REPUBLIC OF KENYA

High Court at Nairobi (Nairobi Law Courts)

Civil Suit 251 of 2011

JAY RAJ ENTERPRISES LTD...……..……..…….....PLAINTIFF

VERSUS

LUCKY DISTRIBUTORS LTD..…..……..……..……1ST DEFENDANT

RELIABLE ELECTRICAL ENGINEERS (NRB) LTD.…….……2ND DEFENDANT

BRIAN OTIENO, E G BENGI AND L W MIRITI

T/A BENGI MIRITI & ASSOCIATES ADVOCATES…….……3RD DEFENDANT

GEORGE GITONGA MUCHIRI

T/A FANTASY AUCTIONEERS…….……....4TH DEFENDANT

RULING

The Plaintiff has moved this Court by a Notice of Motion dated 5th July 2011, filed the next day on 6th July 2011 expressed to be brought under the provisions of sections 3A of the Civil Procedure Act and Order 40 rules 1, 2, 4, 10 & 11 of the Civil Procedure Rules and all other enabling provisions of the law, the Plaintiff/Applicant seeks the following orders:

i) That instant matter be certified as urgent and heard ex-parte in the first instance

ii) That the 1st, 2nd and 4th defendants jointly and severally and either by themselves, their agents and/or servants be restrained by any of an injunction from levying distress, proclaiming, evicting and/or interfering with the plaintiff's quiet possession of the suit premises (LR No. 209/9792/17) and/or its goods of whatever nature and in whatsoever manner pending the hearing and final determination of the suit herein and/or BPRT No. 442 of 2011 (JAY RAJ ENTERPRISES LTD VS. LUCKY DISTRIBUTORS LTD & ANOTHER)

iii) That the 3rd defendant and/or the 2nd defendant be compelled by way of a mandatory injunction to unconditionally refund to the Plaintiff/Applicant the sum of Kshs. 4,667,840/= transferred and/or paid to the 3rd defendant by the plaintiff on 1st July 2011. In the alternative the 2nd and defendants be ordered to deposit the said amount of Kshs. 4,667,840/= in court or in an interest earning bank Account in the 3rd defendant's favour and that of the Plaintiff's Advocates on record pending further orders of this Honourable court and/or pending the hearing and final

determination of the suit herein and/or BPRT Case No. 442 of 2011.

iv) That the 4th defendant be ordered to forthwith refund to the Plaintiff and/or in the alternative deposit in court or any other place as the Honourable court may deem fit the sum of Kshs. 1,176,356/= paid to him by the Plaintiff/Applicant on 1st July 2011 as alleged Auctioneer fees pending the hearing and final determination of the subject suit, BPRT 442 of 2011 and/or pending further orders of this Honourable court.

v) That the 3rd and 4th defendants by themselves, their agents and/or servants be restrained by way of an injunction from using, trading, exchanging, releasing and/or transferring to the 1st and/or 2nd defendant or any other third party the sum of Kshs. 4,667,840/= and Kshs. 1,176,456/= respectively paid to the 3rd and 4th defendants by the plaintiff/applicant on 1st July 2011 pending the inter parties hearing of the subject application.

vi) That pending the inter-parties hearing of the instant application there be an interim orders in terms of prayers (ii) and (v) herein above.

vii) That the costs of this application be provided for.

The application is based on the grounds that the plaintiff has been a tenant in respect of the suit premises known as LR No. 209/9791/17 since 2006 and is up todate in rent payment which rent has all along been paid to the 2nd defendant. However on 1st July 2011 the 4th defendant on the instructions of the 3rd defendant and for the alleged benefit of the 2nd defendant in company of others purported to distress the plaintiff for rent thus forcing the plaintiff to make a bank transfer of a sum of Kshs. 4,667,840/- to the third defendant and a further sum of Kshs. 1,176,356/- to the 4th defendant in form of the 4th defendant auctioneer's fees. The said action it is contended to be unlawful, extortionist, fraudulent and uncalled for since the plaintiff is not in arrears. The said payment was made from the plaintiff's trading cash and borrowed monies which greatly compromised the plaintiff's business and exposed the plaintiff to irreparable loss as a result of which the plaintiff lodged a complaint at the Business Premises Rent Tribunal which is still pending. The plaintiff, it is contended has a meritorious case against the defendants and the interests of justice mitigate in favour of the orders sought.

