

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

Civil Suit 203 of 2008

PRAKRUTI INVESTMENTS LIMITED PLAINTIFF/APPLICANT

Versus

PBM NOMINEES LIMITED DEFENDANT/RESPONDENT

RULING

The Notice of Motion dated 21st May, 2008 is brought by the Plaintiff under order XXXIX Rule 2 and Order L Rule 1 of the Civil Procedure Rules and Section 3A of the Civil Procedure Act seeking in prayer number 3 a temporary restraining order against the Defendant and in prayer number 4 a mandating order against the Defendant.

During the exparte appearance before the Duty Judge, the Applicant's Counsel Mr. Mutuli obtained an order in terms of prayer number 1 certifying the application urgent, and also obtained a conditional temporary injunction pursuant to prayer number 2 but failed subsequently to comply with the said condition requiring him to file in court a bank guarantee within 10 days and therefore the said temporary injunction automatically lapsed on 2nd June, 2008 before this Notice of Motion was heard inter parties on 18th June, 2008.

During the interpartes hearing, it emerged that while the Applicant was a tenant of the Respondent at the suit premises Land Reference Number 1870/IX/159 Sarit Centre, Westlands, Nairobi, the said Applicant had fallen into arrears of rent as a result of which the Respondent was claiming the said arrears to the tune of **Kshs.3,207,073.30/=** or thereabouts including interest. Out of that sum, the Applicant acknowledges the rent arrears of **Kshs.2,832,361.30/=** but by a letter dated 5th February, 2008, the Respondent says he terminated and forfeited the Applicant's lease for non-observance of terms thereof.

Subsequent to that termination notice, the Respondent proceeded to levy distress upon the Applicant's goods and another disputed issue has therefore arisen between the parties as to whether the levying of distress constituted a waiver of the termination notice thereby restoring the parties back to their landlord and tenancy relationship, the Respondent was claiming had been terminated. An important question therefore is whether the levying of distress by the Respondent was wrong as otherwise even the Applicant acknowledges that the letter dated 5th February, 2008 had terminated the lease.

That is the scenario as the parties also dispute whether interest on the rent arrears is payable and at what rate; whether the goods distressed are goods of trade and should not be under distress; why the arrears came to be there and whether the eviction that may result will be wrongful.

On the other hand there is no dispute that the rent arrears is high and from what has been brought before me, there is no evidence as to the efforts the Applicant is making to pay the arrears notwithstanding that he claims the Respondent is refusing to accept further rent he says is payable as a result of the restoration of tenancy relationship following the distress.

To my mind, this is a situation where rent arrears can only keep on rising with no clear evidence of reducing the arrears by payment from the Applicant and I find it unfair to subject the Respondent to the

conditions the Applicant wants the Respondent be subjected to in terms of prayer numbers 3, 4 and 5 in this Notice of Motion dated 21st May, 2008. I think the Applicant can be adequately compensated by an award of damages if the Applicant suffers loss. Otherwise I hold the opinion that the balance of convenience in this case tilts infavour of the Respondent.

From the foregoing the Notice of Motion dated 21st May, 2008 is hereby dismissed with costs to the Respondent.

Dated this 10th day of July, 2008.

J.M. KHAMONI

JUDGE