



**Sehmi v Hassan (Environment and Land Case Civil Suit
640 of 2017) [2022] KEELC 21 (KLR) (28 April 2022) (Ruling)**

Neutral citation: [2022] KEELC 21 (KLR)

**REPUBLIC OF KENYA
IN THE ENVIRONMENT AND LAND COURT AT NAIROBI
ENVIRONMENT AND LAND CASE CIVIL SUIT 640 OF 2017**

SO OKONG'O, J

APRIL 28, 2022

BETWEEN

TEJ SEHMI PLAINTIFF

AND

MOHAMED WELI HASSAN DEFENDANT

RULING

1. What is before the court is the Plaintiff's Notice of Motion application dated 21st June 2021 seeking for the following orders;
 1. Spent;
 2. Spent;
 3. That pending the hearing and determination of this Application inter-partes, the Respondent be ordered to deposit the sum of Kshs.2, 749,308.00/- within thirty (30) days from making of such order into the Plaintiff's Advocate Client Account being the total amount of rent that would be payable by the Respondent from 1st April 2018 to 1st June 2021 at the rate of Ksh.71, 500/- per month.
 4. That pending the inter partes hearing and determination of this suit, the Respondent be ordered to deposit by the 5th day of every month a sum of Kshs. 71,500/- being the monthly rent payable by the Respondent to the Applicant.
 5. That the Court be pleased to order that unless the above accrued rent is deposited within the time limits set out in prayers (3) and (4) above, the Applicant be and is at liberty to levy distress against the Respondent to recover any of the outstanding sums together with any other additional and incidental expenses incurred by the levying of distress.
 6. That the costs of this Application be borne by the Defendant/Respondent.



The Applicant's case:

2. The application was brought on the grounds set out on the face thereof and on the supporting affidavit and further affidavit sworn by the Plaintiff (hereinafter referred to as "Applicant") on 21st June 2021 and 3rd August 2021 respectively. The Applicant averred that the Defendant (hereinafter referred to only as "the Respondent") was his tenant in Maisonette No.1, a town house situated on L.R No.1/75 on Ring Road Kilimani (hereinafter referred to as "the suit property") since the year 2005 and paid the monthly rent until November 2016. The Applicant averred that he had engaged a management agent to which monthly rent was paid until in 2014. The Applicant averred that on 16th March 2016, the Applicant and the Respondent entered into a new one-year lease with effect 1st April 2016 at a monthly rent of Kshs.71, 500/-. The Applicant averred that pursuant to this new lease, the Respondent topped up the deposit that he paid earlier by a sum of Kshs.68, 000/- to bring the deposit to a sum of Kshs.143, 000/-.
3. The Applicant averred that the Respondent defaulted in rent payment from 1st November 2016 to February 2017 forcing the Applicant to levy distress for rent in March 2017. The Applicant averred that the Respondent obtained an injunction order at the Rent Restriction Tribunal against the said distress that enabled him to resume occupation of the suit property. The Applicant averred that the Respondent continued to occupy the suit property and to pay monthly rent of Ksh.71, 500/- which he paid until March 2018 despite his lease expiring on 31st March 2017.
4. The Applicant averred that the Respondent did not pay any rent to the Applicant from April 2018 which rent had accrued to a sum of Kshs. 2,749,308/- as of the date of filing the application.

The Respondent's case:

5. The Respondent opposed the application through a replying affidavit sworn on 12th July 2021. The Respondent averred that after falling into arrears of Kshs. 263,000/- in 2017, the Applicant instructed Moran Auctioneers to levy distress for rent against him. The Respondent averred that without serving a proclamation notice on him, the said auctioneers attached his household goods forcing him to file Rent Restriction Case No. 1194 of 2017 against the Applicant at the Rent Restriction Tribunal ("the tribunal"). The Respondent averred that the tribunal ordered him to clear the then outstanding rent arrears by 31st October 2017. The Respondent averred that following that order, he paid Ksh. 300,000/- to the Applicant which was above the rent arrears for which distress was levied by Kshs. 35,000/- even after the Applicant had filed this suit disputing the jurisdiction of the tribunal.
6. The Respondent averred that he paid Kshs. 179,500/- to the Applicant in December 2017 and having cleared the rent arrears, he was advised by the said auctioneers that his goods had been sold in November 2017. The Respondent averred that he was not given an account of the proceeds of the alleged sale. The Respondent averred that he was willing to pay any outstanding rent arrears on condition that all his goods that were attached by the auctioneers were returned. The Respondent averred that the orders that were issued by the tribunal in his favour were never stayed, varied or set aside.

