



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

Civil Case 343 of 2009

1. MR. ISSAK WAINAINA MUCHERU
2. PETER MUNGAI
3. PETER MUGAMBI
4. NJERI KAMAU
5. ANCENT WAMBUA KITTONY
6. NDAAVU NYAMU
7. LYDIA WANGECHI
8. WAIGWA MAINA
9. ALI RAMADHAN JOMO
10. PAUL MURIUKI
11. MWINDANI MBWANA
12. MZEE MUNGAI.....PLAINTIFFS

VERSUS

1. SHUWEKHA ABDALLA MUHSIN
2. SHAMOUN ABDALLA MUHSIN.....DEFENDANTS

RULING

This is an application by the plaintiffs for a temporary injunction restraining the defendants by themselves, their officers, agents or servants or any of them from levying distress, attaching, disposing and or interfering in any way with houses on LR No. 211 Section 11 Mainland North (hereinafter "*the suit premises*") pending the hearing and determination of this suit. The application is made on the main grounds that the defendants have illegally levied distress for rent in respect of ground rent which is disputed and when there is a Government embargo stopping the payment of ground rent; that the defendants action is wrongful, malicious and illegal as it has not been sanctioned by an order of the court and that arrears of ground rent if any can only be recovered as a debt.

The application is supported by an affidavit sworn by the plaintiff **Isaac Wainaina Mucheru**. The affidavit is an elaboration of the above grounds. The application is opposed and there is a replying affidavit sworn by the 2nd defendant, **Shamoun Abdalla Muhsin**. In the affidavit, it is deponed, *inter alia*, that the plaintiffs were indeed permitted to put up houses on the suit premises and have being paying ground rent which rent has been raised from time to time with notice. However, when such a notice was served in 2009, the plaintiffs resisted the same which action is calculated to deprive the defendants of their right. In the premises, the defendants contend that the application should be dismissed for being an abuse of the court process.

When the application came up before me for hearing on 10th May, 2010, counsel agreed to file written submissions which they duly filed by 9th June, 2010. I have considered the application, the affidavits filed both for and in opposition to the application and the said submissions. Having done so, I take the following view of this matter. As this matter is at an interlocutory stage, the court does not, indeed is enjoined not to, determine with conclusiveness the rights and obligations of the parties. At this stage the applicants should show a prima facie case with a probability of success, at the trial. They must also show that unless the injunction is granted, they would suffer irreparable injury which would not be adequately compensated by way of damages. Where the court is in doubt the application is to be considered on a balance of convenience. (See **Giella – v – Cassman Brown & Company Limited [1973] EA 358**).

There is really no dispute that the plaintiffs have put up houses on the suit property and pay ground rent to the defendants. It goes without saying that if they are in default, the defendants are entitled to seek relief. However, is distress for rent available to the defendants? If such a remedy is available to the defendants has it been validly exercised? What is the legal effect of the

publications by the Ministry of Lands stopping payment of ground rent with effect from 1st May, 2007? Those are issues which cannot conclusively be determined at this interlocutory stage. The plaintiffs have however a prima facie case that the mode of distress levied by the defendants may not be sanctioned by the Distress for Rent Act Cap 293. If the plaintiffs succeed in that argument at the trial, they will thereby establish that the defendants' action is unlawful. The plaintiffs could lose their houses unless the defendants are restrained. In the premises, I am satisfied that the plaintiffs have established a prima facie case with a probability of success at the trial and that damages will not be an adequate remedy. As I am in no doubt that a prima facie case has been demonstrated. I need not consider the balance of convenience. However, even if I were to consider this application on that basis, I would still find that the balance tilts in favour of granting the temporary injunction. I say so because, the injunction will preserve the houses the subject matter of this dispute as the parties thrush out the issues referred to above. The injunction is granted on condition that all the plaintiffs will file separate undertakings under oath as to damages within the next seven (7) days.

Costs shall be in cause.

Orders accordingly.

DATED AND DELIVERED AT MOMBASA THIS 12TH DAY OF JULY 2010.

F. AZANGALALA
JUDGE

Read in the presence of:-

Wameyo holding brief for Ngigi for the plaintiffs and Oddiaga for the defendants.

F. AZANGALALA
JUDGE
12TH JULY 2010