REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA AT NAIROBI

CIVIL APPEAL NO. 669 OF 2011

DR. RONALD NGURU GATHARA

RODOKEN VENTURES LTD

RACHAEL V. MUTAHI T/A TOPLINK AUCTIONEER.....….APPELLANTS

VERSUS

CLIFF MBALA…….....RESPONDENT

(Appeal from the original judgment and decree of Mr. P. T. Nditika (P.M.) in Milimani Commercial Courts CMCC No. 8994 of 2006 delivered on 1st December, 2011)

JUDGMENT

1. The Appellants put forward the following grounds on appeal:

i. ***The Learned Magistrate erred in Law and in Fact in failing to appreciate that the respondent herein had defaulted in rent when the distress was carried against him.***
ii. ***The Learned Magistrate erred in Law and in Fact is failing to appreciate the tenor/or weight of the appellant defence on record.***
iii. ***The Learned Trial Magistrate had a distorted view of the evidence tendered in Court and in the final analysis erred in finding against the appellants.***
iv. ***The Learned Magistrate erred in his analysis of evidence and the law applicable thereby making conclusions and deductions.***
v. ***The Learned Magistrate erred in Law and in Fact is awarding an excessive amount in general damages and punitive damages of Kshs. 400,000/= which as not commensurate to the claim and the alleged injury suffered by the respondent.***
vi. ***The Learned Magistrate erred in Law and in Fact is failing to look into the totality of the evidence and pleadings before the Courts.***
vii. ***The Learned Magistrate misapprehended the facts of the case leading to erroneous application of the facts to Law.***

2. The Respondent and the Appellant had a tenancy agreement vide a letter dated 21st February, 2006 whereby the Appellant leased residential unit number 1.3 at Icon Place, New Garden Estate, Nairobi (‘***subject property***’). It was the Respondent’s case that on 11th July, 2006, the Appellants unlawfully and illegally levied distress for alleged rent arrears and breached the Respondent’s quiet possession of the suit premises. On 27th July, 2006, the 3rd Appellant distrained and attached the Respondent’s movable property namely JVC television and Refrigerator. It was the Respondent’s case that the alleged illegal actions were done despite the fact that he was not in rent

arrears as at July, 2006. The Respondent further claimed that he vide a letter dated 30th July, 2006 issued the 1st Appellant with a month's notice to terminate the tenancy. Vide the letter dated 2nd August, 2006 he was given an impression that security deposit would be refunded upon expiry of the notice to terminate the tenancy, the 1st and 2nd Appellants declined to make good the promise of refund.

3. It was the Respondent's testimony that on 20th June, 2006, he received a letter demanding rent arrears of KShs. 26,500/= yet he was at the time in arrears of KShs. 2,000/= only. He again received another letter reflecting a different amount as arrears. Sometime in July, 2006 the Respondent again received a letter demanding KShs. 26,000/=. In August, 2006 he received a statement that he was in arrears of KShs. 25,500/=. He thereafter received a notice to terminate tenancy and distress was levied on 11th July, 2006. He admitted that his households were taken and returned but that the refrigerator was damaged. He stated that he ought not pay the 3rd Appellant's costs and demanded that his deposit be refunded. On cross-examination the Respondent admitted to not paying rent promptly. He stated that he never took any steps to inquire whether the rent reached the 1st Appellant. As at the time he was testifying, the Respondent stated that he had not paid rent for a month.
4. The 1st and 2nd Appellant denied the claim and filed a defence and counter-claim dated 21st December, 2007. They denied having illegally instructed the 3rd Appellant to levy distress and stated that the Respondent was a defaulter. They contended that the Respondent left the subject property in need of repairs which they undertook at a cost. That the Appellant never needed the two (2) months' notice at the detriment of their detriment.
5. The 1st Appellant stated that the agreement for the tenants was a standard one. That rent was to be paid into Consolidated Bank account number 0130225066900, Nyeri. That the caretaker was only meant to issue receipts subject to receipt of bank deposit slips. He stated that the Respondent was meant to pay a rent deposit of KShs. 22,000/=, electricity of KShs. 2,500/= and KShs. 1,500/= for water. It was his evidence that the Respondent did not pay rent promptly and that by the time distress was levied the Respondent was in arrears of KShs. 20,600/=. On cross-examination the 1st Appellant stated that the agreement indicated no specific date when rent was to be paid in advance. He on re-examination stated that the Respondent did not paint the house when he exited.
6. The 3rd Appellant (DW2) stated that upon instructions to levy distress, he proceeded to the subject premises and showed the Respondent the proclamation but that the Respondent refused to sign it. Fourteen (14) days thereafter, she attached the Respondent's television and refrigerator but later released them after the Respondent's advocates instructed her to release. She stated that her fee of KShs. 5,000/= was not paid.
7. In his submission, the 1st Appellant reiterated the averments in the testimony and defence. It was further submitted that the 1st Appellant stated that he agreed to return the Respondent's items not because it was illegal but because it was not good for business. That because the trial magistrate misapprehended this fact which he used to apply the law and further that the Respondent having admitted to falling into arrears and the Appellant having proved by bank statements that no money used to be depositedthis court has power to interfere with that decision. The Appellants cited **Mwanasomoni v. Kenya Bus Services Ltd (1985) KLR 931** and **Kitavi v. Coastal Bottlers Limited (1985) KLR 470**. In **Mwanasomoni** (supra) it was held:-

