



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

Civil Case 112 of 2008

BONIFACE NJENGA KURIA.....PLAINTIFF

VERSUS

JULIUS KERU NJOROGE.....1ST DEFENDANT

JOSEPH NDERITU NDIRANGU

t/a JOGAN DRIES SERVICE.....2ND DEFENDANT

FLORANCE WAIRIMU MBUGUA.....3RD DEFENDANT

GRACE WANJIKU MUGUA.....4TH DEFENDANT

PETER CHEGE MBUGUA.....5TH DEFENDANT

SYLVIA MURUGI MBUGUA.....6TH DEFENDANT

RULING

The Plaintiff/applicant has a plaint in place dated 27th day of March 2008 and filed on 1st April, 2008. The salient features of the same are:-

- (1) He was a tenant of the late Kiarie Mbugua on land parcel number LR. Number 209/1601 carrying on the business of a motor vehicle garage.
- (2) The said Kiarie Mbugua died in December 2006 and the Plaintiff thereby became a tenant of his estate whose administrators are the 3rd, 4th, 5th and 6th defendants.
- (3) Him Plaintiff has been faithful in remitting his rentals and he is not in any arrears.
- (4) On Saturday 8th March 2008 at 5.45 a.m., the 2nd defendant as an agent of the 1st defendant in a bid to recover pretended rent arrears, invaded the Plaintiffs business premises, broke down gates, demolished all office structures and garage sheds that had been put up by the plaintiff, carried away all the plaintiffs and customers property, including but not limited to motor vehicles and spare parts and proceeded to allegedly evict the plaintiff from the premises.

(5) It is his stand that he had not been served with any legal document that would have warranted such action, neither is he aware of any change of ownership of the said premises.

(6) It is his stand that he has no contractual relationship with the first and second defendants, and as such the said eviction was illegal and malicious.

(7) Particulars of malice given is to the effect that while the 1st defendant knowing that he was not the landlord, caused the 2nd defendant to levy distress over a pretended rent arrears, and secondly, went ahead to evict him without authority.

In consequence thereof the plaintiff sought the following reliefs

(a) a reinstatement of the plaintiff and his goods to his rented premises together with restoration of the damaged property by the 1st and 2nd defendants jointly and severally.

(b) Damages against the 1st and 2nd defendants for unlawful eviction and disruption of the plaintiffs business.

(c) In the alternative and without prejudice to the aforesaid a refund of all rents paid to the late Joseph Kiarie Mbugua and to the legal representatives of the estate of the late Joseph Kiarie Mbugua.

(d) Costs of this suit.

The plaint was accompanied by an interim application brought by way of chamber summons dated 2nd April 2008 and filed on 4.4.08. The prayers sought are 4 namely:-

(a) spent

(b) That the 1st defendant by himself his servants or agents be restrained by order of injunction from trespassing or constructing structures on or in any other way working on or transferring any portions of the land or parcel of land known as LR. 209/1601 Muranga Road Nairobi and do remove themselves, their servants, goods and building material from the said plots forthwith.

(c) That the second defendant by himself, his servants or agents be restrained by order of injunction from selling, interfering or in any way parting with the items belonging to the plaintiff and his customers carried away from LR.209/1601 till determination of this suit or further orders of this court.

(d) Costs.

The grounds are set out in the body of the application, affidavit in support, skeleton arguments and case law. The major ones are:-

(1) He entered into a lease agreement with late Kiarie Mbugua annexure Bnk1 effective 1st July 2003 and was to run for a period of five years 3 months, rent was 50,000.00 monthly for the first two years and then 57,000.00 monthly for the next following 2 years and 66,125,00 per month for the remainder period of the lease.

(2) That since then he has been dutifully paying rent as per receipts shown as annexure BNK 2 and at no time did he have his rent in arrears.

(3) He is not aware, neither was he informed of any change of ownership of the suit property.

(4) That he learned later on that there was a suit between his then land lords and the 1st defendant in Milimani CMCC 6190/2006 to which he was not a party.

- (5) That by reason of what is stated above, the raid and eviction complained of was unlawful. That being unlawful, the same should be reversed and what was carried away as shown by annexure BNK 3 should be restored to him as these were customers vehicles. What was to be restored also included tools of trade, office equipment.
- (6) Upon effecting the said unlawful eviction, the 2nd defendant put the first defendant in possession and the said first defendant has started construction at the suit premises using the plaintiff's materials.
- (7) The applicant still maintains that he was never served with a proclamation, neither was he a tenant of the first defendant.
- (8) It is their stand that both the first defendant and the 3rd to the 6th defendants have deponed that the plaintiffs was not a tenant of the first defendant, but the 3rd to the 6th defendants who were the lawful owners of the said premises.
- (9) That the said 3rd to the 6th defendants, have deponed that as at the time matters herein were set in motion, by the first defendant, there existed Milimani Commercial Court CMCC 6190 of 2006 between the 1st defendant and the 3rd to 6th defendant regarding ownership of the said property.
- (ii) That there were restraint orders in the said file issued on 18th October 2006 restraining the first defendant from evicting the 3rd to 6th defendants and their tenants from the said suit premises.
- (iii) It is therefore their stand that the first defendant was contemptuous of the court by proceeding to evict the plaintiff during the tenure of a lawful court order.
- (10) From the documentation displayed, the Plaintiff/applicant was not a tenant, of the 1st defendant and as such the first defendant could not purport to act as plaintiffs land lord.
- (ii) For the reason stated above the first defendant, therefore in applying to the court, for a breaking order and swearing an affidavit to the effect that rent was due to the tune of Kshs 1,780,000/= from his tenant, as shown in the affidavit of the 2nd defendant sworn on the 9th day of April 2008, misled the Court, to believe that the plaintiff was indeed his tenant a fact the first defendant admit was wrong since the plaintiff did not have a lease agreement with them.
- (iii) Since the Plaintiff/applicant could not have been a tenant of the first defendant, as admitted by the first defendant – no rent could have been accruing from the plaintiff to the first defendant as such the purported levying of the distress and eviction of the plaintiff from the suit premises was unlawful.
- (iv) It is further their stand that from the deponment of the 3rd to 6th defendants, by virtue of the existence of the orders in Milimani Commercial Court, CMCC 6190 of 2006, whereby there were restraint orders, against the first defendant him first defendant had no locus standi to claim and purport to be the landlord to the plaintiff hence no rent arrears could be due to the 1st defendant from the plaintiff.

