



REPUBLIC OF KENYA
IN THE HIGH COURT OF KENYA AT KISII
CIVIL CASE NO.37 OF 2015

BENERDETTE MAGOMA NYAKABARIA.....PLAINTIFF/APPLICANT

VERSUS

BONARERI ASIAGO

ONDIMU AUTA OARA.....DEFENDANTS/RESPONDENTS

JEOFRICK N. MUINDI

T/A KIMU AUCTIONEERS)

RULING

Background1

1. On 1st September 2013, the Plaintiff/Applicant herein, entered into a lease agreement with the 2nd Defendant/Respondent in which the 2nd Defendant agreed to lease to the plaintiff a portion of premises situate on **LR NO. KISII/MUNICIPALITY/BLOCK 11/53** (hereinafter in this ruling referred to as the “suit premises”).
2. The plaintiff alleges that on 4th December 2015, the 1st and 2nd Defendants engaged the services of the 3rd defendant to levy distress and/or evict him from the said demised premises even before **Kisii CMCC Misc. Application No. 87 of 2015** that had been initiated by the 2nd defendant seeking to levy distress and the evict the plaintiff had been heard and determined.
3. The plaintiff contends that on 4th December 2015, the 3rd defendant, while acting under the instructions of the 1st and 2nd defendants descended upon the demised premises and carted away all the movable properties, including business stock without issuing or serving any proclamation notice or at all. The plaintiff adds that he was effectively evicted from the suit premises which the defendants locked.
4. The plaintiff therefore contends that the actions of the defendants were carried out without due regard to the due process of the law and without issuance and/or service of the requisite notices, and without procuring a court order to authorize the eviction and distress.
5. The plaintiff then commenced this instant suit in which he has sought orders for:
 - a. **Declaration that the Tenancy Agreement between the plaintiff and the 1st and 2nd Defendant over and in respect of LR NO. KISII MUNICIPALITY/BLOCK 11/53 was a Controlled Tenancy and hence the Distress and eviction, respectively mounted by and/or on behalf of the 1st and 2nd Defendants on the 4th day of December 2015, were *illegal, Null and Void*.**
 - b. **Permanent Injunction, restraining the Defendants, either by themselves, agents, servants**

and/or employees, from further entering upon, interfering with, Evicting, levying Distress, Leasing out to any Third Party and/or otherwise Interfering with plaintiff's possession, occupation and use of the Demised Premises, Situate on LR NO. KISII MUNICIPALITY/BLOCK 11/53, without Due regard to the law or at all.

- c. **Mandatory Injunction directed against the 1st and 2nd Defendants, either by themselves, Agents and/or Servants and compelling same to re-instate and/or restore the plaintiff to the Demised premises situate on LR NO. KISII MUNICIPALITY/BLOCK 11/53.**
 - d. **An order directed against the Defendants jointly and/or severally to restore all the movable goods which were seized and/or carted away from the demised premises situate on LR NO. KISII MUNICIPALITY/BLOCK 11/53 and/or in Default, payment of Monetary value of the said goods, which were seized and/or carted away.**
 - e. **General Damages for Trespass, Mental torture, Harassment and Humiliation.**
 - f. **Interests at Court rates (14%) on (e) above herein.**
 - g. **Costs of this suit be borne by the Defendants.**
 - h. **Such further and/or other relief as the Honourable Court may deem fit and expedient so to grant.**
6. Concurrently with the filing of the plaint, the plaintiff also filed a notice of motion application dated 14th December 2015 under **Order 51 Rules 1, 2 and 4, Order 40 Rules 1, 2, 4 and 10 of the Civil Procedure Rules, Sections 2, 4, 6 and 12 of the Landlord and Tenant (shops, Hotels and Catering Establishments) Act, herein " the Act", Section 17 and 18 of the Distress for Rent Act, Section 26 of the Auctioneers Act and Articles 48, 50 (1) 159 and 165 of the Constitution** in which he has sought orders as follows:
- a. **Spent**
 - b. **Pending the hearing and determination of this Application, the Honourable Court be pleased to issue an Order of Mandatory. Injunction compelling and/or directing the 1st and 2nd Defendants/Respondents to forthwith restore and/or re-instate the plaintiff/Applicant into Demised premises situate on LR NO. KISII MUNICIPALITY/BLOCK 11/53.**
 - c. **Pending the hearing and determination of this Application, this Honourable Court be pleased to grant an Interim Order of Injunction restraining the Defendants/Respondents, either by themselves, agents, servants and/or any person acting under their (Defendants') Instructions, from further entering upon, interfering with, Evicting, levying Distress, Leasing out to any Third Party and/or otherwise Interfering with Plaintiff's/Applicant's possession, occupation and use of the Demised premises, situate on LR NO. KISII MUNICIPALITY/BLOCK 11/53, without due regard to the law or at all.**
 - d. **The Honourable Court be pleased to issue an Order of Mandatory Injunction compelling and/or directing the 1st and 2nd Defendants/Respondents to forthwith restore and/or re-instate the plaintiff/Applicant into Demised Premises situate on LR NO. KISII MUNICIPALITY/BLOCK 11/53, pending the hearing and determination of the instant suit.**
 - e. **The Honourable Court be pleased to issue an Order of Temporary Injunction restraining the Defendants/Respondents, either by themselves, agents, servants and/or any person acting under their (Defendants') instructions, from further entering upon, interfering with, Evicting, levying Distress, leasing out to any Third party and/or otherwise interfering with plaintiff's/Applicant's possession, occupation and use of the Demised Premises, situate on LR NO. KISII MUNICIPALITY/BLOCK 11/53, without due regard to the law or at all, pending the hearing and determination of the instant suit.**
 - f. **The Honourable Court be pleased to issue an order of Mandatory injunction compelling and/or directing the Defendants/Respondents to forthwith restore all the plaintiff's/Applicant's movable goods, (details in terms of paragraph 16 of the plaint) which were unlawfully seized and/or carted away from the Demised Premises situate on LR NO. KISII MUNICIPALITY/BLOCK 11/53, pending the hearing and determination of the instant suit.**

