup>rd</sup> Defendant denied knowledge of documents on letter head of Shelter Auction at pages 36 and 37 of PW3's bundles of documents. 3<sup>rd</sup> defendant denied having gone to PW3 residence. He denied having locked PW3's premises which he went to levy distress. He said proclamation dated 24.2.1994 doesn't bear his signature. He said he didn't find anyone in the premises. He said when he didn't find anything to attach he filed a Report at the Tribunal.

Upon close of plaintiff and defendants case written submissions were filed. The issues for determination are

- Whether the plaintiff was a tenant to the 1<sup>st</sup> and 2<sup>nd</sup> defendants;
- Whether the defendants unlawfully locked the plaintiffs business premises?
- Whether the plaintiff's goods were unlawfully and wrongfully attached.
- Whether the defendants were entitled to levy distress for rent arrears owed by the plaintiff or PW3?
- Whether the plaintiff suffered loss, pain, and suffering and therefore deserves to be paid damages.

This court has perused the pleadings herein and it appears that the parties' dates with each other in court started way back in the 1980s. From H.C.C.C 113/98 PW3 has been that since 1970's paying Kshs Kshs 4500/=. He uses his own name vs Defendant. The claim is similar to 7/97.

In Meru H.C. Civil Appeal No. 88 of 1993 PW3 Dr. Leonard Mwanthi appealed against the judgement. The defendants herein and Maua, Meru Medical Stores co. Ltd and Ms Lucy C.M. Mwanthi were applicants/objectors. The Deputy Registrar at paragraph 3 of his ruling commented that this matter had a long history in the courts and there was an appeal pending in the High court.

He said that distress for rent had been levied and there was no need to close the premises. PW3 sued in person and not in the name of the plaintiff company. Later in 2001's PW3 in Nairobi Court of Appeal case 321 of 2001, PW3 is a party jointly with Meru Medical Stores and Lucy Catherine Mwanthi vs KCB. The Bank appealed against the decision of Osiemo J in H.C.C. No. 69 of 1998.

PW3 does not explain why b 2001, his business appears in the name of Meru Medical Stores instead of Meru Medical stores co. Ltd. Which he claims changed from partnership to Limited Liability Company in 1989.

In Business premises Rent Tribunal C. No. 17 of 1994, Meru Medical Stores Co. Ltd sued S.K. Mwithimbu and Francis Mungori. Rent

Inspector wrote a report to the effect that the premises had not been in use for sometime as there was evidence of a lot of dust which had gathered on the windows doors and floor outside. The report indicates visit was on 1<sup>st</sup> August 1994. It is not shown what the claim was in the suit by plaintiff.

In Business premises Rent Tribunal Case No. 29 of 1994 the Tribunal closed the case because it was informed the tenant had vacated the premises and it lacked jurisdiction.

In Civil Appeal No. 24 of 1994 – High court of Kenya at Nairobi – PW3 was the appellant whereas his wife and Meru Medical stores were objectors to attachment of goods which the Creditors intimated they intended to continue with attachment on 28<sup>th</sup> February 1994.

There is also BPRT C.No. 42 of 1991 where Meru Medical stores Ltd has sued S.K. Mwithembu. 1<sup>st</sup> Defendant herein – where the chairman of the Tribunal gave 30 days within which the parties were to establish rent arrears owed by the tenant.

It is apparent, PW3 has in a bid to avoid his liabilities used his own name, the name of Meru Medical Stores Co. Ltd and even his wife to sue making varied claims in different courts and at the business premises. Rent Tribunal as noted by the Deputy Registrar in Meru H. C. Civil Appeal No. 88 of 1993 the PW3 and the 1<sup>st</sup> and 2<sup>nd</sup> defendants have had a long history of disputes in court over rents and occupation of the business premises known as Meru Municipality Block II/173 and 174 which borders on being vexations because of their multiplicity and determination.

PW3 has persistently over a long period of time wanted the 1<sup>st</sup> and 2<sup>nd</sup> defendant to treat their relationship as between a Ltd Liability company and the defendants but as he admitted there exists no written and registered lease between the plaintiff and the defendants. The plaintiff being a Ltd Liability company it would have required that for it to enter into a contract, resolutions of the Directors sealed with the seal of the company as per the previous company Act would have been required.

A limited Liability company cannot enter with a verbal contract. The lease agreement between the plaintiff and the 1<sup>st</sup> and 2<sup>nd</sup> Defendants ought to have been registered but it was not and PW3 admits as much. He can't use the plaintiff to make a claim from the 1<sup>st</sup> and 2<sup>nd</sup> Defendants where there was no relationship. Minutes akin to the document at page 108 of PW3 bundle of documents would have sufficed.

The PW3 claimed Kshs. 698,000/= being costing security provided between 24<sup>th</sup> February 1994 to 15<sup>th</sup> March 1995 and provided receipts for the same but it was not clarified why he hired security guards. None of the guards testified and the company that allegedly assigned the guards didn't testify.

The valuer who came to produce valuation Report for the value of fittings in the premises- PW1, didn't do the valuation and didn't sign it. In fact he admitted that the signature was for trainee and therefore an unqualified person and can't be allowed to make and produce expert opinion. The Associates in the firm of valuers didn't come to court and it was not evidenced why they could not attend and produce the Report. The same was therefore not admitted. The entire claim at paragraph 8(a) was not strictly proved by PW3 or any of the other 2 witnesses.

Documents at page 34,35,36,37,38,39, 40 and 44 were produced by PW3 as proof that goods were attached from his business premises but the 1<sup>st</sup> documents indicates the chemist had been closed by 29<sup>th</sup> October 1993 and no items were taken away.

On 27.1.1994 it is shown some items were attached from Dr. Gituma as his witness. When the defendants and particularly 3<sup>rd</sup> defendant denied that inventory was made by him or his agents in execution of a court order.

Another inventory at page 37 also indicates some items were taken from Mr. Reuben Gikundi's home. It is not clarified how the items are related to the plaintiff or PW3 herein. There are also items which were attached from the home of Mr. Ezekiah Kitia and he signed for them and yet he was not called.

As evidenced by PW3 and the defendants as well as the documents presented in court, attachments levied against the 3<sup>rd</sup> plaintiff witness were in pursuit of lawful court orders for rent due and owing from PW3 to the 1<sup>st</sup> and 2<sup>nd</sup> defendants. The dispute had existed over a long span of time and multiple suits are still in existence in the Tribunal Magistrates court and in the court of appeal concerning the disputes.

This court's finding is that the plaintiff is not properly claiming from the defendants because no contract of a lease exists between it and the defendants. Secondly, the claims by the plaintiff have not been proved strictly and the same can't be awarded. Consequently all the other claims fail. The plaintiff will pay costs to the defendants.

**HON. A. ONG'INJO**

**JUDGE**

**JUDGEMENT DELIVERED DATED AND SIGNED IN COURT ON 31<sup>ST</sup> DAY OF JANUARY 2019**

**In the Presence of:**

C/A: Kinoti

Plaintiff: Dr. Kimeu – Present in person

Mr. Thangacia Advocate for Plaintiff – Present

Defendants: Mr. Rimiti Advocate for Defendants – Present.

**Mr. Thangacia**

I pray for certified copy of judgment

**Order**

Certified copy of judgment to be supplied to parties upon payment of copying charges.

**HON. A. ONG'INJO**

**JUDGE**