



**REPUBLIC OF KENYA**  
**IN THE HIGH COURT OF KENYA**  
**AT NAIROBI**

**CIVIL SUIT 736 OF 2007**

**TESCO CORPORATION LIMITED.....PLAINTIFF**

**VERSUS**

**KARIMA HOLDINGS LIMITED.....1<sup>ST</sup> DEFENDANT**

**JOSEPH D.K. KIMANI T/A PYRAMID AUCTIONEERS....2<sup>ND</sup> DEFENDANT**

**RULING**

By chamber summons dated 23.10.07 stated to be brought under Order XXXIX rules 1, 2, 3 and 9 of the Civil Procedure Rules and section 3A of the Civil Procedure Act, Cap. 21, the plaintiff applied for the following orders:-

1. That service of the application be dispensed with in the first instance.
2. That this honourable court be pleased to issue order of mandatory injunction compelling the defendants, their servants and agents to return forthwith to the plaintiff and restore to the plaintiff all the goods and chattels which the defendants had distrained in respect of rent arrears.
3. That pending hearing and determination of the application *inter- partes*, or until further orders of the court this honourable court be pleased to issue an order of temporary injunction restraining the defendants either by themselves, their agents, principals or servants from selling, disposing of, offering for sale by public auction or private treaty or alienating in any manner whatsoever the plaintiff's attached movables or in any way interfering with the plaintiff's possession of the demised property and from alienating and demising/leasing the premises known as L.R. No. 209/1086/2 situated on Taveta Road to a third party.
4. That pending the hearing and determination of this suit or until reference of the dispute to the Business Premises Rent Tribunal or until further orders of the court, this honourable court be pleased to issue an order of temporary injunction restraining the defendants either by themselves, their agents or servants from selling, disposing of, offering for sale by public auction or private treaty or alienating in any manner whatsoever the plaintiff's attached movables or in any way interfering with the plaintiff's possession of the demised premises and from alienating and demising/leasing the premises known as L.R. No.209/1086/2 situated on Taveta Road to a third party.
5. That the honourable court be pleased to give such further and other orders and directions as it may deem fit and just to grant.

**6. That costs of the application be provided for.**

**The grounds upon which the application is based are that:-**

- a) At all material times the plaintiff is a protected tenant at the 1<sup>st</sup> defendant's premises known as L.R.No.209/1086/2 situated on Taveta Road.**
- b) The plaintiff's tenancy is a controlled tenancy.**
- c) On 'the 19<sup>th</sup> day of October' (19.10.07) the defendants jointly and severally wrongly broke and entered the suit premises and seized and took possession of the plaintiff's diverse office equipments, goods and chattels and wrongfully removed the same, depriving the plaintiff of the same.**
- d) The defendants purported to commit the acts complained of above under the colour of a distress for rent arrears of Kshs.1.5 million, consequently the rent claimed was not agreed.**
- e) The plaintiff avers that the aforesaid purported distress for rent is illegal, unmaintainable, null and void since the defendants jointly and severally are in breach of their statutory duty.**
- f) The purported proclamation and attachment of the plaintiff's goods and chattels is illegal for want of compliance with the mandatory provisions of the law.**
- g) Unless otherwise restrained by this honourable court, the defendants shall alienate the plaintiff's attached goods and otherwise interfere with the plaintiff's quiet possession of the suit property, consequently the plaintiff shall suffer irreparable loss which cannot be compensated in damages.**
- h) The balance of convenience is in favour of granting the plaintiff the injunction sought.**

**The application is supported by the affidavit of Mukhtar Ahmed, director of the plaintiff company sworn on 23.10.07.**

**At the hearing of the application on 20.05.08, the plaintiff/applicant was represented by learned counsel, Miss M.K. Migiro while the defendants/respondents were represented by learned counsel, Miss C.B. Masaka.**

**The essence of the plaintiff's/application's case is that the plaintiff company was a tenant of the 1<sup>st</sup> defendant at all material times under a controlled tenancy within the meaning of section 2 (1) of the Landlord and Tenant (Shops, Hotels and Catering Establishments) Act, Cap.301 in that there was no written lease of the suit premises between the plaintiff and 1<sup>st</sup> defendant. The distress complained of was on 19.10.07 through breaking and entering the premises to levy the impugned distress. While the 1<sup>st</sup> defendant as landlord was entitled to obtain, under section 12 (1) (h) of Cap.301, permission to levy distress for rent, the 1<sup>st</sup> defendant did not obtain such permission before distraining for rent.. The plaintiff/applicant tendered a cheque for Kshs.1.5 million in respect of rent but the 1<sup>st</sup> defendant refused to accept it and levied distress for rent instead.**