The application is supported by an affidavit sworn by **Kamal Kumar Patel**, a director of the plaintiff company, in which it is deposed that the plaintiff has been a tenant on the suit premises since March 2006 wherein it runs a hardware shop. According to the deponent the landlord in respect of the suit premises has been the 2nd defendant to whom the plaintiff has paid rent todate i.e. June 2011. According to him the relationship between the parties was cordial until 2009 when the 2nd defendant started harassing the plaintiff with arbitrary rent increments and harassment which led to the plaintiff's institution of BPRT Cause No. 745 of 2009 which matter is pending the production of evidence by the 2nd defendant that it sold the suit premises to the 1st defendant. However, it is contended that the 1st plaintiff has not notified the plaintiff of change of ownership of the suit premises while the 2nd defendant has continued receiving rents. Similarly pending is also HCCC No. 514 of 2009 instituted by the 2nd defendant in which injunctive orders were issued on 9th November 2010 and are still in force. Despite the foregoing the 4th defendant who identified himself as an auctioneer in company of hired goons and armed policemen descended upon the plaintiff's premises and commenced the action of hauling the plaintiff's trading stock into their vehicles in purported distress of rent on instructions of the 3rd defendant who was purportedly acting for the 1st defendant. Despite protests from the plaintiff that it was not in arrears and the fact that no proclamation had been done the 4th defendant vowed to cart away the plaintiff's goods unless he was paid rent arrears in the sum of Kshs 4,667,840/- and a further sum of Kshs. 1,176,456/- in his fees. In order to save its goods and avoid disruption of its business the plaintiff managed by 2pm to source the said sum from its financiers and business colleagues the demanded sum of money which it remitted to the 3rd defendant's firm and the 4th defendant. It is deposed that the said action was illegal, unfounded and purely extortionist as no demand had ever been made to the plaintiff on any alleged rent arrears and no

proclamation done. It is the plaintiff's contention that in the absence of any formal lease the relationship between the parties would amount to a controlled tenancy hence the complaint to the said Tribunal. It is therefore the plaintiff's case that the orders sought are merited in order to safeguard the plaintiff's interests in relation to the said premises and taking into account the colossal amount involved, unless the orders sought are granted the plaintiff's business will either collapse and/or suffer irreparably. It is further deposed that the plaintiff is ready and willing to give such security and/or guarantee as may be required of it to ensure that in the event that it is found that it was in arrears the defendants would not go unremedied.

The first defendant opposed the application vide a replying affidavit sworn by **Nagaria Vinod Hanskaj**, a director of the 1st defendant, on 19th July 2011 in which it is deposed that the first defendant purchased the suit premises from the 2nd defendant in March 2010. According to deponent, it was a term of the sale agreement that the 1st defendant would take vacant possession of the premises as the 1st defendant was informed by the 2nd defendant that the plaintiff had been serve with a Notice of Termination and had not filed a reference but had instead pleaded with the 2nd defendant to be allowed to vacate on 30th July 2011 which request the 2nd defendant acceded to on condition that the plaintiff would pay mesne profits of Kshs 500,000.00 per month for the period before handing over to the 1st defendant. However, the plaintiff opted to clandestinely deposit the rent into the 2nd defendant's account without being invoiced. According to the deponent therefore when the 1st defendant purchased the suit premises there was no tenancy in existence between the plaintiff and the 2nd defendant. Although he invited the plaintiff to discuss the issue of rent the plaintiff was adamant and neither remitted the rents nor the said mesne profits. Despite being served with notice to terminate the tenancy, no reference was filed. As the distress was carried out in total compliance with the laid down procedure the plaintiff does not deserve refund of the money he paid to block the sale of his goods and hence the application ought to be dismissed since his complaint to the Tribunal was similarly filed without jurisdiction.

