



**REPUBLIC OF KENYA
IN THE HIGH COURT OF KENYA
AT NAIROBI (NAIROBI LAW COURTS)**

Environmental & Land Case 1402 of 2007

REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA AT NAIROBI

ELC NO. 1402 OF 2007

SHADE MANUFACTURERS

& HOTELS LTDPLAINTIFF/RESPONDENT

V E R S U S

SERAH MWERU MUTUU1ST DEFENDANT/RESPONDENT

JOSEPH KANG'ARI2ND DEFENDANT/RESPONDENT

GRACE GACIKU3RD DEFENDANT/RESPONDENT

VIRGINIA WANJIKU4TH DEFENDANT/RESPONDENT

LOUIS WAITHERA5TH DEFENDANT/RESPONDENT

R U L I N G

This suit was filed on 24th September, 2004 because the Defendants had instructed Starline Auctioneers to distress for rent arrears amounting to KShs. 970,000/= in respect of premises known as L.R. No. 192/19 situate in Karen Area Nairobi which the Plaintiffs had rented in a Lease Agreement. The Plaintiff's case was that it had paid all due rent and therefore the bid to levy distress was illegal. A mandatory injunction was sought to restrain the Defendants, their agents and/or servants, from interfering with the Plaintiff's peaceful occupation of the suit premises is so for it continued to pay rent. With the suit was filed an application under **Order 39 rules 1, 2, 3 and 4 of the Civil Procedure Rules** for interlocutory injunction.

The replying affidavit sworn by the 5th Defendant indicated that when the Auctioneers were instructed to levy distress the Plaintiff owed rent amounting to KShs. 810,000/= but that it had paid KShs. 160,000/= leaving a balance of KShs. 720,000/=. The rent had since accumulated further to KShs. 810,000/=. The application was opposed.

This is the application that came for hearing before Justice P. Kihara Kariuki on 2nd February, 2005 when, upon hearing counsel for the parties, granted an interlocutory injunction on condition that KShs. 600,000/= be deposited by the Plaintiff within 30 days in an interest earning account in the joint names of the advocates for the parties with a bank to be agreed on. The present application under **Order 44 rule 1 of the Civil Procedure Rules** by the Plaintiff seeks the review of the order to show that the disputed rent is KShs. 390,000/= and not KShs. 600,000/= for the period from 1st January, 2002 to 31st March, 2003 when the disputed lease expired. It was further sought that the order be reviewed as the Defendants in fact owe the Plaintiff KShs. 10,000,000/= and the order of any deposit would prejudice the Plaintiff further. The Plaintiff sought the alternative prayer that the order be reviewed to grant the Plaintiff an order to pay the correct accumulated rent (which is disputed) by mode of deposit of instalments of an amount to be determined by the court. The application was opposed by grounds of opposition and replying affidavit.

I understand this case to be about the amount of rent arrears by the Plaintiff to the Defendants over the suit premises. When the Judge granted injunction against the distress that the Defendants were levying it was clear each party had its own idea about how much rent was in arrears. This is what led the Judge to order the deposit of KShs. 600,000/= as a condition for the injunction. It is the money the Plaintiff was saying was in arrears as of 31st December, 2004, when one considered rent at the rate of KShs. 80,000/= per month. The Defendants were saying rent was KShs. 90,000/= and that from 1st January, 2000 KShs. 10,000/= per month had not been paid leading to the claimed arrears at the time of threatened distress. The court did not conclusively determine the issue of monthly rent payable and how much was the rent arrears. Until these issues are settled at hearing the parties will each have their own calculations.

There would be no basis, therefore, for the court to review the orders of 2nd February, 2005. There has been no demonstration of an error on the face of the record nor has there been a discovery of new and important matters or evidence which were not at the time within the knowledge of the Plaintiff after the exercise of due diligence.

The issue of KShs. 10,000,000/= worth of developed structures was not before the court during the injunction application. So is the request to pay rent arrears by instalments.

The application is dismissed with costs, except that, considering the serious dispute over rent and which rent continues to accumulate exorbitantly, I ask that the Deputy Registrar to allocate the case for the main hearing on priority basis.

**DATED AND DELIVERED AT NAIROBI
THIS 12TH DAY OF OCTOBER 2010**

**A. O. MUCHELULE
J U D G E**