



REPUBLIC OF KENYA
IN THE HIGH COURT OF KENYA AT NAIROBI

CIVIL DIVISION

MISC APPLICATION NO 177 OF 2012

1. SAMUEL KIPKORI NGENO
2. IRENE WAMUYU OMUNG'ALA

(t/a OMUNG'ALA & CO., ADVOCATESPLAINTIFFS

VERSUS

1. LOCAL AUTHORITIES PENSION TRUST

(REGISTERED TRUSTEES)

2. GALLANT WORLDWIDE INVESTMENT.....DEFENDANTS

R U L I N G

1. This ruling concerns the **notice of motion dated 19th April 2012** filed by the Plaintiffs under **Order 40, rule 1(b)** of the **Civil Procedure Rules, 2010** (the **Rules**). It seeks temporary injunction to restrain the Defendants from attaching the Plaintiffs' goods (which they claim are their tools of trade) which the 2nd Defendant has already proclaimed, pending hearing and determination of the suit. The intended attachment is in distress for rent.

2. The supporting affidavit is sworn by the 2nd Plaintiff. She has deponed, *inter alia*, -

(i) That on or about 13th November 2008 the 1st Defendant instructed an auctioneer to levy distress against the Plaintiffs for arrears of rent of KShs 116,830/00.

(ii) That the Plaintiffs subsequently paid the outstanding arrears as at 30th November 2008.

(iii) That the Plaintiffs "diligently continued to pay rent when the same became due, but...due to misplacement and/or misfiling of our records, we could not trace receipts to support payment for the years 2009 and 2010", information that "is within the 1st Defendant's knowledge".

(iv) That in or about the year 2011 the Plaintiffs made a lump-sum payment of KShs 100,000/00 "towards the annual rent".

- (v) That as per the Plaintiffs' records the total rent owed to the 1st Defendant is KShs 480,260/00, and that they had made proposals to pay, but that the 1st Defendant has claimed that they owe KShs 880,757/00 in rent arrears.
- (vi) That arrears of rent in the sum of KShs 880,757/00 is highly exaggerated and unfounded.
- (vii) That the proclaimed goods are the Plaintiffs' tools of trade, their business being a law firm, and that therefore the intended attachment will be unlawful.
- (viii) That rent for the year 2012 has been paid.

Various documents are annexed to the supporting affidavit.

3. The main reliefs sought by the Plaintiffs in their **plaint dated 19th April 2012** are -

(a) A declaration that the 2nd Defendant's proclamation of the Plaintiffs' goods is unlawful.

(b) A permanent injunction to restrain the Defendants from levying distress for rent against the Plaintiffs.

4. The Defendants opposed the application by a **replying affidavit filed on 28th June 2012**. It is sworn by one **Irene Gathoni Kanyari**, the Property Manager of the 1st Defendant. She has deponed, *inter alia* -

(i) That the Plaintiffs made irregular payments towards rent and fell into arrears, thereby prompting the 1st Defendant to levy distress against them in the year 2008 after various notices requiring them to pay the arrears.

(ii) That the Plaintiffs never made any payment toward rent in the years 2009 and 2010.

(iii) That in February 2011 the Plaintiffs paid KShs 100,000/00 towards arrears of rent.

(iv) That as at 31st December 2011 the Plaintiffs owed arrears of rent in the sum of KShs 835,203/00, not the KShs 480,260/00 stated in the supporting affidavit.

(v) That by 31st March 2013 the outstanding arrears of rent had grown to KShs 880,732/00 and the 1st Defendant therefore instructed the 2nd Defendant to levy distress against the Plaintiff.

(vi) That in the year 2012 the Plaintiffs paid only KShs 22,800/00 towards rent.

(viii) That the 1st Defendant was entitled to distress for rent in order to recover the huge arrears outstanding.

Various documents are annexed to the replying affidavit.

5. On 28th September 2012 the Plaintiffs filed a **supplementary affidavit** sworn by the 2nd Plaintiff. By it they, in effect, joined issue with the Defendants upon the replying affidavit.

6. The application was canvassed before Khaminwa, J by way of written submissions. The

Plaintiffs' submissions were filed on 5th October 2012 while those of the Defendants were filed on 15th October 2012. Due to unavoidable circumstances Khaminwa, J could not prepare and deliver ruling. That is how the matter ended up before me.

7. I have considered the submissions, including the cases cited. I have also perused the court record.

8. The monthly rent was less than KShs 20,000/00. The **admitted** arrears of rent in the sum of KShs 480,260/00 are therefore very substantial. They represent arrears of rent of over two (2) years!

9. A tenant's first and main obligation is to pay rent as and when it becomes due, for the landlord has the right to an income from his investment. Why would a tenant allow himself to fall into such huge arrears of rent?

10. The court record of 27th February 2012 discloses the following exchange between the learned counsels for the parties.

“Omung’ala: I have receipts here showing that rents have been paid up and including March 2013, except a contentious amount pleaded in the plaint...

Oguttu: The issue was whether the Plaintiffs had paid the admitted sum of KShs 480,260/00. When the suit was filed KShs 880,732/00 was outstanding. Only KShs 241,530/00 had been paid by 24.1.2013. I have seen the receipts that my learned friend has. They correspond to this payment of KShs 241,530/00.

It means that the admitted sum of KShs 480,260/00 has not been fully paid. A balance of KShs 238,730/00 is owing upon the admitted sum...”

11. I am satisfied upon the material now before the court –

(i) That when the Plaintiffs came to court they were, by their own calculation and admission, in arrears of rent of KShs 480,260/00. This represented rent for well over two (2) years.

(ii) That as at 27th February 2013 the Plaintiffs still owed KShs 238,730/00 upon the admitted arrears of KShs 480,260/00.

12. The temporary injunction sought in the present application is an equitable remedy at the court's discretion. He who comes to equity must come with clean hands. A tenant who is in huge arrears of rent is undeserving of the court's discretion. The court cannot be the refuge of a tenant who fails to meet his principle obligation of paying rent as and when it becomes due.

13. In the circumstances I must refuse the notice of motion dated 19th April 2012. It is dismissed with costs to the Defendant. The interim injunction granted on 23rd April 2012 is hereby vacated. Those will be the orders of the Court.

DATED AND SIGNED AT NAIROBI THIS 27th DAY OF NOVEMBER 2013

H.P.G. WAWERU

JUDGE

DELIVERED AT NAIROBI THIS 29TH DAY OF NOVEMBER 2013