



REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA

AT NAIROBI (MILIMANI COMMERCIAL COURTS)

Civil Case 320 of 2008

FRANCIS ATEKA NYAKUNDI.....PLAINTIFF

VERSUS

MARY NJOKI KARUGA.....DEFENDANT

RULING

Notice of Motion dated 10.09.2008 by Applicant/Defendant seeking the discharge of Exparte orders made by this court on 24.06.08, a mandatory injunction to compel the Plaintiff/Respondent to vacate and give vacant possession of the premises to the landlord of house No.7 plot No.5326 Riruta and that the Plaintiff do pay Kshs.72,000 /= arrears or rent.

The application is based on grounds set out and supporting affidavit of the Applicant. Ground 4 states that the Defendant was never served with copies of summons to enter appearance. She was also not served with Chamber Summons and plaint giving rise to the said orders.

The supporting affidavit shows that in the month of 14th May 2008, there was rent arrears in the sum of Ksh.38,000/=. She admits she instructed her agents to levy Distress.

Before this incident there was a time in September and October 2007 when the Respondent submitted some paying in slips of funds deposited in her account at Standard Chartered Bank. The bank disowned those banking slips as forgery. By 31st December, the arrears amounted to Kshs.27,500 /=.

This incident was reported to police. Respondent paid kshs.8,000 /= and kshs. On 12.02.08 . See “MNK 3”. She admits being paid Kshs.8,000 /= on 18th March 2008 and Kshs.10,000 /= was deposited in her account. Total received is Kshs.36,000 /=. The arrears as at 05.04.08 was Kshs.65,000 /= less Kshs.36,000 /= leaving a balance of Kshs.29,500 /=.

The Applicant swears that the amount in arrears as at September 2008 is Kshs.72,000/= together with Auctioneers charges.

She further swears that she has not at any time been served with summons to appear in respect of this case or the lower court case CMCC No.2437/08 and she was not aware of these proceedings.

It is clear that Summons to enter Appearance was never served upon Defendant in this suit. According to the record, the Respondents Advocate in his letter dated 16.09.08 addressed to Deputy Registrar of this

Court, he is asking for Summons to Enter Appearance to be issued.

To proceed with application in the suit without taking out summons is irregular.

Order IV Civil Procedure Rules (Rule 3 (5) states every summons shall be prepared by the Plaintiff or his Advocate and filed with the Plaintiff to be signed in accordance with sub-rule 2 of rule 3.

The Respondent states that he has never dealt with Applicants Agents. He admits tenancy and that he used to pay KShs.8, 000 /= per month. He denies the issue of fake deposit payments and the Respondent spends time arguing about issue of arrears of rent. He proceeds to swear that he was served with an order issued in case No.CMCC 2437/2008. He swears that the Applicant was served with Chamber Summons and Plaintiff as per affidavit of Service filed. The Affidavit sworn by one Samuel Masime is lengthy and tells a long story of his attempt to serve the Defendant. In paragraph 12 thereof, he discloses that he dropped the documents at a certain place where people he does identify assured him that they were safe.

He never served the Defendant in person and now the Applicant states that she was never served. The Applicant gave evidence in Court on oath because there was no time to file a Replying Affidavit. She testified that she got information on this case from Auctioneer. She emphasized that she was not served with anything by Mr. Nyakundi (Plaintiff).

Upon considering the arguments advanced by the Applicant and the Respondent, I am convinced that the Applicant was not served application or hearing notice.

I believe what she says that she came to know of the proceedings from the Auctioneer who was served with orders to stop auction.

The landlord is empowered under the Distrain for Rent Act Cap 293 to levy distress whenever there is arrears of any rent. The remedy of a tenant in case of unlawful distress is in damages. As it is here, the levy did not take place. The proceedings in which the distress was stopped were ex parte. The Applicant was not served. Furthermore, the plaintiff was filed without summons to enter appearance which makes the proceedings defective.

In the circumstances the orders issued by court without hearing the Applicant are hereby set aside and discharged.

The order for mandatory injunction can not issue there being disputes regarding arrears of rent and without trial. Therefore prayer 4 and 5 are not granted.

It is ordered that the costs of this application shall be paid by the Respondent to the Plaintiff.

DATED this 27th day of November, 2008.

JOYCE N. KHAMINWA

JUDGE