The second defendant filed a replying affidavit sworn by **Rameshschandria Chandulal Shah,** its director on 31st October 2011. According to him, plaintiff was the 2nd defendant's tenant in respect of the suit premises and that in April 2009 the 2nd defendant issued a termination notice under Cap 301 Laws of Kenya. Being aggrieved by the notice, the plaintiff filed a reference before the Tribunal in BPRT Case No. 745 of 2009 while the 2nd defendant also instituted eviction proceedings in the High Court vide HCCC No. 514 of 2009. However before the conclusion of the proceedings the 2nd defendant entered into a sale agreement with the 1st defendant for the purchase of the suit premises and hence the tenancy relationship between the plaintiff and the 2nd defendant ceased to exist and this information was relayed to the plaintiff's advocate and the 2nd defendant's instructed to withdraw both the said High Court suit and the notice. According to the deponent the plaintiff upon notification to terminate the tenancy requested for an indulgence for two years which was allowed on condition that the plaintiff would instead of paying rents pay mesne profits at the rate of Kshs. 500,000.00 per month which the plaintiff did not pay but continued to deposit the rent it was paying without the consent authority and/or knowledge of the 2nd defendant which sum is yet to be confirmed. According to him once the property was transferred the plaintiff was expected to enter into a new tenancy agreement with the new owners. It is further averred that the plaintiff has not therefore come to court with clean hands since they have never demanded for payment of rents since the said agreement relating to mesne profits they should not be dragged into this matter as the 2nd defendant nolonger has any interest in the suit property. If the plaintiff deposited any money in the 2nd defendant's account the same was done without authority and the 2nd defendant would refund the same after verification. According to the deponent, justice is for both parties and investors must be allowed to reap from their investments and thus it is unfair to have the owners of the suit premises declined to take possession of their premises and at the same time denied to utilise amounts recovered as mesne profits whereas a competent Tribunal has found the tenancy relationship lapsed and no appeal was preferred against the said finding.

The 3rd defendants filed grounds of opposition on 18th July 2011 in which they stated that the application is fatally defective for misjoinder of parties and that the same is incurably defective and bad in law. Apart

from the said grounds the 3rd defendants filed an affidavit sworn by **Eric Gitonga Bengi** on 18th July 2011 in which it is deposed that **Brian Otieno** and **L W Miriti** were not and are not partners in the firm of **Bengi Miriti & Associates** and that his instructing client in respect of the matters complained of was the 1st defendant who became the registered owner of LR No. 209/9791/71 in August 2009 and that under instructions of the 1st defendant he instructed the 4th defendant to levy distress upon the plaintiff to recover the sum of Kshs. 4,667,840.00 upon payment of which he remitted the whole sum to the 1st defendant. According to him, he is wrongly joined in this suit and since he nolonger has the money any order directed against him would be in vain.

On the part of the 4th defendant a replying affidavit was sworn by **George Gitonga Muchiri** on 19th July 2011 in which while admitting that he is an auctioneer trading as Fantasy Auctioneer, he deposes that on 23rd May 2011 the he received instructions from **Bengi, Miriti & Associates Advocates** to levy distress against the plaintiff for recovery of a sum of Kshs. 4,667,840/- in form of rent arrears for the period between October – December 2010 and January – May 2011 as well as his charges. According to him he was informed that the 2nd (sic) defendant, Lucky Distributors Limited is the landlord of the premises occupied by the tenant and he was furnished with a copy of the title. The same day he did proclaim the plaintiff's goods at the plaintiff's premises situated on LR No. 209/9791/17 along Kombo Munyiri Road Nairobi. Upon expiry of the 14 days he sought further information from the advocate and was informed the plaintiff had not settled the arrears and he was instructed to proceed and levy distress. However, his attempt to levy distress was prevented by the hostile reception from the plaintiff's directors and on 20th June 2011 he applied for and obtained an order for police assistance from the Officer Commanding Station Kamukunji Police Station which he secured after paying the necessary charges and in the company of 150m people, fork lifts, breakdowns and lorries proceeded in the company of regular and administration police officers to effect the said distress. On commencing the said process the plaintiff requested them to stop the process and promised to make arrangement to settle the arrears as well as auctioneers charges and costs which payment was confirmed at around quarter to 2.00 pm at which time the exercise was called off. According to him there was nothing irregular, unlawful, fraudulent and or criminal in the manner in which he executed the instructions and the application ought to be dismissed.