The submissions by the parties:

7. The Applicant filed his submissions dated 3rd August 2021. The Applicant submitted that the Respondent remained in occupation of the suit property despite the expiry of the lease dated 16th March 2016 in March 2017. The Applicant submitted that pursuant to the provisions of section 57(1) (c) & (2) of the *Land Act*, 2012, the Respondent was a tenant of the Applicant and as such liable to pay



rent that remained unpaid from April 2018 to 21st June 2021 in default of which the Applicant should be at liberty to levy distress for the recovery of the same.

8. In support of this submission, the Applicant cited *Royal Gardens Hospital v Ebrahim Omenyi Ambwere & another* [2018]eKLR, and *JK Chatrath and another v Shah Cedar Mart* [1967] EA 93.
9. In his submissions in reply dated 29th September 2021, the Respondent submitted that he was a good tenant. The Respondent submitted that despite the Applicant accepting a cheque for Kshs.300, 000/- from him, the Applicant still went ahead to auction his distressed properties worth Kshs. 2,000,000/- and failed to render an account in respect of the sale.

Determination:

10. I have considered the Applicant's application together with the affidavits filed in support thereof. I have also considered the replying affidavit filed by the Respondent in opposition to the application. Finally, I have considered the submissions by the counsels for the parties. What I need to determine are; whether the Respondent is a tenant of the Applicant, whether he is in rent arrears and whether he should be ordered to pay the same. It is not disputed that as at the time the present application was brought, the Respondent was in occupation of the suit property as the Applicant's tenant despite the fact that his tenancy had expired. It is also not disputed that the Respondent continued to pay a sum of Kshs. Ksh.71, 500/- to the Applicant as rent which was the rent payable under the expired lease and that the Applicant accepted the same. The Applicant has contended that from 1st April 2018 the Respondent continued to stay on the suit property but without paying any rent.
11. The Respondent has not denied that he had not paid rent to the Applicant from 1st April 2018 up to the time the present application was brought. The Respondent has not denied that the rent payable is Ksh.71, 500/-. The Respondent's excuse for not paying rent is that his goods were attached and sold illegally by the Applicant in a purported distress for rent and that no account was rendered by the auctioneer for the proceeds of sale of the said goods.
12. I am satisfied that the Applicant has proved that he is owed rent by the Respondent. The quantum of rent claimed by the Applicant is not disputed. The rent accruing monthly is also not disputed. It is my finding that the Respondent has no defence to the rent arrears claimed by the Applicant. There is also no justification for the Respondent's continued occupation of the suit property without paying rent. If the Respondent feels that he has a claim against the Applicant for illegal distress, he is at liberty to lodge the same. That does not however absolve him from his duty to pay rent to the Applicant as long as he remains in occupation of the suit property. I have noted that the Respondent has already lodged a complaint against the auctioneer who is alleged to have carried out the illegal distress with the Auctioneers Licensing Board. He is at liberty to pursue that complaint to its logical conclusion.
13. The upshot of the foregoing is that I find merit in the Applicant's application dated 21st June 2021. I am however not sure of the appropriate order to make in the matter in view of the manner in which the prayers in the Applicant's application are framed. The Applicant has not sought judgment for the sum of Kshs. 2,749,308.00/- claimed herein either in the plaint or in the present application. Doing the best I can for the Applicant, I will allow the application on the following terms;
 1. Pending the hearing and determination of this suit, the Defendant shall deposit in an interest earning bank account in Nairobi in the joint names of the advocates on record herein for the parties a sum of Kshs. 2,749,308.00/- within thirty (30) days from the date hereof.
 2. Pending the hearing and determination of this suit, the Defendant shall continue to pay to the Plaintiff rent at the rate of Kshs. 71,500/- per month on the 5th day of each month.



3. In the event that the Defendant fails to comply with the orders given in 1 and 2 above the Plaintiff shall be at liberty to levy distress against the Defendant for the recovery of any rent in arrears.
4. The costs of the application shall be in the cause.

DATED AND DELIVERED AT NAIROBI THIS 28TH DAY OF APRIL 2022

S. OKONG'O

JUDGE

Ruling delivered virtually through Microsoft Teams Video Conferencing Platform in the presence of:

Mr. Odera for the Plaintiff

Mr. Mulama h/b for Mr. Cheboi for the Defendant

Ms. C. Nyokabi-Court Assistant

