



**REPUBLIC OF KENYA
IN THE HIGH COURT OF KENYA
OF KISII**

Civil Case 174 of 2004

SIAMANI FARMERS CO LTD PLAINTIFF

VERSUS

JAPHET M. NYARAMBA T/A BOBURIA STORES.....DEFENDANT

JUDGMENT

By a plaint filed on 24th November, 2004, the plaintiff stated that the defendant had been its tenant, occupying a shop in the plaintiff's premises known as Kisii Plot No.II/90, hereinafter referred to as "***the suit property.***" The monthly rent was Kshs.3000/=. The plaintiff alleged that on or about 1st July 2002 it served the defendant with a notice of termination of tenancy which was to take effect on 1st January, 2003. The said notice was alleged to have been issued in accordance with the provisions of the **Landlord and Tenant (Shops, Hotels and Catering Establishments) Act** but the defendant did not file any reference to the Business Premises Rent Tribunal, hereinafter referred to as "the Tribunal". The plaintiff therefore contended that the said notice took effect on 1st January, 2003.

The plaintiff therefore sued the defendant for vacant possession of the said shop.

In his statement of defence, the defendant denied that he was served with any notice of termination of tenancy as alleged and insisted that he was still a tenant of the plaintiff. If any notice was served, the same was invalidated by the plaintiff's action of receiving rent from him between 1st July, 2002 and 1st January 2003, the defendant contended.

The defendant further contended that this court did not have jurisdiction to terminate his tenancy, such jurisdiction could only be exercised by the Tribunal, he added.

On 6th April, 2004, the Plaintiff wrote to the defendant and informed him that the monthly rent would be increased to Kshs.4,840/= with effect from 1st July, 2004. The defendant complied with the said notice and began to pay the new rent and continued to do so upto October, 2004. Immediately after the filing of this suit in November, 2004, the plaintiff refused to accept rent from the defendant.

On 24th April, 2008, the plaintiff allegedly sent a demand letter to the defendant, demanding a sum of Kshs.361,680/= being arrears of rent for the period November 2004 to May, 2008. The defendant denied having received such a letter. The monthly rent for the period November 2004 to June 2007 was quoted at Kshs.4,840/= but for the period July 2007 to May 2008 was said to be at the rate of Kshs.18,800/= per month. The plaintiff did not adduce any evidence to show that it had given any notice of increment of rent from Kshs.4840/= per month to Kshs.18,800/= per month for the latter period.

Sometimes in June, 2008, the plaintiff's advocates instructed M/S. Muriri Auctioneers to levy distress for rent against the defendant so as to recover the sum of Kshs.361,680/= as aforesaid. The said auctioneers, without any notice, proceeded to the defendant's shop and in purported distress for rent removed all the stock therein-including furniture and a photocopier. Thereafter the plaintiff locked up the shop.

During the hearing, the plaintiff's vice chairman, James Gikara, testified as the only witness for the plaintiff. He stated in his examination in chief that the notice of termination of tenancy was served upon the defendant by the plaintiff's secretary, one James Obae. However, a copy of the notice that was allegedly served was not produced. No affidavit of service of the alleged notice was shown to the court. Mr. James Obae was not called to testify. However in cross-examination, the plaintiff's witness stated as follows:

“We served the defendant with a notice to vacate on 1/7/02. It was served upon him by our lawyer Kenneth Obae. Our secretary is James Obae.”

The defendant denied having been served with a notice of termination of tenancy and put the plaintiff to strict proof thereof. It was for the plaintiff to prove that it actually served the defendant with a notice of termination of tenancy. Such proof was not availed to this court. In **MOHAMED SHEIKH ADEN VS PATRICK NJOGU GITHINJI** H.C.C.NO.130 of 1995 at Kisumu, it was held that failure by a landlord to produce the notice to quit that is alleged to have been served upon a tenant is fatal to a suit for vacant possession.

Section 107(i) of the **Evidence Act** states as follows:

“Whoever desires any court to give judgment as to any legal right or liability dependent on the existence of facts which he asserts must prove that those facts exist.”

Neither the plaintiff's secretary nor its advocate, Mr. Kenneth Obae, were called to testify regarding the alleged notice of termination of tenancy. In the circumstances, I hold that the plaintiff did not serve any notice of termination of the defendant's tenancy in the suit premises as alleged in the plaint. If at all such notice was served, the plaintiff was unable to prove service thereof. That being the case, the defendant is still a lawful tenant of the plaintiff. If for any lawful reason the plaintiff wishes to terminate the defendant's tenancy in the suit premises, an appropriate **Section 4(2) of the Landlord and Tenant (Shops, Hotels and Catering Establishments) Act**. I dismiss the plaintiff's suit with costs to the defendant.

Turning to the issue of the alleged distress for rent, the defendant has been in occupation of the plaintiff's premises for nearly thirty-four (34) years. It was not shown that he had ever defaulted in payment of rent all that time. The defendant testified that the plaintiff refused to accept rent from him immediately after this suit was filed in November, 2004. The defendant produced as an exhibit the last receipt that was issued to him by the plaintiff on 7th November, 2004 (D. Exhibit 2). It was in acknowledgement of receipt of Kshs.4,840/= being rent for October, 2004.

A landlord cannot refuse to accept rent from his tenant and after a while turn around and allege that the tenant has defaulted in payment of rent and purport to levy unlawful distress for rent. I agree with the defendant that the plaintiff's real intention was to obtain possession of the shop. In **GUSII MWALIMU INVESTMENT COMPANY LTD & OTHERS VS MWALIMU HOTEL KISII LTD**, Civil Appeal No.160 of 1995, it was held that to obtain possession by levying distress is wrong. Even where distress for rent is lawfully carried out, it is not permissible for a Bailiff or an Auctioneer to lock up a shop. The plaintiff, its advocates and the Auctioneers, Muriri Auctioneers acted unlawfully. This court did not permit any levy of distress for rent. In the aforesaid Court of Appeal decision, it was held that the landlord had to obtain orders of the court before levying distress.

Where premises are subject to the provisions of the Landlord and Tenant (Shops, Hotels and Catering Establishments) Act, **section 12(1) (h)** gives power to the Tribunal to permit levy of distress for rent. It is

not in dispute that a landlord has both common law and statutory right to levy distress for rent that is in arrears. But in this case the landlord had allegedly terminated the tenancy and filed a suit for recovery of possession of the shop. Where distress for rent is levied it means that a tenancy exists, see **GUSII MWALIMU INVESTMENT CO. LTD & OTHERS VS MWALIMU HOTEL KISII LTD** (Supra).

I hold and find that the purported distress for rent that was carried out by Muriri Auctioneers for and on behalf of the plaintiff was wrongful. The plaintiff and the Auctioneers knew or should have known that a victim of wrongful distress is entitled to sue for damages and should therefore have done their work in strict compliance with the law. They had no business locking up the defendant's shop.

The plaintiff and the said Auctioneers should forthwith re-open the defendant's shop and return all the defendant's goods at their own cost. Thereafter the defendant shall pay all the lawful arrears of rent. It is so ordered.

DATED, SIGNED and DELIVERED at KISII this 8th day of October, 2008.

D. MUSINGA

JUDGE.

Delivered in the open court in the presence of:

N/A for the plaintiff.

Mr. Omari for the defendant.

D. MUSINGA

JUDGE