



**REPUBLIC OF KENYA**  
**IN THE HIGH COURT OF KENYA AT NAIROBI**  
**CIVIL CASE NO. 789 OF 2004**

**ROBERT OKELO ORUNGA .....PLAINTIFF**

**VERSUS**

**BLUE MOUNTAINS LTD & ANR ..... DEFENDANT**

**JUDGEMENT**

**Coram**

**Mwera J**

**Oluoch for Plaintiff**

**No Appearance for Defendant**

**Njoroge Court Clerk**

The record of this case bears the following regarding the trial:

- i) The plaint filed on 21.7.04.
- ii) Notice of appointment of advocate filed on 3.8.11 by M/s Wilfred C. Odhiambo & Co for both defendants.
- iii) Amended plaint dated 4.8.04.
- iv) Memorandum of appearance dated 16.9.04 filed by M/s Wilfred C. Odhiambo & Co Advocates for the 1<sup>st</sup> defendant.
- v) Request for judgment by the plaintiff filed on 11.11.04
- vi) An interlocutory judgement entered on 19.11.04 against the 1<sup>st</sup> defendant on failing to file a defence.
- vii) Formal proof before Kubo J on 3.12.08(Note: Mr. Odhiambo for the 1<sup>st</sup> defendant was served

but did not appear.)

In the amended plaint the plaintiff pleaded that he was the registered owner and occupier of a parcel of land known as LR No. 209/3061, Kileleshwa, NRI.

On 8.7.04 the 2<sup>nd</sup> defendant, acting on instructions of the 1<sup>st</sup> defendant appeared on the suit premises threatening to levy distress for alleged rent arrears and served a proclamation notice expiring on 22.7.04. The plaintiff stated that he had never been a tenant of anybody and the 1<sup>st</sup> defendant has never owned or occupied the suit premises, which the plaintiff had enjoyed since 1992. So he moved to court and prayed for a permanent injunction to restrain the defendants from ever interfering with his quiet enjoyment of his plot and that the purported distress for rent was unlawful. It was a further prayer that the defendants be condemned jointly and severally in damages, costs and interest. As noted earlier the 1<sup>st</sup> defendant entered appearance but did not file a defence. It is not clear what the 2<sup>nd</sup> defendant did. Then an *ex parte* hearing in formal proof started on 3.12.08 before Kubo J.

The plaintiff (PW1) told the learned judge that he was the owner of the suit premises, lying along Mandera Rd, Kileleshwa. It was a government plot on which the plaintiff had lived since 1975 but it was transferred to him in 1992. He had lived there since. The plaintiff produced, for marking, a copy of the title he held which was later produced as shall be seen presently. Then he narrated how on 8.7.04 strangers came to his house claiming rent arrears, allegedly owed to a landlord the plaintiff did not know. He had never been anybody's tenant. The team left the plaintiff with a proclamation notice (Exh P2). On 25.8.04 another team of auctioneers, also claiming to have been instructed by the 1<sup>st</sup> defendant, came to the plaintiff's house and carted away household goods. They left a notification for sale (Exh P3) bearing a sum of sh. 2.7m as owed. The plaintiff compiled a list of goods taken (Exh P4) and then instructed a lawyer to go to court. The lawyer, Mr Oluoch, corresponded with the defendants (Exh P5) whereby the plaintiff asserted his right to the suit premises. A letter from the 1<sup>st</sup> defendant (Exh P 6) claimed that the acts of proclamation and attachment were meant for plot no. LR 209/14654 and not the plaintiff's (LR No. 209/3061). Such information was also relayed to the plaintiff's lawyer by letter (Exh P7) by the 2<sup>nd</sup> defendant. To safeguard his property the plaintiff employed M/s Riley Security Ltd at a cost of sh. 353164/= over 2 months (Exh P8 8A, 8B) and he repaired and replaced his damaged property at sh. 185,040/= (Exh P9). So the plaintiff asked the court to grant him the prayers.

Eliud Obel Owino (PW2) was contracted by the plaintiff to carry out the repair works alluded to above - doors, chairs, ceiling etc and he was paid sh. 185,040/= (Exh P9).

The hearing was adjourned to 11.10.11 when PW1 produced the certified copy of his title (Exh P11) dated 8.12.08 adding that he had never had any dealings with the 1<sup>st</sup> defendant.

Directed to submit Mr. Oluoch went over the background of the case as to pleadings and proceedings and urged the court to find that the defendants wrongfully entered upon the premises of the plaintiff and purported to execute distress for rent arrears that never were, by carting away property and destroying some more in the exercise. That liability fell squarely on the 1<sup>st</sup> defendant who should be responsible for the consequences of the unlawful acts herein complained of.

Further and on damages, the court was urged to find that the plaintiff suffered special damages up to a total sum of sh. 538,164/=.

And for general damages, where distress for rent is proved illegal a sum of sh. 5m was proposed. If the court may comment at this point, there was nothing as an illegal distress for rent at all, going by the pleadings and evidence, that the plaintiff and the 1<sup>st</sup> defendant never had a landlord/tenant relationship. This was simply an act of trespass.

The court was also asked to assess exemplary damages based on the manner the plaintiff's premises were approached by the defendant(s) and the damage done in the process – another sh. 5m was put forward.

In the circumstance of this case, the interlocutory judgement entered in default of filing defence is hereby made final. The plaintiff desires in his submission that the 1<sup>st</sup> defendant be held liable for all that took place and this court so holds. The plaintiff has shown by evidence that he is registered over the suit premises. He has testified that he has all along occupied the premises and at no time as any one's tenant – let alone the 1<sup>st</sup> defendant. He had no dealings whatsoever with the 1<sup>st</sup> defendant. In that event the 1<sup>st</sup> defendant, whether by error of the place he desired to be raided for rent arrears or not, he trespassed on the plaintiff's premises and so is held liable for whatever acts that his agents, the 2 auctioneers, did there. Therefore a permanent injunction is issued against the 1<sup>st</sup> defendant never again to set foot, by itself or agent on the plaintiff's property subject here, as he did on the two stated occasions.

As for the purported distress for rent, the court has already found that it could not be, because there was never a landlord/tenant relationship between the plaintiff and the 1<sup>st</sup> defendant. What the 1<sup>st</sup> defendant committed or caused to be committed, was purely an act of trespass, during the 2 visits. The defendant had no right or reason to do this. The acts of attaching the plaintiff's property resulted not only in household goods being carted away, but damage being done to other property. So for the missing goods the plaintiff has tendered evidence and the court awards him the value. As for the repair to damage done, again evidence has been produced. So on both accounts the 1<sup>st</sup> defendant is to pay sh. 538,114/= in special damages.

Coming to general damages, the act was not only unlawful but aggravated. Damage could not be done to doors, boards ceiling etc of the plaintiff's house unless the entry by the 1<sup>st</sup> defendant's agents was rough, forceful even to the extent of causing alarm with likelihood of physical confrontation. And all was preceded with an unlawful act. In trespass, the claimant need not prove particular damage. It is sufficient when the court finds that an act of trespass was committed. Then it proceeds to assess general damages.

In the manner of the trespass in this case, this court is minded to and it awards a sum of sh. 1 million as general damages.

Thus a total sum in damages stands at sh. 1,538,164/=. The plaintiff also gets costs and interest at the lower court rates.

Judgement accordingly

Delivered on 26.10.11.

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