On 1st November 2011, the Plaintiff filed a supplementary affidavit sworn by **Kamal Kumar Patel** on 31st October 2011 in which he denied that the plaintiff did not file reference. While admitting that the 2nd defendant advised the plaintiff of the change of ownership he denied that they were advised on the change of the landlord and since the 2nd defendant continued receiving rent the plaintiff assumed that the landlord had not changed. Apart from reiterating the contents of the earlier affidavit the supplementary contrary to the rules of affidavits is replete with argumentative averments rather than factual matters. He further deposes that if there was no tenancy existing between the plaintiff and the 1st defendant then the issue of distress of rent did not arise. According to him after the court attendance on 20th July 2011 what took place before the BPRT was pre-determined, hasty and biased and that the plaintiff has since appealed against the said decision.

The application was prosecuted by way of written submissions.

In its submissions the plaintiff reiterated the contents of the supporting affidavit and submitted that the documents and the averments made are contradictory as to whether the distress was in respect of the mesne profits of rent arrears. It is submitted that the Distress of Rent Act Cap 296 deals with issues of rent and not other undetermined and/or un-agreed benefits like mesne profits due to a landlord from an occupier of his land/premises. It is submitted that under section 3 of Cap 293 the right to distress for rent only applies to rent or rent service and not mesne profits. It is further submitted that it is settled law that a land owner can only recover mesne profits by first filing suit against the unlawful occupier(s) of his land/premises from who the profits are being sought and it is the court to determine the amount of mesne profits payable, at what rate and for what period after which the amount determined can be executed for as a judgement of the court. In this submission the plaintiff relies on ***Salmond's Laws of Tort***s; ***Clerk & Lindsell on Torts***; **Inverugie Investments Ltd vs. Hackett [1995] All ER 841**; **Southport Tramways Company vs Gandy [1897] QBD 66**; ***Woodfall's Law of Landlord and Tenant***. According to the

plaintiff it has made out a prima facie case for the grant of injunctions pending the hearing and final determination of the instant case as well as the mandatory injunction sought and the plaintiff relies on **Belle Maisson Ltd vs. Yaya Towers HCCC No. 2225 of 1992**; **Kamau Mucuha vs. Ripples Ltd Civil Appeal No. 186 of 1992**; **Suleiman vs. Amboseli Resort Ltd [2004] 2 KLR 589** and **Giella vs. Cassman Brown [1974] EA**.

According to the 1st defendant it is submitted that since at the time of the purchase of the suit premises there was no tenancy existing between the plaintiff and the 2nd defendant, the 1st defendant nevertheless served the plaintiff with a Statutory Notice to terminate the tenancy and the plaintiff did not file any reference. According to the 1st defendant as the plaintiff did not pay the rents for the period it was in the premises after the 1st defendant purchased the suit premises, the 1st defendant was entitled to distress for the same at the rate of Kshs. 583,000.00 per month inclusive of VAT. Attempts by the plaintiff to obtain redress from the Tribunal failed when the Tribunal dismissed the same for want of jurisdiction. Since the plaintiff failed to file a reference to the Tribunal after service of the Termination Notice, it is submitted that there is no prima facie case established. It is further submitted that since the 1st defendant was able to purchase the suit premises for over Kshs. 2.5 million it is capable of paying the damages in the event that the plaintiff is successful which damages will adequately compensate the plaintiff for the loss.

On behalf of the 2nd defendant, it is submitted that that the 2nd defendant having sold the suit premises to the 1st defendant and thereafter demanded no rent from the plaintiff, anything that occurred after the said sale cannot be blamed on the 2nd defendant as the 2nd defendant had notified the plaintiff of the change of ownership and the plaintiff had no basis for continuing to pay the rent to the 2nd defendant. Therefore the order seeking to injunct the 2nd defendant from levying distress cannot be issued as the 2nd defendant is incapable of levying distress and the Court ought not to grant orders in vain. Since the proclamation was issued long after the 2nd defendant had ceased to be the landlord and did not have capacity to instruct auctioneers there is no evidence that it received the money and therefore no prima facie has been established.

