



**REPUBLIC OF KENYA**

**IN THE HIGH COURT OF KENYA**

**AT NAIROBI**

**CIVIL SUIT NO. 373 OF 1999**

**PETER KAMAU MATHARA T/A  
MATHARA & ASSOCIATES**

.....**PLAINTIFF**

**VERSUS**

**REGISTERED TRUSTEES OF THE NATIONAL CHRISTIAN  
COUNCIL OF KENYA .....1<sup>ST</sup>**

**DEFENDANT**

**KINYUA KOECH LTD. ....2<sup>ND</sup>**

**DEFENDANT**

**JUDGMENT**

The Plaintiff was amended on 27<sup>th</sup> October, 2003 and it seeks orders against the two Defendants jointly and severally, which are as under:

- (i) Special damages for Kshs.579,715.00.**
- (ii) An Injunction to restrain the Defendants and their agents or servants or however from interfering with the Plaintiffs quiet possession of the suit premises.**
- (iii) General damages for unlawful distress.**
- (iv) Exemplary damages.**
- (v) Accounts for service charge to be rendered by the Defendants.**
- (vi) Costs and interest of this suit.**

The Defendant thereafter filed an amended defence and counter claim dated 4<sup>th</sup> December 2003 seeking dismissal of the Plaintiff and the following prayers in the counter claim:

- (a) Kshs.677,853.65**
- (b) Costs**
- (c) interest**

The reply to the defence and defence to the counter claim dated 11<sup>th</sup> August, 2010 was filed.

There are some undisputed facts as per the evidence adduced before this court. The Plaintiff who is practicing as an accountant in the name of Mathaara and Associates has been occupying the premises known as LR 209/4280 in Nairobi as a tenant since 1983 to 1988 as a sub-lessee, but in 1988 a lease of 5 years and 6 months dated 24<sup>th</sup> November 1988 was signed between the 1<sup>st</sup> Defendant and the Plaintiff. The lease is produced as document no. 1 in the bundle of documents produced by the Plaintiff. Clause 3(e) thereof gave an option to the Plaintiff, as a lessee, to seek a further lease on the expiry of the aforesaid lease. I do not have any document on record to show that the lessee exercised that option. What I have is the intimation by the 1<sup>st</sup> Defendant to the effect that rent including the service charge shall be Kshs.54,900/- as from 1<sup>st</sup> August, 1998 in place of Kshs.26,050/= which the Plaintiff was paying under the lease which expired (see debit note of 22<sup>nd</sup> October, 1996 Item No. 2 of the Defendant's list of documents). I shall at this stage in view of clause 3(e) of the expired lease be hesitant to accept the claim of the Plaintiff that the rent which was charged by the Defendant was not mutually agreeable. It is the Plaintiff's case that he sought the details for the service charges which was sought to be charged by the Defendant and it was never rendered.

In any event, the Plaintiff continued paying the old rent of Kshs.20,650/= to the Defendant including service charges and the Defendant received the same on account upto 18<sup>th</sup> of February, 1999 when the Defendant demanded the arrears of rent inclusive of service charges in the sum of Kshs.530,650/= from the Plaintiff. The same was not paid and the Defendant instructed one M/s. White Stone Auctioneers to levy distress to recover the said amount. The said auctioneers proclaimed and removed the goods of the Plaintiff as per document 19 in the Plaintiff's bundle of documents. The said distress was carried out unlawfully as per the Plaintiff and he contends that the goods have never been returned which is the basis of the Plaintiff's claim.

Before I go to the further details of the evidence before the court, it is appropriate to note that the lease produced before the court was dated 24<sup>th</sup> November, 1988 which was to be effective for five years and six months. Clause 3(e) of the said lease, as indicated earlier, gave the lessee an option to renew the lease provided such desire by notice in writing is given to the lessor not less than three months or more than 6 calendar months before the expiration of the term. It is evident that if this option was to be taken, the earliest the lessee could have given the notice was November, 1992. However, what is before the court is a letter dated 7<sup>th</sup> August, 1992 from the Plaintiff addressed to the 2<sup>nd</sup> Defendant.

