



**REPUBLIC OF KENYA**  
**IN THE HIGH COURT OF KENYA**  
**AT MOMBASA**  
**Civil Case 252 of 2005**

**KASSIM MANJI & SONS LTD .....PLAINTIFF/APPELLANT**

**-VERSUS-**

**1. FARID AL-MAARY**

**2. MWARA INVESTMENTS LTD. ....DEFENDANTS/RESPONDENTS**

**RULING**

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The plaintiff came before the Court by Chamber Summons application dated 28<sup>th</sup> November, 2005 and brought under Order XXXIX, rules 1, 2, 3 and 9 of the Civil Procedure rules. The main prayer was thus set out:

***“THAT the defendants by themselves, their agents and/or employees be restrained from removing and/or selling the plaintiff’s goods proclaimed on 24<sup>th</sup> November, 2005 and/or proceeding with further acts of distress against the plaintiff until [the] hearing and determination of the suit herein”.***

The general grounds founding the application were stated as follows: 1<sup>st</sup> defendant instructed 2<sup>nd</sup> defendant to levy distress for rent against the plaintiff for no-existent rent arrears; the plaintiff has paid rent in respect of the suit premises for the period up to and including 31<sup>st</sup> December, 2005; 1<sup>st</sup> defendant relied on a defective notice to effect increment of rent against the plaintiff; the notice to alter the terms of tenancy against the plaintiff was premature, and void; the plaintiff has established a *prima facie* case, with high chances of success; damages would not be sufficient to compensate the plaintiff if the distress for rent is allowed to proceed – as the plaintiff would lose its goodwill established over a long duration; allowing 2<sup>nd</sup> defendant to proceed with the distress would amount to aiding an illegality.

The evidence is set out in the supporting affidavit sworn by **Ajitsinh Dayal** on 28<sup>th</sup> November, 2005. The deponent, one of the directors of the plaintiff company, depones that the plaintiff is a statutory tenant on Plot No. Mombasa/Block XX/83 & 84 belonging to 1<sup>st</sup> defendant, paying a monthly rent of Kshs.6,374/= for one shop and store (the suit premises). The plaintiff had received a notice from former landlords, dated 18<sup>th</sup> August, 1999 to terminate and/or alter the terms of tenancy to increase monthly rent to Kshs.111,922/=. This notice occasioned a reference of the matter by the plaintiff to the Business Premises Rent Tribunal (Tribunal Case No. 157 of 1999), and the Tribunal dismissed the notice with costs on **26<sup>th</sup> March, 2003**. The deponent believes his counsel’s advice, that following the dismissal of the notice, no further notice was capable of being given in respect of the suit property until after the expiry of a period of two years, as from the date of dismissal of the notice. The 1<sup>st</sup> defendant issued another notice on **29<sup>th</sup> May, 2003**; but the plaintiff through advocates asked for a withdrawal of this notice because it was defective – failing which a

reference to the Tribunal would have to be made. Indeed, 1<sup>st</sup> defendant's advocates formally withdraw the notice. But on **29<sup>th</sup> January, 2004** 1<sup>st</sup> defendant issued yet another notice, and the deponent's advocates advised him that this was another defective notice – for a period of two years had not yet elapsed since the previous tribunal determination. The plaintiff's advocates sent letters to 1<sup>st</sup> defendant on 20<sup>th</sup> September and 8<sup>th</sup> November, 2005 informing 1<sup>st</sup> defendant of the irregularity of the rent-increase notices which 1<sup>st</sup> defendant had been sending out. But 1<sup>st</sup> defendant continued to demand increased rent, and treated rent-monies paid by the plaintiff as being in payment towards a clearing of arrears. The deponent deponed that the plaintiff had duly paid rent for the suit property for the period up to and including **31<sup>st</sup> December, 2005** – and he annexed to his affidavit the relevant payment receipts.