On their part the 3rd defendants submit that an advocate's liability to a third person (in contract and tort) for acts done by him in his professional capacity is determined in accordance with the ordinary principles applicable to cases of agency in which case, citing ***Halsbury's Laws of England 4th Edition vol. 44(a) page 78***, it is submitted that where an advocate acts under the authority of his client and is known to the third person as so acting, he is not personally liable. Accordingly as the plaintiff knew all along that the firm of advocates was acting for the 1st defendant, the plaintiff cannot in law seek to make the said law firm personally liable for the acts complained about. Further the 3rd defendant having remitted the money received to the 1st defendant, it cannot in law or on fact comply with prayers (iii) and (iv) and/or (v) sought by the applicant. To order them to do so would amount to acting in vain. The lumping of those prayers it is submitted renders the application defective.

On the part of the 4th defendant, it is submitted that as duly licensed auctioneers, he did his work professionally and in accordance with the provisions of the Auctioneers Act. The issue of distress, it is submitted has been determined conclusively in the BPRT Case No. 442 of 2011 and the plaintiff having filed an appeal against the said decision ought to await the outcome thereof. On the auctioneers' charges, it is submitted that a party aggrieved by the same can always request fro taxation hence the application ought to be dismissed.

The plaintiff on 7th June 2012 filed response to the defendants' submissions in which it contended that the 1st defendant has not addressed the issue raised with respect to rent vis-à-vis mesne profits. With respect to the 2nd defendant's submissions it is submitted that the 2nd defendant by receiving the rents was acting in collusion with the 1st defendant. With respect to the 3rd defendant's submissions it is contended that there is no evidence that the sum was transmitted to the 1st defendant and hence the order ought to given against them jointly. If the Court were to decide that the distress was unlawful the 4th defendant would

have no basis for charging fees.

I must point out that by a letter dated 19th July 2012 the suit against Brian Otieno and L W Miriti sued as part of the 3rd defendant firm were purportedly withdrawn with no order as to costs. There is, however, no endorsement of the said intention on the Court file. It is trite that an order withdrawing a suit wholly or in part ought to be endorsed on the Court file before it can become effective. See Theluji Dry Cleaners Ltd vs. Muchiri & 3 Others [2002] 2 KLR 764 and Riverside Farm Nursery School Ltd & Another vs. The Cooperative Bank Of Kenya Limited Nairobi (Milimani) HCCC No. 255 of 2008.

Before I go into the merits of the matter, there is an issue raised by the 3rd defendants that being agents of the 1st defendant, they cannot be held liable at all. The liability of an advocate in matters relating to distress for rent was canvassed by the Court of Appeal in C Y O Owayo vs. George Hannington Zephania Aduda T/A Aduda Auctioneers & Another Civil Appeal No. 2 of 2003 [2008] 2 EA 287 where the Court of Appeal held:

"Under section 3(1) of the Distress for Rent Act, in looking at what constitutes illegality of distress for rents, the court must not only consider our laws, but must also consider what in England would be considered an illegality in the levy of distress. An illegal distress is one which is wrongful at the very outset, that is to say either where there was no right to distrain or where a wrongful act was committed at the beginning of the levy invalidating all subsequent proceedings. The following are instances of illegal distress; a distress by a landlord after he has parted with his reversion; a distress by a person in whom the reversion is not vested; *a distress when no rent is in arrear; or for a claim or debt which is not rent*; as a payment for the hire of chattels; a distress made after a valid tender of rent has been made; a second distress for the same rent; a distress off the premises or on the highway; a distress in the night that is between sunset and sunrise...a distress levied or proceeded with contrary to the law of Distress…In the court's view, the distress that was carried out by the auctioneer on the instructions of the respondent together with the sale of the goods distressed was plainly illegal and the respondent cannot escape liability to the appellant for his instructions to the auctioneer to carry out that distress for rent upon the appellant's goods which should not have been the subject of such levy of distress and in blatant disregard of the legal provisions in place for levy of distress for rent. The respondent is held liable as the appellant had no duty to take the remedial actions enumerated by the superior court as he was not himself in arrears and he had no proper notice of the illegal distress carried out on his premises…*It is also clear that the respondent was only instructed to demand rent and as a lawyer, the landlord relied on him to take the most appropriate legal action in recovering the same rent and/or giving it the best legal advice. Instead, the respondent threw all the legal ways to the window and chose an obviously illegal approach to the issue knowing fully well that such action could end up in the appellant not only illegally losing his properties but also undergoing serious embarrassment. In the court's view, he acted recklessly and under the circumstances exemplary damages are called for which is awarded and assessed at Kshs 10,000/-*." (Emphasis mine).