- g. **The O.C.S Kisii Police Station be directed and/or ordered to enforce, implement and/or otherwise oversee compliance with the orders of this Honourable Court.**
 - h. **Costs of this Application be borne by the Defendants/Respondents jointly and/or severally.**
 - i. **Such further and/or other orders be made as the court may deem fit and expedient.**
7. The application is supported by the affidavit of the applicant/plaintiff, **BENERDETTE MAGOMA NYAKABARIA** in which she depones that she entered into a tenancy agreement with the 2nd respondent on 1st September 2013 and that the tenancy was a protected tenancy which could not be terminated without compliance with the provisions of the **Landlord and Tenant (Shops, Hotels and Catering Establishments) Act Cap. 301 Laws of Kenya**- hereinafter in this ruling referred to as the Act.
 8. The applicant contends that he had paid all his rents in full and was not in any arrears as at the time the 2nd defendant decided to initiate/instigate the seizure of his goods through an illegal levy of distress and eventual eviction from the suit premises without following the requisite legal processes as is envisioned in the Act.
 9. The applicant has in his affidavit given a detailed narrative of the sequence of events that led to what he terms, fraudulent eviction and unlawful seizure of his business goods whose list he has attached to his affidavit as annexure **"BM2"**.
 10. The applicant contends that the action of the respondents constitute trespass to property, forcible entry contrary to section 95 of the Penal Code and that he has suffered and/or is bound to suffer irreparable loss unless the orders of mandatory temporary injunction sought are granted.
 11. It is the applicant's case that he has established that he has a prima facie case against the respondents, with high chances of success.
 12. The 1st and 2nd Respondents filed a memorandum of appearance through M/s Moracha & Co. Advocates on 29th January 2016.
 13. On 8th February 2016, the 2nd Defendant, with the permission/consent of the 1st defendant, filed a replying affidavit in which he admitted that indeed, the plaintiff was his tenant in the suit premises and that the plaintiff was as at April 2015 in arrears of rent in the sum of Kshs. 72,000/= thereby prompting him to issue a notice to terminate the tenancy of the applicant.
 14. The 2nd respondent states that upon serving the applicant with the notice to terminate the tenancy, the applicant did not file any reference to the tribunal as is provided for in the Act and consequently the tenancy lapsed and this necessitated the filing of Kisii Chief Magistrates Misc. Application No. 37 of 2015 for the eviction of the applicant.
 15. The 2nd respondent contends that the applicant has come to the court of equity with unclean hands as he is in arrears of rent of Kshs. 158,000/= as at December 2015 which the 2nd respondent has counter claimed.
 16. The 2nd respondent further adds that the application has been overtaken by events, is a waste of time and ought to be dismissed with costs.
 17. The 3rd respondent, also entered appearance in the suit and filed a replying affidavit sworn on 8th February 2016 in which he states that he was not instructed to levy distress against the applicant or evict her from the suit premises. The 3rd respondent states that he has been wrongly enjoined in this instant suit as the auctioneers who acted for the 2nd respondent was **MINMAX Auctioneers**. He has attached an instructions form to his affidavit which has been marked as **"JNMI"**. He therefore prays that his name be expunged from the court record and proceedings as the applicant has not demonstrated that his firm played any role in the eviction or levying of distress.
 18. In her further affidavit in response to the 1st and 2nd respondents' replying affidavit, the applicant reiterates that she was never served with the alleged notice of termination of tenancy dated 8th May 2015 or at all and she only came to learn about it when she was served with pleadings in respect to **Kisii CMCC Misc. Application number 87 of 2015** which was never heard or determined as the defendants withdrew it after the filing of this instant suit. The applicant contends that no eviction or distress could be initiated against her without a valid court order yet the 1st and 2nd respondents took the law into their hands to levy an unlawful eviction which they have not even endeavored or bothered to deny or defend in their reply to the application.
 19. The applicant maintains that he had no rent arrears due and owing in favour of the 1st and 2nd