**Plaintiff's/applicant's counsel cited paragraph 368 of Halsbury's Laws of England, 4<sup>th</sup> Edition, Volume 13 to make the point that the distress was illegal, *inter alia*, because according to the plaintiff it was made in an unlawful manner by breaking open an outer door and by distraining things privileged from distress. Plaintiff's/applicant's counsel also cited section 16 (1) of the Distress for Rent Act, Cap.293 to make the point that the distress for rent was illegal because it was levied on the plaintiff's tools of trade exempt from distress. Plaintiff's/applicant's counsel also complained that no proclamation notice was given by the 1<sup>st</sup> defendant under section 4 (1) of Cap.293. Likewise plaintiff's/applicant's counsel described the distress for rent as illegal on the basis that under section 18 (1) of Cap. 293 only a person authorized to act as a bailiff by a**

certificate in writing to that effect can lawfully levy distress and that the 2<sup>nd</sup> defendant who is an auctioneer is not authorized to act as a bailiff.

Plaintiff's/applicant's counsel cited paragraph 372 of Halisbury's Laws of England (*supra*) to make the point that the distress is excessive and wrongful by virtue thereof. Plaintiff's/applicant's counsel referred to paragraph 373 of Halisbury's Laws of England (*supra*) on replevin (a process to obtain a redelivery to the owner of chattels which have been wrongfully distrained or taken from him, upon his finding sufficient security for the rent and costs of action and undertaking that he will pursue an action against the distrainor to determine the right to distrain) to make the point that the plaintiff/applicant should have the goods in this case returned to the said plaintiff/applicant. It was the plaintiff's/applicant's counsel's contention that the defendants should not be permitted to benefit from the impugned distress for rent and that this court should order *status quo* prior to the distress for rent complained of as in the said counsel's view damages would be no adequate compensation to the plaintiff/applicant.

Plaintiff's/applicant's counsel submitted that illegal distress involves trespass to goods and that proof of actual loss is not necessary. For this proposition, she relied on the following passage from Interoven Stove Co. -vs- Hibbard (1936) 1 ALL ER 263 at page 270 cited with approval by Simpson, J at page 806 in Nthenge -vs- Wambua [1984] KLR 799, namely:

'And where there is trespass to goods, though no actual damage results, the law gives a right to recover damages not limited to actual damage sustained, but a right to recover substantial damages even though there is no proof of actual loss.'

Regarding the 1<sup>st</sup> defendant's letter of 21.05.07 to the plaintiff giving the plaintiff notice of termination of the plaintiff's/applicant's occupation as tenant in the suit premises, plaintiff's/applicant's counsel submitted that the tenancy, being a controlled tenancy, could only be terminated under section 4 (2) of Cap.301 by giving notice in the prescribed form. It was plaintiff's/applicant's counsel's contention that no prescribed form was used.

Plaintiff's/applicant's counsel pointed out that Mukhtar Ahmed, director of the plaintiff company had vide his supplementary affidavit sworn on 12.11.07 denied abandonment by the plaintiff/applicant of the suit premises.

With regard to paragraph 38 in the replying affidavit of James Mahianyu Gachie, director of the 1<sup>st</sup> defendant company sworn on 30.10.07 to the effect that the plaintiff/applicant is neither a tenant of the 1<sup>st</sup> defendant nor a tenant of the former owner of the suit premises, plaintiff's/applicant's counsel referred the court to paragraph 12 of Mukhtar Ahmed's supplementary affidavit sworn on 12.11.07 for an answer, i.e. that the plaintiff/applicant was in possession of the suit premises not only with the knowledge of the 1<sup>st</sup> defendant and also without objection from the 1<sup>st</sup> defendant but also that the 1<sup>st</sup> defendant accepted rent from the plaintiff/applicant. Counsel submitted that the 1<sup>st</sup> defendant/respondent is estopped from denying a landlord and tenant relationship between the plaintiff and 1<sup>st</sup> defendant.

