



REPUBLIC OF KENYA
IN THE HIGH COURT OF KENYA
AT MOMBASA
CIVIL SUIT 330 OF 2010

ISLAM AHMED SAID.....PLAINTIFF/APPLICANT

-VERSUS-

1. KING FEISAL TRUST OF KENYA
2. ESTHER G. GICHIMU.....DEFENDANTS/RESPONDENTS
[t/a Mwara Auctioneers]

RULING

The plaintiff moved the Court by Chamber Summons filed with his plaint of **14th September, 2010**, which seeks *injunctions* and *declarations* in respect of contractual tenancy arrangements. The application was brought under Order XXXIX, Rules 1 and 2 of the earlier edition of the Civil Procedure Rules, and ss.1A, 1B, 3A and 63(e) of the Civil Procedure Act (Cap.21, Laws of Kenya). The main prayer for consideration herein, is thus set out:

“THAT this Honourable Court be pleased to issue an injunction restraining the defendants by themselves, their agents, employees, servants and/or hirelings from removing and/or carrying away the plaintiff’s household goods, or in any manner howsoever interfering with the plaintiff’s quiet enjoyment of the tenancy in the demised premises on plot No. Mombasa/Block XVI/211/212 MI pending the hearing and final determination of this suit.”

The application rests on the following grounds:

(i) the defendants have levied distress for rent which is not owed;

*(ii) the said proclamation is an abuse of the Distress for Rent Act (Cap.295, Laws of Kenya) in that the proclaimed items are already under proclamation by 1st defendant itself, through M/s. Work-No-Words Auctioneers vide their proclamation dated **6th May, 2010** and which proclamation is pending the Court’s decision in SRMCC No.1275 of 2010, with interim Orders restraining 1st defendant from carrying them away;*

(iii) the said proclamation is illegal and unprocedural, as it seeks to attach all other properties lying within the plaintiff's house, without itemizing them as mandatorily required by Rule 12(1)(b) of the Auctioneers Rules;

(iv) the said distress is only intended to harass the plaintiff with a view to coercing him into vacating the demised premises without due process; for 1st defendant through M/s. Y.A. Ali & Co., Advocates had issued him with a notice to vacate the premises vide their letter dated **21st May, 2010**.

The plaintiff swore a supporting affidavit on **15th September, 2010** deponing that his household goods have been distrained in respect of rent arrears not actually owed; he has faithfully deposited rent due in 1st defendant's Habib Bank Account No. 4631712, thereafter providing the banking slips to 1st defendant. The plaintiff avers that when he went to make rent-deposit for the month of **July, 2010** the Bank declined to accept this, "*citing an instruction from 1st defendant*" as reason for refusing; and he then acted by purchasing a bankers' cheque, No. 110230 for the sum of Kshs.4,500/=, in the name of 1st defendant, for the month of **July, 2010** – which cheque was accepted by 1st defendant by duly issuing a receipt. The deponent avers that at the time 1st defendant's Advocates, M/s. Y.A. Ali released the said receipt to him, they changed the date in reference, from "*payment for July*" to "*payment for April*", even though the rent for April had been deposited in 1st defendant's account on **8th April, 2010**. The rent for **August, 2010** was paid by bankers' cheque No.110405 which was accepted by 1st defendant, though no receipt was issued. But 1st defendant refused to accept the next cheque, No.110524.

The deponent averred that "the [effects] which the defendant proclaimed are already under proclamation by the 1st defendant itself"; 1st defendant had, through M/s. Work-No-Words Auctioneers proclaimed the same goods, by a proclamation of attachment dated **6th May, 2010** – and this led the deponent to institute a suit, SRMCC No. 1275 of 2010 which is still pending and which has interim injunctive Orders.

The deponent apprehends that 1st defendant's intent is to evict him from the demised premises "*by whatever means, including the use of auctioneers.*" Already the 1st defendant, through its Advocates, M/s. Y.A. Ali & Co., Advocates, had (on **21st May, 2010**) served the deponent with notice to vacate the demised premises.

Shabbir Issak, one of the trustees of 1st defendant, swore a replying affidavit on **24th September, 2010** deponing that the plaintiff "*was truly and justly in arrears of rent at the time the distress was levied*"; and that the plaintiff had been "*notified that the rent for the premises has been increased to Kshs.15,000/= per month.*" The deponent deposes that the proclamation of **6th May, 2010** "*was on account of older arrears of rent*"; and that "*the plaintiff is a very vexatious person in that he is determined not to pay the rent of Kshs.9,000/= assessed by the Tribunal by filing one application and suit after another....*" The deponent believes that the suit herein is an abuse of the process of the Court.