respondents so as to justify her illegal forceful eviction, and seizure of property, and that the issue of rent arrears is being raised by the respondents Ex-post facto cover up an illegality.

20. When the matter came up before me for hearing on 1st February 2016, parties agreed to canvass their arguments by way of written submissions.

21. I have considered the rival submissions and after perusing all the pleadings filed, I note that the following are the issues that require this court's determination.

- a. **Whether there was a valid tenancy agreement between the plaintiff and the 1st and 2nd defendants.**
- b. **Whether tenancy was a controlled tenancy.**
- c. **Whether the tenancy was terminated lawfully and by extension, whether the eviction and distress was lawful.**
- d. **Whether the applicant/plaintiff is entitled to the orders sought.**

Existence of a tenancy agreement.

22. It is not disputed by both sides that the applicant and the 1st and 2nd respondents had a written and signed tenancy agreement dated 1st September 2013. It has also not been disputed that the said tenancy was a controlled tenancy in terms of **Section 2 of the Act** as evidenced by the actions of the 1st and 2nd respondents when giving notice to terminate the said tenancy which they further ratified by filing Kisii CMCC Misc. Application No. 87 of 2015.

23. **Section 2 (1) of the Act** states as follows:

For the purposes of this Act, unless the context otherwise requires—

“catering establishment” means any premises on which is carried out the business of supplying food or drink for consumption on such premises, by persons other than those who reside and are boarded on such premises;

“controlled tenancy” means a tenancy of a shop, hotel or catering establishment_which has not been reduced into writing; or

(a) —(i) which has not been reduced into writing; or is for a period not exceeding five years; or

(b) (ii) contains provision for termination, otherwise than for breach of covenant, within five years from the commencement thereof; or

(iii) relates to premises of a class specified under subsection (2) of this section:

Termination of tenancy

24. It has however been argued by the applicant that the termination of her tenancy was not lawful as the due process was not adhered to.

25. The applicant contends that she was not served with a notice of termination of tenancy as is required by the law and that this became a moot question before the lower court in Misc. application no. 87 of 2015 which the respondents withdrew prematurely before the issues raised by the applicant could be determined.

26. It is my finding that the tenancy agreement between the parties was a controlled tenancy as at part V of the said agreement the parties executed on 1st September 2013 contained a clause for termination, otherwise than for breach of covenant. The tenancy being a controlled one, service of the notice to terminate the said tenancy was a very fundamental procedure which ought to have been undertaken before the applicant could be evicted or her property seized. One would then reasonably expect that the 1st and 2nd respondents would demonstrate to this court that they had indeed served the applicant with the notice to terminate her tenancy. This bit of evidence of

service was not forthcoming from the respondents in this case.
27. **Section 4 of the Act** provides as follows:

“Whenever a landlord appoints an agent for the purpose of effecting transactions relating to a controlled tenancy, the particulars of such agent shall be recorded in the rent book and authenticated by his signature.”

28. **Section 15** of the Act provides:

(1) “Any party to a reference aggrieved by any determination or order of a Tribunal made therein may, within thirty days after the date of such determination or order, appeal to the Environment and Land Court:

Provided that the Environment and Land Court may, where it is satisfied that there is sufficient reason for so doing, extend the said period of thirty days upon such conditions, if any, as it may think fit.