As regards paragraph 3 of the replying affidavit of Joseph D.K. Kimani t/a Pyramid Auctioneers, 2<sup>nd</sup> defendant sworn on 30.10.07 stating that on 28.09.07 he visited the suit premises which he found unattended and fixed on its main door a 14-day proclamation notice for the plaintiff to respond and comply within the statutory period, plaintiff's/applicant's counsel submitted that the said paragraph 3 contained mere allegations. She pointed out that the alleged proclamation was not even annexed to the replying affidavit and contended that no proclamation notice was served on the plaintiff.

Counsel for the plaintiff urged that the plaintiff's chamber summons application dated 23.10.07 be allowed.

On the other hand, defendants'/respondent's counsel opposed the application. She relied on the replying affidavit of James Mahianyu Gachie, director of the 1<sup>st</sup> defendant company sworn on 30.10.07 and the replying affidavit of Joseph D.K. Kimani t/a Pyramid Auctioneers also sworn on 30.10.07. Like the plaintiff's/applicant's counsel, the defendants'/respondents' counsel also relied on various authorities.

Defendants'/respondents' counsel narrated the history of the suit as under. The suit premises came to the 1<sup>st</sup> defendant by way of sale in December, 2006. The plaintiff was a tenant of the previous owner. When the 1<sup>st</sup> defendant bought the suit property, the lease between the plaintiff and the previous owner had elapsed but the 1<sup>st</sup> defendant was willing to take in the plaintiff as its tenant and continue the existing tenancy. Defendants' counsel referred this court to a copy of the lease between the plaintiff and the previous owner annexed as exhibit 'JMG2' to James Mahianyu Gachie's replying affidavit sworn on 30.10.07. It was the 1<sup>st</sup> defendant's case that his offer to the plaintiff to take it on as a tenant elicited no formal response from the plaintiff despite reminders and that as at 30.03.07 the plaintiff had paid no rent to the 1<sup>st</sup> defendant and that on 21.05.07 the 1<sup>st</sup> defendant issued a written notice to terminate the plaintiff's occupation as a tenant in the suit premises. The same termination notice also demanded arrears of rent. Defendants' counsel submitted that it is not true as claimed by the plaintiff company that it enjoyed quiet possession of the suit property. Defendants' counsel also contended that the plaintiff is not legally a tenant of the 1<sup>st</sup> defendant as the plaintiff was in rent arrears. In the latter regard, defendants' counsel referred the court to Mukhtar Ahemd's affidavit sworn on 23.10.07 in support of the present application where at paragraph 7 Mukhtar Ahmed as a director of the plaintiff company admitted offering the 1<sup>st</sup> defendant a cheque for Kshs.1.5 million in respect of rent for September, October and November, 2007 in an attempt at amicable settlement. Defendants' counsel also drew attention to Mukhtar Ahemd's supplementary affidavit sworn on 12.11.07 where he admitted vide paragraph 4 that he delayed in paying rent for September, October and November, 2007. Defendants' counsel pointed out that the plaintiff did not attach to its present application any receipts for rents paid to the 1<sup>st</sup> defendant since the 1<sup>st</sup> defendant took possession of the suit premises, except for a Bankers' cheque dated 07.08.07 for Kshs.500,000/= being one month's rent. Paragraph 11 of the replying affidavit of James Mahianyu Gachie's replying affidavit sworn on 30.10.07 depones that although the plaintiff had forwarded that cheque purporting it to be for August, 2007, the 1<sup>st</sup> defendant accepted it to clear the plaintiff's rent arrears for July, 2007.

With regard to the plaintiff company's claim that it forwarded a cheque dated 19.10.07 for Kshs.1.5 million in respect of rent for September, October and November 2007, defendants' counsel said the 1<sup>st</sup> defendant denied receiving such cheque, pointing out that 19.10.07 when the cheque was purportedly issued is the date the distress for rent, which included breaking into the suit premises, complained of took place, leading to the suit herein. Defendants' counsel submitted that the plaintiff came to a court of equity with unclean hands as it did not disclose that it was in arrears of rent and that it had not regularized its position with the 1<sup>st</sup> defendant. Defendants' counsel said it was his clients' case that the plaintiff company had on its own abandoned the suit premises as deponed at paragraph 13 of James Mahianyu Gachie's aforesaid affidavit and that it is not true that the plaintiff was in possession of the premises doing business as usual when distress for rent was levied.

