



REPUBLIC OF KENYA
IN THE HIGH COURT OF KENYA AT MERU

ELC NO. 92 OF 2014

DR. JOEL JAPHET MUTHURI.....PLAINTIFF

VERSUS

MIRIAM KANARIO MBAABU.....1ST DEFENDANT

SAMUEL KARITHI RURIGI T/A

QUICKLINE AUCTIONEERS.....2ND DEFENDANT

R U L I N G

This application by the plaintiff is dated 16th June, 2014 and seeks orders:

- 1. That the application be certified urgent and service be dispensed with in the first instance.***
- 2. That an order of injunction do issue restraining the Defendants/Respondents, their agents, servants or any person acting through them from selling, disposing or whatsoever dealing with the goods items and records taken away from the Plaintiff's business premises on Plot No. 266 Maua town pending inter-partes hearing of this application.***
- 3. That an order injunction do issue restraining, the Defendants/respondents, their agents, servants or any persons acting through them from selling, disposing or whatsoever dealing with the goods, items and records taken away from the Plaintiff's business premises on plot No. 266 Maua town pending inter-partes hearing of this application.***
- 4. That the Defendants/Respondents be ordered to release all the items, goods and records taken away from the Plaintiff's business premises on Plot No. 266 Maua town pending inter-partes hearing and determination of this application.***
- 5. That costs of this application be borne by the Defendants/Respondents***

It is based on the following grounds:

- 1. The defendants have unlawfully taken away the Plaintiff's goods, items and records while purporting to levy distress for rent.***
- 2. The seizure of he Plaintiff's goods, items and records was unlawful having been done in contravention of the law.***
- 3. The Defendants further unlawfully evicted the Plaintiff from the premises and immediately***

leased the same to a third party.

4. The said distress and eviction were done during the pendency of Business Premises Tribunal Case No.55 of 2013.

5. The Defendants' actions were unlawful and have occasioned irreparable loss upon the Plaintiff.

The Applicant, in his submissions, has explained that the Applicant and the 1st Respondent were tenant and landlady. The property upon which the tenant/landlord, relationship existed was Plot No. 266 Maua town. It was stated that the 1st Respondent had moved to terminate the tenancy and served the applicant with a notice dated 18.9.2013. As a result the applicant filed a reference with the Business Premises Rent Tribunal to oppose the notice to terminate the tenancy.

The applicant claims that on 9.5.2014, while the Tribunal case was still pending, the 1st Respondent instructed the 2nd respondent to levy distress for unpaid rent. The 2nd Respondent in pursuance of the instructions moved into the Applicants premises and removed all the goods therein. It is stated that the 1st Respondent proceeded to hand-over possession of the premises to another tenant.

The Applicant has submitted that the Respondents levied distress without having obtained leave to do so from the Tribunal as required by Section 12 (1) (h), Cap 301. The Applicant proffered the case of **Sammy Kiprotu Tonui Vs. Jeremiah Koech & Another (HCCC No. 43 of 2008, Kerichu) and Birds Paradise tours & travel Ltd V Hotel Secretaries (HCCC No. 841 of 1988, Nairobi)** as authorities in this regard.

The Applicant further submitted that the 1st Respondent's intention was to remove the applicant from the premises and the levying of distress for rent was merely a disguise to achieve the eviction. The applicant proffered the case of **M/s Gusii Mwalimu Investment Co. Ltd & Others Vs M/S Mwalimu Hotel Kisii Ltd (Court of Appeal C. A. No. 160 of 1995)** as his authority for his proposition that the power to levy distress is limited to recovery but not to evict a tenant from the rented premises.

The applicant opined that the levying of distress was done prematurely before termination by a Tribunal on whether or not there as any rent payable. He offered the case of **Professor Washington Jalango Okume Vs Buffar Limited (HCCC 649 of 2005, Nairobi)** to support the position that levying of distress in respect of disputed rent arrears is illegal.

The applicant submitted that the contention by the 1st Respondent that the Applicant should deposit in Court the sum of Kshs.430,000/- as rent arrears was untenable as the amount was neither agreed nor determined by the Tribunal.

The Respondents submitted that the Applicant had filed a misplaced application as he owed the Respondents Kshs.430,000/= being unpaid rent and further sum of Kshs.90,000/= being auctioneers cost and transport for the distrained goods. He submitted the obvious thing to be done is for distrained goods to be sold to recover unpaid rent and costs. The alternative was for the applicant to deposit the sum of Kshs.430,000/= in court pending hearing of the suit.

