



**REPUBLIC OF KENYA**  
**IN THE HIGH COURT OF KENYA AT NAIROBI**  
**ENVIRONMENT & LAND COURT**  
**ELC NO. 563 OF 2015**

**NEXIC COMPANY LIMITED..... PLAINTIFF**

**VERSUS**

**THE BOARD OF TRUSTEES NATIONAL SOCIAL SECURITY FUND....1<sup>ST</sup> DEFENDANT**

**REGENT AUCTIONEERS.....2<sup>ND</sup> DEFENDANT**

**RULING**

The 1<sup>st</sup> Defendant is the registered proprietor of all that parcel of land known as L.R No. 209/8595 on which it has a building known as View Park Towers. The Plaintiff is one of the 1<sup>st</sup> Defendant's tenants in View Park Towers where it occupies office premises measuring approximately 160 sq. feet (hereinafter referred to as "the suit property") on terms and conditions which are contained in the letter of offer dated 23<sup>rd</sup> November 2010. According to the said letter of offer which was accepted by the Plaintiff, the 1<sup>st</sup> Defendant granted to the Plaintiff a lease over the suit property for a term of 6 years with effect from 1<sup>st</sup> January, 2011 at a quarterly rent of Kshs.24,000/= for the first two years, Kshs.28,800/= for the next two years and Kshs.34,560/= for the last two years. In addition to the rent, the Plaintiff was to pay service charge to the 1<sup>st</sup> defendant on a reimbursement basis for the expenses incurred by the 1<sup>st</sup> Defendant in maintaining the building on which the suit property is situated. The Plaintiff was to pay service charge at the rate of Kshs.7,680/= per quarter upon taking possession of the suit property. The 1<sup>st</sup> Defendant was however entitled to recover any service charge incurred during the Plaintiff's tenancy over and above the said sum of Kshs.7,680/= at the end of the every year of the Plaintiff tenancy subject to audit.

The Plaintiff brought this suit against the Defendants on 22<sup>nd</sup> June 2015 seeking a permanent injunction to restrain the Defendants from levying distress, attaching, carrying away, evicting or in any other way interfering with the Plaintiff's possession of the suit property. The Plaintiff also sought a mandatory injunction to compel the Defendants to produce audited accounts for the expenses incurred in maintaining the building on which the suit property is situated on the basis of which it has been levying service charge for the suit property. In its plaint dated 22<sup>nd</sup> June 2015, the Plaintiff averred that it has been regular and diligent in paying rent to the Plaintiff for the suit property as and when it falls due and that it has never delayed in the payment of its rent for the entire duration that it has been the 1<sup>st</sup> Defendant's tenant. The Plaintiff averred that on 29<sup>th</sup> September 2014 the 1<sup>st</sup> Defendant wrote to all the tenants in View Park Towers through its agents Lustman & Co. (90) Ltd. to the effect that following the service charge audit that was carried out for the financial years 2012, 2013 and 2014, it had been discovered that the expenses that the 1<sup>st</sup> Defendant had incurred in maintaining View Park Towers building was more than the expenses that the 1<sup>st</sup> Defendant had billed to the tenants and on account of that, the tenants were required to pay the

excess service charge on a prorata basis. Following this letter, the 1<sup>st</sup> Defendant submitted to the Plaintiff an invoice for Kshs.31,787 as its share of the excess service charge which was back dated to the year 2011. The Plaintiff averred that the 1<sup>st</sup> Defendant refused and/or neglected to produce upon request the audited accounts on which the invoiced service charge was based.

The Plaintiff averred that on 4<sup>th</sup> June 2015, the 1<sup>st</sup> Defendant forwarded to the Plaintiff a statement of its rent account in which the 1<sup>st</sup> Defendant claimed that a total sum of Kshs.209,962.61 was due and payable by the Plaintiff to the 1<sup>st</sup> Defendant. This amount was comprised of among others, excess service charge of Kshs.31,787/=, alleged unpaid rent for January to March, 2013 in the sum of Kshs.37,862.40, alleged unpaid rent for October to December, 2013 in the sum of Ksh. 43,430.40, and alleged unpaid rent for October to December 2014 in the sum of Kshs.53,452.80/=.

