



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

Civil Suit 453 of 2008

JOHN KABA.....1ST PLAINTIFF
FRASHIER WAIRIMU.....2ND PLAINTIFF
VIRGINIA NJERI.....3RD PLAINTIFF
**TRUSTEES OF APOSTOLIC
FOUNDATION FELLOWSHIP.....4TH PLAINTIFF**

VERSUS

**HYDRO DEVELOPERS LTD.....
DEFENDANT**

RULING

1. The application before me is the Chamber Summons dated 14/10/2008 by which the Applicant seeks **ORDERS:?**
- (1) THAT this application be certified as urgent and service of application be dispensed with and the same be heard ex-parte in first instance.**
 - (2) THAT there be an order directed to the Respondent to release the applicant's goods which have been wrongfully attached and detained by the Respondent agents namely M/s Kindest Auctioneer pending the hearing interpartes of this application.**
 - (3) THAT there be an order restraining the Defendants/Respondents by themselves and/or through their authorized servants and/or agents from evicting the Plaintiff/Applicant from the occupation and/or running of its business on the 4th floor of Meliala Business Centre situate on L.R. No.209/6576 O.T.C. RACE COURSE ROAD Nairobi, pending the full hearing and determination of the reference case No. BPRT No.447 of 2008 and 157 of 2008 filed at the Business Premises Rent Tribunal Nairobi.**
 - (4) THAT the Defendants/Respondents by themselves and/or their authorized servants or agents be restrained from harassing, intimidating and/or interfering with the Applicants business in anyway whatsoever.**
 - (5) THAT the Honourable Court do direct the O.C.S. – Kamkunji Police Station to assist with the**

enforcement of any orders granted herein.

(6) THAT the costs of this application be borne by the Respondents.

The application which is brought under Order 39 Rules 1,2,3 and 5 of the Civil Procedure Rules, Section 3A of the Civil Procedure Act, Sections 6 and 12 of the Landlord and Tenant Act, Cap 301 Laws of Kenya is also premised on six grounds on the face thereof:?

(1) THAT the Plaintiff/Applicant is the lawful occupant of the suit premises situated in MELIALA BUSINESS CENTRE OTC RACE COURSE ROAD – NAIROBI.

(2) THAT on 4th October 2008 the defendant's agents M/S Kindest Auctioneers descended on the plaintiff's premises and carried away all the properties purporting to distress for rent without having given the 14 days mandatory notice and in breach of the orders of the Chairman of the Business Premises Rent Tribunal.

(3) THAT the Defendant/Respondent has been intimidating, harassing and interfering with the Plaintiff/Applicant ownership and/or quiet possession of the suit premises by locking the Plaintiff's premises severally.

(4) THAT the Defendant/Respondent has caused the Plaintiff/Applicants goods to be wrongfully detained by Kindest Auctioneers.

(5) THAT the Chairman of the Business Premises Rent Tribunal has no jurisdiction to order the return of the plaintiffs property wrongfully detained.

(6) THAT the Plaintiff/Applicant stand to suffer irreparable loss should the Defendants/Respondents continue in their illegal acts.

2. The application is also supported by the sworn affidavit of VIRGINIA NJERI dated 14/10/2008. The deponent swears the affidavit in her capacity as a Senior Pastor and Trustee of the Applicant Church. She says that the Applicant herein filed a complaint at the Business Premises Rent Tribunal in complaint No. 157 of 2008 by which the Applicant sought to stop the Respondent from evicting the Applicant. She says the Applicant filed yet another complaint with the Tribunal seeking to deposit rent in court.; that on 14/07/2008, the Tribunal issued a status quo order pending the hearing of the application that was filed at the Tribunal. Njeri also averred that on 15/09/2008, the Tribunal confirmed the status quo order and specifically barred the Respondent from levying distress on the suit premises. According to the further averments, the deponent says that on 3/04/2008, the Plaintiff/Applicant gave notice to the Defendant to have the rent reduced from Kshs.30,000/= to Kshs.10,000/= and that since the notice was not opposed, the Tribunal confirmed the notice. The deponent also says that by a letter dated 10/07/2008, the Respondent was duly informed of the change in rent but that the Respondent has persisted in its refusal to accept the new rent.

3. It is further stated that on 4/10/2008, the Respondent filed an application seeking leave. Reference out of time but that before the application could be heard on 4/10/2008, the Respondent sent auctioneers to the Plaintiff's premises and carted away the Plaintiff's property. She says the attachment was followed by a Notification of Sale of Moveable property as per annexure marked "VN10" – which is a copy of the Notification of Sale. The deponent says that the actions of the Respondent were illegal, unlawful and irregular as there was a Court Order against any distress of rent and that the distress was carried out without giving the mandatory 14 days notice.