(2) In hearing appeals under subsection (1) of this section the Court shall have all the powers conferred on a Tribunal by or under this Act, in addition to any other powers conferred on it by or under any written law.

(3) Deleted by [Act No. 2 of 1970](#), s. 13.

(4) The procedure in and relating to appeals in civil matters from subordinate courts to the Environment and Land Court shall govern appeals under this Act:

Provided that the decision of the Environment and Land Court on any appeal under this Act shall be final and shall not be subject to further appeal.”

29. The above sections give clear steps and procedure to be followed in termination of controlled tenancies.

30. The 1st and 2nd respondents have not shown that they adhered to these steps in seeking to evict the applicant. Instead, the 1st and 2nd respondents have sought to make a counter claim and justify their action of evicting and seizing the applicant’s goods by stating that the applicant was in arrears of rent of the sum of Kshs. 72,000/= as at the time of the eviction.

31. The 1st and 2nd respondents were aware of the procedure to be followed in eviction and levying of distress against their tenant and this is why they filed a miscellaneous application before the lower court pursuant to the provisions of the Act. What is however confounding is the fact that the respondents did not wait for the said lower court miscellaneous application to run its course before taking further steps but opted to evict the applicant and seize her property prematurely without a valid court order.

32. In **Gusii Mwalimu Investment Company Ltd vs Mwalim Hotel Kisii Limited CA Civil Appeal no. 160 of 1995** unreported the court of appeal observed as follows at page 10 of the decision.

“I have no hesitation, whatsoever, in holding that the Landlord did all it could to obtain possession unlawfully and the learned judge was entirely right in making the orders he made. If what the Landlord did in this case is allowed to happen, we will reach a situation when the Landlord will simply walk into the demised premises exercising his right of re-entry and obtaining possession extra judicially. A Court of law cannot allow such state of affairs, whereby the law of jungle takes over. It is trite law that unless the Tenant consents or agrees to give up possession, the Landlord has to obtain an order of a competent court or a statutory Tribunal for possession”

33. In the instant case, as I have already noted in this ruling, the 1st and 2nd respondents did not comply with any of the procedures preceding and eviction or distress.
34. The miscellaneous application filed before the lower court was withdrawn prematurely and no orders were made authorizing the respondents to either evict the applicant or seize her goods. It would appear that the respondents were determined to have their way and break every rule in the book, as it were, in their quest to evict the applicant. The tenant was not a trespasser and had rights known in law and which were capable of protection. At the time of the eviction, the tenant enjoyed rights which could not be brushed aside or eroded in the manner that the respondents did.
35. In the case of **Caledonia Supermarket Ltd vs Kenya National Examinations Council [2000] 2EA 351**, the Court of Appeal held that in order to terminate a controlled tenancy, the appellant had to comply with **section 4 of the Act**. The court also considered that even if the supermarket 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.”

36. Having found that there existed a valid tenancy agreement between the applicant and the 1st and 2nd respondents and further, having found that the tenancy was terminated irregularly and the eviction and distress carried out in an unlawful manner, I now turn to the last issue for determination which is, whether the applicant is entitled to the orders sought.
37. The applicant has basically sought a mandatory injunction to compel the respondents to restore her movable goods which were unlawfully seized and carted away from the suit premises pending the hearing and determination of the suit.
38. The applicant also seeks an order of temporary injunction to restrain the respondents, their agents or servants and/or any person acting under their instructions from further entering upon, interfering with, evicting, levying distress, leasing out to any third party or otherwise interfering with the applicant's occupation and use of the suit premises without due regard to the law pending the hearing and determination of the suit.
39. Simply put, the applicant seeks order of mandatory injunction to compel the respondents to restore her goods that were unlawfully seized to the suit premises and an order of temporary injunction to restrain the respondents from any further interference with her occupation and use of the suit premises pending the hearing and determination of the instant suit.
40. The principles for the grant of orders of injunction were well spelt out in the celebrated case of **Giella vs Cassman Brown Co. Ltd (1973) EA 358** as follows:

“The conditions for the grant of an interlocutory injunction are now, I think, well settled in East Africa. First, an applicant must show a prima facie case with a probability of success. Secondly, an interlocutory injunction will not be normally granted unless the applicant might otherwise suffer irreparable injury which would not adequately be compensated by an award of damages. Thirdly, if the court is in doubt, it will decide an application on the balance of convenience.”