The first respondent opposed the application on the basis of a replying affidavit sworn by one Julius Keru Njoroge sworn on 9th April, 2008 and filed on the 10th April, 2008. The salient features of the same are:-

- (i) That one Kiarie Mbugua had taken a loan from National Bank of Kenya, in respect of which he defaulted in its repayment, as a result of which National Bank of Kenya, advertised the property LR. NO. 209/160/1 for sale by public auction. On 3.8.2004 the first defendant purchased the said property to the tune of Ksh 3,500,000.00. He was thus a bona fide purchaser for value.
- (ii) That the terms of the Auction did not specify that the said property was being auctioneered subject to the existing tenancies.

(iii) That the first defendant moved to Milimani Commercial Court, and filed CMCC 6190/2006 upon issuance of notice to vacate the premises to the previous owner who had failed to vacate. The pleadings were served on one Kiarie Mbugua, who entered appearance but failed to file defence as a result of which the first defendant applied for judgment, to be entered against him for want of defence and the court, acting in the exercise of its jurisdiction as bestowed upon it by law, entered judgment in the 1st defendant's favour. A decree was issued in his favour followed by execution orders namely eviction orders which were duly effected.

(iv) It is his stand that the plaintiff was fully aware of his ownership of the suit premises and although the first defendant has never entered into a lease agreement with the plaintiff, the plaintiff was obligated to pay rent to him and since he had not been doing so he was in rent arrears, the plaintiff's allegations that he was paying rent to the 3rd to 6th defendant does not hold as in doing so he was simply conspiring with the said persons to defeat the 1st defendant's rightful claims to the said rents and as such the attachment levied by the auctioneers was lawful.

(v) That the plaintiff upon being attached mobilized the mobs which assisted him take back what the auctioneers had attached and took away all other properties that had been proclaimed and carried them away to an unknown location. Hence, the 1st defendant does not have any of the plaintiff's properties. Further upon the plaintiff vacating the said premises the first defendant had no alternative but to take possession of the premises to protect it from vandalism.

(vi) That for the reasons stated above the application is unsustainable and should be dismissed.

The second respondent also opposed the application on the basis of a replying affidavit sworn by Joseph Nderitu Ndirangu on 9th April, 2008 and filed on 10th April, 2008. The salient features of the same are as follows:-

(a) That he received instructions from the advocate of the landlord, first defendant, to levy distress and he proceeded to the suit premises and proclaimed the goods but the persons found at the premises declined to sign the proclamation.

(b) At the expiry of the statutory 14 days, they went back on 20th February 2008 to carry away the attached goods but they were chased away by the tenant. They made further attempts on 1st and 4th March 2008 but they met the same hostile reception.

As a result of which the 2nd defendant was forced to go back to court, to enable them get a breaking order to break into the premises and distrain the goods. Upon being issued with the order, he went to the premises in the company of security personnel broke into the premises, and took the distrained goods and removed them to Pangani Auction Storage centre. But the Plaintiff in company of 50 people came to the said Auction centre, broke in and carted away all the goods, that he had stored there. As a result of the said invasion, the matter was reported to police at Pangani, and booked vide O.B. No.27/08/03/08, which goods have not been traced as at the time the deponment was being made.

(c) That the applicant committed an offence under Section 7 of the distress for rent Act Cap.293 laws of Kenya.

(d) He denied detaining the plaintiff's goods, and says that all the goods that were attached were carried away by the applicant. Also denied damaging the property of the plaintiff and asserted that if any damage was occasioned to the properties, then the same was caused by the applicant and his group.

(e) That he is still searching for the distrained goods.

The defence counsel also put in written skeleton arguments. The salient features reiterated the deponment in both replying affidavits and then stressed the following points.

- (i).** The first respondent purchased all that parcel of land known as LR NO. 209/160/1 situated along Forest Road with the City Council of Nairobi on the 3rd day of August 2004 and the title was transferred to the 1st Respondent on 20th June 2005.
- (ii).** The 1st and 2nd defendants are strangers to property known as LR No 209/160 against which the plaintiff seeks orders and on that account the two contend that they have been wrongly sued.
- (iii).** It has been alleged that the previous owner of the said property was one Joseph Mbugua Kiarie of No 1601/1 and yet no documentary proof to that effect has been exhibited to prove that ownership neither is there proof that the Auction which vested the property in the first defendant was challenged.
- (iv).** When the said Joseph Mbugua Kiarie failed to give up vacant possession. The first defendant filed action in Milimani Commercial Court evidenced by the presence of a plaint annexed by the 3rd defendant which clearly show that the action was for vacant possession.
- (v).** No death certificate of the deceased has been annexed.
- (vi).** Neither have they exhibited letters of administration.
- (vii).** The affidavit of the 3rd Respondent is not based on any direct information. The same should be expunged from the record.
- (viii).** The court is urged to resolve all the issues raised by them in favour of the 1st and 2nd defendant for the reasons given.
- (ix).** Since the applicant has deponed that he is aware of Milimani Commercial Court CMCC No. 6190 of 2006, he is estopped from claiming that he was not aware that the suit was for vacant possession. It also follows that his dealing with the 3rd to the 6th Respondent in terms of payment of rent of duly paid, were done in bad faith with an aim if gaining from the first Respondent.
- (x).** Annexure 7 to the 3rd defendants' affidavit indicate that they misled the Auctioneer that there were injunctive orders in CMCC 6190/2006.
- (xi).** The alleged restraint orders have not been annexed.
- (xii).** The applicant has no prima facie case with a probability of success against the 2nd Respondent because him 2nd Respondent was instructed to distrain for the goods and that is what he did.
- (xiii).** There is no deponement for the applicant controverting the 2nd respondents deponement to the effect that the applicants came with hooligans and carfed away all the distrained goods from the place where the 2nd Respondent had stored them.
- (xiv).** There is no document annexed to show that any body has been claiming anything from the applicant i.e any of the alleged distrained goods.
- (xv).** There is no suit pending in any court of law challenging the ownership of the 1st defendant.
- (xvi).** The 3rd to the 6th defendant were wrong fully enjoying rent proceeds from the applicant which rents were meant to be enjoyed by the owner of the premises who was the first defendant.
- (xvii).** The prayers sought of restraining the 1st defendant from evicting the plaintiff from the suit premises, and stopping the construction cannot issue because they will prejudice the first defendant as they are meant to frustrate the construction that is going on and yet the applicant is not seeking possession

as of tenant.

(xviii). The court is called upon to find that the application is competent as it has been brought by way of chamber summons and yet it seeks prohibitory orders and mandatory injunction orders contrary to the provision of order 39 CPR and as such it should be dismissed.

