REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA AT KIAMBU

CIVIL CASE NO. 15 OF 2017

LILIAN WANGUI KAGIRI.....PLAINTIFF

VERSUS

MUHATIA PALA AUCTIONEERS.....1ST DEFENDANT

HARUN N. WANYARORO.....2ND DEFENDANT

JUDGMENT

1. The Plaintiff/Applicant ("Applicant") took out a plaint on 15/05/2017 against the two Respondents seeking four orders as follows:

a. A declaration that the Notification of Sale of Movable Property Numbers 334 and 405 by the 1st *Respondent are illegal.*

b. An order that the Defendants do return the properties of the Applicant carted away and listed in the notification of sale of movable property numbers 334 and 405 by the 1st *Defendant at their own cost.*

c. An order for the Defendants to compensate the Plaintiff for the loss of business and investment,

d. Costs of the suit and interests from time of filing of the suit

2. The Applicant also filed a Notice of Motion which she later amended with the leave of the Court asking for certain interim reliefs. In the main, she asks for temporary orders injuncting the Respondents from proceeding with the sale of the properties listed in the Notification of Sale of Movable Property Numbers 334 and 405 by the 1st Respondent as well as other properties the Applicant says were carted away but were not included in the Notifications of Sale of Movable Property. She also seeks a mandatory injunction compelling the Respondents to return the goods to her. Finally, she seeks an injunction restraining the Respondents from evicting her from Land Title No. 76/443 Kiambu pending the hearing and determination of the suit.

3. The Applicant's narrative is simple enough. She says she entered into a lease agreement with the 2nd Respondent for a five year period for Land Title No. 76/443 Kiambu. She says that despite the rent amounts indicated in the Lease Agreement, she verbally agreed with the 2nd Respondent that her rents would be reduced to Kshs. 50,000/- initially as her business picked up and since she had to sink foreground costs in landscaping the structures to be used in her business.

4. The Applicant says that she completed the construction in 2016 and only then did the parties agree that

her rent will be increased to Kshs. 100,000/- per month effective from July, 2016. She further says that she was surprised to receive a highly inflated statement of rent from the 2nd Respondent at the end of 2016 following which she agreed with the 2nd Respondent that they needed to harmonize the numbers as she disputed the rents cited as due.

5. The Applicant says that following the discussions she was having with the 2nd Respondent, she was dismayed to learn from her employee, Christine Oduor,that the 1st Respondent had visited the business on 09/05/2017 and carted away her properties. She insists that both the Notification of Sale of Movable Property Numbers 334 and 405 as well as the intended sale are illegal both because they did not state the amount due and because no due demand for rent had been served on her.

6. Both Respondents filed Replying Affidavits but did not file Written Submissions as directed by the Court. The narrative of the Respondents is simple: The Applicant entered into a Written Lease Agreement. The rents payable are appointed in that instrument. She failed to pay the rents. The 2nd Respondent gave her time and even had meetings with her to resolve the issue. The 2nd Respondent exhibited notes of a meeting held between himself and the Applicant in which the Applicant promises to clear the balance. In the exhibited notes, which are not contested by the Applicant, the Applicant voluntarily agrees to hand over the log book to her Motor Vehicle Registration No. KBL 284X to be held as collateral/security for "the rent arrears owed to Mr. Wanyahoro…"

7. In the self-same Notes, the Applicant also writes in her own handwriting thus: "I have filled out a blank transfer form (New Owner details) which will only be executed upon mutual consent by both parties in the event the payment promised at the end of December, 2016 or thereafter is not effected."

8. The 2nd Respondent says that it was when the Applicant failed to pay the accrued rents as promised that he proceeded to instruct the 1st Respondent to distress for rent. The 1st Respondent, on the other hand, insists that the distress for rent was both regular and legal. He is insistent that his agents faithfully recorded all the properties carried away and intensely contests the Applicant's suggestion that some properties were carted away yet they were not listed in the Notification for Sale of Moveable Properties.

