



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

Civil Case 616 of 2009

DR. B.B. MAINA MWEA T/A

SPAX PUB & RESTAURANTPLAINTIFF

VERSUS

GEORGE KIMANI NJUKI1ST DEFENDANT

GEPRGE WAINAINA REBO.....2ND DEFENDANT

RULING

1. By a Chamber Summons dated 20th August 2009, the Plaintiff seeks for a restraining order against the Defendants from levying distress for rent on the premises occupied by the plaintiff known as Spax Pub and Restaurant situated on LR 209/3808 South B Shopping Centre Nairobi or in any interfering with the plaintiff's peaceful occupation. This application is supported by the grounds stated on the body thereto and the matters disposed to in the Supporting Affidavit sworn by the applicant.

2. Briefly stated, the applicant claims that the defendants are the joint registered owners of the suit premises. The plaintiff is a tenant of a portion for which he pays rent to the 2nd defendant. The plaintiff has fully paid the rent to the 2nd defendant up to the month of August 2009, but the 1st defendant has illegally instructed Planmore Enterprises to levy distress on the plaintiff's goods to recover rent which is non existence.

3. The plaintiff contends that he pays a monthly rent Kshs.45, 000/= as per the lease agreement entered into with the 2nd defendant after the original lease he had entered into with both defendants in the year 2003, had expired. The Defendants as joint proprietors disagreed on the sharing of the rent and the plaintiff has been paying rent to the 2nd defendant who is the owner of the portion of the premises he occupies. The plaintiff denies that there are any arrears of rent owing he annexed receipts for the rents that he had paid to the 2nd defendant.

4. This application was opposed by the Respondent, Counsel for the 1st defendant relied his client's replying affidavit sworn on 1/9/2009. It is admitted that the suit premises is registered in the names of the 1st and 2nd defendant as tenants in common and the plaintiff is a tenant by virtue of a lease agreement dated 12/12/2003. The plaintiff leased part of the premises for a period of 5 years and 3 months but the lease expired on 31/3/2009. Rent was to be paid in the joint account held between the defendants in account No.13661 at East African Building Society. This is because the defendants had recorded consent in November 1994 in **HCCC 1598/94** in which they agreed rent be deposited in their joint account and that order is still valid and has not been set aside.

5. The plaintiff complied with that requirement up to August 2005, but fell in arrears for which the 1st defendant was trying to recover through distress warrants. The 1st defendant denied that there was any agreement reached between the parties varying the terms of the rent. The 1st defendant also denied that there was any rent paid because all rent had to be paid in their joint account. The 1st defendant contended that the payment receipts exhibited in the application must have been for other payments not rent as the plaintiff is truly indebted to the tune of 1,607,301.64.

6. Counsel for the 1st defendant submitted that under Section 5 of the Distress for Rent Act, the landlord is entitled to levy distress within six (6) months after the expiry of the lease. The lease expired on 31/3/2009 thus the 1st Defendant was entitled to levy distress. Thus the proclamation was done within 6 months; counsel urged the court to dismiss the present application because the plaintiff has not established a prima facie case with a probability of success. The plaintiff had specific contract under the lease agreement to pay the rent in the joint account.

7. The above is the summary of the salient issue raised in rival submission and pleadings in this matter. The primary issue for determination is whether the plaintiff has established a prima facie case with a probability of success. The Court of Appeal as explained what constitutes a prima facie case in the case of **Mrao Ltd v First American Bank of Kenya Ltd & 2 others [2003] KLR 135**. 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 with 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.”

8. The lease that was entered into between the plaintiff and defendants expired on 31/3/2009. The plaintiff contends that he has been paying rent to the 2nd defendant who is co-owner of the suit premises. The 2nd defendant was duly served with this application; he even attended court at the hearing of this application but did not say anything. There is a letter annexed to the plaintiff's application written by the 2nd defendant and addressed to the 1st defendant's advocates in which he is clarifying that the plaintiff has paid all the rent to him because they shared the property equally.

9. The issue for determination is whether the plaintiff has paid rent to one of the co-owner of the suit premises, can the other partner pursue for the same rent which has been paid and levy distress. In my opinion, the dispute over the rent and the ownership of the property should be sorted out between the defendants. One of the landlords cannot purport to levy distress behind the back of the other. The other co-owner cannot also purport to lease the premises without the other.

10. Whatever the cost the two defendants must sort out their ownership wrangles, either formally demarcates the property, but they should desist from dealing with tenants individually. The plaintiff has been able to establish on the face of the matter that there are triable issues. He claims to have paid rent to one of the co-owners who are claiming to be the legitimate allottee of the portion occupied by the plaintiff.

11. However since there is a dispute over whether the premises are partitioned, what is evident is that the property is held by both defendants in common, it is in the interest of justice that all the future rent is paid in a neutral account. Accordingly I grant prayer No. 1 of the chamber summons on condition that future rent by the plaintiff be paid in joint account held by the two defendants until the determination of this suit.

12. Costs of this application will be in the cause.

RULING READ AND SIGNED ON **4th December 2009** AT NAIROBI.

M. K. KOOME

JUDGE