



REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA AT KISII

ENVIRONMENT AND LAND CASE NO.354 of 2014

GUSII JUMBO HARDWARE & PAINTS LTD PLAINTIFF

VERSUS

SIMON NJUGUNA MACHARIA.....1ST DEFENDANT

KENNEDY MOKUA T/A MOCO AUCTIONEERS..... 2NDDEFENDANT

RULING

1.1 Introduction

1. Sometimes in the year 2012, the plaintiff and the 1st defendant entered into an oral tenancy agreement with respect to a shop on a building known as Masimba Plaza which is situated on **LR No. Kisii Municipality/BlockIII/108**. The said shop shall hereinafter be referred to as “**the suit property.**” The tenancy period was not specified and the rent that was agreed upon by the parties is not certain. The plaintiff has contended that the monthly rent was agreed at kshs. 120,000/= while the 1st defendant has claimed that the rent was agreed at kshs.120,000/= plus 16% VAT which brings the total monthly rent to kshs. 139,200/=. I will revert to this issue of rent later in this ruling. It was agreed further by the parties that the plaintiff would supply the 1st defendant with building materials and the price or costs thereof would be offset against the monthly rent payable by the plaintiff to the 1st defendant for the suit property.
2. Following the said agreement, the plaintiff took possession of the suit property on 1st August, 2012 and occupied the same as a tenant of the 1st defendant until 15th September 2014 when the 1st defendant re-entered the suit property and leased it out to a third party following a distress for rent that was levied against the plaintiff by the 2nd defendant on the instructions of the 1st defendant. The parties are not in agreement as to the circumstances under which the said distress for rent was levied against the plaintiff and the subsequent re-entry by the defendant into the suit property.
3. The plaintiff has contended that the distress that was levied against it by the 2nd defendant on behalf of the 1st defendant was unlawful and that the re-entry by the 1st defendant into the suit property and re-letting the same to a third party was equally illegal and amounted to unlawful eviction. The plaintiff has contended that considering the value of the building materials that it had supplied to the 1st defendant, its rent payment to the 1st defendant was upto date and as such there was no basis upon which distress could have been lawfully levied against it. On his part, the 1st defendant has contended that as at the time when the distress was levied, the plaintiff was in

arrears of rent to the tune of kshs. 360,000/= and as such the distress complained of by the plaintiff was proper and lawful. The 1st defendant has contended further that his re-entry into the suit property was equally lawful. The 1st defendant has contended that, after distress for rent was levied upon the plaintiff, the plaintiff locked up and abandoned the suit property which was handed over to the 1st defendant by the 2nd defendant after the 2nd defendant broke into the premises pursuant to a court order and removed the distrained goods.

4.1 This Suit:

4. The plaintiff brought this suit on 18th September 2014 to challenge the said distress for rent and its eviction from the suit property. The plaintiff has sought; an order that the distress that was levied upon it and its subsequent eviction from the suit property was illegal, unlawful, null and void, kshs. 1,150,050/= as special damages for the goods that were illegally distrained, a permanent injunction restraining the defendants from levying distress, attaching and/or in any other manner whatsoever interfering with the plaintiff's tenancy on the suit property and a mandatory injunction to restore the plaintiff into the suit property.

