



**REPUBLIC OF KENYA**  
**IN THE HIGH COURT OF KENYA AT NAIROBI**  
**CIVIL DIVISION**  
**CIVIL CASE NO. 470 OF 2011**

1. ABDI ABDIKADIR HASSAN ...
2. IBRAHIM SAJAAC ADE .....
3. AHMED NUNI (T/A AGLE SHOP) .....
4. ALI ADOW (T/A JAMIL CYBER CAFÉ II) .....
5. DEQ ABDIKARIM (T/A NOMADTEL) .....
6. IBRAHIM MOHAMED (T/A AL BADAR BOOKSHOP).....PLAINTIFFS

**VERSUS**

1. JAMES GACHAU KIRATHE
2. JOSEPH D.K. KIMANI (T/A PYRAMID  
AUCTIONEERS)
3. MOHAMUD SHEIKH HUSSEIN .....DEFENDANTS

**RULING**

1. The Plaintiffs have sought by **notice of motion dated 28<sup>th</sup> October 2011** the main relief of temporary injunction pending disposal of this suit, to restrain the Defendants from “further levying distress” against them, or interfering with their business in any manner whatsoever. The application is brought under **Order 40, rules 1, 2 and 4** of the **Civil Procedure Rules** (the **Rules**). Sections **1A, 1B, 3A** and **63 (c) & (e)** of the **Civil Procedure Act, Cap 21** are also cited.

2. The grounds for the application on the face thereof include: -

- (i) That the Plaintiffs are not tenants of the 1<sup>st</sup> Defendant but of the 3<sup>rd</sup> Defendant.
- (ii) That the Plaintiffs do not owe any arrears of rent to the 3<sup>rd</sup> Defendant.
- (iii) That the Plaintiffs’ tenancies are controlled under the **Landlord and Tenant (Shops, Hotels &**

**Catering Establishments) Act**, and no distress for rent can be levied without the leave of the **Business Premises Rent Tribunal** (the **Tribunal**).

(iv) That the distrained properties belong to the Plaintiffs and not to the 3<sup>rd</sup> Defendant.

3. There is a supporting affidavit sworn by the 1<sup>st</sup> Plaintiff which gives the factual basis for the application.

4. The Plaintiffs' case as set out in the plaint dated 28<sup>th</sup> October 2011 is as follows-

(i) That the 3<sup>rd</sup> Defendant is the head-tenant of the 1<sup>st</sup> Defendant in the suit premises.

(ii) That the Plaintiffs are the 3<sup>rd</sup> Defendant's sub-tenants in the premises.

(iii) That their tenancies (or sub-tenancies) are controlled under Cap 301 aforesaid.

(iv) That they have "over the years" paid their due rents to the 3<sup>rd</sup> Defendant.

(v) That on 15<sup>th</sup> October 2011 the 2<sup>nd</sup> Defendant, acting on instructions of 1<sup>st</sup> Defendant, levied distress for rent upon the Plaintiffs' stock-in-trade in the suit premises.

(vi) That the said distress is illegal for not having been sanctioned by the Tribunal and also because there is no privity of contract between the Plaintiffs and the 1<sup>st</sup> Defendant.

(vii) That the 1<sup>st</sup> Defendant cannot lawfully levy distress against the Plaintiffs for rent arrears owed to him by the head-tenant (3<sup>rd</sup> Defendant).

5. The 1<sup>st</sup> Defendant opposed the application by replying affidavit sworn by him and filed on 29<sup>th</sup> November 2011. Grounds of opposition emerging therefrom include -

(i) That the Plaintiffs are strangers to him "as there is no agreement between them in respect of the alleged tenancy (sic)".

(ii) That the 2<sup>nd</sup> Defendant, upon the 1<sup>st</sup> Defendant's instructions, "proclaimed goods found in my premises... occupied by the 3<sup>rd</sup> Defendant".

(iii) That the 3<sup>rd</sup> Defendant was ordered on 17<sup>th</sup> December 2010 in **High Court Civil Appeal No. 498 of 2008** to deposit KShs 3,440,000/00 in a joint interest-earning account or furnish security for the same "being the amount he had been deducting from the rent", but that he had not done so.

(iv) That under the **Distress for Rent Act, Cap 293** a landlord is permitted to levy distress on sub-tenants in respect of any arrears of rent.

(v) That the Plaintiffs' recourse is against the 3<sup>rd</sup> Defendant "who has defaulted in paying rent due to me whereas he has been receiving the same as deponed in the affidavit of (1<sup>st</sup> Plaintiff)".

6. In a supplementary affidavit filed on 9<sup>th</sup> January 2012 the 1<sup>st</sup> Plaintiff has deponed that the Plaintiffs were not parties in HC Civil Appeal No. 498 of 2008.

7. I have considered the submissions of the learned counsels, including the cases cited.

8. In interlocutory applications the court should refrain from making final determinations upon contested issues of fact and law that ought to await trial of the action. Tested sworn oral evidence is

always preferable to untested affidavit evidence.

9. In this case the Plaintiffs aver that they are the sub-tenants of the 3<sup>rd</sup> Defendant who is the head-tenant of the 1<sup>st</sup> Defendant, and that they have been so for a number of years. They have also asserted that they pay their rents to the 3<sup>rd</sup> Defendant and that they are not in arrears.

10. They have also taken the legal position that in any case their tenancies (or sub-tenancies) being controlled under Cap 301 no distress for rent can be levied without the sanction of the BPR Tribunal, and that there was no such sanction. *Prima facie* that would appear to be so under **section 12(1) (h)** of Cap 301.

11. The 1<sup>st</sup> Defendant has himself taken contradictory positions. On the one hand he depones that the Plaintiffs are strangers on account of there being no tenancy agreements between them and him. But on the other hand he appears to admit that he levied distress against the Plaintiffs and not against the 3<sup>rd</sup> Defendant; otherwise what was the point of pleading that he could lawfully levy distress against sub-tenants under the Cap 293?

12. And talking of Cap 293, the 1<sup>st</sup> Defendant's counsels probably had in mind **section 19** of that Act which appears to permit levy of distress against a sub-tenant in particular circumstances. There is no evidence that the particular circumstances set out in **sub-section 1(a)** of that section applied to the Plaintiffs.

13. Having considered all matters placed before the court, I am satisfied that the Plaintiffs have demonstrated a *prima facie* case with a probability of success. I am also satisfied that unless the order sought is granted the Plaintiffs' businesses will be ruined. It may not be easy to quantify their resultant losses in monetary terms. I am thus satisfied that they stand to suffer irreparable loss.

14. I will in the event allow the application and grant the temporary injunction sought pending disposal of the suit. The same is subject to the Plaintiffs' filing appropriate individual undertakings as to damages within ten (10) days of delivery of this ruling. It is so ordered.

**DATED AT NAIROBI THIS 1<sup>ST</sup> DAY OF MARCH 2012**

**H.P.G. WAWERU**  
**JUDGE**

**DELIVERED AT NAIROBI THIS 2<sup>ND</sup> DAY OF MARCH 2012**