Defendants' counsel submitted that the prayers sought in the present application and those sought in the plaint are final and that if the court grants the application, it will have determined even the main suit. Counsel pointed out that the 2<sup>nd</sup> defendant admits carrying away the distrained goods; that the goods are in safe custody; and that the plaintiff is at liberty to get the goods on payment of rent arrears and auctioneers fees. Defendants' counsel submitted that there is no dispute that the plaintiff is not in the suit premises, that the present application is not for the plaintiff to be restored into the suit premises but to restrain the defendants from selling and disposing of the movables attached from the suit property and that the application is overtaken by events as the plaintiff is longer in the suit premises or carrying on business there. It is the defendants' counsel's contention

that whether the distress was legal or otherwise is an issue to be determined at the hearing of the main suit when oral evidence will be given and that any loss incurred can be compensated by way of damages.

Regarding the plaintiff company's claim to be a protected tenant, defendants' counsel noted that the plaintiff claims to be a protected tenant under Cap. 301 and that it also claims protection under Cap. 293. Defendants' counsel submitted that if the plaintiff company is a protected tenant, it could have lodged a complaint in the relevant tribunal. With regard to prayer 4 in the present application, defendants' counsel submitted that the court cannot issue an order in anticipation of a suit to be filed and that no complaint was filed in the Business Premises Rent Tribunal to form the basis of a temporary injunction. Defendants' counsel contended that if the plaintiff company was determined to be the 1<sup>st</sup> defendant's tenant, it could have been paying rent or depositing rent in court but that only Kshs.1.5 million was deposited in court in respect of rent arrears for September, October and November, 2007 and that no other deposits were made by the plaintiff thereafter. Defendants' counsel said the 1<sup>st</sup> defendant denies distraining the plaintiff's goods in order to put a view tenant into the suit premises and that James Mahianyu Gachie was being truthful, or transparent, in disclosing vide his replying affidavit sworn on 30.10.07 that there was a tenant willing to take the suit premises and pay requisite rent for the same.

Defendants' counsel cited Northern Ireland Commissioner of Valuation –vs- Fermanagh Protestant Board of Education & Another [1969] AII ER 352 to make the point made at letter I on page 365 of that case, namely, that:

'In the ordinary meaning of the word a person is in "occupation" of premises if he in fact uses them and is able to control the day-to-day use of them by other persons.'

Defendants' counsel also cited Giella –vs- Cassman Brown Co. Ltd. [1973] E.A. 358 and submitted that the plaintiff/applicant has not made out a case in terms of that authority for the grant of an injunction and urged this court to dismiss the plaintiff's application with costs.

In reply, plaintiff's/applicant's counsel pointed out with regard to the deposit of Kshs.1.5 million lodged in court that Visram, J directed the plaintiff to make the deposit within 10 days (the Judge's order was in fact that the deposit be made within 3 days of 23.10.07) and that there was no order for deposits subsequently.

As regards applicability of Cap. 293, plaintiff's/applicant's counsel submitted that Cap. 293 is applicable to the issue of distress for rent regardless of the issue of tenancy, whether controlled or otherwise.

With regard to prayer 4 hinting at a possible reference of the rent dispute to the Business Premises Rent Tribunal, plaintiff's/applicant's counsel submitted that the High Court has by virtue of section 60 of The Constitution of Kenya unlimited jurisdiction.

It was plaintiff's/applicant's counsel's contention that paragraph 21 of James Mahianyu Gachie's replying affidavit aforesaid is an admission that the distress for rent was to enable the 1<sup>st</sup> defendant to put a new tenant into the suit premises.

On the suggestion that the present application seeks final orders, plaintiff's/applicant's counsel pointed out that prayer 4 seeks a temporary injunction.

As regards the contention that the present application has been overtaken by events, plaintiff's/applicant's counsel submitted that it has not, because the application seeks orders restraining defendants from disposing of the goods.

As to reasons for the distress levied, plaintiff's/applicant's counsel submitted that the main reason was rent arrears, not wastage of the suit premises. In counsel's contention, if the premises had been

abandoned, the defendants should have obtained orders for possession from the High Court or from the Business Premises Rent Tribunal.

With regard to the Northern Ireland Commissioner's case (*supra*), plaintiff's/applicant's counsel contended that there is a difference between being in occupation and being in possession. She submitted that that case is distinguishable on facts and referred the court to holding No. 1 in the said case.

Plaintiff's/applicant's counsel reiterated her prayer that the present application be allowed.

I have given due consideration to the rival arguments of the parties as well as to the authorities cited by their advocates.

