REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA

AT NAKURU

CIVIL SUIT NO. 12 OF 2014

NANCY MUTHONI MWANGI.....PLAINTIFF/APPLICANT

VERSUS

SAID ABDALLA AZUBEDI.....DEFENDANT/RESPONDENT

RULING

The notice of motion dated 14.2.2014, inter alia, seeks to restrain the defendant from attaching the applicant's properties proclaimed by M/S Jogedah Auctioneers on 3rd February, 2014 pending the hearing and determination of the suit herein.

The application is premised on the grounds that the proclamation was illegal as it was done without notice or a court order in respect of the alleged rent arrears; that at the time the respondent instructed the auctioneer to levy distress, the applicant had paid rent (Kshs. 150,000/= per month) upto and including the month of December, 2013; that the tenancy which existed between the applicant and respondent was a controlled one and, as such, the respondent required the leave of the Business Premises Rent Tribunal (BPRT) to either levy distress or to increase rent.

In the affidavit sworn in support of the application, the applicant contends that on or about 5th November, 2011 she leased shop premises from the respondent at a monthly rent of Kshs. 150,000/= where she operates a supermarket business. Despite having paid rent upto and including the month of December, 2013, on 3rd February, 2014, the respondent instructed an auctioneer (Jogedah Agencies Auctioneers) to levy distress for rent. Consequently, the auctioneer visited her business premises and proclaimed the assets there in to recover Kshs.1,950, 000/= which she did not owe.

Explaining that she is not aware of any rent increment by the BPRT or any other court; the applicant argues that unless restrained, the respondent will proceed with the illegal distress and occasion her great loss and prejudice.

In opposing the application, the respondent filed a replying affidavit in which he explains that in exercise of his right to increase rent (reserved under clause 6 of the Lease Agreement) he served the applicant with a notice increasing rent effective from 1st March, 2013; that the applicant did not heed the notice and that by the time he instructed the auctioneer, the applicant had not paid rent for the month of January and February, 2014.

As Concerns the applicant's contention that the tenancy herein is a controlled one, the respondent argues that since the Lease herein is for a term exceeding five years, the tenancy created is not a controlled one (is not subject to the provisions of the Landlord and Tenants (Shops Hotels and Catering Establishments)

Act, Cap 301 Laws of Kenya.

Reiterating that the tenancy herein is not a controlled one, the respondent argues that neither the leave of court nor the leave of the BPRT was required before he could lawfully instruct auctioneers to levy distress for rent. He argues that the Landlord and Tenant Act, in any event, does not prohibit levying distress for rent.

Terming the applicant's application bad in law and lacking in merit, the respondents argues that the role of the court is to interpret contracts between parties and not to re-write them or assist parties to escape from their contractual obligations. The applicant having failed to meet her contractual obligations, under the lease agreement, is said to be undeserving the orders sought.

In a rejoinder, the applicant swore a further affidavit in which she admits that she owes the respondent rent for the month of January and February, 2014 but denies owing the respondent the amount claimed in the proclamation.

Concerning the respondent's claim for increased rent, the applicant denies having received any notice for increment of rent and contends that, such increment could only be effected by mutual consent of the parties involved and not unilaterally.

The applicant contends that the respondent cannot rely on the notice allegedly sent to her because it was issued to the wrong entity, the business as opposed to herself. Besides the alleged increment of rent is not borne out by the rent documents kept by the respondent or issued to him to wit, the rent card and/or the receipts issued to her in respect of rent payment.

Counsel for the applicant, Mr. Kimatta, gave the circumstances in which the tenancy agreement herein was entered into. He explained that the respondent and the applicant's husband had agreed that the applicant's husband would construct a commercial premises on the respondent's land and that upon completion, the expenses incurred in constructing the premises would be converted into rent. Unfortunately, two days after the completion of the suit premises, the applicant's husband passed on.

On the basis of the agreement that existed between the respondent and the applicant's husband, the parties herein entered into the Lease Agreement hereto. In that Lease Agreement the parties herein agreed to convert the moneys the applicant's husband expended into rent. The applicant contends that the money converted to the rent covered rent upto and including the period the respondent was levying distress for rent.

Concerning the alleged increment of rent, Mr. Kimatta submitted that any increment of the reserved rent could only be effected through a subsequent agreement.

