



**REPUBLIC OF KENYA**  
**IN THE HIGH COURT OF KENYA**  
**AT NAIROBI**  
**CIVIL CASE NO. 245 OF 2010**  
**GOURMET VENTURES LIMITED & 2 ORS....PLAINTIFF**  
**VERSUS**  
**NELLEA LIMITED & ANOTHER .....DEFENDANTS**

**RULING**

Coram: Mwera J  
Otieno for Apopo for Plaintiff  
Kimondo for defendant  
Njoroge Court Clerk

The 3<sup>rd</sup> plaintiff filed a chamber summons dated 10.1.11 under Order 40 rr. 1 (a), 2 of the Civil Procedure Rules ss 1A, 1B, 3A of Civil Procedure Act and Section 12 of the Landlord & Tenant (Shops, Hotels & Catering Establishments) Act, *the Act*, with the main prayer:

i) that the 1<sup>st</sup> defendant be restrained from levying distress over the applicant's goods or entering and interfering with its occupation in plots LR 12700 and 25040 at Cross Roads Shopping Centre, Karen NRI until the suit herein is finally determined.

The reasons for the above prayers were that the tenancy in dispute was controlled under the Act and yet on 21.12.10 the 1<sup>st</sup> defendant/respondent moved into the said premises and levied illegal distress for rent and threatened to carry away the applicant's goods. The dispute was pending before the relevant tribunal (in BPRT Ref No. 784/10). The goods distrained were the applicant's tools of trade exempted from attachment under the Distress for Rent Act. And that between the parties there existed a genuine dispute as to the rent account.

One George Dicks Atetwa, a director of the 3<sup>rd</sup> plaintiff swore a supporting affidavit. It was deponed without stating whether the tenancy between the 2 defendants was oral or written, that it was a contested one. That on 24.7.2010 the 1<sup>st</sup> defendant disconnected power to the premises aforesaid occupied by the 3<sup>rd</sup> plaintiff, which prompted it to file the above referred-to tribunal cause. The tribunal gave restraining orders against the 1<sup>st</sup> defendant but it neglected to comply with it. Then the 1<sup>st</sup> defendant sent an auctioneer to levy distress for rent. By disconnecting power the applicant had been disabled in running its petrol station services, hence this application.

In her replying affidavit, Leah Muguku a director of the 1<sup>st</sup> defendant, deponed that when that company bought the suit premises in March, 2010 the 3<sup>rd</sup> plaintiff became its tenant (found in the premises?) wef April 2010 with the obligation to pay rent. This was as contained in the exhibited lease of July 1, 2008 between the applicant and the previous landlord. The rent was sh. 174,100/=pm plus VAT, increasing at 10% after every 2 years (NOTE: the document stated that the lease was for 5 years with an option to renew). It was stated that since April 2010 the applicant did not pay any rents, despite demands. And to frustrate the demands to pay rents the applicant filed the stated tribunal cause. That that cause was dismissed on 23.11.10 and so there was no subsisting dispute to warrant the order sought. There could be no rent accounts because the applicant has never paid any, now standing at Sh 2,139,504 in arrears plus VAT. So this application was without merit whatsoever except to do injustice to the respondent. Its move to levy distress for rent was justified. The applicant had come to court with unclean hands. The parties submitted more or less on the lines of the affidavits above.

Asked to comment on the alleged rent arrears, the respondent computed this to sh. 2,361, 528/= while the applicant sought to avail its own data later. Such data was not anyway essential for the determination about to follow.

It is not in doubt, and in fact the applicant refers to the lease agreement lasting 5 years with a monthly rent plus VAT as stated earlier. It asserts that it was a controlled tenancy and goes on to say how it was running petrol station services business in the premises.

Either by affidavit or in the submission it is not denied that the applicant defaulted in rent payment since April 2010 now standing at sh. 2,361,528/= plus VAT. Similarly it was stated in the replying affidavit and in the respondent's submission that the case at the tribunal had been dismissed on 15.1.11. At no point did the applicant care to disclose this to court instead it maintained that there was such a cause still pending at the tribunal. It did not also explain why the respondent would disconnect its power.

In sum the applicant has come to court with unclean hands with the effect that the orders sought cannot and should not be granted. But this court would have considered some kind of relief to the applicant if it had deposited or paid the rent arrears stated herein. Again it did not – another act of mala fides.

This application is dismissed with costs.  
Delivered on 22.2.11.

**J. W. MWERA**  
**JUDGE**