He submits that since the applicant does not explain how the rent owed to the 1st Respondent will be paid once the distrained goods are released, this suggests that the applicants wants to defraud the defendant of their money. He wonders aloud about what security will be there to cushion the defendants since he had occupied the 1st defendants' premises and did not pay the amount of money claimed as rent.

The 1st Respondent denies that he evicted the Applicant. He says that for distress purposes, the premises were broken into but could be left abandoned as the applicant had vanished almost a month earlier. He opined that the pendency of Business Premises Tribunal case No. 55 of 2013 did not mean that rent was not to be paid. He also submitted that there was no order to stay distress.

The Respondents took issue with the claim that the plaintiff was unable to pay rent as he was in hospital and said that though the accident occurred in June, 2013, the non-payment of rent occurred mainly between September, 2013 and April 2014. He termed this pleading by the applicant as merely an excuse.

The Respondents concluded their submissions by saying that the prayer to release the distrained goods was untenable because the moment the goods are released the cause of action shall be overtaken by events as the prayers in the plaint are the same as those in the application.

I have carefully considered the averments, the submissions and the authorities proffered by the parties. I have noted that despite there having been **CM's Court Misc. App. No. 3 of 2014 at Maua**, the Applicant/Plaintiff has on paragraph 11 of his plaint averred that there was no previous suit between the parties except **Tribunal case No. 55 of 2013**. There is no dispute that there was lease agreement between the parties dated 8th July, 2010. For the first two years monthly rent was to be Kshs. 35,000/= from the third year, rent was to be Kshs.40,000/= per month. I, therefore, do not agree with the Applicant's submissions that rent had not been agreed upon.

I do note that the applicant has not prayed for reinstatement of the tenancy in this application. The two main prayers are to restrain the disposal of the distrained property and for the release of that property. I did not understand why, dispute of the existence on Tribunal Case No. 55 of 2013, the Applicant never moved the Tribunal appropriately at the right time.

I also note that in his submissions, the Applicant did not address the Court regarding whether or not the tenant/landlord relationship was a controlled one or not. However, on 14th May, 2014 the applicant filed an application in the **CM's court at Maua in Misc App. No. 3 of 2004** seeking the following orders:-

1. that there be a stay of the distrained goods/items seized by the M/s Quick Line Auctioneers from the applicant's premises plot No. 266 Maua Town pending interpartes hearing and determination of this application.

2. That the orders made by this Honourable Court on 7th May, 2014 be set aside.

3. That all distrained goods/items seized by M/s Quick Line Auctions from the applicant's premises on Plot No. 266 Maua town be returned to the Applicant forthwith or their equivalent value be paid to the Respondent/Applicant by the 1st and 2nd respondents jointly and severally.

4. Costs of the Application.

The application was dismissed by the Hon. C. M. Maundu on 11.6.2014. The applicant sought leave to appeal. The applicant was granted leave to appeal.

I do find that the orders sought in the lower Court are quite similar to the orders sought by this application. It is pellucid that this suit was brought to this court by way of plaint. The application as an interlocutory application within that plaint.

At paragraph 17 of his Supporting Affidavit sworn on 16th June, 2014 depones:

“THAT on 7.5. 2014, the Respondents fraudulently obtained a Court Order in Maua Misc. Civil Application No.3 of 2014 allowing them to break into my premises. Annexed and marked “JJM8” is a bundle of the pleadings and the order made in Maua Misc Appl. No. 3 of 2014.”

I find that granting the prayers sought in this application would have the effect of setting aside the Ruling delivered in Maua CM's Court Misc Appl. No. 3 of 2014 when the Ruling had to be appealed against.

Regarding the authorities proffered by the applicant, I find that the circumstances in the 3 cases are quite dissimilar to the circumstances in this case. Most eminently, the distraining in this case was authorized by a Court of law.

As the Court of Appeal opined in **Mbuthia Vs Jimba Credit Corporation [1988] KLR1:**

“The correct approach in dealing with an application for an Interlocutory Injunction is not to decide the issues of fact, but rather to weigh up the relevant strength of each side's propositions. The lower Court Judge had gone far beyond his proper duties and made finding of fact on disputed affidavits.”

I opine that the approach enunciated by the Court of Appeal is a proper guide when Courts are dealing with all Interlocutory Applications, and may not be confined to injunctions.

In conclusion, I find that the prayers sought by the applicant are not merited. I, therefore, dismiss the application. I award costs to the respondents.

It is so ordered.

Delivered in Open Court at Meru this 21st day of October, 2014 in the presence of:

CC Daniel/Lilian

Parties not in Court.

P. M. NJOROGE

JUDGE