



**REPUBLIC OF KENYA**  
**IN THE HIGH COURT OF KENYA**  
**AT MERU**  
**CIVIL CASE 33 OF 2004**

JOSEPH NYAGA KARINGI .....PLAINTIFF

VERSUS

NATHAN MUHATIA PALA *t/a* MUHATIA PALA AUCTIONEERS....1<sup>ST</sup> DEFENDANT

JOHNSON MUGWE WANG'ANG'A .....2<sup>ND</sup> DEFENDANT

**JUDGMENT**

The plaintiff has sued two defendants, the first one being the proprietor of Muhatai Auctioneers and the second being an owner of business premises on plot No. 112/78 within Embu Town.

The plaintiff was already a tenant in the premises when the second defendant purchased the premises in August 2003. the plaintiff pleaded that he was already a protected tenant under the provisions of **Landlord and Tenant (shops and Hotels and Catering Establishments) Act, Cap. 301** Laws of Kenya.

There arose several disputes between plaintiff and second defendant resulting in Business Tribunal cases namely Nos. 46 of 2003, 52 of 2003, 55 of 2003, 15 of 2004 and 16 of 2004.

While these suits were pending in the Tribunal the first defendant purported to proclaim plaintiffs assets stock-in-trade and subsequently collected virtually everything belonging to the plaintiff from the premises. And he locked up the shop. This is disputed by the first defendant who was the auctioneers employed by the 2<sup>nd</sup> defendant.

The goods attached were valued at Shs. 591,704/= according to the plaintiff. The plaintiff suffered loss of earnings due to illegal eviction at the rate of Shs. 34,493/= per month. When the shop was closed he was unable to collect trade debts, goodwill and his registration was terminated.

Because of closure of his business the plaintiff was unable to serve his bank loans Shs. 200,000/= from KCB Shs. 70,000/= from wife Shs. 147,500/= from Barclays Bank. The plaintiff pleaded that there was no rent arrears or an order from the tribunal authorizing the levy of distress and eviction.

The plaintiff therefore claimed:

1. **declaration that the eviction was illegal and irregular and an account of all the goods attached of proceeds of sale and of goods not sold.**
2. **order that defendant do pay to the plaintiff all sums found due to the plaintiff after taking account and the payment of double their value under section 8 of Distress for Rent Act, Cap. 293.**
3. **damages**
4. **interest**
5. **costs**

There is defence filed by both defendants who were represented by same advocate. They denied that plaintiff was lawful tenant in the premises, that the distress was lawful and sanctioned by court, that the plaintiff was not evicted but escaped from the premises, that the plaintiff was in rent arrears in the sum of Shs. 198,000/= which he failed to pay.

Further they said the stock was valued at Shs. 70,000/= only not as alleged by plaintiff. That the plaintiff escaped and left the premises unguarded and unlocked and furthermore alleged that the plaintiff was a man of no means, impecunious and therefore incapable of suffering any business loss or damage.

Furthermore the defendants pleaded lack of jurisdiction, some matters still pending before Tribunal and others being **res judicate**. Statement of issues was filed by plaintiff's advocate but it was never signed by the defendants.

The evidence adduced at the trial shows that the plaintiff was a tenant in premises on plot No. 112/78 since 1990 as demonstrated under "Exhibit 1". That exhibit was an agreement of tenancy for a period of 5 years. In addition the tenant was granted permission to sub-let back rooms on his account. Then by agreement dated 1/8/2003 the property was sold to the second defendant. On the same date notice to terminate tenancy was served upon the plaintiff by second defendant with effect from 1/8/2003 on the ground that the landlord intended to demolish or reconstruct the premises and that he intended himself to occupy the premises for a period of not less than one year for the purpose of a business to be carried on by him.

Then there were disputes regarding rents between plaintiff and his landlord and advocate Njiru and tribunal cases No. 52/2003 and No. 16/2004, were instituted. Tribunal case No. 52/2003, No. 16/2004 the defendant complained that the plaintiff was sub-letting the premises without his permission and not remitting the rent. The plaintiff had already authority to sub-let the rooms as shown by exhibit 1 and keep the rents.

In the Tribunal case No. 46 of 2003, exhibit 11 A, the plaintiff complaints were:

1. **threatening eviction without statutory notice**
2. **refusal by landlord to accept money for rent for months of August 2003 and**
3. **he had refused to issue rent card**

by commencing distress the defendant pre-maturely caused the termination of the said suits. The distress and eviction were carried out by DW2 who visited the premises, carried the goods with him and stored them in his stores. He testified that some items were not sold but remained stored in his stores.