The 3rd, 4th, 5th and 6th defendant entered appearance through counsel and in position or in support of the application as put by the 1st and 2nd respondent, they filed a replying affidavit sworn by one Florence Wairimu Mbugua on 29th day of April 2008 and filed on 8th May 2008. The salient features of the same as follows:-

- (1)** That the deponent Florence Wairimu Mbugua has authority from the 4th, 5th and 6th defendant to swear the said affidavit.
- (2)** That she is aware the first defendant filed Milimani CMCC 6190/2006 against Joseph Kiarie bugua deceased and him 1st defendant falsely misled the court into granting him eviction orders.
- (3)** That upon having knowledge of the same the deceased instructed counsel to have the same set aside. The said conviction orders which were accordingly set aside.
- (4)** That the said CMCC 6190/06 is still pending and the 3rd, 4th, 5th and 6th defendants have been enjoined to the said proceedings as legal representatives of the deceased.
- (5)** They contend that both the injunctive order and the stay order are still in force and so the 1st defendant by taking the action he did, against the applicant, he is in contempt of the court orders. The act of contempt comprises the 1st defendant instructing the 2nd defendant to go and demolish all the structures on the premises and then chase away tenants on 8th March 2008.
- (6)** That the 1st defendant has committed perjury by lying on oath concerning CMC 6190 of 2006 which is still pending.
- (7)** The acts of contempt are fortified by the fact that the 1st defendant has admitted taking possession of the suit premises illegally, and unlawfully and is therefore using both sharp practice and abuse of office in the pursuit of his interest.
- (8)** The court is urged to punish the 1st defendant for perjury and contempt of court orders so as to uphold the rule of law and the defence of the court.
- (9)** The 2nd defendant too should be punished for contempt, in addition the court to note that what he has deposed to is immaterial and irrelevant as his action of the alleged distress for rent, was a smoke screen to illegally and unlawfully carry out the eviction. The illegality of the said purported distress, is evidenced by the fact that instruction to levy distress does not state the arrear of rent for which particular months/period. The goods produced and the goods attached more so, when the vehicles were attached without carrying out a search to verify the owners thereof and as such the 2nd defendant acted illegally to aid the 1st defendant carry out his illegal and wrongful actions.
- (10)** They have annexed a bundle of documents to assist the court arrive at a just decision in this matter.

On case law the applicants' counsel referred the court, to the case of Mawji versus US International University and another (1976) KLR 185 in which it was held inter alia that, the court has power to prevent a breach of the provision of section 52 of the transfer of property Act in proceedings before it, in which any right to movable property is directly and specifically in question by imposing a prohibitory order against the title of the property to prevent all dealings in it pending the final determination of the

proceedings except under the authority of the court, and upon such terms as it may impose.

The case of Kamau Mucuha versus the Ripples limited Nairobi CA 186 of 1992. At page 6 of the judgement line 2 from the bottom the court made observations that:-

“a court is far more reluctant to grant a mandatory injunction than it would be to grant a comparable prohibitory injunction. That in a normal case, the court, must inter alia feel a high degree of assurance that at the trial it will appear that the injunction was rightly granted, and that this is a higher standard than is required for a prohibitory injunction.” At page 8-9 line 1 from the top, of page 9, the court, quoted with approval passages from Halisbury Laws of England 4th Edition paragraph 948 thus:- *“ a mandatory injunction can be on an interlocutory application as well as at the hearing, if the defendant attempted to steal a match on the plaintiff.....a mandatory injunction will be granted on an interlocutory application.”* Upon that reason at line 8 from the top on page 9 the court went on to hold that a party as far as possible ought not to be allowed to retain a position of advantage that it obtained through a *planned and blatant unlawful act”*

The 1st and 2nd defendants’ counsel on the other hand referred the court to the case of John Ibrahim and 8 other versus TAL holding limited and another Mombasa HCCC number 176 of 2000 decided by Mwera J. on 15th November 2005. At page 6 of the judgement line 12 from the bottom the learned judge in answer an issue raised therein had this to say inter alia :-

“It has been shown that the 1st defendant bought this property which was previously leased to Kenya shell. It holds a title to it and in law the plaintiff tenant cannot impeach it. They have no capacity. Infact the moment a tenant impeaches land lords title, he has no business to continue being a tenant. Here the plaintiffs do acknowledge now that indeed the 1st defendant has the title to the subject property” at line 5 from the bottom on the same page court continued:-

“arising from issues no 1 above the plaintiffs are tenants. As they accepted Kenya shell and paid rent raised to Ksh. 2,900.00 per month, each for 2 years, they should have accepted Tai as the land lord and should pay rents. They should forget the lease agreement they signed with Kenya shell. The leases were not in any case executed by Kenya shell and so they remained ordinary contract, between the land lord, not capable of being transmitted to have effect on the subsequent property owners –TAI. It is therefore a falacy on the part of the plaintiffs to wish to remain enjoying the benefit under agreement that are not actually agreement to be enforced against the first defendant in 2010”

At line 7 from top on page 7 the court went on:-

“The plaintiffs have asked to pay rent in arrears and new or they vacate. If they were not doing either legal action would follow to evict them. That is fair in enough. It was not termination of tenancies requiring notices”

The case of Florence I . Makotsi T/A our connection and another versus fortune properties limited and another Nairobi Milimani Commercial court case number 353 of 2006 decided by F. Azangalala Judge on the 31st day of July 2006. at page 5 of the ruling the learned judge quoted with approval the case of Morris and company limited versus Kenya Commercial Bank limited and others (2003) 2EA 600 in which it had been held thus:-

“interculatory injunctions are not contemplated by order XXXIX of the civil procedure rules. An application for a amendatory injunction can only be made pursuant to the provisions of section 3A of the CPA and the procedural mode is a motion on notice pursuant to order L rule of the CPR. In an application where the plaintiff seeks both interculatory, prohibitive and mandatory injunction, it is incumbent to do so in a motion on notice for under the procedural law it is established that where a matter is partly falls within the scope of a summons in chambers, and partly within a motion on notice, the motion to be invoked”.

In the same ruling, same page line 10 from the bottom, the learned judge also quoted the case of Salume Namukaja versus Yozefu Bukya (1966) EA 433 in which observation had been made thus:-

“ counsel must understand that rules of this court were not made in vain. They are intended to regulate the practice of the court of late a practice seems to have developed of counsel instituting proceedings in this court without paying due regard to the rules. Such a practice must be discouraged. In a matter of this kind, might the needs of justice not be better served by his defective, disorderly and in competent application being struck out”.

