



**REPUBLIC OF KENYA**

**IN THE HIGH COURT OF KENYA**

**AT MOMBASA**

**Civil Case 78 of 2009**

**J.B. MAINA & CO. LTD .....PLAINTIFF**

**VERSUS**

**FARID M. AL-MAARY .....DEFENDANT**

**RULING**

J.B. Maina & Co. Ltd., the applicant herein took out a chamber summons pursuant to order XXXIX rules 1 and 2 of the Civil Procedure rules in which it sought for an order of injunction to restrain Farid M. Al-Maary, the Respondent herein, from levying distress for rent pending trial. The summon is supported by the affidavit of Nilesh Patel sworn on 17.3.2009. In the plaint, the applicant sued the Respondent claiming for a permanent injunction to halt the distress for rent dated 6<sup>th</sup> March 2009. The defendant Respondent filed a replying affidavit and a notice of Preliminary Objection to oppose the application.

When the application came up for interpartes hearing Msrs. Hamza and Ndegwa appeared to argue on behalf of the applicant and Respondent respectively. It is the submission of the applicant that the Respondent intends to distress for rent which has not been legally effected. It is argued that the rent increase is the consequence of the decision of Business Premises Rent Tribunal made on 30.8.07. The aforesaid decision is said not to have been adopted by a resident magistrate's court. For the above reason the applicant implored this court to find that it has established a prima facie case with high chances of success. Mr. Hamza submitted to the effect that the plaintiff is likely to suffer substantial loss if the order is not given. It is said that if the amount of rent is recovered by distress, the plaintiff's business will be forced to close down.

Mr. Ndegwa opposed the application by stating that under S.14(1) of Chapter 301 Laws of Kenya, it is not necessary to have the Business Premises Rent Tribunal Act adopted by the Resident Magistrate's Court before one can execute. His argument is that the defendant is not execution a decree but he is levying distress. It is also Mr. Ndegwa's argument that even if the defendant was executing a decree, the application will not succeed because the same is resjudicata. The learned counsel also accused the plaintiff of material non-disclosure in that it failed to reveal that there were pending proceedings involving the same parties and over the same properties and that two similar applications have been heard and determined.

Having considered the salient issues raised by both learned counsels; let me now give the brief background of the facts leading to filing of this suit. On the 30<sup>th</sup> day of August 2007, the business Premises Rent Tribunal increased rent payable by the Applicant (Tenant) to the Respondent (Landlord). The applicant is a tenant of the Respondent occupying two shops. The total amount increased was Kshs.15,900 and 14,910 per month for the 1<sup>st</sup> and 2<sup>nd</sup> shops respectively. The order increasing rent was made vide BPRT case No. 112 of 2007. The rent was backdated to take effect as from 1<sup>st</sup> June 2006. The applicant did not pay hence the Respondent was prompted to instruct auctioneers to levy distress. The auctioneers proclaimed the applicant's goods on 6<sup>th</sup> March 2009. This action prompted the applicant to file the current suit. The applicant now wants this court to issue temporary orders of injunction pending the hearing and determination of the suit. One issue which arose in the submission of Mr. Ndegwa, learned advocate for the Respondent is that the applicant is guilty of material non-disclosure. It is stated that the applicant failed to disclose that there were previous suits and proceedings between the

parties over the same property. I have perused the plaint and the verifying affidavit of Harish M. Patel. In paragraph 11 of the plaint the plaintiff clearly avers that there have never been any proceedings and suits in any court between the plaintiff and the defendant over the same subject matter. I have perused the replying affidavit of Farid Al-Maary. The contents of the aforesaid affidavit have not been controverted by any affidavit. Annexed to the Replying affidavit of Farid Al-Maary are documents showing that the applicant had previously filed Miscellaneous Civil application No. 390 of 2007 in which it prayed to have the execution of the decision of B.P.R.Tribunal dated 30.8.2007 to be stayed pending appeal. The aforesaid application was heard and dismissed on 24<sup>th</sup> February 2009. The decision dismissing the application is also annexed to the replying affidavit. The Respondent also annexed to the proceedings of 5/3/2009 showing that the applicant had filed another application for stay of execution pending appeal. On the same date the application was dismissed for being resjudicata. The applicant did not disclose that the aforesaid proceedings and rulings existed at the time of filing of this suit. I agree with the submissions of Mr. Ndegwa that the applicant is guilty of material non-disclosure. The applicant is now before this court seeking for an equitable remedy of injunction. Its hands are already tainted and equity cannot assist such a party. In view of the applicant's conduct, I do not need to consider the other grounds or the merits of the application. The application is ordered dismissed with costs.

**Dated and delivered at Mombasa this 21<sup>st</sup> day of May 2009.**

**J.K. SERGON**

**J U D G E**

In open court in the presence of Mr. Hamza for plaintiff.

Mr. Sitonik h/b for Ndegwa for Defendant.