



REPUBLIC OF KENYA
IN THE HIGH COURT OF KENYA AT NAIROBI
CIVIL CASE NUMBER 270 OF 2013

BONIFACE NGURE NDUNG’U. PLAINTIFF

VERSUS

BESTLADY COSMETICS SHOP LIMITED..... DEFENDANT

J U D G M E N T

1. Boniface Ngure Ndung’u the plaintiff herein filed an action against Bestlady Cosmetics Shop Ltd, the Defendant herein, vide the amended plaint dated 5th December, 2014 whereof he sought for judgment as follows: -

- a) A mandatory injunction do issue ordering the defendant to provide a full, true and correct inventory of and to return or cause to be returned by its agents, namely, Bealine Kenya Auctioneers, all the Plaintiff’s Real Photo Studio equipment, stock-in trade, goods, items, furniture and various documents more particularly itemize in Paragraphs 11 and 11(a) of the amended plaint with their condition ascertainably verified at the cost of the said defendant.*
- b) Kshs.24,078,300.00 pleaded in paragraphs 11 and 11(a) of the amended plaint.*
- c) Kshs.40,000.00 as pleaded in paragraph 18 of the amended plaint*
- d) The refund of Ksh.322,728.00 pleaded in paragraphs 4(b) and 4(c)of the amended plaint.*
- e) Loss of business profits at the rate of Kshs.150,000.00 per month from 14th June, 2013 until effective and satisfactory reinstatement back into the suit shop 15th June, 2015 in terms of Cap 301 and the Land Act 2012.*
- f) General and Exemplary damages for trespass, illegal distraint for rent and illegal and contumacious eviction.*
- g) General damages for wrongful deprivation of use and enjoyment of the various goods and items pleaded in paragraphs 11 and 11(a)of the amended plaint.*
- h) Interest on items (b), (c) and (e) hereinabove from 14th June, 2013, 26th December, 2012 and 14th June, respectively at the rate of 20% per annum until payment in full.*
- i) Interest on items (e), (f) and (g) at 14% per annum from the date of judgment until payment in full.*

j) Costs of this suit together with interest thereon at court rates.

2. The defendant filed a defence to deny the Plaintiff's claim. It also filed a counter-claim and sought for judgment in the following terms: -

a) Payment of Ksh.577,508/93, being arrears as at June, 2013.

b) Costs and interest

3. When this suit came up for hearing, the Plaintiff testified and summoned the evidence of five (5) independent witnesses.

4. Boniface Ngure Ndung'u (PW1) the Plaintiff herein testified by stating that there existed a landlord – tenant relationship between the Plaintiff and the Defendant having taken him as a sitting tenant when the defendant purchased the property known as LR. No. 209/785/30 units 1 and 23.

5. PW 1 tendered in evidence the statutory notices served upon him in which the Defendant sought to terminate his tenancy pursuant to the provisions of Section 4(2) of the Landlord and Tenant (Shops, Hotels and Catering Establishments) Act, Cap 301, laws of Kenya.

6. PW 1 further stated that those termination notices were successfully challenged before the Business Premises Rent Tribunal (BPRT).

7. It is the evidence of PW 1 that since there was no written tenancy, the tenancy was controlled. He produced a letter from the Defendant's Advocate in which it was confirmed that the tenancy was controlled.

8. The Plaintiff further averred that he was a protected tenant despite the defendant's denial.

9. It is the evidence of PW 1 that despite the court dismissing the Defendant's termination notices the defendant – landlord denied the Plaintiff's access to his shop by placing locks on top of the Tenant's locks and on the shutter door in an attempt to evict him. It is said the defendant also welded the said shutter door to the metal frame and stationed guards at the entrance to the Plaintiff's shop.

10. PW 1 produced proceedings and the order issued by BPRT on 20th December, 2012 barring the Defendant from interfering with the Plaintiff's quiet and peaceful possession of his shop and authorising the breakup of the locks superimposed on the Plaintiff's locks to regain access of the premises.

11. PW 1, also stated that on 14th June, 2013, the Defendant unlawfully dispossessed him of his premises when there was an order to maintain the status quo issued by BPRT. The Plaintiff produced photographs to buttress his assertion that his fixtures to the premises were removed using a crow bar.

12. Mercy Wangechi Nderitu, (PW 3) stated that the defendant's managing agent put a padlock on the Plaintiff's premises.

13. PW 1 further stated that the auctioneers removed everything from the shop and had them loaded onto a lorry after which two security guards were stationed to guard the premises. It was pointed out that the auctioneer carted away items like signboards which are excluded from attachment under Section 16 of the Distress for Rent Act.

14. The Plaintiff submitted that the defendant was not distaining but was in effect carrying out an eviction. The Plaintiff pointed out that the defence and counter-claim was a sham. The plaintiff averred that he did not abandon the premises as alleged by the defendant but was basically ejected.

15. PW 1 averred that he even offered to pay to the Auctioneer the alleged rent arrears plus the Auctioneer charges but the auctioneer declined to accept upon consulting the Defendant's Managing

Agent.

