**REPUBLIC OF KENYA**

**IN THE HIGH COURT OF KENYA**

**AT NAIROBI (NAIROBI LAW COURTS)**

**Civil Suit 256 of 2009**

**FATUMA AMIN ABDULLAHI. …….....…… PLAINTIFF/APPLICANT**

**VERSUS**

**SILVESTER HASUSA MAKOKHA**

**PETER BARASA RAJABU**

**E A MAKOKHA**

**C G WAITHIMA T/A WAITHIMA CO. ADVOCATES**

**SIMON KANURE KIBUE T/A RESTORES**

**CONSULT AUCTIONEERS….....RESPONDENTS/DEFENDANTS**

**R U L I N G**

The Plaintiff filed this application dated 13th May, 2009. She sought several orders of which the following are the presently relevant ones to be dealt with: -

a) That a temporary injunction do issue against the Defendants or representatives, employees, agents or servants or other persons acting on the defendants behalf or claiming through them, from interfering with the Plaintiff's tenancy over the suit premises known as L.R. No. 36/7/170 Eastleigh Section 1, Nairobi, pending the hearing and final determination of this suit.

b)That a temporary injunction do issue against the defendants

etc… from evicting the Plaintiff from the suit premises L.R. No. 36/T/170 Eastleigh aforementioned pending the hearing and final determination of this suit.

(c) That the court do grant an order of mandatory injunction compelling the 5th Defendant to return to the Plaintiff all the goods removed by them from the Plaintiff's premises aforesaid on 11.5.2009 at the cost of the Defendants pending the hearing and final determination of this suit.

(d)That the court do declare as illegal the attachment of the Plaintiff's goods and the breaking of the doors in the suit premises and further, lift the order of such attachment.

(e) Costs.

The facts upon which the applicant bases her prayers are as follows, as I understand them:-

The Plaintiff, Fatuma Amin Abdullahi is a tenant of the premises known as L.R. No. 36/7/170 Eastleigh, Section I on the 1st Avenue, Nairobi. The tenancy, contained in the Lease Agreement dated 1st March, 2004, is for Ten years from 1st April 2004 to 31st March, 2014, yielding a monthly rent of Kshs.120,000 for the first five years and thereafter, Kshs.165,000/= per month until the tenancy expires. The Lease Agreement was made between the Plaintiff/Applicant and the 3rd Defendant herein who then was the registered legal owner as the Legal Representative of the estate of one Clement Mzee Wakasa. However, sometimes in May, 2006 the property was transmitted to the 1st and 2nd Defendants who are the son and grandson of the 3rd Defendant.

It was admitted and can be adduced from the documents on the record, that the 1st and 2nd Defendants always knew of the tenancy of the plaintiff and that they inherited and took up the ownership of the suit premises while the said lease lasted. Further more the evidence confirms that the two knew and were aware from the beginning of the lease aforesaid, that the stipulated rents were always being paid to and received by the 3rd Defendant, E.A Makokha through one of his sons called Placid Rostorn Egesa. The facts also show that the Plaintiff had been a tenant for 10 years before the existing lease was entered.

Further material annexed to the application before the court confirm that the Plaintiff did not at any relevant time fail to pay her relevant monthly rent which she paid through a firm called Hark Investment Company Ltd. (H.I.C). This was so confirmed by the 3rd Defendant.

The Plaintiff was accordingly shocked when an auctioneer, Restorers Consult Auctioneers, swooped upon the suit premises on 11th May, 2009 and not only broke doors and damaged and removed roof iron sheets from the suit premises but also took away in distress, various goods then found in the premises belonging to the Plaintiff and her subtenants. It is in the record also that the 5th Defendant was trying to levy distress for purported unpaid rents amounting to Kshs.360,000/=.

It is important to therefore know how the rent due is supposed to have arisen. Apparently, the 1st and 2nd defendant became aggrieved when the suit premises was transmitted to them and registered in their names without the rents or part thereof being available to them. Coming from the property, going into their pockets. As earlier noted the rents were going to the 3rd Defendant who at this material time had ceased being one of the registered owners. The 3rd Defendant however, as earlier observed, was the person administering the suit property and was to the awareness and knowledge of the 1st and 2nd Defendants, the recipient of the rents.

There is no evidence on the record from the 1st and 2nd Defendant that once they became registered owners of the suit premises, they attempted to demand that the monthly rents due, should be paid to them. Nor did they claim that notice of demand directed to the Plaintiff was served upon the Plaintiff seeking that future rents be paid to them.

The replying affidavit to this application was sworn by one Charles G. Waithima, the advocate who received instructions to levy distress and who instructed the auctioneers, the 5th Defendant, to levy distress. He shows that he filed the replying affidavit on behalf of the 1st and 2nd Defendants as well as his own behalf. This replying affidavit does not deny the facts upon which the Applicant/Plaintiff brings this application. That is to say he does not deny the fact that the Plaintiff had been a tenant in the suit premises for 10 years before the present lease was entered. He does not further deny the fact that his clients the 1st and 2nd Defendant became owners of the suit premises through transmission and during the subsistence of the present 10 year lease, in favour of the Plaintiff/Applicant. Also the deponent does not deny the fact that the 1st and 2nd Defendant always knew that it was the 3rd Defendant who always received the Plaintiff's rents. Finally, Mr. Charles G. Waithima advocate does not state that his clients instructed him to and that he tried to alter the above arrangement when his clients became the registered Owners of the suit premises through transmission.