In this courts' assessment of the facts herein, it is clear that side rule has put forward issues meant to assist the court, in resolving this mater. Those for the applicant are set out at page three of the written skeleton arguments and these are:-

- (i). Was the plaintiff a tenant of the 1st defendant?
- (ii). Was the plaintiff in rent arrears as alleged?
- (iii). Was the distress for rent lawful or was it for pretended areas of rent/
- (iv). Was there a court order, allowing the first defendant to evict the plaintiff?
- (v). Is the plaintiff entitled to the remedies he seeks?

Those put forward by counsel for the 1st and 2nd defendants /respondents are found at page 2 of their written skeleton arguments and for purposes of this record these are:-

- (1) Is the 1st defendant/respondent the registered owner of the premises known as LR 209/160
- (2) Was the applicant aware of the fact that the 1st respondent is the owner of the suit premises.
- (3) Did the applicant make any rent payment to the first respondent upon coming to know that the first respondent is the registered owner of the suit premises.
- (4) Were the payments made to the representatives of Joseph Mbugua Kiarie beneficial to the 1st respondent.
- (5) Was the distress here in proper/legal.
- (6) Did the 1st respondent have a legal right to demand for rent payment.
- (7) Is the plaintiff entitled to remedies sought?

Due consideration has been made of these issues and the same have been duly considered by this court, in the light of deponements and arguments presented, by both the applicant and the respondents, and the court proceeds to make the following findings:-

(1) on ownership of the suit property namely LR No 209/160/1 apparently mis described by the applicant as LR no 209/160, there is in place title documents issued under the registration of titles Act cap 281 laws of Kenya. This has been annexed to the affidavit of the 1st defendant/respondent as annexure JKN 1. A perusal of the same reveals that vide entry no. 17, there is a transfer of the said property to one Joseph Kiarie Mbugua effected on 11/11/1976. There is entry for a charge to National bank of Kenya at entry number 25 effected on 18/10/96. At entry number 29, there is entry of a transfer of the said title to one Julius Keru Njoroge freed and discharged from any encumbrances effected on 20/6/2005.

It is therefore the finding of this court, that prima facie from the one mentioned entries, the court is

satisfied that at some point in time one Joseph Kiarie Mbugua was an owner. Apparently it was in his capacity as an owner, that he entered into a lease with the plaintiff/ applicant over the said suit property as per annexure Bnk 1 annexed to the applicants supporting affidavit. A perusal of the same reveals that the parties executed the same on 1st July 2003, that is the applicant in his capacity as the tenant and one JK Mbugua as the landlord.

It is to be noted that the said document is titled letter of intent. It is dated 20th May, 2003. It is not witnessed, neither is it registered. Section 40 of the Registration of titles Act cap 281 provides:-

“When any land is intended to be leased for any term exceeding 12 months, the proprietor is a minor or of in sound mind the guardian, the ground or next friend or other person appointed by the court, to act on behalf of the minor or person of in sound mind in the matter, shall execute a lease in form H in the first schedule, and every such instrument shall for description of the land intended to be dealt with, refer to the grant or certificate of title of the land, or shall give such other description as may be necessary to identify the land provided that no lease for the period above specified shall be valid unless registered.

41 Any lease or agreement for a lease granted for a term not exceeding twelve months shall be valid without registration. Provided that no right to purchase the land contained in any such lease or agreement shall be valid as against any subsequent purchaser of the land unless the lease or agreement be registered”

Section 19 of the stamp duty Act on the other hand provides:-

“19 (1) subject to the provisions of subsection (3) of this section and to the provisions of section 20 and 21, no instrument chargeable with stamp duty shall be received in evidence in any proceedings except-

(a). In criminal proceedings and

(b). In civil proceeding by a collector to recover stamp duty, unless its duly stamped”

section 4 of the Registration of documents Act cap 285 laws of Kenya on the other hand provides:-

“ 4 all documents conferring or purporting to confer, declare, limit, extinguish any right title or interest whether vested or contingent to in or over immovable property, other than such documents as may be of a testamentary nature, and vakallas shall be registered as herein after prescribed. Provided that the registration of the documents following shall not be compulsory:-

(iv) Any leaser or licence of land for any term not exceeding one year.....”

Applying the above provisions of law to the letter of intent, annexure Bnk1, it is evidently clear that intended terms of lease was to be for five years (3) months commencing 1st July 2003 with option for renewal at a rent to be negotiated. Definitely the period exceeds the exempted period of 12 months, under section 41 of the Registration of Title Act cap 281, and section 4 of the registration of documents Act cap 285 laws of Kenya it is also to be noted that from the face of the document, that the same does not bear a stamp duty payment stamp. By reason of the above, the said document does not qualify to be termed a lease.

None compliance notwithstanding the applicant has availed and exhibited a bundle of documents marked Bnk2 as proof of payment of Rental dues by the applicant to the contracting landlord J.K. Mbugua and proof of acknowledgment of some of these payments.

Having faulted the agreement relied upon by the applicant, as not being capable of being termed, as a lease, and hence not enforceable, the question to be determined is whether the relationship created between the parties is capable of being protected by law. It is common ground that the relationship created by that document is what is the subject of these proceedings. The applicant insists that the

relationship created is that of a landlord and tenant, which no doubt, the respondent 1 and 2 recognized it existed and that is why distress for rent was levied. From the demonstration annexed, it is apparent that offer of space was made by J.K Mbugua in his capacity as the landlord, it was accepted by the applicant in his capacity as the tenant, consideration in form of rent was paid by the applicant, as tenant, consideration was accepted by J.K. Mbugua as landlord and operation of business started. The operation of the business started, and continued from the date the first month rent was paid, and continued till events leading to these proceedings were set in motion. Case law has settled the position of such a relationship in law. The case of **BACHELORS BAKERY LIMITED VERSUS WEST LANDS SECURITIES LIMITED (1982) KLR 366** it was held inter alia, that “*such an agreement is a contract valid between the parties even in the absence of registration*”. In the case of **AROKO VERSUS NGOTHO AND ANOTHER (1991) KLR 178**. In this case too, it was held inter alia “*that in the absence of a lease, in writing, then the lease was a periodic tenancy, which periodic tenancies was a month to month tenancy as the rent was being paid monthly*”.

Applying the above decisions to the facts herein, it is clear that despite in validity of the lease agreement, none the less a landlord and tenancy relationship existed.