Learned counsel, **Mr. Odongo** for the plaintiff/applicant began from the disputed matter of evidence that "*the applicant is not in arrears at all.*" The truth on this question cannot be ascertained at this interlocutory stage.

Is it a relevant question that there are two sets of proclamations of the plaintiff's goods? Counsel submitted that the earlier proclamation had led to a suit, SRMCC No.1275 of 2010, and that the Court in that case had made restraining Orders against the 1st defendant, pending a final determination which has not yet been made. This Court cannot ascertain the averment that the two proclamations related to the same effects: for as **Mr. Odongo** states from the affidavit evidence, the proclamations were in breach of the Auctioneers Act, 1996 (Act No.5 of 1996), [under the Auctioneers Rules, Rule 12(1)(b)] by *not itemizing the effects proclaimed*.

But learned counsel urged that "*the plaintiff has a prima facie case with high chances of success.*"

He submitted that restraint Orders be made against the defendants because if they dispose of the goods in question, “no amount of compensation can restore them.”

Counsel urged that the substratum of the suit be sustained, because it also seeks a *declaration* that the distress action is illegal: “it [would] therefore make no sense if eventually the Court agrees with us that the distress was illegal, while the distrained goods had been removed and sold.”

Learned counsel, **Mr. Hamza** for the defendants, again, began from the disputed fact: “the plaintiff is truly in arrears of rent.” This matter is controversial since the parties are applying different formulae in arriving at rental-amounts due. Thus, **Mr. Hamza** submits: “the assessment of rent by the Tribunal [at] Kshs.4,500/= meant that the Tribunal de-controlled the premises by assessing rent above the Kshs.2,500/= threshold”; indeed, on that basis, as counsel states, “the 1st defendant did clearly notify the plaintiff that the rent for the premises has been increased to Kshs.15,000/= per month from Kshs.4,500/=”. Counsel urged: “the effect of removing the premises outside the ambit of [the] Rent Restriction Act [was] that the landlord was free to fix rent [as] deemed commercially viable.” Counsel then expresses the logical consequence of the foregoing premise: “the plaintiff was also at liberty to leave the premises and look for premises that would suit his financial means.”

From the content of 1st defendant’s affidavit, **Mr. Hamza** submitted that “the plaintiff has [not] been paying rent diligently”; and he went further to question the integrity of the bankers’ cheques which the plaintiff had produced as evidence of payment.

Counsel asked the Court to find that the plaintiff was truly in rent arrears, and that the distress action taken against him was lawful.

The plaintiff considers himself aggrieved, in a critical respect that merits the filing of suit; and he has filed suit seeking *declarations* and *injunctions*, and attributing *illegality* to the conduct of the defendants. Such are, certainly, *justiciable issues*, to be resolved by the Court, the winner partaking of the fruit of the Judgment, and the loser bearing the attendant costs. In the absence of special circumstances raised before the Court and in proper form, such a suit is for *maintaining*, to the end. It would in general be inappropriate to issue Orders that have the effect of disposing of the substratum of the suit, before the suit is heard.

After considering the contested state of facts in this case, and hearing the submissions of counsel, I am of the opinion that the *issues of rights* emerging should be resolved only after *evidence* has been taken during the trial. But in the meantime, the *status quo* especially as it relates to the proclaimed goods, should be maintained. However, since it is not at this stage possible to determine the strength of the applicant’s case, I will Order that he makes a specific *undertaking as to damages*, in the event his case is unsuccessful.

I will make Orders as follows:

(1)The status quo shall be maintained, and the defendants shall not distrain and/or dispose of the subject goods pending the hearing and determination of the main suit.

(2)The plaintiff shall file in Court an undertaking as to damages, pending the hearing and determination of the suit.

(3)The plaintiff shall exercise due diligence in the making of the pre-trial arrangements, and this matter shall be listed for mention and directions for trial within 21 days of the date hereof.

(4)The costs of this application shall be in the cause.

(5)Parties shall have the liberty to apply.

SIGNED at NAIROBI

J.B. OJWANG
JUDGE

DATED and DELIVERED at MOMBASA this 19th day of March, 2012.

MAUREEN ODERO
JUDGE