



**HONEYCARE AFRICA LIMITED v REGISTERED TRUSTEE OF AGRICULTURAL SOCIETY OF KENYA & KANGERI WANJOHI T/A KINDEST AUCTIONEERS (Civil Case 484 of 2009) [2009] KEHC 1150 (KLR) (Civ) (6 November 2009) (Ruling)**

*HONEYCARE AFRICA LIMITED v REGISTERED TRUSTEE OF AGRICULTURAL SOCIETY OF KENYA & another [2009] eKLR*

Neutral citation: [2009] KEHC 1150 (KLR)

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

**CIVIL**

**CIVIL CASE 484 OF 2009**

**MK KOOME, J**

**NOVEMBER 6, 2009**

**BETWEEN**

**HONEYCARE AFRICA LIMITED ..... PLAINTIFF**

**AND**

**THE REGISTERED TRUSTEE OF AGRICULTURAL SOCIETY OF KENYA ALIAS AGRICULTURAL SOCIETY OF KENYA LIMITED ALIAS AGRICULTURAL SOCIETY OF KENYA NAIROBI BRANCH ALIAS AGRICULTURAL SOCIETY OF KENYA LIMITED ..... 1<sup>ST</sup> DEFENDANT  
KANGERI WANJOHI T/A KINDEST AUCTIONEERS ..... 2<sup>ND</sup> DEFENDANT**

**RULING**

1. By the chamber summons dated 6<sup>th</sup> July 2009, the plaintiff seeks for an order restraining the respondents, their agents, or employees from levying distress for rent on the premises occupied by the applicant at Jamuhuri Park Nairobi. The applicant also seeks for an order that the respondents be restrained from selling or disposing of the plaintiff's motor vehicle no. KAN 592R, until the suit is heard and determined. Further, the applicant seeks for orders of execution or breaking in order made by Senior Resident Magistrate in C. MMISC.APPL. NO.335 OF 2009 be stayed and the ruling be set aside. Lastly the applicant seeks for a mandatory order of injunction compelling the respondents to restore the motor vehicle attached forthwith.
2. This application is supported by the grounds stated on the body thereto, and the matters deposed to in the supporting affidavit of Jeremiah Ngao the Finance Manager of the plaintiff.



3. Briefly stated, the applicant claims to be a tenant of the 1<sup>st</sup> defendant at their premises located at Jamuhuri Show Ground. On 29<sup>th</sup> May 2009, and 4<sup>th</sup> June 2009 the 2<sup>nd</sup> respondent entered the premises of the applicant and levied distress. This distress was levied pursuant to an order of distress of rent issued in CM MIC.NO.335 OF 2009, which order authorized the police to provide security so that the 2<sup>nd</sup> respondent could break in the premises and levy distress. This order was issued after the 2<sup>nd</sup> respondent swore an affidavit on 10<sup>th</sup> March 2009, claiming that he was obstructed from gaining access to the premises, thus he sought a breaking in order. Counsel faulted the issuance of the order because the letter in support of the affidavit was vague, it merely referred to outstanding rent and gave a list of 18 tenants and the amounts owing.
4. Before these orders were obtained, the parties were involved in Business Premises Rent Tribunal where reference No. 285 of 2008 was filed by the tenants against the 1<sup>st</sup> defendant. The plaintiff and other tenants were seeking protection as protected tenants. The plaintiff and other tenants were so declared by the Chairperson's ruling on 9<sup>th</sup> October 2008. The 1<sup>st</sup> defendant appealed against that ruling in High Civil Appeal No. 606 of 2008, which is still pending determination in the High Court.
5. The 1<sup>st</sup> defendant also filed an application seeking to strike the applicant's reference because it was instituted in the wrong names. That application was argued and the ruling was to be delivered on 21<sup>st</sup> January 2009. However the chairperson was not sitting on that day. It is alleged that the ruling was delivered on 27<sup>th</sup> January 2009, in the absence of counsel for the plaintiff. In the ruling the plaintiff and other tenants were required to amend the reference by substituting the respondent within 14 days from the date of ruling, failure to which the application was granted which means the reference by the applicant was dismissed. The 1<sup>st</sup> respondent filed an appeal against that ruling in High Civil Appeal No. 53 of 2009 and served the Memorandum of Appeal on the plaintiffs' advocates on 17<sup>th</sup> February 2009.
6. Meanwhile, the plaintiff contends that on 29<sup>th</sup> May 2009 they were confronted by a large group of people from the 2<sup>nd</sup> respondent who claimed to be auctioneers authorized by an order obtained in CM Misc. Appl No.335 of 2009, raided their premises and levied distress. The plaintiff contends that the auctioneers attached a motor vehicle which is a tool of trade which the plaintiff uses for delivering supplies to customers. Further the value attached to the said motor vehicle is grossly undervalued at Ksh.200,000/- while the correct value is close to 500,000/-.
7. Counsel submitted that the distress levied was irregularly carried out, it is a nullity, moreover the properties claimed were not the properties seized and due to those irregularities there is jurisprudence from cases cited that the applicant can be granted the orders sought.
8. This application was opposed by the respondent; Counsel submitted that the plaintiff has not established a prima facie case with a probability of success to warrant the granting of the orders of injunction. Counsel particularly referred to paragraph 12 of the plaint in which the plaintiff admits being arrears which they contend they were preparing to pay. The plaintiff did not attach receipts to prove to this court that they have been paying rent except for a single receipt in respect for the month of July. The 1<sup>st</sup> defendant contends that the relationship between it and the plaintiff is one of a licensee. A license is a contract and distress for rent can be levied as provided for under the [\*distress for rent act\*](#).
9. The plaintiff and other tenants were granted new terms of contract but failed to comply and filed a matter in the business premises rent tribunal. The 1<sup>st</sup> respondent raised a preliminary objection but the chairperson of the tribunal held that the applicant was a protected tenant. The 1<sup>st</sup> respondent filed a further application seeking to strike the reference and by the ruling of 27<sup>th</sup> January 2009, the name of the landlord was expunged from the application. Although they were given leave to substitute the name of the 1<sup>st</sup> defendant, they did not do so and the reference stood dismissed.