As for the notice allegedly sent to the applicant, he submitted that the notice was sent to the wrong party, Ebenezer, yet the Lease Agreement was executed between the applicant and the respondent in their personal capacities. Counsel also submitted that the notice cannot form the basis of the respondent's claim as it. Further that all along, the applicant paid Kshs. 150,000/= and was issued with receipts for payment of rent. The respondent had not, at any time, indicated that the rent was in part payment.

Disappointed by the manner in which the distress for rent was conducted, counsel submitted that the applicant was greatly prejudiced yet she had not refused to meet her contractual obligations (pay rent).

Counsel for the respondent, Mr. Murimi, opposed the application terming it as lacking in merit. He argued that the applicant seeks a temporary injunction yet he has not sought a permanent injunction in his plaint. He referred to **Kihara v. Barclays Bank (K) Ltd (2001) E.A;** **James Archimedes Gichana v. Pyrethrum Board of Kenya Nakuru HCC NO. 237 of 2007** and **Mary Ngaru v. Family Bank Ltd Nakuru HCCC NO.41 of 2013** to argue that issuance of the orders sought, when the applicant has not sought a permanent injunction in the plaint, would be in vain.

Arguing that the applicant has admitted to owing rent for the month of January and February, 2014, Mr. Murimi submitted that even if the pleadings were proper, the prayers sought cannot issue because, by the time the applicant came to court she was in breach of her contractual obligations. In this regard, he referred to **Snells on Equity at page 655** and to **Kenya Breweries Ltd & another v. Washington Okey C.A No. 332 of 2000** to argue that the court cannot issue an injunction whose effect is to excuse a party from its contractual obligation and effect breach of the contract. Counsel also cited **Proxy Auto Consultants v. Kenya Commercial Bank & another Nakuru HCCC NO.90 of 2008** and **Hezron Muruka v. Helasabili Mobile Services Ltd Nakuru HCCC NO. 129 of 2011** to buttress his argument against issuance of the orders sought.

Concerning the contention that the respondent was not entitled to revise the rent, and that the Lease herein was reversionary, Mr. Murimi argued that, vide clause 6 of the Lease Agreement, the respondent had reserved the right to revise rent yearly. With regard to the applicant's contention that the notice herein was sent to the wrong entity, he explained that in all receipts for rent were issued in the name of the business.

Explaining that the money expended in construction of the suit property and which had been converted into rent had been exhausted by the time the respondent instructed the auctioneer to levy distress for rent, Mr. Murimi submitted that the distress for rent was lawful. As concerns the applicant's contention that the respondent ought to have obtained leave of the BPRT or order from the court to levy the distress herein, counsel submitted that since the tenancy was for a period exceeding 5 years, the respondent did not require the leave of the BPRT or an order of the court to levy the impugned distress. In this regard, counsel referred to **Section 12** of the Cap 301 and **Erastus Riungu v. J.S Riungu Nairobi HCCC No.34 of 1989** where the presiding judge S.0 Oguk (as he then was) observed:-

> **"In my view, the distress that was levied was proper. There mere fact that the Tribunal is empowered under section 12(h) to permit the levying of distress for rent does not thereby render any distress carried out by the Landlord under the Distress for Rents Act (Cap 293) illegal provided that the tenant is in arrears of rent."**

In conclusion, Mr. Murimi submitted that the duty of the court in the current dispute is to interpret the contract entered into between the parties and not to re-write the contract for the parties.

In reply, Mr. Kimatta submitted that the application is tenable and arguable because it raises issues concerning whether the respondent had revised rent and/or whether the respondent could revise rent unilaterally; and/or whether the distress for rent was based on the revised rent and/or whether the notice of the revised rent was sent to the right entity. Further that there is no evidence that the applicant has refused to pay rent or to make an undertaking for future payment of rent.

Concerning the applicant's failure to seek a permanent injunction in the plaint, counsel submitted that the applicant cannot restrain the respndent to levy distress whenever it is due and owing.

Although counsel for parties addressed me at length on the legality or otherwise of the impugned distress, the sole issue for determination, at this stage is whether the applicant has satisfied the conditions for grant of an injunction pending the hearing and determination of the suit.

It is settled law that the guiding principles for an injunction are as set out in **Giella -Vs- Cassman Brown and Company Ltd [1973]E.A**. Those principles are first, that the applicant must show a *prima facie* case with a probability of success; secondly that he stands to suffer irreparable harm not compensatable in damages; and thirdly, if in doubt, the court must assess the balance of convenience.