The 2<sup>nd</sup> paragraph thereof, reads:-

***“With respect to what the Landlord wishes regarding renewal terms of our Lease is neither here nor there since we as Lessee did not make a proposal as the period of Lease of 5 years and 6 months is provided for in our Lease.”***

Obviously, this letter specifies and contends that written notice as stipulated in the lease was not given by the Plaintiff. I also note from the lease that the rent agreed was 10,000/= per month. Over and above that rent, the lessee (the Plaintiff) was supposed to pay shs.625/= as per clause 1(b) thereof and proportion of the City Council Rents and Rates. I will presume that the amount of Kshs.20,650/= which is agreed by the Plaintiff to be the rent and service charge would be inclusive of all other charges payable.

It is also averred by the Plaintiff that the Defendant did not give details of the breakdown of the actual expenses but I have in the list of documents from the Defendant a letter of 5<sup>th</sup> February, 1991, which is item No. 4 on the list, giving all the details of the expenses which were incurred by the 1<sup>st</sup> Defendant.

Curiously, the Defendant continued receiving Kshs.20,650/= on account and periodically sent the details of the service charge apportionment and notice of arrears of the rent to the Plaintiff. Items Nos. 2 - 13 of the Defendant's documents are the correspondence to that respect. Apart from asking for some more details, the Plaintiff did ignore the demand of the arrears of rent.

From the facts of these case, it cannot be gainsaid that from the date of expiry of the only lease entered between the parties was around May, 1994 and thus the tenancy herein thereafter automatically reverted to the monthly tenancy. It is interesting to note that again on 5<sup>th</sup> of June, 1998, in response to the Plaintiff's letter of 27<sup>th</sup> May, 1998 wherein the Plaintiff expressed his desire to renew the tenancy, the Defendant offered the terms and conditions for the lease which included the monthly rent of Kshs.43,920/= per month for the 1<sup>st</sup> two years. This particular offer was neither responded by way of counter offer nor any response was given as far as the Plaintiff was concerned. The said letter of 5<sup>th</sup> of June, 1998, is at item No. 9 in the Defendant's list of documents. For the completion of the facts in this matter, there are few letters seeking details for service charges from the Plaintiff. I note similarly that the details were given by the Defendant as aforesaid and after the demand, the distress was raised.

The Plaintiff has produced the proclamation forms on item No. 19 and 20. The proclamation was carried out on the 18<sup>th</sup> of February 1999 and the proclaimed goods were distressed on 26<sup>th</sup> of February, 1999. According to the Plaintiff, those goods have not been returned and in support of his claim against the damage for unlawful distress, he has filed his accounts which are prepared by himself and produced it as item No. 16 in his bundle. He has also produced copies of insurance policy which is shown to be in the name of Sonina Traders Limited. In any event, the policy shows that insured furniture and property were valued at kshs.94,100/=. Moreover, the Plaintiff has failed to disclose any relation with the said company and his accountancy firm.

The Plaintiff denies that he was in arrears of the rents as claimed by the Defendant and invites the court to note the following:-

- a) **The contractually agreed rent and service charge was Kshs.20,650/=**
- b) **The landlord could not impose the new rent of Kshs.54,900/= unilaterally.**
- c) **When the tenant declined to agree on the new demand for rent in the sum of Kshs.54,900/=, the landlord had an option of terminating the tenancy.**
- d) **The landlord could also have gone to court to move it to make a decision on the standard rent payable.**
- e) **Alternatively, the landlord could have moved to appoint an arbitrator as the parties had agreed in the earlier lease, for an arbitrator to be appointed to establish the standard rent.**
- f) **There was no agreement on rent increment. The mutually agreed rent and service charge was Kshs.20,650/=. The tenant continued paying Kshs.20,650/= and at the time of the distress he was not in any arrears.**
- g) **The distress was based on the un-agreed offer and it is therefore null and void. It is our submission that the tenant became a holding over tenant after the lease expiry on the terms of the lease which had expired.**

I have earlier observed that after the expiry of the lease term, the Plaintiff having not chosen to extend the lease dated 24<sup>th</sup> November, 1988, the tenancy under the lease came to an end and the Plaintiff who continued to occupy the premises, became the monthly tenant or the tenant holding over.