41. In **Mrao vs First American Bank of Kenya & Two others [2003] KLR 125** a prima facie case was described as:-

“a prima facie case in a civil application includes but is not confined to a genuine and arguable case. It is a case which, on the material presented to the court, a tribunal properly directing itself will conclude that there exists a right which has apparently been infringed by the opposite party as to call for an explanation or rebuttal from the latter.”

42. In the instant case, I find that the applicant has established that she has a prima facie case against the respondents with high chances of success. The plaintiff/Applicant has established that she had

- a valid tenancy agreement with the 1st and 2nd respondents which had not been terminated at the time the respondents forcibly evicted her.
43. On the aspect of substantial/irreparable loss, the applicant has contended that the unlawful eviction has destroyed/deprived her of her only source of livelihood since the eviction had the effect of bringing her business to a halt.
44. The balance of convenience in this case tilts in favour of the applicant who stands to lose a great deal in terms of loss of business unless the orders sought are granted.
45. Orders of mandatory injunctions are, however, a completely different ball game whose conditions for granting are more stringent and a notch higher than prohibitory injunctions as courts have severally held that they can only be granted in special circumstances (**see Canadian Pacific Railway vs Gaud (1949) 2DB 239**).
46. In **Locabail International vs Agro Export [1986] ALLER** , it was stated as follows:

“A mandatory injunction ought not to be granted on an interlocutory application in the absence of special circumstances and only in clear cases where the court thought that the matter ought to be decided at once, or where the injunction was directed at simple and summary act which could easily be remedied or where the Defendant had attempted to steal a match on the plaintiff. Moreover, before granting a mandatory interlocutory injunction, the court had to feel a high sense of assurance that at the trial it would appear that the injunction had rightly been granted, that being a different and higher standard than was required for a prohibitory injunction”

47. In **Shephard Homes Ltd vs Sandham (1970) 3 ALLER 402**, Mergarry J said:

“Third, on motion, as contrasted with the trial, the court is far more reluctant to grant a mandatory injunction than it would to grant a comparable prohibitory injunction. In a normal case, the court must inter alia feel a high degree of assurance that at the trial it will appear that the injunction was rightly granted and this is a higher standard than is required for a prohibitory injunction.”

48. In the instant case, I find that the grant of mandatory injunction will be justified. On the basis of the material placed before this court I am certain that at the trial, it will appear that the injunction was rightly granted. My assurance stems from my finding that the respondents did not follow the due process of the law in evicting the applicant from the suit premises. This blatant disregard for the law on levying of distress and eviction of a tenant cannot go unabated.
49. It is for the above reasons that I allow prayers 4,5 and 6 of the Notice Motion dated 14th December 2015, I am hesitant to grant prayer No. 7 of the said application in view of the fact that this is a civil matter in which it is not necessary to involve the law enforcement officers/police when it has not been shown by the plaintiff that there is a likelihood of breakdown law and order or any resistance by the respondents in obeying this courts orders.
50. In the end, I make final orders as follows:

- a. **An Order of Mandatory Injunction compelling and/or directing the 1st and 2nd Defendants/Respondents to forthwith restore and/or re-instate the plaintiff/Applicant into Demised Premises situate on LR NO. KISII MUNICIPALITY/BLOCK 11/53, pending the hearing and determination of the instant suit.**
- b. **An Order of Temporary Injunction restraining the Defendants/Respondents, either by themselves, agents, servants and/or any person acting under their (Defendants') instructions, from further entering upon, interfering with, Evicting, levying Distress, leasing out to any Third party and/or otherwise interfering with plaintiff's\ Applicant's possession, occupation and use of the Demised Premises, situate on LR NO. KISII MUNICIPALITY/BLOCK 11/53, without due regard to the law or at all, pending the hearing and determination of the instant suit.**
- c. **An order of Mandatory injunction compelling and/or directing the Defendants/Respondents to forthwith restore all the plaintiff's/Applicant's movable goods, (details in terms of paragraph 16 of the plaint) which were unlawfully seized and/or carted away from the Demised Premises situate on LR NO. KISII**

MUNICIPALITY/BLOCK 11/53, pending the hearing and determination of the instant suit.

Dated, signed and delivered in open court this 8th day of June 2016

HON. W.A OKWANY

JUDGE

In the presence of:

- Mr. Oguttu for Plaintiff/Applicant
- N/A Moracha for Defendant/Respondent
- Omwoyo court clerk