DW2 was not a licensed auctioneer or court bailiff. According to the plaintiff the value of goods attached is shown in exhibit 13 as Shs. 591,704. Exhibit 14 shows that the business debtors held 56,030 which the plaintiff was not able to collect after eviction. He had a loan facility from Kenya Commercial Bank owing Shs. 171,678/=. He was left no means to service the loan. Plaintiff also produced his profit and loss account showing that he made profit in the sum of 248,049/= in the year 2002 and Kshs. 310,615 in the year 2003.

Evidence is that the landlord, 2<sup>nd</sup> defendant was seeking the earliest opportunity to demolish the premises which he could have done by seeking a court order. The evidence by the defendants is that the defendants did not evict the plaintiff but it was testified in court that he ran away from the premises when the defendants came to collect his goods. How can it be then that he was present when the inventory showing the value of goods collected was signed on 27/7/04.

The evidence offered by the defendants is unbelievable. The court is persuaded by the evidence of the plaintiff that the defendants collected all the goods from the shop and locked the premises.

The issues arising for decision were the legality of the plaintiff's tenancy and whether the 2<sup>nd</sup> defendant was entitled to levy distress against the goods of the plaintiff on 27/7/04. the other issue is whether the plaintiff was evicted from the premises or vacated on his own will.

The plaintiff was in the property by virtue of a tenancy agreement. This agreement was lawful by the time the 2<sup>nd</sup> defendant purchased the property. The transaction did not terminate the plaintiff's tenancy. Furthermore, the plaintiff was a protected tenant in terms of **Landlord and Tenant (Shops, Hotels and Catering Establishments) Act, Cap. 301**. in view of the fact that there were several suits pending before the Business rent Tribunal as stated above, it was an abuse of process to proceed to levy distress without the leave of the court.

The conclusion is that the action that took place on 27/7/04 was unlawful. On the issue of arrears of rent there is evidence that the 2<sup>nd</sup> defendant deliberately refused to accept rent from the plaintiff giving rise to complaints to the Tribunal by the tenant. The conclusion is that the 2<sup>nd</sup> defendant refused to receive rents so that he can build a case for

distress for rent. He acted in bad faith and was not entitled to levy distress.

On the issue of accounts, it was the plaintiff's evidence that he was never given an account of the sale of his goods. The defendants were not able to explain what goods were sold and which were not. In exhibit 13 and 14, the plaintiff testified that his goods were valued at Kshs. 591,704/=. The plaintiff claims double the value as provided under **Section 8, Distress for Rent Act.**

**“if any distress and sale are made under this Act for rent pretended to be in arrears and due when in truth no rent is in arrear or due to the person distaining or the person in whose name the right of distress is taken then the owner of the goods or chattels distressed and sold ..... shall be entitled to recover double the value of the goods and chattels so distracted and sold together with full costs of suit from the person so distaining recoverable sum fairly as a civil debt”.**

As stated above the 2<sup>nd</sup> defendant refused to accept rent and then pretended there were arrears of rent. The claim of arrears was higher than that ordered by Tribunal shown in the rent book as 9000/= p.m. (exh. 4), again the conclusion is that the 2<sup>nd</sup> defendant is bound to pay double value of goods distained being Shs. 1,183,408/=.

On issue of general damages the first item is for trespass in the business premises of the plaintiff. Authorities supporting this claim are:

1. **Ouma vs. Nairobi City Council 1976 KLR (1985 730)**
2. **Willsden Investment Lts. Vs. Kenya Hotel properties Ltd. 2006 KLR**
3. **Ms. Jeane Odhalo vs. Nairobi Cit Council**

Plaintiff also claims punitive/exemplary damages and loss of business Opportunity these items are not pleaded. A party is only granted orders on pleaded claims. The plaintiff is therefore entitled to the actual loss he suffered. That is the

Trade debts	-	Shs.	50,000/=
Loan unpaid	-	Shs.	171,678/=
Lost goodwill	-	Shs.	542,820/=
Sub total	-	Shs.	664,498/=
Double value of goods -		Shs.	1,183,408/=
Total	-	Shs.	1,847,906/=

I therefore find that the plaintiff has proved his case on a balance of probabilities. Judgment is entered for plaintiff as prayed in the plaint. Damages assessed at total Shs. 1,847,906/= is awarded.

The plaintiff shall have costs of this suit plus interest on damages at court rates from of judgment.

It is so ordered.

DATED this 23<sup>rd</sup> day of December 2008.

**JOYCE N. KNAMINWA**

**JUDGE**

DELIVERED this 9<sup>th</sup> day of February 2009

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**JUDGE**