The deponent deponed that the 1<sup>st</sup> defendant still proceeded to instruct 2<sup>nd</sup> defendant to levy distress against the plaintiff, for arrears of rent purportedly owing, in the sum of **Kshs.1,821,574/=**; and 2<sup>nd</sup> defendant (auctioneers), in pursuance of the said instructions, issued a proclamation of attachment.

The deponent believes that unless this Court issues a restraining order against the defendants, the plaintiff's goods are threatened with illegal removal and sale.

The deponent swore a supplementary affidavit on 21<sup>st</sup> March, 2006, in which he stated that the plaintiff had been dissatisfied by a ruling of the Business Premises Rent Tribunal made on 16<sup>th</sup> February, 2006, and as a result the plaintiff had filed an application for **judicial review**, in High Court Application No. 277 of 2006 – and the High Court on 17<sup>th</sup> March, 2006 granted stay of the said Tribunal order.

The 1<sup>st</sup> defendant, on 1<sup>st</sup> December, 2005 swore a replying affidavit in which he avers as follows. The rent-increase notice of **28<sup>th</sup> January, 2004** was duly served upon the plaintiff on **29<sup>th</sup> January, 2004**, but the plaintiff neither replied, **nor did they file a reference on the matter: and hence that notice has become effective**. The deponent denies having been party to BPRT No. 157 of 1999. The deponent annexes to his affidavit (Exh. FAM2) a copy of an order made by the Tribunal in BPRT No. 77 of 2002 between himself and the plaintiffs: as a consequence, the earlier notice dated 28<sup>th</sup> August, 2002 was withdrawn, and costs of Kshs.86,491/40 were awarded to the plaintiff.

The 1<sup>st</sup> defendant depones that the suit premises is **“in[an] up-market commercial area opposite Castle Hotel and the rent of Shs.6,375/= is unrealistic”**. The deponent attaches a valuer's report recommending a rent level of **Kshs.135,000/=** (Exh. FAM3). He further states that if the tenant (plaintiff) cannot afford to pay the market rent, then he is at liberty to vacate the premises **“since there is no lease and his is a monthly tenancy”**.

The 1<sup>st</sup> defendant depones that since the plaintiff is a limited liability company, if it should be wound up, then this would cause substantial loss to 1<sup>st</sup> defendant.

On 15<sup>th</sup> March, 2006 the deponent swore a supplementary affidavit. The deponent depones that he believes the Business Premises Rent Tribunal's order of 26<sup>th</sup> March, 2005 **did not dismiss the landlord's rent-increase notice**. He depones that he had made a successful application to that Tribunal, **“to revoke and/or correct the order issued on 17<sup>th</sup> April, 2003”** – the revocation being done in the Tribunal ruling of **22<sup>nd</sup> February, 2006**.

Learned counsel **Mr. Hamza**, for the plaintiff, submitted that whereas the plaintiff was not disputing the fact that it was served with a rent-increase notice on 29<sup>th</sup> January, 2004, he was disputing the **validity** of the notice. The validity question, it was urged, arose from the terms of the Landlord and Tenant (Hotels, shops and Catering Establishments) Act (Cap. 301, Laws of Kenya, s. 9 (3), (c) and (b), which provide:

**“(3)where a Tribunal has made a determination upon a reference, no further tenancy notice shall be given in respect of the premises concerned, which is based on any of the matters affected by the**

*determination –*

*(a) in the case of an assessment of rent, until after the expiration of two years; or*

*(b) in any other case, until after the expiration of twelve months”.*

It was urged that in the instant case, the plaintiff was served with a notice to increase rent which was dismissed by the Court in its order of 17<sup>th</sup> April, 2003.

