



REPUBLIC OF KENYA
IN THE HIGH COURT OF KENYA
AT MOMBASA
CIVIL SUIT 149 OF 2007

HUSSEIN POTHIWALLA PLAINTIFF

- Versus -

1. GRACE MWAI MATHENGE

2. KINYUA & CO. AUCTIONEERSDEFENDANTS

RULING

(1) **Isaiah Mwai Mathenge** (the Deceased) died on 18th January 2006. Prior to his death he was the landlord of the Plaintiff for some 27 years on Plot No. 40/XX (the suit premises). A dispute arose between the Deceased and the Plaintiff in respect to rent and the Deceased instructed the auctioneers to distress for it. Not unexpectedly the Plaintiff filed a reference to the Business Premises Rent Tribunal (the Tribunal) where he got a respite by obtaining a status quo order that stopped the distress. The Deceased passed on before the reference was concluded and with the order of status quo still subsisting.

(2) The 1st Defendant is the daughter of the Deceased and co-administratrix to his estate. Upset with the continued default in payment of rent, she instructed the 2nd Defendant to distress for it. In execution of those instructions the 2nd Defendant proclaimed the Plaintiffs goods on 13th June 2007. That action triggered these proceedings in which the Plaintiff seeks an order of injunction restraining the Defendants from removing, advertising, selling and/or in any other way disposing of the Plaintiff's goods or any other way interfering with the plaintiffs quiet possession of the suit premises.

(3) Alongside filing the plaint, the plaintiff filed an application for temporary injunction which is the subject of this ruling. The highlights of the arguments made in favour of the plaintiff are-

(a) The distress process is flawed as it attempts recovery for arrears of rent barred by the limit of time imposed by Section 8 of The Limitation of Actions Act.

(b) The plaintiffs tenancy is protected by the provisions of The Landlord & Tenant (shop, hotels & catering establishment) Act (the "Act") and the distress is unlawful as it was not permitted by the Tribunal.

(c) There is a dispute as to exact rent outstanding.

(d) The Distress is contrary to Section 4(1) of The Distress for Rent Act (the Distress Act) for failing to

state the period of arrears.

(4) In response to the application the 1st Defendant sworn two affidavits of 4th July 2007 and 22nd November 2007 respectively. In these affidavits and the submissions, the 1st Defendant contends that-

(a) The plaintiff is guilty of concealing to the court that she owed the landlord Kshs. 149,500/- when she approached and obtained interim orders at the ex parte stage. The concealment amounted to material non-disclosure and on the strength of judicial precedent this court should discharge the interim orders forthwith and must dismiss the application without further ado.

(b) Supplementary to the above argument, the 1st Defendant states that the plaintiff has introduced new issues at the interpartes stage which he failed to take up at the ex parte proceedings. The court is argued to disregard these belated issues which include the plea that the distress is time-barred and that proclamation is ambiguous.

(c) The provisions of the Act does not require the landlord to seek leave or permission of the Tribunal to levy distress.

(d) That rent is indeed in arrears and the distress process was lawful.

(5) In determining this application the Court bears in mind the principles enunciated in **Giella –Vs- Cassman Brown** and that at this interlocutory stage it is not its business to make any final determinations that will pre-judge the outcome of the main hearing.

(6) Emerging from the rival submissions the court identified the following issues for determination-

(i) was the 1st Defendant legally entitled to levy distress notwithstanding the pendency of the Tribunal case and the status quo order therein.

(ii) Could the 1st Defendant commence and levy distress without first seeking and obtaining the permission of the Tribunal.

(iii) Is the plaintiff guilty of material non disclosure and if so what are the consequences.

(7) It is common ground that the plaintiff's tenancy is protected by the provisions of The Act. The Court also accepts that at the time of his death Tribunal Case No. 21 of 2005 was still pending between the plaintiff and the deceased. It is however the position of the 1st Defendant that she was unaware of those proceedings as they were never brought to her attention by the plaintiff. That may be so but it is not excusable. The 1st Defendant is a co-administratrix to the deceased estate having been so appointed on 29th November 2006. It is a position that comes with responsibility. The 1st Defendant was obligated to call in the assets and take stock of the Deceased's estate and ought to have, in this process, interacted with the plaintiff who was a tenant thereto. (See generally Section 83 of The Law of Succession Act on the duties of personal representatives). The 1st Defendant would have become aware of the pending proceedings if she had acted diligently in her duties as co-administratrix. Instead, by a letter dated 11th June 2007 the 1st Defendant gave the Plaintiff a two day notice before instructing that his property be proclaimed.