The conditions outlined in *Giella's* case (*supra*) are sequential "so that the second condition can only be addressed if the first one is satisfied and when the court is in doubt then the third condition can be addressed" See **Kenya Commercial Finance Company Ltd Vs Afraha Education Society** [2001] 1 E.A. 86.

It is noteworthy that an injunction being a discretionary remedy a party who has acted in a manner not

acceptable to a court of equity, will be denied the remedy. See **Kenya Hotels Limited Vs Kenya Commercial Bank and another** [2004] 1 KLR 80 where Ibrahim J., (as he then was) observed:-

> **"An injunction being an equitable remedy, the court may, while remaining guided by these three principles, also look at all circumstances including the conduct of the parties..."**

Has the applicant established a ***prima facie case?***

In answering this question I take note of the decision in **Jiwaji v. Jiwaji & another (1968) E.A 547** where Sir Clement De Lestang, V.P., (as he then was) observed:-

> **"...Courts will not, of course, make contracts for the parties but they will give effect to their clear intention..."**

As the applicant has admitted having been in arrears of rent for the month of January and February 2014, her case can only be said to be genuine and arguable case, if and only if, on construction of the Lease Agreement herein, the court is of the view that her contention that she is a protected tenant is arguable. In making that determination, the duty of this court is to analyze the agreement the parties entered into without making definitive findings thereon, as that will be the duty of the trial court. See **Mrao Ltd v. First American Bank of Kenya Ltd & 2 Others** (2003) KLR 125.

Having read and considered the Lease Agreement executed between the parties herein, and in particular, clause 5 thereof which gave the parties to the lease the option to terminate the lease and the provisions of Section 2(1)(b)(ii) of the Landlord and Tenant Act, which defines a controlled tenancy to include a tenancy which contains provision for termination, otherwise than for breach of covenant, within five years from the commencement thereof; and taking note that the parties did not limit the time within which that clause could be invoked. I am persuaded that the applicant's claim that she is a protected tenant is arguable. I also note that there is uncertainity as regards the respondent's right to increase rent.

Although the Landlord and Tenant Act, does not prohibit levying of rent, it regulates the manner in which distress for rent can be levied in respect of properties governed by the Act.

Having found the applicant's contention that she is a protected tenant arguable, I turn to the respondent submission that an injunction cannot issue in favour of the applicant because she has not sought a permanent injunction in her plaint.

Indeed, it has been held in numerous authorities that a temporary injunction cannot issue in favour of a litigant who has not sought a permanent injunction in his plaint. However, that rule is not cast in stone. In discharging its mandate, the court has the duty to consider the circumstances of each particular case.

In the circumstances of this case, it has been argued and, rightly so, that a prayer for a permanent injunction is not tenable because the applicant cannot permanently restrain the respondent from levying for distress for rent, whenever due.

Under Order 40(1) of the Civil Procedure Rules; where in any suit it is proved by affidavit or otherwise-

> **"(a) that any property in dispute in a suit is in danger of being wasted, or alienated by any party to the suit, or wrongfully sold in execution of a decree the court may by order grant a temporary injunction to restrain such act, or make such other order for the purpose of staying and preventing the wasting, damaging, alienation, sale, removal, or disposition of the property as the court thinks fit until the disposal of the suit or until further orders."**

In view of the foregoing, it is my considered view that failure to seek a permanent injunction will not necessarily lead to deny of a temporary injunction. The decision to grant or refuse a temporary injunction must be made after considering the particular circumstances of the case.

I agree with Mr. Kimatta that in the circumstances of this case a permanent injunction would not be an appropriate remedy. However, the applicant has admitted that she owes the respondent rent for the months of January and February 2014. Due to that fact, it is submitted that an injunction being an equitable remedy cannot issue in her favour. Counsel for the applicant countered that argument by pointing out that the applicant has not refused to pay rent or make an undertaking to meet her contractual obligations.

Having considered the special circumstances of this case, particularly the issue as to when Clause 6 of the agreement can be invoked, and the fact that the applicant is willing to pay the rent arrears, I find that a prima facie case with probability of success has been established. I therefore grant the orders sought on condition that the applicant must pay the rent arrears to the current date within 21 days in default of which the orders will stand vacated.

Costs of this application shall be in the cause.

Delivered and dated this 28th day of July 2014 at Nakuru.

H.A. OMONDI

JUDGE