Counsel considered the 1<sup>st</sup> defendant's reply that he was not a party to the proceedings in BPRT No. 157 of 1999 and so the order does not affect him. Counsel urged that the said order will affect 1<sup>st</sup> defendant, because s. 9 (3) of the governing Act provides: “Where a Tribunal has made a determination upon a reference no further tenancy notice shall be given in respect of the premises concerned .....” So, it was urged, s. 9 (3) of the Act is concerned with **the premises**, but not the **party**. There is an order in existence dismissing the notice dated 18<sup>th</sup> August, 1999 in respect of Plot No. Mombasa/block XX/83 and 84 (dated 26<sup>th</sup> March, 2003); and before the expiry of the statutory period of two years, another notice was issued in respect of the same premises.

Counsel submitted that the rent-increase notice dated **28<sup>th</sup> January, 2004** was irregularly given, and was **a nullity**. Hence there was no requirement that a reference be filed against this notice of 28<sup>th</sup> January, 2004.

Counsel urged that, as at **28<sup>th</sup> January, 2005** old rent was not disputed; and since the notice of **29<sup>th</sup> January, 2004** that sought to increase rent was a nullity, the distress for rent based on the increased rent is “irregular and/or unlawful”.

Counsel called in aid the authority of **Munaver N. Alibhai T/A Diani Boutique v. south Coast Fitness & Sports Centre Limited**, Civil Appeal No. 203 of 1994. The following passage in that judgment is relevant:

*“The [trial] Judge ... was of the view that the notice, strictly construed, did not comply with the requirements of the Act, but having so found, he went on to uphold the magistrate on the ground that the appellant had not reacted to the invalid notices sent to him. The Judge thought the appellant was bound to react to the invalid notices by, for example, making a reference to the Tribunal, so as to be able to claim the protection afforded to it by the Act. There can be no doubt that both the Judge and the Magistrate were clearly wrong ....*

*“The Act lays down clearly and in detail, the procedures for the termination of a controlled tenancy ....*

*“... The notice of termination given by the respondent was clearly void and had no effect in law on the appellant's tenancy and the appellant was under no duty, legal or otherwise to react to it”.*

Counsel contested the 1<sup>st</sup> defendant's claim that the Tribunal decision of 26<sup>th</sup> March, 2003 had not been against 1<sup>st</sup> defendant, and that it had merely been held that the Tribunal reference was overtaken by events: By s. 9 of the Landlord and Tenant (Shops, Hotels and Catering Establishments) Act, the courses of action open to the Tribunal are specified:

*“(1) Upon a reference a Tribunal may, after such inquiry as may be required by or under the Act, or as it deems necessary -*

*(a) approve the terms of the tenancy notice concerned, either in its entirety or subject to such amendment or alteration as the Tribunal thinks just having regard to all the circumstances of the case; or*

*(b) order that the tenancy notice shall be of no effect; and in either case*

*(c) make such further or other orders as it thinks appropriate”.*

Counsel urged that the Tribunal had **dismissed** the rent-increase notice.

Learned counsel submitted that the distress for rent levied against the plaintiff by 2<sup>nd</sup> defendant on 24<sup>th</sup> November,

2005 was illegal – because it was based on an unlawful rent-claim.

Counsel urged that as the premises in question is for business, “the levying of the illegal distress will clearly expose the plaintiff to irreparable loss ....”

**Mr. Kasmani** for the 1<sup>st</sup> defendant submitted that an order made by the Tribunal would not be binding on a party not appearing before it – and so the first refusal to approve rent-increase was not binding on 1<sup>st</sup> defendant. It was urged that the 2<sup>nd</sup> Tribunal Order too was not binding on 1<sup>st</sup> defendant – because it was **revoked** by a subsequent order of the Tribunal – and the said revocation of the Tribunal Order was not stayed by High Court Orders on the plaintiff’s judicial review application; because the stay order obtained by the plaintiff who was the applicant, “was obtained on an **ex parte** application and the Court has not heard both sides”. Counsel urged that the fate of the judicial review matter remained uncertain, and the Tribunal’s revoking order could remain in place – in which case the plaintiff “has no case at all”. Counsel urged: “the applicant is relying on [the] first order to say [the rent-increase] notice was dismissed, which order is now revoked”.