The landlord thereafter as per letter of 5<sup>th</sup> June, 1998, has in response to the request from the Plaintiff counter offered the lease of Six years since 1<sup>st</sup> August, 1998. That letter is totally ignored by the Plaintiff. In view of the aforesaid facts he cannot rely on the terms of the old lease which has lapsed since long. His insistence of mutually agreeable rent as per the old lease does not stand.

I also note that the Defendant has been accepting the payments of Kshs.20,650/= on account and not as a receipt of the agreed rent. The plaintiff ought to be aware of the significance of these receipts.

Moreover, it is trite law that the landlord cannot be expected to charge the same rent on expiry of the tenancy. In my view, the tenancy herein translated into a monthly tenancy since the expiry of old lease.

The tenant's insistence on the full accounts of the service charges may not be justified in view of the periodical statements given by the landlord/Defendant and also further in view of the fact that the Plaintiff was only asking for details of service charges which were given. The Plaintiff ought to be aware there were statements sent to him before the proposal for new lease in 1998. I would like to note specially the letter of 24<sup>th</sup> October, 1995 (item no. 7 of the Defendant's list) which gives details of the arrears and I note that the Plaintiff has not even been paying Kshs.20,650/= as averred. I further note that the receipts of Kshs.20,650/= produced by the Plaintiff are for the year 1998 and 1999 only. He has not produced the earlier receipts, which according to letter of 24<sup>th</sup> October, 1995, were for Kshs.17,575/- only.

I give the aforesaid facts just to illustrate that the Plaintiff has been given regular reminder of the arrears of the rent and service charges. The distress for rent in the circumstances, in my considered view, was lawful. It was unjust and improper for the Plaintiff to insist on the payment of the rent which was agreed as averred by him in a lease which expired since May, 1992.

The Defendant has offered the tenancy lease after the Plaintiff requested for it (Item No. 18 of the supplementary list of documents of the Defendant). It is true that the Defendant has been unable to show the accounts for the expenses before 2000, but the notice of review of service charges have been regularly given since 1996. Moreover, the statements always gave the proportionate service charges which were shown to be due and payable.

The Plaintiff was aware that there were demands of arrears for rent and service charges and ought to be aware that the rates as well as expenses on the maintenance would be expected to rise along with the valuation of the properties. His insistence to pay the rent which was paid in early 90's cannot be lawful and/or equitable and is not justified or substantiated by him in any event.

In the premises, it shall be inequitable to accept the contention that the distress for rent was unlawful. The lease, the conditions whereof the Plaintiff is seeking the Defendant to abide by, has expired and is without any force or effect and thus cannot be made applicable to the present claim.

The claim that the goods were collected in pursuance to the proclamation and not returned cannot avail to the Plaintiff against the Defendant in absence of joinder of the Auctioneers, specifically in view of the court's finding as aforesaid that the distress was not unlawful.

A tenant unilaterally deciding to stick to the payment of old rent and refusing and/or ignoring the demand of arrears of rent cannot expect any equitable remedy and/or sympathy from the court.

The authorities cited by the learned counsel for the Plaintiff are not relevant to the facts of this case, in my considered opinion.

The upshot of all the above is that I dismiss the suit.

As far as the counter-claim as pleaded by the Defendant is concerned, I shall have to find that the same was not appropriately proved and I do hereby find so.

The accounts which are produced on page 45 of the Defendant's bundle are not substantiated by any corresponding documents and the same are moreover not audited.

I shall in the premises also dismiss the same.

Finally, I must point out on record that none of the parties have appropriately prepared or presented this case and I regret this position. I have strived to reach this decision despite the lack of appropriate assistance.

I shall not make any order on costs.

**Dated, signed and delivered** at Nairobi this 30<sup>th</sup> day of **June, 2011**

**K. H. RAWAL**  
**JUDGE**  
**30.06.2011**