



**REPUBLIC OF KENYA**  
**IN THE HIGH COURT OF KENYA AT NAIROBI**  
**CIVIL DIVISION**  
**HIGH COURT CIVIL CASE NO. 164 OF 2011**

**TOWETT T. M. ASWANI.....PLAINTIFF**

**V E R S U S**

**1. GIMCO LIMITED**  
**2. JOSEPH M. GIKONYO**  
**(t/a GARAM INVESTMENTS).....DEFENDANTS**

**R U L I N G**

The Plaintiff is the tenant of **Kenya Local Government Officers Superannuation Fund** at the premises called **Fourways Towers** on **L.R. No. 209/4383 Nairobi**, (hereinafter called the **suit premises**). That tenancy relationship is governed by a **lease agreement dated 17<sup>th</sup> March, 2010**. The lease is for **6 years from 15<sup>th</sup> July, 2005 to 14<sup>th</sup> July, 2011**. It means therefore that the lease is **due to expire on 13<sup>th</sup> July, 2011**, about a week from the date of delivery of this ruling. The Plaintiff, who is an advocate of this court, runs his law firm from the suit premises.

It is common ground that the 1<sup>st</sup> Defendant manages the suit premises on behalf of the Plaintiff's landlord. The 2<sup>nd</sup> Defendant is an auctioneer.

The Plaintiff has pleaded in his **plaint dated 4<sup>th</sup> May, 2011** that on 18<sup>th</sup> April, 2011 the 2<sup>nd</sup> Defendant, acting upon instructions of the 1<sup>st</sup> Defendant, entered the suit premises and proclaimed attachment by way of distress for rent various pieces of office furniture and equipment. The amount claimed to be due was the sum of KShs. 289,574/00.

It is the Plaintiff's case that the said distress for rent was unlawful as no arrears of rent were due and the 1<sup>st</sup> Defendant has in any event failed to provide details of any such arrears.

The Plaintiff therefore seeks the relief of injunction to restrain the Defendants from entering the Plaintiff's offices to distrain for rent, and from selling, alienating or wasting the proclaimed goods, or in any way harassing the Plaintiff or interfering with his peaceful and quiet enjoyment of the demised premises.

Together with the plaint, the Plaintiff filed **notice of motion dated 4<sup>th</sup> May, 2011** in which he seeks a temporary injunction under **Order 40, rules 2, 3 and 4 of the Civil Procedure Rules (the Rules)**. The application is supported by the Plaintiff's affidavit, to which various documents are annexed.

Some of the grounds for this application are that the 1<sup>st</sup> Defendant, as managing agents of the landlord, have been charging service charge retrospectively in contravention of clause 5 of the lease agreement, and have thus created “bogus” arrears of rent; that the 1<sup>st</sup> Defendant has failed to inform the Plaintiff on due dates of any review of the service charge; that in any event no arrears of service charge are due; that the proclamation issued in the name of the 1<sup>st</sup> Defendant is a nullity in law because the 1<sup>st</sup> Defendant is not the Plaintiff’s landlord and cannot sue on behalf of the landlord; and that if the temporary injunction sought is not granted, the Plaintiff will continue to be harassed by the Defendants and will suffer irreparable loss and damage, mental and emotional anguish and distress, and will be unable to practise his profession in peace.

Interim injunction was granted *ex parte* on 6<sup>th</sup> of May, 2011 and has been extended from time to time.

The Defendants have opposed the application as set out in the **replying affidavit filed on 20<sup>th</sup> June, 2011**. The same is sworn by one **Irene Kanyari** who has described herself as the property manager of the suit premises working with the 1<sup>st</sup> Defendant, the estate and management agents of the Plaintiff’s landlord. The thrust of the replying affidavit is that the Plaintiff is in arrears, accumulated “over the years”, to the tune of KShs. 349,867/00.

I heard this application on 13<sup>th</sup> June, 2011. I have considered the submissions of the learned Plaintiff who is appearing in person, and also the submissions of the Defendants’ learned counsel.

No authorities were cited, but the principles governing applications for temporary injunction are now well established. The applicant must demonstrate a *prima facie* case with a probability of success. He must also demonstrate that he stands to suffer irreparable loss unless the order sought is granted. If the court is unable to determine the application upon those two principles, it will do so on a balance of convenience.

### **Prima facie case**

There is no dispute over the amount so far paid by the Plaintiff towards rent and service charge. What is in dispute is a certain amount of service charge. The Plaintiff says that this amount accrued before the commencement of the tenancy, and is therefore illegal and not due. He states that it is this sum, originally a modest sum, which has continued to accrue interest and therefore grown into the substantial sum that is now demanded.

This is obviously an issue that must be investigated properly at the trial of the action or upon the taking of proper accounts. Though it is claimed in the replying affidavit that the Plaintiff is a habitual defaulter in payment of rent and service charge, it is curious that this is the first time that distress has been levied.

The lease agreement provides for payment of rent and service charge quarterly in advance, but a practice appears to have developed between the parties where rent and service charge are paid by the Plaintiff only upon receipt of a note for the same from the landlord. So, the charge that the Plaintiff is a persistent defaulter in payment of rent and service charge does not appear to be well founded.

Looking at all the material now before the court, it does appear, *prima facie*, that the Plaintiff has a genuine complaint regarding the arrears of service charge demanded. I am therefore persuaded that the Plaintiff has demonstrated a *prima facie* case with a probability of success.

### **Irreparable loss**

A distress for rent which might turn out to be illegal, possibly carried out in view of clients of a practising advocate, would likely do untold harm to his practice. The ensuing disruption would harm his practise and his reputation as an advocate. The resultant loss may not be quantifiable by way of damages. I am persuaded that the Plaintiff stands to suffer irreparable loss unless the order sought is granted.

As already pointed out elsewhere, the Plaintiff’s lease comes to an end on 13<sup>th</sup> July, 2011. I hope that the parties can sort out the little outstanding matter of the claimed arrears of service charge before that date so

that it becomes unnecessary for this suit to be heard.

In the meantime, I am satisfied that it is in the interests of justice that the Plaintiff be protected from any distress upon the claim of arrears of service charge. I will therefore grant temporary injunction as prayed.

Costs of the application shall be in the cause.

**DATED AND SIGNED AT NAIROBI THIS 6<sup>TH</sup> DAY OF JULY, 2011**

**H.P.G WAWERU**  
**JUDGE**

**DELIVERED AT NAIROBI THIS 8<sup>TH</sup> DAY OF JULY, 2011.**