**Mr. Kasmani** submitted that it was not the law that “the new landlord cannot serve another notice for increase or for ... any variation for two ... years”.

Counsel urged that the plaintiff had failed to show any irreparable damage that they would suffer if the orders sought are not granted.

Counsel relied on a Court of Appeal authority, **Jitendra Mathurdas Kanabar & 2 Others v. Fish and Meat Limited**, Civil Appeal No. 267 of 1996 which appears not to be on all fours with the earlier decision of the same Court, **Munaker N. Alibhai T/A Diani Boutique v. South Coast Fitness & Sports Centre Ltd.**, Civil Appeal No. 203 of 1994. A reading of the two cases shows the earlier one to be the more detailed, on the relevant point here. The relevant passage in the later decision thus reads:

**“...once a reference in accordance with section 6 (1) of the Act has not been made to the Tribunal and a tenancy notice to terminate the tenancy has taken effect from the date specified therein in terms of section 10 of the Act, the landlord/tenant relationship comes to an end. Thereafter, one can no longer talk of the existence of a controlled tenancy in terms of section 2 of the Act without which the Tribunal under the Act has no jurisdiction. In the instant appeal, the respondent’s failure to refer the appellant’s tenancy notice to the Tribunal in accordance with section 6 (1) of the Act resulted in the cessation of its tenancy of the appellants’ godown/warehouse with effect from 1<sup>st</sup> June, 1995 in terms of section 10 of the Act.”**

On the basis of the **Jitendra Mathurdas** case, counsel urged that the rent-increase notice issued by 1<sup>st</sup> defendant was “now effective”.

Counsel doubted that the balance of convenience was in favour of the plaintiff, but urged that if the Court were to find in favour of the application, then the plaintiff should give security for orders granted; and counsel here relied on the Court of Appeal decision in **E.A. Building Society Limited v. A.C.A.d’ Souza & Another**, Civil Appeal No. 124 of 1997. It was held in that case, which was of the same **genre** as the instant one, that –

**“... the interests of justice would be met by ordering the tenants to deposit into a joint account in the names of the advocates of the parties, the difference between the original and the assessed rent. Such deposit plus future extra rent must be made within the next sixty days ....”**

The issues for determination in this matter have emerged clearly enough. As between the plaintiff and its previous landlord, the landlord had, on **18<sup>th</sup> August, 1999** issued a notice to terminate protected tenancy status by raising the level of rent from Kshs.6,374/= per month to Kshs.111,922/= per month. The plaintiff objected, by filing a reference before

the Business Premises Rent Tribunal; and the outcome was that on **17<sup>th</sup> April, 2003**, the Tribunal allowed the reference, and dismissed the landlord's notice.

In the meantime, ownership of the suit premises passed on to the 1<sup>st</sup> defendant herein; and 1<sup>st</sup> defendant, on **29<sup>th</sup> January, 2004** (just under a year since the earlier order of the tribunal) issued yet another notice, seeking to raise rent and to put the plaintiff outside the category of protected tenant.

The issue arising out of the foregoing facts is: was the new landlord (1<sup>st</sup> defendant) bound by the Tribunal's order of 17<sup>th</sup> April, 2003? By s. 9 (3) (a) of the Landlord and Tenant (Shops, Hotels and Catering Establishments) Act, if the 1<sup>st</sup> defendant was subject to the said Tribunal Ruling, then he could not give another rent-raise notice until a period of two years had elapsed.

The 1<sup>st</sup> defendant contended that he was not bound by the Tribunal's order of 17<sup>th</sup> April, 2003 because he was not a party to the proceedings; but the plaintiff raised the riposte that the Tribunal's orders attach not to parties alone but also to **suit premises**; and therefore, the 1<sup>st</sup> defendant was bound, and could not have served upon the plaintiff the notice of 29<sup>th</sup> January, 2004. The relevant provision of the law is s. 9 (3) of the Landlord and Tenant (Shops, Hotels and Catering Establishments) Act, which specifies that: "**where a Tribunal has made a termination upon a reference no further tenancy notice shall be given in respect of the premises concerned ....**".