The existence of such a contractual relationship gives rise to duties and obligations, among them an obligation to pay rent, promptly on the part of the tenant and a guarantee for quiet enjoyment on the part of the landlord. Breach of duties would definitely lead to a court action. In the case of breach on the part of the tenant this would give rise to a right to distress for rent. This leads the court to ask who of the two the 1st defendant and J.K Mbugua was entitled to distrain for rent.

The distress for rent Act cap 293 laws of Kenya is very clear as to who is entitled to distrain for rent. This right is enshrined in section 3 of the said Act. It reads “*section 3(1) subject to the provision of this Act and any other written law, any person having any rent or rent service in arrears and due upon a grant, lease, demise or contract, shall have the same remedy by distress for the recovery of that rent or rent service as given by common law*” From the reading of the section, in order to qualify for a right to distrain for rent, one must show that he is any person having any rent or rent service in a arrear and due upon a:-

- (a). Lease
- (b). Demise
- (c). Or contract

Since it is the first respondent who gave instruction for the distress for rent, it is better to interrogate the basis for his rent entitlement before determining whether there were any arrears of rent or not. The building blocks for the 1st defendants claim are drawn from his own deponement, in his affidavit sworn on 9th April 2008 and filed on the 10th April 2008.

(1) That he is the registered owner of the suit property LR 209 (160/1 and he has exhibited a copy of title Jon 1 whose entry number 28 shows clearly that the suit property was transferred to him on 30.6.2005 freed and discharged from all encumbrances.

(2) That the said property was acquired through a public auction. The reason for the property being auctioned was because of loan default. Indeed a perusal of the said title document at entry 17 thereof, the said property was transferred to on Joseph Kiarie Mbugua on 11.11.76. At entry number 18, the said Joseph Kiarie Mbugua charged it to Standard Bank limited in 11/11/1977, a further change to the same bank was effected. On 29.10.87, vide entry no 21, these were discharged vide entry number 24 which discharged change at no 18 and 21 vide entry number 25 there is entry for a charge to National Bank of Kenya limited on 18/10/96. There is no entry for the discharge of the charge to National bank. Absence of an entry for the discharge of change to National Bank fortifies the 1st defendants’ stand that there was default, which default, to the property being auctioned. The first defendant went further and displayed

documents indicative of the fact of an Auction of the suit property having taken place on 3rd August 2004 although the notice advertising the Auction is not exhibited.

There is also proof of payment of the purchase price both to the Auctioneer and the bank as follows.

(a) Cheque number 794818 payable to Garam investment to the tune of Ksh. 1,850,000/= with Garam Investment being indicated as the Auctioneer. There is traced in the bundle a corresponding receipt no 9732 headed Garam investments dated the same date of 3/08/04. The cheque is drawn on standard bank.

(b) Other payments followed as follows:-

(i). Vide cheque number 746756 to the tune of Ksh. 2,845,000.00 payable to National Bank of Kenya limited account LR no 209/1601/IR6036

(ii). There are two other payments vide cheque number 003121 to the tune of Ksh. 850,000/= and cheque number 746831 to the tune of Ksh. 1,775,000.00 but these concerned property LR no 209/5821/9IR number 18530 not subject of there proceedings. The payments for the subject property was on 18/10/2004 long before the transfer in June 2005.

Upon registration as owner under the Registration of Titles Act cap 281 laws of Kenya, the said title became subject of the provision of section 23 of the said Act. It reads:-

“ the certificate of title issued by the Registrar to a purchaser of land upon transfer or transmission by the proprietor thereof, shall be taken by all courts, as conclusive endone that the person named therein, as proprietor of the land is the absolute and indefinable owner thereof subject to the encumbrances, easement restrictions and conditions contained thereof, or endorsed thereon, and the title of that proprietor shall not be subject to challenge except on the ground of fraud or mis representation to which he is proved to be a party”

As per record, as at the time, the property was purchased, by the 1st defendant, the plaintiff was already a tenant in the premises. The question that arises is whether the tenant/landlord relationship shifted immediately upon the change of ownership by virtue of which the 1st defendant became entitled to receive the rent from the premises and the plaintiff became obligated to pay the rent to the new land owner and upon default distress for rent to issue.

Section 3 of the distress for rent Act spells out clearly under what circumstances a right to distrain for rent arises. It reads:-

“ subject to the provision of this Act and any other written law any person having any rent or rent services in arrear and due upon a grant lease, demise or contract shall have the same remedy by distress for the recovery of that rent or rent service as is given by the common laws of England”

This being the case in order to show that the 1st defendant was entitled to distrain for from the rent he was obligated to demonstrate that he has become so entitled by reason of:-

- a. Grant-The 1st defendant had not lease but purchased the premises.
- b. Lease – the 1st defendant did not lease but purchased the premises.
- c. Demise the property was not demised to the 1st defendant meaning it was not handed to him by Mr. Mbugua.
- d. Contract – there is no contractual relationship between the 1st defendant and the plaintiff not even by conduct. One by conduct would have arisen if after purchase, he moved in and secured a new lease agreement with the plaintiff, or served the plaintiff with a notice for payment of rent to the first defendant

as the new landlord. The first defendants' situation is therefore slightly distinguishable from the facts of the case of John Ibrahim and 8 other versus Tal Holding limited and another Mombasa HCCC 1769 of 2000 decided by Mwera J on 15th November 2005.

At page 1 of the judgement line 1 from the top, the learned judge made the following observations:-

“The suit instituted by pliant filed here on 11th April 2000 has nine (9) plaintiffs. The first defendant company is in the centre of the dispute, while the 2nd defendant is a firm of auctioneers he sent to levy distress on the goods of the plaintiffs. They plead that they have been tenants of various flats in Block No IV Tudar Mombasa, standing on a parcel number Mombasa Block IX /124 owned by Kenya shell limited and paying monthly rent of Ksh. 2,900/= since 1st August 1995. That some time in 1998 Kenya shell declined to accept the rent and on 20th March 2000 they received letters from the 1st defendants lawyers (TAL) demanding rent arrears between 1999 and March 2000 and on 3rd April 2000 TAL issued a second quit notice, and instructed the 2nd defendant to levy distress, for rent effective on 17th APRIL 2001.

A reading of both replying affidavits of the 1st and second defendants respondents/ do not yield:-

- a. Notice to the plaintiff or any other tenant on the suit premises notifying the said tenant/tenants that the 1st defendant was now the new landlord, from any particular date, and that they/him tenant/tenants were obligated to pay rent to him failing which they be evicted .
- b. Any notice issued by the 1st defendant or his agent to vacate the premises due to non payment of rent.
- c. Any civil proceedings undertaken against the tenant/tenants with a view of seeking a declaration that he is the lawful landlord of the premises from the date of purchase of the suit property and as such the tenant/tenants in the premises were obligated to pay rent to him effective a particular date failing which the same be evicted.