The above circumstances in the courts view only confirm that the 1st and 2nd Defendant's concern was to use the now newly established situation of being the new owners of the suit premises to disrupt the long existing arrangements without caring about the possible consequences. That is how the court reads the situation where without notice to terminate the existing lease in favour of the Plaintiff, the 1st and 2nd Defendant through their advocate, eventually descended upon the Plaintiff, broke the doors of the suit premises and emptied them before destroying the roofs to discourage any continued occupation by the Plaintiff and her tenants of the suit premises.

In so far as the 1st and 2nd Defendants' conduct led to serious damage to property and human suffering and torment on the part of the Plaintiff, the Court sees callous and reckless conduct on the part of the 1st and 2nd Defendants. In my view the law provides and does not lack, more civilized ways of acquiring, and reclaiming and protecting citizens' property. It will be only in few cases, where the law would allow a party to use force to reclaim and/or protect ones property, and the method used by the 1st and 2nd Defendants is not one of those few cases.

The 1st and 2nd Defendant may have had possible rights to demand for the payment of rents for the suit premises partially or wholly from the moment they became legal owners. This could have led to peaceful rearrangement as to who in future should receive the rents. In default, the 1st and 2nd Defendant could have settled the issues through a court of law where all relevant facts and circumstances would be disclosed to enable the court to determine the conflict while protecting every party's rights. The 1st and 2nd defendants, clearly out of malice and selfishness, decided to use legal machinations to destroy plaintiff's property and force the Plaintiff and her tenants out of the premises.

Indeed, the 1st and 2nd Defendants did not in my view, disclose all the relevant facts before the lower court which issued a warrant of distress or leave to the 5th defendant to use force to gain entry into the suit premises. Had such information been placed before the lower court it is unlikely that the orders made thereat would have been made. Nor clearly, did Wamaitha & Co. Advocates properly advise their client in relation to the whole process of the levying of the distress.

I accordingly find that the eviction of the Plaintiff and/or her tenants from the suit premises L.R. No. 36/7/170 Eastleigh, Section 1 by the 1st and 2nd Defendants through the 4th and 5th Defendants, was unlawful and totally mischievous. They used the law unlawfully in order to remove the Plaintiff from the suit premises. They deliberately withheld proper and relevant facts from the lower court and from the Police Force in order to achieve their illegal purposes. And at the end of the day, they caused unlawful damage to the properties of the Plaintiff and Plaintiff's tenants, apart from violating their rights.

The question, however, is whether or not the Plaintiff should on the above facts be entitled to the orders sought at the beginning of this ruling.

In my view and as admitted by the Plaintiff, there was interference with the Plaintiff's occupation and possession of the suit premises through the unlawful conduct of the Defendants. However, this fact in my view, does not in anyway terminate the tenancy contained in the Lease Agreement dated 1st March, 2004. This does not mean that the 1st and 2nd Defendant may not through proper and lawful mechanisms challenge or bring to an end the said tenancy. Such an issue however, is not before this court and nothing more will be said about it. It is the view of the court accordingly, that in the circumstances of this case the court may grant an injunction against the defendants restraining them from interfering with the Plaintiff's tenancy of the suit premises pending the hearing and final determination of this suit.

The Plaintiff also seeks a mandatory injunction compelling the 5th Defendant to return to the Plaintiff and her tenants all goods removed by him from the Plaintiffs leased premises as aforestated at the 4th Defendant's cost. Since the court has arrived at the conclusion that the levy of distress and eviction through forced entry and damage to doors was unlawful and that it was obtained almost through fraud by failure to disclose to the lower court proper and relevant facts, it follows that goods taken were unlawfully taken. Damage made was unlawful damage forced upon the Plaintiff's. Those who inflicted such damage should not surely be left to escape scot free.

As earlier stated, the replying affidavit filed in defence to this application and sworn by the 4th defendant, did not attempt to deny or contravert the facts forming the obtention of the leave to break, the breaking of the doors of the premises, the gaining of entry into the premises, and the collection of the Plaintiff's or her tenant's goods in levying the wrongful distress of the alleged arrears of rent. If anything the 4th defendant in his replying affidavit, and averments of the Plaintiff confirms the facts while seeking to hide behind the break-in-order issued by the Milimani Resident Magistrate's Court upon the misleading or half-truths or failure of disclosure, of the relevant facts.

The court is however satisfied on the balance of probability that the facts on the record show that the defendants were in a bid to and actually stole a match against the Plaintiff. They had decided and succeeded in an unlawful eviction of the Plaintiff and her tenants by breaking into the premises and removing doors and the roof of the premises. The law should try to put the Plaintiff back to the position she was in before the raid by the Defendants. That can only be achieved through a mandatory order. In my view special and exceptional circumstances are revealed in the facts of this case in view of the fact that the 4th Defendant who set up the machinery to levy distress is an advocate of the High Court who is supposed to know the importance and compliance of the rule of law in securing or protecting any personal right under the constitution.

**ORDERS**

The application dated 13th May, 2009 is hereby granted in terms of prayers 4, 6, 7, 8 and 9. Orders accordingly.

Dated and delivered in Nairobi this 29th day of July, 2009.

**D A ONYANCHA**

**JUDGE**