Such a state of the law and the pertinent state of fact, in my understanding, would be material details such as ought to feature in negotiations and sale, of the kind that applied in the case of the suit property herein. On that principle, I would consider a Tribunal decision such as that of **17<sup>th</sup> April, 2003** to be in the first place attached **to the property itself** (a decision **in rem**), and therefore binding on whosoever comes to hold the title to the suit property.

By a letter dated 7<sup>th</sup> November, 2005 the landlord (1<sup>st</sup> defendant) was demanding in arrears a revised rent of Kshs.96,800/= per month, which was said to have taken effect from **April, 2004**, and the alleged arrears of rent now stood at Kshs.1,821,574/=. It is on that basis that 2<sup>nd</sup> defendant, under instructions from 1<sup>st</sup> defendant, issued a proclamation of attachment of the plaintiff's goods.

M/s. **Yasmin Abdulkarim Ali** Advocates wrote to 1<sup>st</sup> defendant's advocates, **K.A. Kasmani & Co. Advocates** on 20<sup>th</sup> September, 2005 stating that the landlord could not increase rent, because two years had not elapsed since the rent Tribunal's order of **26<sup>th</sup> March, 2003** which was issued on **17<sup>th</sup> April, 2003**.

The 1<sup>st</sup> defendant believed the tribunal's order issued on 17<sup>th</sup> April, 2003 to be incorrect; so he applied to the Business Premises Rent tribunal which on **22<sup>nd</sup> February, 2006** made an order **revoking** the said order.

However, the plaintiff then moved the High Court, seeking leave (operating as stay) to apply for the judicial review order of certiorari to remove the proceedings and order of the Business Premises Rent Tribunal into the Court for the purpose of being quashed. The application was granted; but up to now the substantive motion has not yet been heard and disposed of.

Counsel for the 1<sup>st</sup> defendant submitted that since the judicial review matter has yet to be disposed of, the plaintiff is not in a position to say whether or not he will be required to pay the arrears of rent being demanded, and therefore, there is no basis for allowing the instant application.

The judicial review application which has not yet been disposed of, is the basis of **valid orders of the High Court made on an interim basis**, and these orders **include an order of stay**, in relation to the orders of the Business Premises Rent Tribunal which revoked earlier orders of 26<sup>th</sup> March, 2003.

In law, therefore, 1<sup>st</sup> defendant's rent-increase notice could not take effect, and so, cannot be used as a basis for the computation of rents payable by the plaintiff. Such calculations of increased rent as 1<sup>st</sup> defendant has done, thus, become

just an expression of *intent for the future*.

Has the plaintiff made a *prima facie* case, with a probability of success, justifying the grant of an injunctive order? I believe so. For, not only did 1<sup>st</sup> defendant not comply with the statutory requirements of rent-increase notice, but the respondent went further and secured a proclamation by an auctioneer, on the applicant's named effects. It falls within the balance of convenience that such effects be not disposed of in the manner intended by 1<sup>st</sup> defendant, until the rights of the parties have been fully determined.

Consequently I now make orders as follows:

- (a) ***The plaintiff/applicant's prayers set out in the Chamber Summons application of 28<sup>th</sup> November, 2005 are allowed.***
- (b) ***The defendants/respondents shall bear the costs of this application.***

**DATED** and **DELIVERED** at **MOMBASA** this 14<sup>th</sup> day of December, 2009

**J.B. OJWANG**

**JUDGE**

Coram: Ojwang, J.

Court clerk: Ibrahim

For Plaintiff/Applicant: Mr. Hamza

For Defendants/Respondents: Mr. Kasmani