It is on record that the action the 1st defendant took was directed at the previous owner of the premises. It is common ground that the 1st defendant was in the pursuit of realization of the fruits of his purchase. The case filed was Milimani Commercial courts CMCC no 6190 of 2006. The parties are Julius Keru Njoroge as the plaintiff, and Joseph Kiarie Mbugua as the defendant. The plait is dated 18th day of May 2006 and filed on the same date. It is annexed as JWMI to the affidavit of the 3rd defendant and JKN2 to the replying affidavit of the 1st defendant. The prayers sought were two namely:

“The defendant and or any other person living in LR no 209/160/ICIR No 6036 along. Forest road Nairobi be ordered to vacate the plaintiffs premises forthwith and give up vacant possession of the same.

(b) Costs of this suit and interest therein”

Recovery of rent was not one of the reliefs sought in the same bundle of exhibits marked JKN 2, there is an eviction order which on the face of it appears to have been issued by the CHIEF MAGISTRATE in CMCC 6190 of 2006. The content reads:-

“Eviction order to

S.M.G. Gathogo t/g. valley auctioneers Nairobi.

Where as, it was ordered by the chief magistrate court, at Nairobi, on the 7th June 2006 that the defendant Joseph Kiarie Mbugua shall give possession of the premises, occupied by Joseph Kiarie Mbugua at LRno 209/9601/ICIR no 6036) along Forest road Nairobi to the plaintiff Julius Keru Njoroge.

And where as the said defendant has not complied with the order aforesaid, you are hereby directed to put the said plaintiff in possession of the said premises and you are hereby authorized to remove any

person bound by the order, of the chief magistrates' court, who may refuse to vacate the same. Given under my hand and the seal of this court, at Nairobi this 26th day of June 2006”

Neither party has annexed the proceedings of the lower court, to enable this court, really know what transpired in the lower court, and the current position on the file as at the time the plaintiff came to court. The 1st defendant is silent in his deponement as to whether the status quo given by the eviction orders were even disturbed subsequently.

The affidavit of the 3rd respondent on the other hand reveals otherwise. Annexure FWM3 to 3rd defendants affidavit, in reply annexes an application by way of chamber summons dated 6th July 2006 and filed under certificate of urgency on the same date. The prayers sought were 8 namely;-

- “ (1) That this application be certified urgent and be head exparte, in the first instance.*
- (2) That an urgent temporary injunction, restraining the plaintiff/his servant agents employees or otherwise from evicting the defendants, his tenants, agents, servants and or employees from the defendants premises known as LR 209/1601/1.1.R No 6036 pending the hearing and determination of this application inter partes.*
- (3) That an urgent temporary injunction do issue restraining the plaintiff, his servant, agents, employees or otherwise from evictions the defendant, his tenants agents, servants, and/or employees from the defendants premises known as LR 209/1601/1.1.r NO 6036 pending the hearing and determination of this suit.*
- (4) that the interlocutory judgement and decree entered herein on 7th June2006 be set a side and all other consequential orders herein.*
- (5) That the defendant be granted leave to file his defence and the draft defence annexed herein be deemed to be duly filed and served on payment of requisite court fee,*
- (6) That the Honorable court, be pleased to stay this suit pending the hearing and determination of HCC No. 420 of 2006 Nairobi.*
- (7) That the cost of this application be provided for*
- (8) That any other relief as this Honorable court, may deem it and just to grant”*

To the same exhibit, there is annexed a defence which is not titled draft, dated, the same 6th day of July 2006 and filed same date. The salient features of the same are:-

- (i) Vide paragraph 2 thereof, denied registered, proprietorship, of the plaintiff/defendant there in.*
- (ii) vide paragraph three, that the plaintiff/1st defendant conspired with auctioneers to disposes off the defendants of his afore said property LR 209/1601/1 (IR 6036) by way of auction sale, which purported sale was illegal unlawful and fraudulent*
- (iii) (ii) vide paragraph 4 there of averred that there is no good title or transfer of the suit premises to the defendant, and the plaintiff cannot claim to be the registered proprietor of the suit premises and therefore the defendant is still the registered owner of the suit premises and in his physical possession of the same.*
- (iv) Vide paragraph 5 there of, that he had filed HCC No. 470 of 2006 against the plaintiff among others, which suit touched on the suit property and which suit should be heard first.*
- (v) Vide paragraph 6 thereof, that the defendant would seek stay of the proceedings in the said suit*

pending hearing and final disposal of HCC 470/2006

(vi) Vide paragraph 7 that the plaintiff has not disclosed how much he paid for the purchase of the properties”

A reading of the said draft defence does not yield a counter claim, seeking:-

- (a) a declaration that the said Joseph Kiarie Mbugua was still the registered proprietor of the suit land.
- (b) A declaration that the sale to the plaintiff, herein, first defendant, was null and void and should be set aside.
- (c) A declaration that HCC 470/2006 should be heard first before this suit.
- (d) A declaration that the purported eviction issued there in was null and void and that the same should be set aside.

It is also common ground that annexure FWMA is the resultant ruling, of the application mentioned above. It was delivered by the Lower court on the 18th day of October 2006. At page 3 thereof the said ruling, the resultant orders of the said application are set out and these are:

- (1) The final interlocutory judgment entered herein on 7th June 2006 and all consequential orders are hereby set aside ex-desi to justiclae.
- (2) The defendant/applicant is granted leave to file his defence within 14 days, from the date hereof unconditionally.
- (3) The plaintiff/respondent shall be at liberty to amend and file its plaint within 14 days from the date of service of the defence thereof
- (4) That costs of this application to abide the event. The extracted order is also exhibited but the same is not sealed.

Applying the afore set out assessment to the rival claims herein, the question to be asked is whether in view of the fact that:-

- (a) Indeed the 1st defendant is the current registered owner of the suit property, and in terms of section 23 of the RTA, the said title Annexure JKNI is prima facie proof of ownership; and
- (b) Considering that upon such registration the 1st defendant never issued a notice to the tenant/tenants to start paying rent to him; and
- (c) Considering that no notice of threat of eviction and or distress for rent was issued by the 1st defendant to the tenant.
- (d) Considering that eviction orders issued in the lower court of the suit premises; and were subsequently set aside; and
- (e) Considering that the current position of the proceeding in the said lower court is unknown to this court: and,
- (f) Consideration that there is no order seeking to counter claim for the cancellation of the title, the sale and declaration that one Joseph Kiarie Mbugua is still the registered owner, was the 1st defendant entitled to distrain for the rent herein, or alternatively was the distress for rent unlawful? Hand in hand with the above question is whether in the circumstance demonstrated herein the plaintiff/applicant is entitled the

interim remedy being sought?