4. Contemporaneously with the Chamber Summons the Plaintiff filed a plaint dated 14/10/2008 in which the Plaintiff avers that on 4/10/2008, the Defendant unlawfully, illegally and irregularly sent auctioneers to the Plaintiff's premises and that the said auctioneers removed the Plaintiff's property on the basis of an illegal distress for rent without any proclamation and against the express orders of the Business Premises Rent Tribunal. It is also averred that the purported eviction of the Plaintiff was done

without justification and as a result thereof, the Plaintiff has been harassed, suffered great loss and mental anguish. The Plaintiff therefore prays for judgment against the Defendant for:?

- (a) ***A declaration that the purported distress for rent was illegal and void.***
- (b) ***An injunction restraining the Defendant from repossessing and reallocating the premises occupied by the tenant to any other person.***
- (c) ***An unconditional order of release of the Plaintiff's property attached by Kindest Auctioneers.***
- (d) ***General damages for trespass.***
- (e) ***Cost of the suit.***
- (f) ***Such further orders as the court deems reasonable to give.***

5. The application was served upon the Respondent on 17/10/2008, though the process server said a Mr. Mohammed of the Defendant Company refused to sign on the copy of the application and the hearing notice. Thus when the application came up for hearing on 27/10/2008, it proceeded ex parte after the court satisfied itself that the service was proper.

6. On the 15/10/2008, the Applicant was granted prayer 2 of the application on condition that it deposited Kshs.80,400/= in court or showed proof that the money had been so deposited at the Business Premises Tribunal. At the hearing, the Plaintiff showed proof that the amount had been paid in two instalments.

- Kshs.40,000/= paid on 13/10/2008
- Kshs.40,400/= paid on 16/10/2008

7. I have considered the application as filed and the grounds in support thereof. I have also considered the averments of the affidavit in support and from the evidence that is placed before me, I have established that the Defendant distressed for rent when there was a court order prohibiting such an action; that the distress for rent was carried out when there were proceedings in court.; that since the distress for rent, the Plaintiff's goods have been returned to the Plaintiff as ordered by this honourable court on 15/10/2008. The question that now arises is whether the Plaintiff has satisfied the conditions for the granting of an injunction as set out in the case of **Giella –vs- Cassman Brown & Co. Ltd. [1973] EA 358.**

8. There is no doubt that an interlocutory injunction is a discretionary equitable remedy and accordingly the same will not be granted where it is shown that the Applicants conduct with respect to matters pertinent to the suit does not meet the approval of a court of equity (see **David Ngugi Mbuthia –vs- Kenya Commercial Bank Ltd. & Another** – Nairobi Milimani) HCCC No. 304 of 2001). It is also trite law that where an award of damages would be an adequate remedy, an interlocutory injunction will not be issued – see **Mwakio –vs- Kenya Commercial Bank Ltd. – Civil Appeal No. 28 of 1982 and 69 of 1983.**

9. In the instant case, I am satisfied that the Plaintiff has a high probability of proving his claim against the Defendant. The Plaintiff has been ready and willing to pay the rent that he was ordered to pay by the Business Premises Tribunal. The Defendant has persistently refused to receive the rent and while an order was in force, he (Defendant) went ahead to levy distress for rent. As a result of the Defendant's actions,, the Plaintiff has been disrupted in its business which it carried on the 4th Floor of Meliala Business Centre situate on LR No.209/6576 O.T.C. Racecourse Road, Nairobi. The Defendant has soiled his hands by doing that which a court of competent jurisdiction has forbidden it to do. Even if I were to consider this case on a balance of convenience, it is my view that the same does tilt in favour of the

Plaintiff.

10. In the result, I allow the Plaintiff's application dated 14/10/2008 and make the following orders:?

(1) THAT the Defendants/Respondents be and are hereby restrained by themselves and/or through their authorized servants and/or agents from evicting the Plaintiff/Applicant – from the occupation and/or running of its business on the 4th Floor on Meliala Business Centre situate on L.R. No.209/6576 O.T.C. Race Course Road Nairobi pending the full hearing and determination of the Reference Case No. BPRT No. 447 of 2008 and 157 of 2009 filed at the Business Premises Rent Tribunal Nairobi or until further orders of this court.

(2) THAT the Defendants/Respondents be restrained by themselves and/or their authorized servants or agents from harassing intimidating and/or interfering with the Applicant's business in any way whatsoever pending the hearing and determination of the Reference Case No. BPRT No.447 of 2008 and 157 of 2008 filed at the Business Premises Rent Tribunal Nairobi or until further orders of this honourable court.

(3) THAT costs of this application shall be borne by the Defendants/Respondents.

It is so ordered.

Dated and delivered at Nairobi this 18th day of November, 2008.

R.N. SITATI

JUDGE

Delivered in the presence of:-

..... For the Plaintiffs

.....For the Defendant