9. Most importantly, the Respondents have exhibited a Court Order dated 28/07/2016 respecting Milimani Commercial Court Misc. App. No. 527 of 2016 in which reads thus:

> It is ordered that the Officer Commanding Muthaiga/Kiambu Police Station or Administration Officer in charge of Nairobi Central Division or Officer under their Command with the rank of an inspector of police or above to accompany Nathan Pala for the purpose of keeping peace and witness the said distress to enable the landlords recover rent arrears of Kshs. 1,400,000/- from the tenant herein Lillian Wangui Kagiri at the premises situated on Title No. LR No. 76/443, Kiambu County.

10. In her submissions, the Applicant appears to impugn the *bona fides* of this Court Order. She wonders why the case was filed in Nairobi yet the premises are situated in Kiambu County and within the geographical jurisdiction of the Kiambu Chief Magistrate's Court. She also says she was never served with the Court papers or Court order prior to their being exhibited here. Of course the answer to that last query is that the proceedings were ex parte in accordance with the Auctioneers' Act.

11. The procedural posture of the case at this point is that this is an application for injunctive relief. In our jurisprudence, consideration whether a party is entitled to an interlocutory injunction now enshrined in a tripartite legal criterion set out in the celebrated case of ***Giella vs Cassman Brown*** in the words of Spry V.P.:

> First, an applicant must show a prima facie *case with a probability of success. Secondly, an interlocutory injunction will not normally be granted unless the applicant might otherwise suffer irreparable injury, which would not be adequately compensated by an award of damages. Thirdly, if the court is in doubt, it will decide an application on the balance of convenience*.

12. Hence, the Court's first task is to determine if the Applicant has established a *prima facie* case with a probability of success once the full case is fully ventilated. It is important to recall that at this point the Court can do no more than form a necessarily provisional view of the case.

13. I have looked at all the documents filed in this case. I am uncertain that the Applicant has established a prima facie case with a probability of success. I say so for three reasons. First, the Lease Agreement and the Addendum exhibited seem clear on the amounts of rents payable by the Applicant. Second, the Applicant has not adduced any evidence whatsoever about the amounts of rents she has paid. Indeed, her Court documents are carefully couched and framed to avoid responding to the all-important question whether she owes rents which would justify the distress for rent. Third, from the Minutes of the Meeting held between the Applicant and the 2nd Respondent, there is obvious admission by the Applicant that she owes rent arrears.

14. In the circumstances, it appears disingenuous for the Applicant to approach this Court with the claim that she did not know that rents were due. In my view, a dispute as to the exact amounts of rents due does not disentitle a landlord from exercising its statutory power to distress for rent. I am therefore unable to say that the Applicant has established a prima facie case with a probability of success to stop the distress for rent.

15. Even if I were to hold that the Applicant had established a *prima facie* case, I am not satisfied that the injury she would suffer is irreparable with damages. Quite clearly, what is at issue is the sale of properties (and a factual dispute whether all the distrained goods were listed in the Notification for Sale). There is no serious claim that these goods are in any way unique and cannot be replaced or that their values cannot be quantified. On the contrary, the Applicant herself has included a long list of goods she says were carted away carefully catalogued to include their prices. Indeed, in some cases, she has included receipts to prove their values. This is sufficient proof that if she succeeds in this suit, the Applicant can be sufficiently compensated with monetary damages.

16. In view of my findings on the first two *Giella* prongs, I need not reach the third *Giella* factor: balance of convenience. If I reached it, it would probably have favoured the Applicant – but it really would be a toss-up.

17. In any event, since I am not satisfied that the Applicant has established a *prima facie* case with a probability of success and since I am not satisfied that any injury the Applicant will suffer is not capable of being compensated with monetary damages, I am compelled to dismiss the Application dated 23/05/2017 with costs.

18. Orders accordingly.

Dated and delivered at Kiambu this 29th day of January, 2018.

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JOEL NGUGI

JUDGE