Section 15 of the distressed rent Act Cap 293 Laws of Kenya provides:-

“Section 15 where distress is made for any kind of rent justly due and any irregularity or unlawful act is after words done by the party distressing or by his agents the distress itself shall not be therefore deemed to be unlawful nor t he party making it duties be deemed a trespasser abinitio but the party aggrieved by the unlawful act or irregularity may recover full satisfaction for the damages there by in a suit for that purpose. Provided that when the plaintiff recovers in that suit he shall be paid his full costs of suit and have the same remedies for them as in the other cases of costs

(i) no tenant or lessee shall recover in any suit for any such unlawful act or irregularity if tender of amends has been made by the party distaining or his agent before the suit is brought”

This courts construction of this provision is that unlawful or irregular distress for rent is excusable where the same was levied in circumstances where rent was justly due

Applying that to the facts demonstrated here in, as concerns the tenant/landlord relationship, between the 1st defendant and the applicant, issue of just rent cannot arise because:

- (a) There was no lease agreement between the 1st defendant and the plaintiff and the said property.
- (b) It is true that upon transfer of title to the first defendant, in the manner that it was done, the said 1st defendant then became the owner thereof in terms of section 23 of the RTA. The title became indefeasible save for circumstance specified therein.
- (c) By virtue of what has been stated in number (b) above, the 1st defendant was entitled to reap the fruit of the purchase namely rental value of the said premises.
- (d) To realize what he was entitled to as in number (c) above, he ought to have made the first move by issuing a notice to the tenant/tenants that he was now the owner and rent should be paid to him failing which measures would be taken against tenant/tenants. Even if no formal agreement would have been entered into by parties, the act of demand and receipt of the rent could have created land lord and tenant relationship by conduct. No such conduct has been demonstrated herein on the part of either.

The question for determination by this court is whether the applicant has come within the ambit of principles governing the granting of the reliefs sought. In view of the facts demonstrated above prayer (b) thereof reads:-

“(b) the first defendant by himself, his servants or agents be restrained by order of injunction from trespassing on, constructing structures on or in any other way working on, or transferring any portion of the land or parcel known as LR 209/1601 Muraga Road Nairobi, and do remove themselves, their servants, goods and building materials from the said plots forth with where as prayer (c) there of reads:-

“(c) that the second defendant by himself, his servants or agents be restrained by order of injunction from selling, interfering in any way parting with the items belonging to the plaintiff, and his customers carted away from LR 209/1601 till determination of this suit or further orders of this court”.

Prayer (b) seeks two orders one for restraint and another mandatory removal. Where as prayer (c) seeks injunctive relief.

The Law on the subject is now settled. Part of these principles are set out in the case law cited. This court in its own ruling read and delivered on 23rd day of March2007, in the case of Mpala wild life Foundation versus Tom Githere Nairobi HCC No 57 of 2007 had occasion, on to deal with issues of applicability of the law on mandatory injunctions. Case law on the subject is discussed at page 14 and 15

of the said ruling. At page 14 the court, cited with approval the decision of Gacheche J in the case of Eldoret White castle Motel Ltd versus the Kenya Power and Lighting Company Ltd Eldoret HCC Number 122/04 (2005) KLR in which the learned judge ruled thus:-

“a mandatory injunction can be granted on an interlocutory application as well as at the hearing, but in the absence of special circumstances it will not normally be granted. However if the case is clear and one which the court thinks it ought to be delivered at once or if the act done is a simple and summary one which can be easily remedied or if the defendant attempted to steal a match on the plaintiff.....a mandatory injunction will be granted on an information application”

At page 15 there is quoted with approval the decision of Ojwang J in the case of Reuben Gitonga M. Mugambi versus Kenyatta National Hospital Nairobi HCC number 973/2004 where the learned judge held thus:-

“a mandatory injunction jurisdiction is a jurisdiction which must be exercised only in special circumstances. Special circumstances however depend on the facts and the circumstance of each case and the good sense of the trial judge”.

On the same page is quoted Alnasir Visram J in his decision in the case of Palace Dry cleaners Ltd and another versus Kenya Power and Lighting Company Ltd Nairobi HCC No 837/2000, where the learned judge ruled thus:-

“Special circumstance is a question of facts to be determined on the facts and circumstance of each case and good sense of the trial judge. A court exercising the jurisdiction for a mandatory injunction at the interlocutory stage must consider each case on its own facts”

All these three cases are cases of courts of concurrent jurisdiction and are therefore not binding on this court. However where they state the correct position in law, there is no reason to depart from that line of reasoning. The guiding principles echoed by these decisions are these:-

- (i) A mandatory injunction is available to an applicant at an interlocutory stage as well as at the main hearing.
- (ii) In order for an applicant to earn this relief, it must be shown that there are special circumstances of the case.
- (iii) The litigant must go further and show that the special circumstances are not only special but are also clear and plain which ought to be decided at once
- (iv) The act done must be a simple and summary one which can be easily remedied.
- (v) There is a demonstration that the defendant attempted to steal a match on the plaintiff
- (vi) There is no uniform standard set, for establishing or determining the special circumstances. Each case depends on its own facts and circumstances.
- (vii) The determination of what amounts to special and clear circumstances, and what does not amount to such circumstances depends on the good sense of the trial judge.
- (viii) The determination of the special and clear circumstances is a question of facts and circumstances of each case.
- (ix) Each case must be considered at each time on its own facts.

Turning to the other limb of the interlocutory restraint, under the case law, too is well established. There is the famous case of GIELLA VERSUS CASSMAN BROWN & COMPANY LIMITED (1973) EA 358

discussed at page 16 of the same own cited ruling. Further principles on the subject of interlocutory reliefs were set out by this court, in own ruling decided on the 7th day of March 2008, in the case of Kenya Institute of Management versus Kenya Reinsurance Corporation Nairobi HCC 156 of 2007. Case law on the subject is discussed at page 37-39 of the said ruling.