16. The Plaintiff also stated that he was not in arrears of rent and that the defendant – landlord criminally trumped up a case for levying distress for rent so as to use it as a smokescreen for the illegal eviction.

17. The Plaintiff through the evidence of Nzuki Musyoki (PW 2) said that he served the defendant with a tenant's notice to obtain re-assessment of Rent on 28th February, 2013 which evidence was not challenged.

18. In the evidence of DW 1 the defendant asserted that it had increased the rent with effect from November, 2012 and that the Plaintiff had consented to the said increment.

19. The Plaintiff, however, disputed that assertion stating that he approached the BPRT to complain that the landlord had illegally increased the monthly rent and had locked the tenant's shop to enforce the same. The Plaintiff stated that he did not agree with the Defendant's proposal to increase rent and therefore, the credit note given was a fabrication to avoid compliance with Section 4 of Cap 301 Laws of Kenya.

20. The Plaintiff also stated that the Defendant failed to tender evidence showing that he had agreed to have the rent increased.

21. It is the submission of the Plaintiff that he proved on a balance of probabilities that in desperation, to save his business, he attempted to settle the purported rent arrears plus the Auctioneer's charges at the time of distress and before the seizure but the Defendant's Managing Agent and the Auctioneer's assistant refused to accept payment because it intended to evict him. It was also pointed that the alleged proclamation was not served upon him by the Auctioneer.

22. DW 1 admitted in cross-examination that on the fateful day he witnessed the auctioneer collecting goods from the tenant's premises and that he did not know where the goods were taken to.

23. It is the Plaintiff's submission that at all times the Defendant and the Auctioneer did not give accurate details about the whereabouts of the goods which had been carted away from his premises.

24. PW 5, a Registered Practicing Valuer presented a valuation Report dated 24th November, 2015 which placed the value of the goods which were taken at Ksh.22,299,770/-. It is said that none of the items which were taken were returned.

25. The Plaintiff proposed to be paid a sum of Ksh.5,000,000/- and Ksh.3,000,000/- as general and exemplary damages respectively plus interest at 14%.

26. The Defendant on its part is of the submission that it was entitled to levy distress and that it instructed the auctioneer to levy distress and not to carry out an eviction as alleged by the Plaintiff. The Defendant denied the allegation that the Auctioneer removed fixtures or permanent structures with the intention to evict.

27. The Defendant further stated that the plaintiff should have sued the auctioneer to recover damages but not the instructing party under Section 26 of the Auctioneers Act. It was pointed out that there was evidence showing that a complaint was filed at the Auctioneers Licensing Board whose outcome is that the Auctioneer was penalized for wrongful conduct.

28. The Defendant further submitted that the Defendant is and was not liable for the wrongful acts of the Auctioneer. The Defendant further stated that the plaintiff was not entitled to exemplary damages. The defendant also stated that the prayer for a mandatory injunction to compel the defendant to provide a full inventory cannot issue because such an inventory was provided.

29. Having considered the evidence and the rival submissions, the following issues commend themselves

for determination.

i) First, whether the defendant unlawfully levied distress against the plaintiff?

ii) Secondly, whether the distress levied against the Plaintiff amounts to constructive eviction of the Plaintiff.

iii) Thirdly, whether the plaintiff is entitled to the orders sought.

iv) Fourthly, whether the defendant is entitled to payment of rent arrears sought in the counter-claim.

30. On the first issue as to whether the defendant unlawfully levied distress against the plaintiff, I have already taken into account the evidence and submissions of both sides. It is not in dispute that the Plaintiff became the defendant's tenant upon the defendant purchasing the premises standing on L.R. No. 209/785/30. The Plaintiff and others continued occupying those premises as sitting tenants.

31. It is the submission of the plaintiff that the defendant unlawfully levied distress against him. The defendant on the other hand is of the submission that it lawfully levied distress against plaintiff to recover arrears of rent.

32. It is apparent from the evidence tendered by the Plaintiff that upon purchasing the demised premises, the defendant "*issued a pro-forma Invoice No. T003/Feb-09*" in which it set out the new rental terms as follows: -

| | |
|----------------------|------------------------------|
| - Rent | Kshs.85,000.00 |
| - Service Charge | <u>Kshs. 8,300.00</u> |
| | Kshs.93,300.00 |
| - Add Service Charge | Kshs. <u>14,928.00</u> |
| | Total Kshs.108,928.00 |
| | ===== |

There is also uncontested evidence that the defendant issued statutory landlord's notices to terminate or alter terms of tenancy dated 15th September, 2009 and 15th June, 2010. Pursuant to the provisions of Section 4(2) of the Landlord and Tenant (Shops, Hotels and Catering Establishments) Act, Cap 301.

33. The Plaintiff successfully challenged the aforesaid notices at the Business Premises Rent Tribunal. The Defendant thereafter placed locks at the Plaintiff's premises prompting the plaintiff to approach the Business Premises Rent Tribunal for protection.

34. BPRT issued ex-parte orders on 20th December, 2012 vide BPRT No. 959 of 2012 to restrain the Defendant from interfering with the Plaintiff's quiet and peaceful possession of his shop and further authorized the plaintiff to break the Defendant's superimposed locks.

