REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA

AT NAIROBI

CIVIL CASE 1 OF 2009

BIWOTT PIUS KIPROTICH ……. PLAINTIFF

VERSUS

TAGUMA AGENCIES LTD. ……. DEFENDANT

R U L I N G

The Plaintiff/Applicant is the tenant in premises whereat the Defendant is the managing agent for purposes of collecting rent. The Defendant attempted to levy distress for rent arrears giving rise to the suit and an application brought under Order XXXIX rules 1 and 2 of the Civil Procedure Rules, amongst other laws, to have the defendant be restrained by means of an interlocutory injunction from levying unlawful distress for rent or harassing the plaintiff at his business premises pending the hearing of the application and later pending the hearing of the suit. The application is supported by affidavit of the Plaintiff in which he depones in the main, that he is not in any rent arrears. He adds that the distress for rent is unlawful as the same offends the Landlord and Tenant (Shops, Hotel and Catering Establishments) Act Cap 301 of the Laws of Kenya as to the leave of the Business Premises Rent Tribunal being sought and obtained before levying distress and further that the goods distrained are tools of trade contrary to the provisions of the Distress for Rent Act Cap 293 of the Laws of Kenya. The Plaintiff also filed a supplementary affidavit with leave of the court.

That application is opposed and the defendant/respondent has filed a Replying Affidavit sworn by its director one Patrick Maguta Mwangi. In it he swears that the plaintiff is in rent arrears and gives the amount outstanding as at the date of swearing the affidavit, that is to say on 13th January 2009, as being Kenya Shillings 49,000/-. The deponent adds and annexes the Exhibit marked PMM/1 which is communication from the Business Premises Rent Tribunal to the effect that as the plaintiff has failed to respond to the notice given by the Defendant at the said Tribunal, then the Defendant was at liberty to now proceed under the Distress for Rent Act and levy distress. He swears that that is exactly what he was doing when the plaintiff rushed to this court and obtained a temporary injunction. The deponent then adds that orders of injunction as sought are merely meant to be used as a shield to deny the landlord his rightful rent. He believes that the plaintiff has no case with a probability of success at trial.

After hearing this application and before delivering its ruling the court took the view, and both counsel appearing agreed, that the issue was one of the exact amount by way of rent still owing. Holding that view, and in an endeavour to save the court's time the court ordered that the parties do take accounts and the Defendant's counsel was ordered to supply to the plaintiff's counsel a statement showing what was in arrears. This was to be done within five (5) days of the order. The plaintiff was ordered to thereafter respond thereto also within five (5) days of the supply of that statement. Such time was not adhered to but the Defendant did supply a statement on 24/02/2009. The Plaintiff did not file anything in court, though not quite required to, and despite stating to the court that he was reconciling its accounts supplied nothing to the Defendant's counsel. Counsel for the Plaintiff then asked the court to deliver its ruling, and this after the order of taking accounts given on 10/02/09, a period in excess of three months.

This then is the court's Ruling. What is abundantly clear is that there is a dispute as to the amount of rent arrears payable. A dispute as to the amount payable has never been held to be a ground upon which an injunction can issue. This case/application is no different from that position. No distress for rent was yet levied but a proclamation of distrait of movable property was made. That ought to have aroused the

Plaintiff into resolving the issue of arrears, if any. The plaintiff would not even obey a court order for taking of accounts. That was a lawful order obedience to which would have amicably resolved the case as on the pleadings before court. The court was invited from the bar to note that the Defendant was now claiming unlawful rent for the premises and for the ground on which the premises stand. If that be so then it ought to have been made a pleading, at the very least a sworn statement to that effect would have been made. The court can only proceed on what is before it. Has the Plaintiff made out a case with a probability of success at trial to entitle it to a grant of the equitable remedy of injunction? Not on the matters before court, in my considered view. And if he should suffer any loss then I hold that such loss would be adequately compensated by an award in damages. Having found that I need not consider the issue of balance of convenience but even if I were to do, I would hold that the same tilts to the Defendant. The landlord deserves his rent, if the same be not paid. And if paid then proof was not given. The upshot is that the application fails and the same is hereby dismissed with costs.

DATED AND DELIVERED AT ELDORET THIS 17TH DAY OF JUNE 2009.

P.M. MWILU

JUDGE

In the presence of;

Clerk …….

Advocate for the Plaintiff ……

Advocate for the Defendant……