The Plaintiff averred that on 15<sup>th</sup> June 2015, it pointed out to the 1<sup>st</sup> Defendant that the said statement of rent account was erroneous but the Defendant insisted that the said sum of Kshs.209,962.61 was due and payable by the Plaintiff and proceeded on the same day to instruct the 2<sup>nd</sup> Defendant to levy distress against the Plaintiff for the recovery of the said amount of kshs.209,962.61. The Plaintiff averred that the distress that was levied against it by the Defendants was illegal in that the alleged service charge of Kshs.31,787/= which was back dated to 2011 was not payable and that the rent that the Defendants claimed to be due for the years 2013 and 2014 had been paid and as such was also not payable.

Together with the plaint, the Plaintiff filed an application by way of Notice of Motion dated 22<sup>nd</sup> June 2015 seeking a temporary injunction to restrain the Defendants from levying distress for rent, evicting, harassing or in any other way interfering with the Plaintiff's quiet possession of the suit property pending the hearing and determination of this suit. The Plaintiff's application which was supported by the affidavit of the Mercy Ndanu Kyalo was brought on the same grounds which I have highlighted above. The Plaintiff contended that the distress that was levied upon it by the Defendants was illegal since the service charge and rent on the basis of which the distress was levied was not payable.

The Plaintiff's application was opposed by the Defendants through a replying affidavit sworn by one, Arnold Muturi who described himself as a valuer and property agent with Lustman and Co. (90) Ltd. which is managing View Park Towers on behalf of the 1<sup>st</sup> Defendant. Mr. Muturi stated that he was authorized by the 1<sup>st</sup> Defendant to swear the affidavit. He stated that the Plaintiff is contractually bound to pay the service charge claimed by the 1<sup>st</sup> Defendant. He stated that during the subsistence of the Plaintiff's tenancy with the 1<sup>st</sup> Defendant, the 1<sup>st</sup> Defendant incurred expenses in managing the suit property in excess of the service charge that was paid by the Plaintiff during the financial years 2011/2012, 2012/2013 and 2013/2014 and as such it became necessary to call upon the Plaintiff to pay the said excess service charge that was incurred by the 1<sup>st</sup> Defendant. He stated that the 1<sup>st</sup> Defendant issued the Plaintiff with the audited accounts showing how the said excess service charge was arrived at but the Plaintiff refused to acknowledge receipt thereof. On the issue of rent, Mr. Muturi stated that at times, the Plaintiff used to delay in its rent payments and paid the same in arrears. He stated that the distress that was levied by the 1<sup>st</sup> Defendant against the Plaintiff was lawful.

The Plaintiff's application was argued by way of written submission. The Plaintiff filed its submissions on 9<sup>th</sup> November 2015 while the Defendants did so on 17<sup>th</sup> December 2015. I have considered the Plaintiff's application together with the affidavit filed in support thereof. I have also considered the Defendants affidavit in opposition to the application. At this stage, what I need to determine is whether the Plaintiff has established a prima facie case against the Defendants with a probability of success and whether the Plaintiff stands to suffer irreparable harm which cannot be compensated in damages if the injunction sought is not granted. In the event that I am in doubt as to the above, the application would be determined on a balance of convenience. See, **Giellavs. Cassman Brown & Co. Ltd. (1973) EA 358**. The Plaintiff's complaint against the Defendants is that they have levied an illegal distress against it. It is not in dispute that the 1<sup>st</sup> Defendant instructed the 2<sup>nd</sup> defendant to levy distress against the Plaintiff for the recovery of an alleged rent arrears of Kshs.209,962.61. It is also not in dispute that the 2<sup>nd</sup> Defendant