35. The case before the Tribunal was adjourned several times with an order to maintain status quo being issued. On 14th June, 2013, the defendant dispossessed the plaintiff of the suit premises despite the existence of the order to maintain the status quo. The correspondences exchanged between the advocates appearing in this matter were produced in evidence indicating that the defendant immediately secured another tenant to replace the plaintiff in the demised premises.

36. The Plaintiff also produced photographs which show that padlocks were superimposed on top of those of the plaintiff. It is the evidence of Mercy Nderitu (PW 3) that the defendant's Managing Agent gave instructions to the security guards to lock the premises.

37. The defendant admits that in the month of June, 2013 it levied distress against the plaintiff to recover arrears of rent in the sum of Ksh.182,439/- through Bealine Kenya Auctioneers.

38. In my humble view, I am convinced that the levy for distress against the plaintiff was unjustified in that the same was carried when there was an interim order issued by the Business Premises Rent Tribunal had made issued an order restraining the defendant from interfering with the plaintiff's quiet and peaceful occupation of the suit premises.

39. The Tribunal had also made an order to maintain the status quo. The defendant was, therefore, not entitled to proceed and purport to distress for rent arrears, which in any case was disputed, and pending the adjudication by the Business Premises Rent Tribunal.

40. The second issue, to be determined is whether the distress levied against the plaintiff amounted to a constructive eviction.

41. Having considered the evidence tendered by both parties, it is clear that the defendant's managing agent was the one who supervised the superimposition of a padlock(s) on the plaintiff's premises. The plaintiff presented photographs of a police officer supervising the collection of the plaintiff's goods from the premises in the name of providing security to the auctioneer. It is apparent from the evidence from both sides that the plaintiff never violently resisted the eviction, hence there was, therefore, no justification for the provisions of security to the auctioneer who attached the plaintiff's goods. With respect, I agree with the Plaintiff's submission that the police help was sought ostensibly to provide security during the purported levying of distress so that the defendant could conveniently evict the plaintiff without security and without resistance on the part of the Plaintiff.

42. I am satisfied that the act of placing parallel locks on the Plaintiff's doors on top of other locks meant that the Plaintiff was effectively evicted. I am therefore, convinced that the defendant's purported takeover of the Plaintiff's premises can only be treated as constructive eviction but merely coated as levying distress.

43. The Third issue is whether the Plaintiff is entitled to the orders he sought in the amended plaint. Having found that the defendant unlawfully levied distress by carting away the Plaintiff's goods and by dispossessing the Plaintiff of his premises, I find that the plaintiff is entitled to be given a full inventory as sought in prayer (a) of the amended plaint.

44. If the defendant is unable to provide a full inventory as sought in prayer (a), then the defendant will be required to pay the plaintiff as sought in prayers (b) and (c).

45. I am also satisfied that the plaintiff is entitled to be given a refund as sought in prayer (d).

46. Having considered the evidence tendered, I find that the plaintiff has failed to prove that he used to make a monthly income of ksh.150,000/- per month. I, therefore, decline to grant him prayer (e).

47. In prayer (f), the Plaintiff sought to be paid Ksh.5,000,000/- and Ksh.3,000,000/- for general and exemplary damages respectively. I am satisfied that the plaintiff is entitled to claim general damages. However, the plaintiff failed to lay a basis to be granted exemplary damages.

48. Consequently, I award the plaintiff a sum of ksh.5,000,000/- for general damages. I am however, not convinced that the plaintiff is entitled to claim interest, therefore, I decline to grant the order for interest sought in prayers (h) and (i).

49. Being as successful litigant, the plaintiff is awarded costs and interest at court rates from the date of

judgment until the date of full payment.

50. The final issue is whether the defendant is entitled to payment of arrears of rent as sought in the counter-claim in the sum of Ksh.577,808/93. This court found that the outstanding rent claimed by the defendant is disputed. The defendant failed to tender credible evidence to prove that the plaintiff was in arrears of rent. The counter-claim is, therefore, found to be without merit.

51. In the end judgment is entered in favour of plaintiff and against the defendant as follows: -

a) A mandatory injunction do issue ordering the defendant to provide a full, true and correct inventory of and to return or cause to be returned by its agents, namely, beeline Kenya Auctioneers, all the Plaintiff's Real Photo Studio equipment, stock-in trade, goods, items, furniture and various documents more particularly itemize in Paragraphs 11 and 11(a) of the amended plaint with their condition ascertainably verified at the cost of the said defendant.

b) In the alternative, if the defendant is unable to comply with (a) above, it should pay: -

i) Ksh.23,078,300/- as pleaded in paragraph 11 and 11a.

ii) Ksh.40,000/- as pleaded in paragraph 18 amended plaint.

c) Refund of rent deposit of Ksh.322,728/-

d) General damages of Ksh.5,000,000/-.

e) Costs of the suit.

f) Interest at court rates from the date of judgment until full payment on (c) above.

g) Counter-claim dismissed with costs to the plaintiff.

Dated, signed and delivered at Nairobi this 29th day of November, 2019.

.....

J K SERGON

JUDGE

In the presence of

..... *for the plaintiff*

..... *for the defendant*