(8) At the time the proclamation was made there existed a Tribunal order maintaining the status quo as at 1st March 2007. The effect of the order was to bar the distress in respect to Deceased's claim at the time the reference was filed at the Tribunal ie 2nd July 2005. It was therefore unlawful for the Defendant to levy distress for any portion of rent which was the subject of proceedings before the Tribunal. The 1st Defendants advocates notice of 11th July 2007 made a claim for rent of Kshs. 822,000/- for the period of 1998 upto June 2007. Quite clearly the distress included recovery for rent for a period (1998 to 2nd July

2005) which was the subject of the Tribunal proceedings. To that extent the plaintiffs complaint that the distress was in contravention of the existing order of the Tribunal is properly taken.

(9) It is however the view of this court that the order of the Tribunal did not bar the 1st Defendant from claiming any rent in arrears that was not the subject of the dispute before the tribunal. On the admission of the Plaintiff (paragraph 7 of his affidavit of 24th October 2007) some Kshs. 149,500/- was due upto December 2007. Given that the monthly rent was Kshs. 8,000/-, at least Kshs. 101,500/- was outstanding as at 25th June 2007 when the plaintiff sought and obtained interim orders herein. I have to agree with the 1st Defendant that the plaintiff was under a duty to disclose this indebtedness to the Judge entertaining the matter at the exparte stage.

(10) There are alternative views as to whether or not a landlord of a controlled tenancy can levy distress for recovery of rent without obtaining the permission of the Tribunal. Without making a final determination on this question, I am attracted to the proposition that such permission is not necessary where the quantum of rent is not in dispute and the landlord seeks recovery of rent only and nothing else (**Provident Securities Ltd -Vs- Trimfit Ltd Nrb HCC No. 91 of 1976**). It seems to me that the 1st Defendant did not need the sanction of the tribunal to levy distress for arrears of rent that is admittedly owing. Even if I was to hold otherwise, I would still find that the plaintiff was under a duty to disclose his indebtedness. There is no knowing whether, with this knowledge, the court would have still granted an unconditional injunction. By concealing this material fact the plaintiff obtained a blanket order protecting him from distress even for undisputed rent.

(11) The Courts have always taken a dim view of parties who conceal material facts when seeking exparte orders. I fully identify with the sentiments of the Court of Appeal in the decision of **Uhuru Highway Development Ltd -Vs- Central Bank of Kenya Ltd & 2 Others Civil Appeal No. 140** when the learned Judges said-

“a party who goes to a Judge in the absence of the other side assumes a heavy burden and must put before the Judge all relevant materials, including material which is against his interest.”

A party that fails to make a full and frank material disclosure must be ready to live with the consequences of that failure. Once the non-disclosure is brought to the attention of the Court, then the Court must not only discharge the exparte orders granted but must refuse to consider the application any further.

(12) I now turn to consider whether I should discharge the exparte orders enjoyed by the plaintiff in their entirety. I have already held that the distress process initiated by the 1st Defendant breached the order of a lawfully constituted Tribunal to the extent that the rent it sought to recover was partly (*infact substantially*) the rent that was in dispute before the Tribunal and in respect to which an order of status quo had been made. So although the plaintiffs failure to make a full disclosure at the exparte stage must be frowned upon I am anxious that whatever order I make will not undermine to the authority of the Tribunal. It is for this reason that I will only make a partial discharge.

(13) The order that commends itself to me is to grant an inter-locutory injunction barring the Defendant's from distressing for rent in respect to the amounts disputed at the Tribunal. The 1st Defendant is, however, at liberty to recover the arrears admitted as owing by the plaintiff in his affidavit of 24th October 2007 and whatever sum may have become due thereafter.

(14) In view of the unacceptable conduct of the plaintiff at the exparte stage the costs of the application shall be borne by him.

Orders accordingly.

Dated and delivered at Mombasa this 26th day of April, 2012.

F. TUIYOTT
JUDGE

Dated and delivered in open court in the presence of:-

Alwenya for the Plaintiff

Ngigi for the Defendants

Court clerk - Moriasi

F. TUIYOTT
JUDGE