



**REPUBLIC OF KENYA**  
**IN THE HIGH COURT OF KENYA**

**AT NAIROBI**

**CIVIL CASE NO. 156 OF 2011**

**KESHAVLAL BHAGWANJI**

**SHAH.....PLAINTIFF**

**VERSUS**

**SHANTILAL BHAGWANJI**

**SHAH .....DEFENDANT**

**RULING**

**Coram: Mwera J.**  
**Mbabu for plaintiff**  
**Nyanga for Defendant**  
**Court clerk Njoroge**

The plaintiff brought a notice of motion under Order 40 rules 1, 2, 4 Order 51 rule 1 of Civil Procedure Rules and section 3A of Civil Procedure Act with the principal prayer:

i) that the defendant be restrained from levying distress for rent by attaching the applicants household goods in Flat 1 at LR No. 209/100/1 by M/s Fantasy Auctioneers or evicting him from that Flat.

It was set out in the grounds that the plaintiff had been residing in the said flat for 23 years without paying rent. The property had been developed by application of proceeds from the operations of a company called Kenya Transporters Ltd where these 2 litigants and two other brothers held shares. That the defendant and the plaintiff co-owned other properties and from which several family disputes had arisen eg HCCC 267/2007. The defendant was keeping rental income from those other properties without sharing with the plaintiff. He was 78 years of age with no income and so throwing him onto the streets would prejudice him – hence this application.

In a 26 paragraph supporting affidavit, the plaintiff expanded on what was stated in the grounds. It was however added, so it appears, that the property on which the plaintiff lives is registered in the name of the defendant. But upon its development a director of their company, now deceased, directed the plaintiff to move in the flat he occupies with his family since 1988, rent-free. Any efforts to resolve the issue of the plaintiff occupying this flat have come to nothing. The defendant fixed the rent to be paid or the plaintiff would be thrown out (notice exhibited). The plaintiff saw the defendant's actions as meant to intimidate and frustrate him in his old age, in ill health and no income.

In the defendant's replying affidavit it was averred that the suit herein was fatally defective and incompetent worth only to be struck out. He held a 99-year lease over LR No. 209/1008/1 (not LR 209/100/1 as per this motion.)

That the defendant then developed that property in the late 80s and granted the plaintiff, a brother, a licence to occupy a flat there with his family, rent-free. Then in 2006 the plaintiff began to lay claim to the subject property so the defendant served him with a notice to begin paying rent or vacate. Although the plaintiff was in ill health and old, the plaintiff was not harassing/intimidating him. As a licensee, the plaintiff had no proprietary right or interest in the suit property. He owned properties in Nairobi which he leased out. There was a HCCC 267/07 yes, but LR 209/1008/1 was not the subject there. So he had not made out a prima facie case to warrant the injunction sought and none should issue either on the balance of convenience or other. Matters stated in the replying affidavit were repeated, but expanded upon in the defendant's submission – all to the effect that the plaintiff had not made out a case to warrant an injunction.

On his part the plaintiff maintained that proceeds from Kenya Road Transporters Ltd developed the subject plot which he was allowed to occupy rent-free.

In this court's view the property in dispute is LR No. 209/1008/1 registered in the name of the defendant. While the plaintiff claims that he was a co-shareholder in a company known as Kenya Road Transporters Ltd from whose resources were obtained to develop the suit premises, there was no evidence that such a company existed, or that the plaintiff was a shareholder therein and that it had a policy to build houses for its directors. On the other hand the defendant maintained that the suit premises were his on a leasehold as per the certificate he holds. He developed it with his own resources then allowed the plaintiff to occupy a flat there as a licensee – paying no rent, since the late 1980's. On this point of the plaintiff becoming a resident in the premises rent-free, the 2 are in agreement. The plaintiff is thus a licensee only because he has not demonstrated the base on which he claims that he is a beneficial owner in LR 209/1008/1 herein. So if the plaintiff has laid such a claim which prompted the defendant, even as a brother, to take it that the plaintiff was showing ingratitude, one can say that demanding rent payment or vacation of the premises is not a far-fetched idea.

In sum the plaintiff has not made out a **prima facie** case to warrant the orders sought.

This application is thus dismissed with costs.

Delivered on 26.5.11.

**J. W. MWERA**

**JUDGE**