5.1 The application before the court:

5. Together with the plaint, the plaintiff filed an application by way of Notice of Motion dated 18th September 2014 in which the plaintiff sought; a temporary injunction to restrain the defendant from interfering with the plaintiff's occupation of the suit property pending the hearing and determination of this suit, a temporary injunction to restrain the defendants from disposing of and/or selling the plaintiff's goods which, were attached pursuant to the purported distress for rent pending the hearing and determination of this suit and, an order restoring the plaintiff back into the suit property pending the hearing and determination of this suit. This is the application that is the subject of this ruling.
6. The application was supported by the affidavit of one, Laximich and Virchand Gutka sworn on 18th September 2014. In the said affidavit, the plaintiff has contended that it was at all material times a tenant of the 1st defendant on the suit property at monthly rent of kshs.120,000/= and that from 1st August, 2012 when it took possession of the suit property, the arrangement was that it would supply the 1st defendant with building materials the price of which it would set off from the rent payable to the 1st defendant. The plaintiff contended that it supplied to the 1st defendant building material to the tune of kshs.4,227,385 which according to its computation, would have covered rent payable to the 1st defendant up to July, 2015. The plaintiff contended that since it had paid rent to the 1st defendant in full, the distress for rent that was levied upon it by the defendants on 13th August 2014 had no basis and as such was unlawful. The plaintiff contended that following the said unlawful distress, the 1st defendant took possession of the suit property thereby evicting the plaintiff therefrom.
7. The plaintiff contended that it's tenancy on the suit property was controlled under the provisions of the Landlord and Tenant (Shops, Hotels and Catering Establishments) Act, Cap 301 Laws of Kenya and that the 1st defendant failed to comply with the provisions of the said Act while levying the said distress and evicting the plaintiff from the suit property. The plaintiff contended that it would suffer irreparable injury if the orders sought are not granted.
8. The plaintiff's application was opposed by the defendants through separate replying Affidavit filed in court on 15th October 2014. In his affidavit, the 1st defendant contended that the plaintiff became his tenant on the suit property on 1st August, 2012 at a rent of kshs.120,000/= exclusive of 16% VAT per month for the first twenty four (24) months of the tenancy and that the rent was to increase by kshs.30,000/= per month thereafter if the tenancy continued beyond the initial 24 months aforesaid. The 1st defendant admitted that he had an arrangement with the plaintiff whereby the plaintiff would supply him with goods and offset the cost thereof from the rent that was payable by the plaintiff for the suit property. The 1st defendant contended that the plaintiff supplied to him goods worth kshs.3,167,315.00, which covered the plaintiff's rent for the suit

property up to 31st May, 2014. The 1st defendant contended that as at the date when he instructed the 2nd defendant to levy distress, an amount of kshs.360,000/= was due by the plaintiff to him on account of rent from June, 2014 to August 2014. The 1st defendant contended that since the plaintiff's rent was in arrears, the distress levied upon it was lawful and proper. The 1st defendant contended that the plaintiff had abandoned the suit property after the distress was levied, and as such the 1st defendant's re-entry into the suit property was equally lawful. The 1st defendant contended that he has since let the suit property to a new tenant who is now in possession thereof. In his opposition to the application, the 2nd defendant contended that; he was instructed by the 1st defendant to levy distress against the plaintiff to recover an outstanding rent of kshs.360,000/=. He proceeded to the suit property and made a proclamation. Once the plaintiff's goods were proclaimed, the plaintiff locked up the premises. When he came back after 14 days to collect the distrained goods for sale, he found the suit property locked. He proceeded to court and obtained a break in order. He thereafter broke into the premises and carried away the goods that he had distrained. He denied that he had evicted the plaintiff from the suit property.

9.1 Analysis of the parties' respective cases and the Court's findings on the issues arising:

9. On 29th October 2014, I directed that the plaintiff's application be argued by way of written submissions. The advocates for both parties filed their written submissions as ordered by the court and the same are on record. I have considered the plaintiff's application together with the replying affidavits and grounds of opposition filed by the defendants in opposition thereto. I have also considered the written submissions by the advocates for the parties and the authorities cited in support thereof. This being an application for a temporary injunction, the same shall be considered on the principles that were set out in the case of **Giella vs. Cassman Brown & Co. Ltd (1973) E.A. 358**. The court will not grant temporary injunction unless the applicant establishes a prima facie case against the respondent with a probability of success and also demonstrates that he stands to suffer irreparable injury which cannot be adequately compensated for in damages unless the order is granted. In the event that the court is in doubt as to the above, the application would be determined on a balance of convenience. In the case of **Mrao vs. First American Bank of Kenya and 2 Others (2003) KLR 125**, the court of appeal defined a prima facie case as follows:-

“a prima facie case in a civil application includes but is not confined to a genuine and arguable case. It is a case which on the material time presented to the court, a tribunal properly directing itself will conclude that there exists a right which has apparently been infringed by the opposite party as to call for an explanation or rebuttal from the later.”

10. The plaintiff has contended that the distress that was levied upon it by the defendants and its subsequent eviction from the suit property were unlawful. The plaintiff has contended that its rent payment for the suit property was up to date and that there was no basis upon which distress could be levied against it. The plaintiff has contended further that, it was at all material times a protected tenant and as such distress could only be levied upon it with the sanction of the tribunal established under the Landlord and Tenant (shops, hotels and catering establishments) Act, Cap 301 Laws of Kenya (hereinafter referred to only as “**the Act**”) and the same applies to its eviction from the suit property. It is not in dispute that the plaintiff was a protected tenant. It is also not in dispute that the plaintiff had an arrangement with the 1st defendant whereby the plaintiff would supply the 1st defendant with goods the cost of which would be set off from the rent payable by the plaintiff to the 1st defendant for the suit property.