It is therefore clear that an advocate may be held liable where he acts recklessly in the circumstances as a result of which a party suffers loss and damages. An advocate is expected, just like any other professional, to exercise due diligence expected of a professional professing legal knowledge and where he fails to do so, he may be held liable in respect of damages arising from his professional negligence. That matter, however, does not fall for determination in these proceedings; at least not at this stage.

The principles guiding the grant of interlocutory injunctions are well settled. Firstly, an applicant must show *a prima facie* case with a probability of success. Secondly, an interlocutory injunction will not normally be granted unless the applicant might otherwise suffer irreparable injury, which would not adequately be compensated by an award of damages. Thirdly, if the court is in doubt, it will decide an application on the balance of convenience. See **East African Industries vs. Trufoods [1972] EA 420; Giella vs. Cassman Brown & Co. Ltd [1973] EA 358.**

However, the conditions enumerated above are not the only conditions for consideration by the court. There are more conditions which the Courts have found over a period of time essential and an undertaking by the applicant as to the security for damages is one. The Court, under Order 40 rule 2(2), is empowered to make an order for injunction on such terms as to an inquiry as to damages, the duration of the injunction, keeping an account, giving security or otherwise as the court deems fit. Therefore, in

appropriate cases, the court may grant a conditional injunction with respect to the duration and even impose such terms as may be appropriate to the circumstances of the case. See **Hesbon Owuor Oluoch vs. Enos Omollo Misiani Kisumu HCCC No. 22 of 2002.**

In an interlocutory application, it must be emphasised, the Court is not required to make any conclusive or definitive findings of fact or law, most certainly not on the basis of contradictory affidavit evidence or disputed propositions of law. It is, nevertheless, not excluded from expressing a *prima facie* view of the matter and is entitled to consider what else the deponent to the supporting affidavit has stated on oath which is not true

In the case of **Mrao Ltd vs. First American Bank of Kenya Ltd & 2 Others [2003] KLR 125** the Court of Appeal held as follows:

"in civil cases a *prima facie* case is a case in which on the material 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 to call for an explanation or rebuttal from the latter. A *prima facie* case is more than an arguable case. It is not sufficient to raise issues but the evidence must show an infringement of a right, and the probability of success of the applicant's case upon trial. That is clearly a standard, which is higher than an arguable case".

The first issue that I have to determine is therefore whether the plaintiffs have established a *prima facie* case with probability of success. The plaintiff's suit is premised on the ground that the distress that was carried out by the 4th defendant on instructions of the 3rd defendant acting as agent for the 1st defendant was unlawful. According to him, there were no rent arrears in existence as he was not aware of the fact that the 1st defendant had taken over the 2nd defendant's rights as landlord in respect of the suit premises. In the supplementary affidavit, it is however admitted that the plaintiff was notified that the property had been sold. The plaintiff's contention, if I understood it properly is that it ought to have been expressly informed that the 1st defendant was the new landlord. In my view once a tenant is notified that the property the subject of the tenancy has changed hands it is upon it to confirm whether it should continue paying the rents to the old landlord and if no information is forthcoming to take the necessary steps to invoke the jurisdiction of the Business Rent Premises Tribunal or even the High Court for appropriate orders. If the tenant insists on paying rents to the "wrong" person it can only have itself to blame if it turns out that it was paying the rents to a person not entitled to the same.