10. Counsel for the respondents submitted that he was not under any obligation to inform the plaintiff's counsel of the ruling. Counsel for the plaintiff was faulted for not exercising due diligence to find out from the tribunal when the ruling was delivered. The 1<sup>st</sup> defendant was not satisfied with one limb of the order, and for that reason filed an appeal which they duly served upon the plaintiff's advocate on 17<sup>th</sup> February 2009. Upon being served with Memorandum of Appeal the plaintiffs' advocate became aware of the ruling but they did not amend the reference therefore when the distress for rent was levied there was no reference pending, the distress for rent was levied because there were outstanding rent.
11. The plaintiff cannot be granted mandatory order of injunction because there are no special circumstances. The plaintiff's remedy lies in damages, granting the orders sought would dispose of the entire matter. Further, the jurisdiction of this court is not properly invoked when asked to issue an order of stay and to set aside the order in CM MISC.APPL.335 OF 2009; the plaintiff should have filed an appeal. As regards the value of the motor vehicle, goods restrained are sold by way of public auction, thus the sale value is determined by the bids at the auction.
12. The 2<sup>nd</sup> defendant also filed a replying affidavit and gives details of how they were given instructions to levy distress for the outstanding rent, they issued a proclamation notice. Some of the licensees paid the license fees, but the plaintiff refused to pay and the auctioneer levied distress pursuant to the [Distress for Rent Act](#) which provides for a breaking in, nothing stops them from seeking police protection if they anticipate a likelihood of breach of peace. Counsel for the respondent urged the court to dismiss the application for lacking merit.
13. The above is the summary of the salient issues raised in the rival submissions, and the pleadings. The principle issue for determination in this matter is whether the applicant has established a prima facie case with a probability of success. The Court of Appeal has explained what constitutes a prima facie case in the case of *Mrao Ltd v First American Bank of Kenya Ltd & 2 others* [2003] KLR 125. Their Lordships held;

“A prima facie case in a civil application includes but is not confined to a “genuine and arguable case”. It is a case which, on the material presented to the court, a tribunal properly directing itself will conclude that there exists a right which has apparently been infringed by the opposite party as to call for an explanation or rebuttal from the latter.”
14. It is not in dispute that the plaintiff and the 1<sup>st</sup> defendant are in a relationship, call it a license, or a landlord tenant relationship, or protected tenant. A dispute arose and the plaintiff together with other tenants filed a reference before the Business Premises Rent Tribunal. The outcome of that reference is not clear, what I can discern from the documents attached herein, is that as at the time the 1<sup>st</sup> defendant levied distress for rent the reference had been withdrawn or dismissed due to lapse of time.
15. The plaintiff is challenging the distress for rent levied on its premises. Under the provisions Cap.293 the [Distress for Rent Act](#), it is provided under section 3(1) and 2 as follows:
  - “ 1. Subject to the provisions of this Act any other written law having any rent or rent service in arrear and due upon a grant, lease, demise or contract shall have the same remedy by distress for the recovery of that rent or rent service as is given by the common law of England in a similar case.
  2. No distress shall be levied between sunset and sunrise or on any Sunday.”



16. The issue that follows is whether the 1<sup>st</sup> defendant was entitled to levy distress. The plaintiff admits that they owed some arrears of rent, under paragraph 12 of the Plaintiff is stated as follows;

...The Plaintiff, who pays its rent quarterly in arrears, is always reasonably up to date on its remittances and is at the moment preparing to pay for the quarter which has just passed. The relationship between the Plaintiff and the 1<sup>st</sup> defendant being a controlled tenancy, the 1<sup>st</sup> defendant”.

17. By the plaintiff's own admission, it owed some arrears of rent, thus the 1<sup>st</sup> defendant was entitled to levy distress. The plaintiff had challenged the mode of levying distress where the 2<sup>nd</sup> respondent used an order irregularly obtained in CM MIS. APPL.335 OF 2009 to use the police during the raid in their premises. It is for that reason the plaintiff applied to stay and set aside the order issued by the Learned Magistrate. That might very well be so, however, what prejudice did the presence of the police cause the plaintiff who had not paid rent? Further I am vividly aware that I am not sitting on an appeal against the order issued in CM MIS. APPL NO.335 OF 2009. This matter has been introduced in an application for injunction the appropriate procedure should have been an appeal then an application within the appeal.

18. For the foregoing reasons I find the plaintiff has not established a prima facie case with a probability of success since they were in arrears of rent when the distress was levied. There was also no order restraining the defendants as at the time the distress was levied.

19. Accordingly, I need not discuss the other conditions for granting an injunction since the principles are applied in sequential so that the second condition can only be addressed if the first one is satisfied and when the court is in doubt then the third one is addressed. In the circumstances this application is dismissed with costs to the respondents.

**RULING READ AND SIGNED ON 6<sup>TH</sup> NOVEMBER 2009 AT NAIROBI.**

**M.K. KOOME**

**JUDGE**