proceeded to the Plaintiff's premises and attached the Plaintiff's movable assets pursuant to the said instructions and notified the Plaintiff that unless the said sum of Kshs.209,962.61 was paid together with their fees of Kshs.20,996/= within 14 days, the said goods would be removed from the Plaintiff's premises and sold to recover the said amount. As I have mentioned earlier, the said sum of Kshs.209,962.61 is said to comprise of rent arrears and service charge amounting to Kshs.31,787/=. The Plaintiff has contended that it is not in rent arrears. The Plaintiff has claimed that it has always paid rent to the 1<sup>st</sup> Defendant as and when it falls due. The Plaintiff has claimed that the rent claimed to be due by it to the 1<sup>st</sup> Defendant had been paid. The Plaintiff annexed to its affidavit in support of the present application, a statement of account that was submitted to it by the 1<sup>st</sup> Defendant on how the sum of Kshs.209,962.61 which is the subject of the disputed distress was arrived at. According to the said statement, the rent said not to have been paid by the Plaintiff is for the period covering January to March, 2013, October to December, 2013, October to December 2014 and April to June 2015. The 1<sup>st</sup> Defendant having provided this statement showing the months in respect of which the Plaintiff is said not to have paid rent, the onus was upon the Plaintiff who claims that the rent said to be due was actually paid to prove on a prima facie basis such payment. The distress for rent was levied upon the Plaintiff on 15<sup>th</sup> June 2016. The Plaintiff has not placed any evidence before the court to show that it had paid rent that was being demanded by the 1<sup>st</sup> Defendant. The Plaintiff which claims to have paid rent for January to March, 2013, October to December, 2013 and October to December 2014 placed no evidence before the court in proof of the said payments. The only payment in respect of which evidence has been placed before the court is that of rent for April to June, 2015 in the sum of kshs.53,452.80. This payment was made on 15<sup>th</sup> June 2015, the same day distress was levied against the Plaintiff and was rejected by the 1<sup>st</sup> Defendant. From the statement, this payment was due on 1<sup>st</sup> April 2015 and was not made until 15<sup>th</sup> June 2015 when distress was levied against the Plaintiff. From the foregoing, I am not satisfied that the Plaintiff had paid rent in full as at 15<sup>th</sup> June 2015, when distress for rent was levied against it. The other component of the sum of Kshs.209,962.61 in respect of which distress was levied against the Plaintiff was excess service charge in the sum of Kshs.31,787/=. The Plaintiff has contested this charge. It is not very clear from the affidavit in support of the application and the Plaintiff's submissions as to whether this charge is contested because it is back-dated or because it is not supported by audited accounts.

I am in agreement with the submission by the 1<sup>st</sup> Defendant that under the tenancy agreement it had entered into with the Plaintiff, it was entitled to recover from the Plaintiff the expenses it had incurred in the maintenance of the suit property over and above the service charge that had been paid by the Plaintiff. The excess service charge was recoverable at the end of every year of the tenancy. I am not in agreement with the contention by the Plaintiff that the excess service charge could not be back dated. That contention finds no support in the tenancy agreement that the parties had entered into. The payment of the excess service charge was however conditional upon the 1<sup>st</sup> Defendant furnishing audited accounts of the service charge received, the expenses incurred and the excess or deficit. The Plaintiff has contended that it called for such accounts and none was submitted. On its part, the 1<sup>st</sup> Defendant has contended that the Plaintiff was furnished with the said accounts but it declined to acknowledge receipt thereof. In its replying affidavit, the 1<sup>st</sup> Defendant did not annex the service charge audited accounts. Instead, it referred the court to the accounts that were attached to its bundle of documents. I am in agreement with the submission by the Plaintiff that documents which are not annexed to an affidavit and marked as exhibits in accordance with the provisions of the Oaths and Statutory Declarations Act, Chapter 39 Laws of Kenya have no evidential value in interlocutory proceedings of this nature. The 1<sup>st</sup> Defendant has therefore not placed any evidence before the court of the audited accounts which it claims to have submitted to the Plaintiff. In the absence of evidence that the excess service charge of Kshs.31,787/= being claimed by the 1<sup>st</sup> Defendant from the Plaintiff is based on audited accounts in accordance with the terms of the tenancy agreement between the parties, there is arguable case that the charge is unlawful. Due to the foregoing, I am satisfied that the Plaintiff has established a prima facie case against the Defendants with a probability of success on the issue of the excess service charge claimed by the 1<sup>st</sup> Defendant.

On the issue as to whether the Plaintiff would suffer irreparable harm if the injunction sought is not granted, I am in agreement with the Plaintiff that that would be the case. The Plaintiff is carrying out business on the suit property. If the distress for rent which is said to be unlawful is allowed to continue,

the Plaintiff's business and reputation would suffer. The actual loss the Plaintiff is likely to suffer would be difficult to quantify.

Due to the foregoing, I am satisfied that the Plaintiff has satisfied the conditions for granting interlocutory injunction. I therefore allow the application dated 22<sup>nd</sup> June 2015 in terms of prayer 3 thereof save that the injunction shall last until the hearing and determination of this suit or the determination of the Plaintiffs tenancy whichever comes earlier. The costs of the application shall be in the cause.

**Delivered and Signed at Nairobi this 2<sup>nd</sup> day of August, 2016**

**S. OKONG'O**

**JUDGE**

**In the presence of**

**N/A for the Plaintiff**

**Mr. Kiamba for the Defendants**

**John Court Assistant**