



**REPUBLIC OF KENYA**  
**IN THE HIGH COURT OF KENYA AT NAIROBI**  
**CIVIL APPEAL NO. 383 OF 2010**

MARY MUTHONI NDUNGU.....APPELLANT

VERSUS

KANG'ERI WANJOHI T/A AUCTIONEERS.....RESPONDENT

**JUDGMENT**

1. This appeal is filed on the following grounds:-

i. *That the Board erred both in law and in fact in failing to punish the auctioneer for his malicious and illegal actions of evicting the Appellant without a court order and/or vacation notice.*

ii. *That the Board erred both in law and fact in finding that the instructions to levy distress were valid yet what the auctioneer did not to levy distress but to evict.*

iii. *That the Board erred both in law and in fact in finding that there was no eviction done by the Auctioneer in spite of evidence produced before it to support the eviction complaint.*

iv. *That the Board erred in both law and in fact in holding that the Appellant was in rent arrears yet the alleged rent arrears had been deposited in court and rent for the month of December paid up as at the time of the said eviction.*

v. *That the Board erred in both law and fact in failing to give the Appellant a fair hearing and considering irrelevant issues in arriving at the decision it did.*

vi. *That the Board erred in both law and fact in failing to appreciate to pay costs of KShs. 20,000/= to the Respondents which costs were unjustified.*

vii. *That the Board erred in both law and fact in failing to appreciate and properly evaluate the facts and law presented before it by the Appellant.*

viii. *That the Board erred in law and fact in dismissing the Appellant's complaint.*

2. The Appellant lodged a complaint with the Auctioneers Licensing Board claiming that the Respondent wrongfully and unlawfully evicted her from Flat No. 12 L.R. No. 209/118/17/2 Chemelil Road managed by Kiragu & Mwangi Limited on 10<sup>th</sup> December, 2009. She lamented that the eviction was done yet she was not in rent arrears. That the gang that evicted her neither introduced nor

identified themselves. She contended that she had not been issued with an eviction and/or vacation notice prior to the eviction. She stated that in the process of the eviction she lost a Rado watch, jewellery, Camera, Cell-phones, perfumes and money all amounting to hundreds of thousands of shillings. That the auctioneer had no court order empowering him to conduct the eviction. That the Auctioneer was assisted by a police officer, one Inspector Ojwang' to carry out the eviction.

3. In response to the complaint, the Respondent filed a Replying Affidavit in which he explained that the Appellant filed a plaint and a chamber summons CMCC No. 3824 of 2009 seeking to injunct the Respondent from levying distress on her. That the trial magistrate found that the Appellant acknowledged being in rent arrears. That she was granted interim injunction on condition that she deposits the disputed sum of KShs. 84,000/= in court within 7 days. That the Respondent was only barred from evicting the Appellant from the premises within 30 days from 21<sup>st</sup> October, 2009. The Respondent stated that it is on that background that he received instructions to levy distress on the complainant's movable assets to recover rent of Kshs. 114,000/=. That while in the process levying distress, the Appellant's lawyer and an army officer by the name Mr. Mburu came with a pistol and without warning shot and wounded one of the Respondent's workers. That due to the aforesaid, the workers abandoned the exercise and never evicted the Appellant or lock the Appellant's premises.

4. This being an appeal, this court is enjoined to assess afresh and re-evaluate the evidence ad come to its own independent findings and conclusions. In compliance herewith, this court has reviewed the evidence of the parties, the Affidavits and submissions tendered before the Tribunal. The court has also considered the submissions made by learned Counsel at the hearing of the appeal. The issues that fall for determination can be framed thus:- whether the Respondent had instructions to levy distress or to evict the Appellant; whether the Respondent evicted the Appellant; whether there was any rent arrears; whether the decision of the Tribunal was proper in the circumstances.

5. By an application dated 19/6/09, the Appellant approached the Chief Magistrates Court, Milimani Commercial Courts in CMCC No. 3824 of 2009 for an injunction to restrain her landlord from levying distress upon her goods. That court found that the Appellant was in rent arrears and dismissed that injunction application on 30/7/2009. The Appellant thereupon approached this court by way of Civil **Appeal No. 406 of 2009**. On 31/07/2009, she filed a summons for an injunction in respect of which the court granted the same on the same day on condition that she deposited in court the disputed rent of Kshs.84,000/= within 7 days. The said amount was deposited on 7/8/09 vide receipt No. 570227. That application was heard inter- partes but was dismissed by a ruling delivered on 21/10/2009.

6. The record shows that on 24/11/09, someone by the name Eunice was served by the Respondent with a proclamation dated the same day for distraint of rent arrears of Kshs.114,000/=. The photographs produced by the Appellant show her household items lying outside the premises. It is a clear indication of her eviction from the premises. The question that arises is, was the eviction carried out by the Respondent. The Respondent has denied that fact while the Appellant insists on it.

7. The evidence before the tribunal included several statements made to the police by various witnesses to the events of 10<sup>th</sup> December, 2009, the day of the eviction. According to the statements made by Josphat Omondi Warinda and Joseph Mwangi King'ori, the two told the police that they had been hired by the Respondent to evict the Appellant. They narrated how they descended upon the Appellant's premises with the intention of evicting her but due to the commotion that followed, one of those in their company was shot and the police came and calmed the situation. That all the people went to the police station to make a report of the incident.

8. The Appellant also made a detailed statement to the police about the incident. In that statement, she narrated how the Respondent invaded her premises in the company of about other 20 people,. They informed her that they had a court order to evict her. When they started to remove her household items, she called her two friends who caused a commotion. That due to the commotion the police came and ordered all of them, including the Respondent, to go to the police station where she reported the matter in OB No. 25/10/12/2009 about the incident. When she returned to the scene, she

found all her household goods outside and confirmed that she had been evicted. She however did not state in that statement who padlocked her house or who removed all her household items from the premises. She never mentioned the Respondent as the one who did it. Likewise, the statements of Josphat Omondi and Joseph Mwangi Kingori did not indicate that the eviction was completed by them or their colleagues as originally planned. It must be remembered that these statements were made soon after the incident as opposed to the Affidavits tendered at the Tribunal. The statements must have been telling the truth as the incident was fresh in the minds of the witnesses.

9. In the totality of the evidence, although I find that the Tribunal did not evaluate the evidence, I find that the Tribunal arrived at the correct decision that the Respondent had instructions to levy distress; he properly served a Notice of Proclamation; that there was no evidence that it is he, the Respondent who evicted the Appellant. Clearly there were rent arrears as the amount deposited in court was neither paid over to the landlord nor ordered to be so released. Further, as regards the costs of Kshs.20,000/- ordered by the Tribunal, I find no grounds to interfere with the discretion of the Tribunal in arriving at that figure as the costs ordinarily follow the event. There is nothing to show that the discretion was wrongfully exercised or the amount is so exorbitantly high as to be evidence of a misdirection.

10. Accordingly, I find the Appeal to be without merit and dismiss the same with costs.

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**A. MABEYA**

**JUDGE**

Dated, Signed and Delivered at Nairobi this 18<sup>th</sup> day of September, 2015

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**JUDGE**