The evidence available at the present interlocutory stage establishes that the distress complained of was levied on 19.10.07. The plaintiff company avers at ground (d) of its application that if it owed any rent to the 1<sup>st</sup> defendant company at all at the material time, it was only Kshs.1 million but not Kshs.1.5 million as claimed by the 1<sup>st</sup> defendant company. However, paragraph 4 of the supplementary affidavit of Mukhtar Ahmed, director of the plaintiff company sworn on 12.11.07 acknowledges that the plaintiff company delayed in paying rent for September, October and November, 2007. Paragraph 11 of the replying affidavit of James Mahianyu Gachie, director of the 1<sup>st</sup> defendant company sworn on 30.10.07 avers that the actual monthly rent at the material time was Kshs.500,000/= and that on 08.08.07 the plaintiff company forwarded a cheque for that amount in favour of the 1<sup>st</sup> defendant company purporting it to be for August, 2007 and that the 1<sup>st</sup> defendant company accepted the amount but used it to clear the plaintiff company's rent arrears for July, 2007. There is a fierce dispute regarding the legality or otherwise of the distress, principally on account of the manner in which it was levied. A determination of this issue will have to await the hearing of the main suit. For now, I note the following: The picture emerging from the supplementary affidavit of Mukhtar Ahmed sworn on 12.11.07 is that the plaintiff company delayed in paying rent for September, October and November, 2007. The picture emerging from the replying affidavit of James Mahianyu Gachie sworn on 30.10.07 is that the actual monthly rent the plaintiff company was paying at the material time was Kshs.500,000/= and that the cheque dated 07.08.07 for Kshs.500,000/= paid by the plaintiff company to the 1<sup>st</sup> defendant company purportedly for August, 2007 rent was utilized by the 1<sup>st</sup> defendant company to clear the plaintiff company's rent arrears for July, 2007. The effect of that set-off was to put the plaintiff company in rent arrears for August, 2007 as well.

I shall assume for purposes of this interlocutory Ruling that the applicable rent arrears were for August, September, October and November, 2007. Since the actual monthly rent was admitted by the 1<sup>st</sup> defendant company vide paragraph 11 of James Mahianyu Gachie's replying affidavit sworn on 30.10.07 to be Kshs.500,000/=, the total arrears of rent due at the material time works out at Kshs.500,000/= each for August, September, October and November, 2007, i.e. Kshs.2 million. According to the plaintiff company, the distrained goods are of a considerably higher value than Kshs.2 million. No valuation report has, however, been availed to this court. The replying affidavit of Joseph D.K. Kimani t/a Pryamid Auctioneers sworn on 30.10.07 depones at paragraph 8 that he is still holding the distrained goods in his custody and that he is ready to release them to the plaintiff company upon payment of rent arrears due, plus the auctioneer's fees. His said fees are indicated as Kshs.200,000/= in a document entitled 'NOTIFICATION OF SALE OF MOVABLE PROPERTY (REMOVAL FORM)' annexed as 'JDKK1' to his aforesaid replying affidavit. I shall assume the stated figure for fees to be correct for now. This brings the figure for rent arrears plus auctioneer's fees to Kshs.2,200,000/=. The plaintiff company has already deposited in court Kshs.1,500,000/= following Judge Visram's order of 23.10.07. The difference between Kshs.2,200,000/= and Kshs.1,500,000/= is Kshs.700,000/=.

I shall at this interlocutory stage only concern myself with the issue of saving the distrained goods from disposal by the defendants by directing that some sort of security be provided against which

**the goods may be released to the plaintiff/applicant. Accordingly, I make the following orders:?**

- 1. That the plaintiff company shall within 7 days of the date hereof deposit in court a further Kshs.700,000/= to upgrade the current deposit of Kshs.1,500,000/= to Kshs.2,200,000/= as a condition for the release of the distrained goods to the said plaintiff company.**
- 2. That upon the plaintiff company making the aforesaid additional deposit of Kshs.700,000/= in court, the distrained goods shall be released to the said plaintiff company forthwith.**
- 3. That the upgraded deposit of Kshs.2,200,000/= shall remain in the custody of the court until hearing and determination of the main suit herein.**
- 4. That costs of the present application shall be in the cause.**

**Orders accordingly.**

**Delivered at Nairobi this 7<sup>th</sup> day of July 2008.**

**B.P. KUBO**

**JUDGE**