> ***"The Court of Appeal will interfere with a finding of fact by the High Court where the finding is based on no evidence, or on a misapprehension of the evidence, to the Judge is shown demonstratably to have acted on wrong principles in receiving the finding and secondly the Appellate court also has the power to examine and re-evaluate the evidence on a first appeal where that becomes necessary."***

8. The Respondent on the other hand cited **Halsbury's Laws of England 4th Edition at pages 543 to 551** on the common law principles regarding illegal or irregular distress and the remedies therein where the authors state:-

> ***"An illegal distress is one which is wrongful at the very outset, that is to say either where there was no right to distrain or where a wrongful act was committed at the beginning of the levy invalidating all subsequent proceedings… The following are instances of illegal distress:…a distress when no rent is in arrears…a distress made after a valid tender of rent has been made…a distress made in an unlawful manner…"***

9. It was submitted that in the instant case the 3rd Appellant did not hold a certificate issued by the High Court authorizing her to levy distress as stipulated under Section 18 of the Distress for Rent Act, Cap 293 Laws of Kenya. On this point he cited **Nthenge v. Wambua 1984 KLR 799-808** where Simpson J (as he then was) was of the aforesaid proposition. The Respondent also relied on **Kenya Commercial Bank Limited v. Specialized Engineering Co. Ltd Nairobi HCCC No. 1728 of 1979**where Ringera J when citing **Hall v. Barclays (1973) 3All ER 620** held:-

> ***"A Plaintiff who is suffering from a wrong committed by a Defendant is entitled so far as money can do it, to be put into the same position as if he had not suffered that wrong. That is what is referred to as restitution in integrum. The second principle which is accepted is that what he is entitled to as damages for conversion or detinue in respect of the article so detained or converted and not returned, is the value of that article."***

The Respondent submitted that the 1st and 3rd Appellants conceded the breach by returning the goods unconditionally. He submitted further that the 2nd Appellant had no locus standi to give instructions for the levy of distress since it was not privy to the contract. He submitted that the 1st Appellant admitted on oath that he accepted the one (1) month notice issued by the Respondent and is estopped from claiming rent in lieu of two (2) months notice.

10. I have considered the deposition and submission by parties. The issue for my determination is whether the distress was unlawful. From the evidence on record, the Respondent neither sufficiently established that he was not in arrears nor controverted the Appellant's evidence that he was in arrears at the time of levying distress. On the other hand, the Appellants tendered no evidence to prove that they had obtained an order from court allowing them to levy distress as required by law. It follows therefore that the distress was illegal. There is no dispute that there existed landlord-tenant relationship. Such existence gave rise to duties and obligations such as the obligation to pay rent promptly on the part of the tenant and a guarantee to enjoy quiet possession on the part of the landlord. In the event of a breach of the said duties and obligations, court action ought to have been sought. See **Gusii Mwalimu Invastment Co. Ltd & 2 Others v. Mwalimu Hotel Kisii Ltd. Civil Appeal No. 160 of 1995 (UR)** where it was held:-

> ***"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 statutory tribunal (as appropriate) to obtain an order for possession."***

The upshot is that this appeal is dismissed with costs to the Respondent.

Dated, Signed and Delivered in open court this 13th day of February, 2015.

J. K. SERGON

JUDGE

In the presence of:

Mutai h/b for Macharia for the Appellants

Mr. Jaoko for the Respondents