11. The parties have not agreed as to value of the goods that were supplied by the plaintiff to the 1st defendant as at 1st August, 2014. The parties are also not in agreement as to the rent that was payable by the plaintiff to the 1st defendant for the suit property. Whereas the plaintiff has put the value of the goods supplied at kshs 3,867,3125/=, the 1st defendant has contended that the goods supplied by the plaintiff as at that date were worth at kshs.3,167,315/= only. It is difficult to ascertain the value of goods that were supplied by the plaintiff to the defendant. This is because,

- the plaintiff has not supplied copies of the invoices raised for the goods which were supplied to the 1st defendant which seems to have been supplied on credit over a period of over 2 years. It is not clear to me why the plaintiff failed to raise invoices for accounting purposes.
12. In the circumstances, I would for the purposes of this application believe the contention by the 1st defendant who was being supplied with the goods that the goods supplied to him by the plaintiff as at 1st August, 2014 were worth kshs.3,167,315/=. As concerns rent, the plaintiff has contended that the rent payable was kshs.120,000/= per month. On the other hand, the 1st defendant has maintained that the rent payable was kshs 120,000/= plus 16% VAT per month which brings a monthly rent to kshs.139,200/=. Again, I am unable to determine whether the rent payable was kshs.120,000/= per month or kshs.139,200/= per month. As in the case of the goods that were supplied by the plaintiff to the 1st defendant, the 1st defendant did not place before the court copies of the rent invoices that he had issued to the plaintiff. There is therefore no evidence that the rent payable was kshs 120,000/= plus 16% VAT. To be able to claim VAT from the plaintiff, the 1st defendant was obliged to issue to the plaintiff a VAT invoice. The failure by plaintiff and the 1st defendant to issue tax invoices, suggests that they may have been engaged in some form of tax evasion scheme from which none of them should be allowed by this court to benefit.
13. The onus was upon the 1st defendant to raise rent invoices from which the agreed rent could have been easily ascertained. In the absence of such invoices, I would take the monthly rent that was agreed upon by the parties as kshs 120,000/= per month. Taking the monthly rent as kshs 120,000/=: the cost of the goods supplied by the plaintiff to the 1st defendant which amounted to kshs.3,167,135/= would have covered rent for a period of 26 months from 1st August 2012. The plaintiff had therefore paid rent up to 1st October 2014. This being the case, there was no basis for the distress for rent that was levied by the defendants herein whose purpose was to recover rent arrears for the months of June, July and August 2014. The plaintiff's contention that the distress levied against it by the defendants was unlawful is therefore not farfetched. Even if it is assumed that the plaintiff was in arrears of rent that was due to the 1st defendant, did this entitle the 1st defendant to re-enter the suit property and lease the same out to a third party?
14. As I have stated above, it is not disputed that the plaintiff was a protected tenant. The plaintiff's tenancy over the suit property could not therefore be altered or determined without leave of the tribunal established under the Act. The distress for rent did not entitle the 1st defendant to re-enter the suit property. Through the said distress for rent, the 1st defendant succeeded in evicting the plaintiff from the suit property which seems to have been his aim. This practice which is very prevalent has been abhorred by the courts over the years. In the case of **Gusii Mwalimu Investment Co. Ltd & 2 Others vs. Mwalimu Hotel Kisii Ltd, Court of Appeal at Kisumu, Civil Appeal No.160 of 1995**(unreported), It was stated that ;

“it is trite law that unless the tenant consents or agrees to give up possession the land lord has to obtain an order of a competent court on a statutory tribunal (as appropriate) to obtain possession.”

15. There is no evidence before me that the 1st defendant obtained an order from a competent court or tribunal to re-enter and take possession of the suit property from the plaintiff. There is also no evidence that the plaintiff consented to give back possession of the suit property to the 1st defendant. The 1st defendant's claim that the plaintiff had abandoned the suit property cannot be taken seriously. The plaintiff's contention that the suit property was broken into by the 2nd defendant on Friday, 12th September, 2014 for the purposes of removing the distrained goods and by Monday, 15th September, 2014 the 1st defendant had already taken possession of the suit property and leased it out to a third party has not been rebutted. I don't think that the absence of the plaintiff from the suit property for two (2) days could be said to amount to abandonment of the suit property. Once again, I am of the view that the plaintiff's contention that the 1st defendant's re-entry into the suit property was unlawful has basis.
16. The defendants have raised several issues in their submissions to show that the plaintiff has not established a prima facie case and as such it is not entitled to the orders sought. I think that this is