The second issue raised is that the 1st defendant was not entitled to distress for rent since what it was claiming for was mesne profits. It is not clear whether the 1st defendant's instructions to the 3rd defendant were in respect of distress for rent or recovery of mesne profits since the instructions seem to indicate that the recovery was in respect of mesne profits which contention is confirmed by the 1st defendant's position that there was no tenancy agreement in existence between the 1st defendant and the plaintiff. If this was the position, then the plaintiff's contention based on the holding of **Owayo's Case** (supra) may be well founded. It is, however, noteworthy that whereas the 1st defendant contends that there was no tenancy in existence between the plaintiff and the 1st defendant, the latter still went ahead to issue a Notice of Termination of the Tenancy. Such notice would not have been necessary unless the 1st defendant recognised that there was in existence a tenancy relationship between the 1st defendant and the plaintiff. The general rule is that a purchaser's title is subject to the existing encumbrances including tenancies. This general rule is, of course, not absolute and is capable of rebuttal. Further, the 1st defendant by distressing for rent has opted to treat the plaintiff as its tenant, the 1st defendant is not entitled to invoke the remedy of distress for rent to evict the plaintiff from the suit premises. The plaintiff can only be evicted after the 1st defendant has followed the laid down procedure for termination of the tenancy. The law is that to obtain possession by levying illegal distress is *per se* wrong. The usual procedure where a Notice to Terminate is given under the provisions of Cap 301 and the tenant fails to file a reference is to institute civil action for vacant possession of the premises and for an order of an eviction of the tenant. In **Gusii Mwalimu Investment Company Ltd. & 2 Others vs. Mwalimu Hotel Kisii Ltd. Civil Appeal No. 160 Of 1995 [1995-1998] 2 EA 100 Shah, JA** held:

"….A Court of law cannot allow such state of affairs where the law of the jungle takes over. It is trite law that unless a tenant consents or agrees to give up possession the landlord has to obtain an order of a competent Court or a statutory tribunal (as appropriate) to obtain an order for possession".

Accordingly, it is my view and I so hold that the plaintiff has on these twin issues established a *prima facie* case with probability of success at the trial.

On the issue of irreparable loss, **Ojwang, AJ** (as he then was) in **Suleiman vs. Amboseli Resort Limited [2004] 2 KLR 589** expressed himself as follows:

"The plaintiff has averred that all along during his occupancy of the suit shop, the defendant has noted, acknowledged, acquiesced in, and approved the alleged sub-tenancy; and that on the strength of that status quo of the business relations, the plaintiff has over the years set up what appears to be a large and successful business on the suit premises dealing with curios and gifts – items intimately linked with the tourist industry. That fact is nowhere disputed; and neither is it denied that the plaintiff's trade is a unique and sensitive one, which, as it is now, has a substantial goodwill that is greatly endangered if the plaintiff should be evicted. In law, these circumstances, new rights may have emerged which ought, as a vital question of ends of justice, to be litigated and determined by the best method of the judicial system and that method is the full trial, with examination of witnesses, taken through examination-in-chief, cross-examination and re-examination. At the end of that process the question of rights and liabilities will be determined with finality, and a new status quo in relations amongst the parties will have been put in place. It is the business of the court, so far as possible, to secure that any transitional motions before the Court do not render nugatory that ultimate end of justice…The argument that the law governing the grant of injunctive relief is cast in stone is not correct, for the law has always kept growing to greater levels of refinement, as it expands, to cover new situations not exactly foreseen before. Traditionally, on the basis of the well-accepted principles, the Court has had to consider the following questions before granting injunctive relief: (i) is there a prima facie case with a probability of success? (ii) does the applicant stand to suffer irreparable harm, if relief is denied? (iii) on which side does the balance of convenience lie? Even as those must remain the basic tests, it is worth adopting a further, albeit rather special and more intrinsic test which is now in the nature of general principle. The Court, in responding to prayers for interlocutory injunctive relief, should always opt for the lower rather than the higher risk of injustice…Although the court is unable at this stage to say that the applicant has a prima facie case with a probability of success, the Court is quite convinced that it will cause the applicant irreparable harm if his prayers for injunctive relief are not granted; and in these circumstances, the balance of convenience lies in favour of the applicant rather than the respondent. There would be a much larger risk of injustice if the court found in favour of the defendant, than if it determined this application in favour of the applicant".

In other words the learned Judge took into account the principle of proportionality which is now one of the hallmarks of the overriding objective under sections 1A and 1B of the civil Procedure Act, a principle which the Court is enjoined to give effect to in the exercise of its powers under the Act or the interpretation of any of its provisions.

However, it is clear that the 1st defendant was entitled to receive returns from his investment and if the plaintiff was entitled to pay the rents the Court would be reluctant to assist the plaintiff if he was relying on such grounds to seek the grant of equitable orders of injunction since a party who comes to Court seeking equitable relief ought to come to Court with clean hands and he who comes to equity must do equity. Courts, it has been held, must not be converted into a haven of refuge by defaulters since lenders and investors also have their rights. See **Kyangavo vs. Kenya Commercial Bank Ltd & Another [2004] 1 KLR 126.**

In saying this I am fully cognisant of the fact that the law is not that in all cases where the damage is capable of being quantified injunction will not be granted but rather that normally injunction will not be granted in such cases. As was stated by **Ringera, J** (as he then was) in **Martha Khayanga Simiyu vs.**

Housing Finance Co. of Kenya & 2 Others Nairobi HCCC No. 937 of 2001 [2001] 2 EA 540:

"the law is not that an interlocutory injunction can never issue where damages would be an adequate remedy and the Respondent is in a position to pay them. That is the normal course but not the invariable course. The court has to take into account the conduct of the Respondent and the gravity of the breaches of law or contract alleged otherwise it would confer a carte blanche on those who are rich enough to pay all quantums of damages to ride roughshod over the rights of other persons. The rich do not fear to pay damages and they must be compelled to submit to the authority of the law by being put to other perils".

I am, in the circumstances of this case, not convinced that the plaintiff stands to suffer irreparable loss with respect to the sum paid by itself to the 1st and 4th defendants since it has itself proposed that the sum paid by itself be deposited into Court or any other place deemed fit by the Court. However, with respect to the issue of the eviction, I am satisfied that if the plaintiff is evicted from the suit premises the damages it stands to suffer including loss of business and goodwill may not be adequately compensated in damages.

It is also not lost to the Court that it is admitted that the plaintiff deposited some money in the 2nd defendant's account. Accordingly, it is only fair that the 2nd defendant accounts for the money had and received from the plaintiff which the plaintiff ought to have paid to the 1st defendant since equity frowns at unjust enrichment.

With respect to the auctioneers' charges the plaintiff has a remedy in law if properly advised, in the event that it considers that the sum demanded by the 4th defendant as his fees was not in accordance with the scale.

With respect to prayer (iv) what is sought is mandatory injunction. In the case of Kenya Breweries Limited & Another vs. Washingtone O. Okeyo Civil Appeal No. 332 of 2000 [2002] 1 EA 109 the Court of Appeal stated as follows:

"A mandatory injunction can be granted on an interlocutory application as well as at the hearing but in the absence of special circumstances, it will not normally be granted. However if the case is clear and one which the Court thinks it ought to be decided at once, or if the act done is a simple and summary one which can be easily remedied, or if the defendant attempted to steal a march on the plaintiff, a mandatory injunction will be granted on an interlocutory application…A mandatory injunction ought not to be granted on an interlocutory application in the absence of special circumstances, and then only in clear cases either where the Court thought that the matter ought to be decided at once or where the injunction was directed at a simple and summary act which could be easily remedied or where the defendant had attempted to steal a march on the plaintiff. Moreover, before granting a mandatory injunction the Court had to feel a high degree of assurance that at the trial it would appear that the injunction had rightly been granted, that being a different and higher standard than was required for a prohibitory injunction".

I am not convinced that the plaintiff has made out a case which would entitle me to feel a high degree of assurance that at the trial it would appear that the injunction had rightly been granted**.**

Accordingly the orders that commend themselves to me and which I hereby grant are as follows:

1. That a temporary injunction is hereby granted restraining the 1st Defendants its servants and or agents from evicting the plaintiff from the suit premises or interfering with the Plaintiffs' quiet possession of the suit premises pending the hearing and determination of this suit on condition that the Plaintiff remits the due rents to the 1st defendant in accordance with the terms of the existing tenancy.

2. That the 2nd defendant renders within 14 days a true account of the money deposited by the plaintiff after the 2nd defendant ceased to be entitled to rents from the suit premises and refund the

same to the plaintiff.

3. That the Plaintiff files appropriate undertaking as to damages within 7 days.

4. That the costs of this application be in cause.

5. That there be liberty to apply.

Dated at Nairobi this 31st day of October 2012

G.V. ODUNGA
JUDGE

Delivered in the presence of:

Mr Wairegi for 2nd defendant and holding brief for Mr Kibanga for the 3rd defendant

Mr Amadi for the 4th Defendant