the opportune moment to deal with the said issues. The defendants have contended that this suit is premature and that this court has no jurisdiction to entertain the same. The defendants have contended that the tenancy between the plaintiff and the 1st defendant having been a controlled one under the Act, the plaintiff should have sought redress from the tribunal established under the Act in the first instance before coming to this court. I find no merit at all in this contention. It is not in dispute that the plaintiff has been evicted albeit unlawfully from the suit property by the 1st defendant. Upon its eviction, the landlord and tenant relationship that existed between the plaintiff and the 1st defendant that was regulated by the Act ceased. The tribunal therefore lacked jurisdiction to entertain any dispute between the plaintiff and the 1st defendant after the said eviction. The only forum that could entertain such dispute is this court.

17. The other issue raised by the defendants is that, in its plaint, the plaintiff has referred to the suit property as **LR Kisii Municipality/Block III/103** while in the application for injunction, the same premises has been referred to as **LR Kisii Municipality/Block III/108**. The defendants have contended that the plaintiff is bound by his pleadings in the plaint and as such having referred to the property in dispute as **LR NO. Kisii Municipality/Block III/103**, in the plaint, it is not open to the plaintiff to seek injunction in respect of **LR NO. Kisii Municipality/Block III/108**. It is not in dispute that the premises in dispute are situated on **LR Kisii Municipality/Block III/108**. It is obvious therefore that reference to the premises as **LR NO. Kisii Municipality/Block III/103** in the plaint is an error. Can this error deny the plaintiff the injunction sought? I don't think so. The plaintiff has a right to amend the plaint with leave of the court to correct the said error. That window is not yet closed for the plaintiff. To lay the issue to rest, I would adopt in the statement by **Shah J. A** in the case of **Gusii Mwalimu Investment Co. Ltd & 2 Others vs. Mwalimu Hotel Kisii Ltd** (supra) where he stated that:-

“I would not succumb to the temptation of not granting an interlocutory equitable remedy merely for want of proper pleadings. The plaint, as I have pointed out can be amended, more so when there is evidence on record to justify such amendment and here such evidence was provided by the landlord himself. I would not drive a party away from the judgment seat when the facts of the matter call out for righting of a wrong.”

18. The defendants have also contended that the plaintiff is not entitled to an order for restoration into the suit property because the suit property has already been rented out by the 1st defendant to a third party. In the case of **Gusii Mwalimu Investment Co. Ltd & 2 others vs. Mwalimu Hotel Kisii Ltd** (supra) **Shah J.A** stated as follows:-

“.....it is fallacious for a person who forcibly and riotously enters premises to maintain that his occupation of these premises is the status quo which must be maintained. In this case if I were to allow the appeal, I would be giving my assent to occupation of the premises by a third party and assist the landlord to perpetuate what it did illegally. My equity conscience does not allow that.”

19. I entirely agree. As I have stated above, the 1st defendant seems to have obtained possession of the suit property illegally. The 1st defendant cannot therefore be aided by this court to keep what he has obtained unlawfully. The purported leasing out of the suit property by the 1st defendant to a third party was equally illegal and neither the said third party nor the plaintiff can benefit from an illegality.

20. From what I have set out herein above, I am satisfied that the plaintiff has satisfied the conditions for granting both prohibitory and mandatory injunction sought herein. I am satisfied that the circumstances herein are exceptional and that the plaintiff has demonstrated that it has a strong case against the defendants. The plaintiff has also established that it will suffer irreparable injury which cannot be compensated in damages if the orders sought are not granted.

21.1 **Conclusion**

21. Due to the foregoing, I am satisfied that the plaintiff's application dated 18th September 2014 has

merit. The same is accordingly allowed in terms of prayers 6, 7, 8 and 9 thereof. The 1st defendant shall restore the plaintiff into the suit property within seven (7) days from the date hereof. The plaintiff shall have the cost of the application. The orders issued herein shall in no way be construed as relieving the plaintiff of its obligation to pay rent to the 1st defendant as and when it falls due.

Delivered, dated and signed at Kisii this 21st day of November, 2014

SAMSON OKONG'O

JUDGE

In the presence of :

N/A for the plaintiff/applicant

N/A for the defendants/respondents

Mr. Mobisa court clerk

SAMSON OKONG'O

JUDGE