At page 37 of the said ruling, there is cited with approval the a fore mentioned case of Giella Versus Cassman Brown & Company Ltd (1973) EA 358. This land, mark decision establishes in 3 major principles relevant to this ruling, namely;

That in order for a litigant to earn the relief of an interlocutory injunction one must demonstrate the existence of the following:-

- *The existence of a prima facie case with a probability of success.*
- *The existence of facts which demonstrate that if the injunction is not granted, the applicant will suffer irreparable loss which cannot be compensated for by on award of damages.*
- *That where the court, is in doubt about ingredient 1 and 2 above, it will decide the matter on a balance of convenience of both parties*

At page 38, there is quoted with approval the case of Film Rover International Ltd and others versus common Film Sales Ltd (19 86) AER 772 whose gist of the holding is that:-

“In determining whether to grant an interlocutory injunction or not, the question for the court, was whether the injustice that would be caused to the defendant if the plaintiff was granted an injunction, and later failed at the trial out weighed the injustice that would be caused to the plaintiff if an injunction was refused and he succeeded at the trial”

On the same page 15 – there is cited the court, of appeal decision in the case of Alkman Versus Michuki (1984) KLR 353 where the gist of the holding is that equity does not aid law breakers hence where the respondent had unlawful seized possession of the estate and were infringing on the right of the appellants Receiver manager they ought to have been restrained. Secondly that an interlocutory injunction can be properly granted where liability has not yet been ascertained. On page 39, there is another case Waithaka versus Industrial and Commercial Development Corporation (2001) KLR 374 where Ringera Jas he then was held thus:

“It is not an inexorable rule that where damages may be an adequate remedy interlocutory injunction should never issue. If the adversary been shown to be high, handed or oppressive in its dealings with the applicant, this may move a court of equity to hold that one cannot hold another citizens rights only at the pain of damages.”

These principles on injunctive reliefs have to be applied to the competing interests of the disputants herein with that of the 1st defendant in a summary form being:

- (a) He is the registered proprietor.
- (b) He has an eviction order.
- (c) As owner he was entitled to the rents
- (d) Rents were not paid hence the distress.
- (e) To them the distress was proper.

Those of the second defendant in summary are:-

He was simply an agent of the 1st defendant and he was acting on basis of a court order. Where as those of the applicant are:

- (a) He was a tenant of Joseph Kiarie Mbugua and not the 1st defendant by virtue of a lease agreement exhibited.
- (b) He dutifully paid his rent to one Joseph Kiarie Mbugua as per the annexed bundle of receipts
- (c) When the said Joseph Kiarie Mbugua passed on, he started paying rent to the representatives and he has never defaulted.
- (d) He is a stranger to the alleged proceedings in the Lower Court where the alleged eviction orders were issued as he was not a party to the same.
- (e) He had no land lord and tenant relationship with the first defendant which could give rise to distress for rent.
- (f) That by reason of the aforesaid assertion in number a, b, c, d, and e, above, the actions of the defendants are illegal, unlawful unjust and oppressive and he is entitled to the relief being sought.

These have been considered in the light of the principles established by case law set out above, and this courts findings on the same are as follows:

- (1) On the ingredient of establishing a prima facie case with a probability of success, the applicant has to show that he was a better title to the suit property as opposed to that of the 1st defendant. It is already on record that the applicant has placed reliance on the lease document annexed as annexure Bnk1

As noted earlier on, the 1st defendant cannot rely on it to enforce his rights against the applicant. Neither can the applicant rely on it to enforce his rights against the first defendant.

Although it was adjudged by this court, to be invalid by virtue of the reason, that it was in excess of 12 months and yet it had not been registered. But that invalidity notwithstanding, the court, went a head to hold that a tenant and land Lord relationship existed between the applicant and one Joseph Kiarie Mbugua by conduct – where by rent was paid, by the tenant, and accepted by the landlord.

The court, has been informed that the said landlord is now deceased. Form the deponements of the applicant, he has solicited support from the deceased's representatives to confirm that he had been dutifully paying rent to them. It therefore follows that in order to succeed in his assertion, that he has been paying rent to the representatives of the estate of one Joseph Kiarie Mbugua, the applicant has to demonstrate the following

- (a) That the said representatives have confirmed receipt of the same either through documentary or otherwise.
- (b) That the said representatives have a better title to the property as well as the rents better, than that of the 1st defendant.
- (c) That the said representatives are legally and lawfully entitled to receive the same as such.

As regards item (a), indeed the applicant has exhibited rent

Receipts up to and including the period when the eviction was executed. The applicant has further received support from the deponent of the replying affidavit of the 3rd defendant. The 3rd, 4th, 5th and 6th defendants are described in paragraph 4 of the plaint as legal representatives of the estate of the late Joseph Kiarie Mbugua. It reads:-

“4 the 3rd, 4th, 5th and 6th defendants are the legal representatives of the estate of the said Joseph Kiarie Mbugua (deceased) and carry on business in Nairobi in the Republic aforesaid”

Paragraph 1 and 5 of the 3rd defendants replaying affidavit tends to fortify this stand. These read:-

“1. that I am the third defendant herein and have the authority of the 4th, 5th and 6th defendants to swear this affidavit on behalf of administrators of the estate of the late Joseph Kiarie Mbugua.

5. That immediately the late J.K. Mbugua became aware of the eviction order aforesaid, he instructed counsel to set aside the same and an application was filed on 6th July 2006 attached here to and marked FWM 3.

6. That on 18th October 2006 a ruling was delivered by the honourable Cherono SRM granting the application filed, on behalf of the late Joseph K. Mbugua, Inter alia setting aside the eviction order attached here to and marked FMW4 and FMW5 are the said ruling and order respectively”

These deponents do not disclose when the said J.K. Mbugua died. Neither is there a certificate of death annexed to prove the same. The same deponement does not also exhibit the grant of representation to provide locus standi in this matter for the 3rd, 4th, 5th and 6th dependants. In so far as they are sued in their capacity as legal representatives.

From the applicants' deponement, he has moved to result the 1st defendants' move to claim ownership of the suit premises because of his link to J.K Mbugua by virtue of his land lord and tenant relationship which to him still submits. Indeed the 3rd defendant as submitted earlier supports this stand. However in the absence of production of a death certification, and a grant of representation to prove firstly that J.K. Mbugua, died, and when he died, and secondly that his estate has locus standi both in the Lower court proceedings which were prosecuted on his behalf, and these proceedings, there is nothing to show that the setting aside of the eviction orders granted in favour of the applicant was procedural. Without them also, there is no basis upon which the applicant can take refuge in the order setting aside the eviction order in the lower court, as providing good ground on which to stand and resist the respondents 1-2 moves. Likewise, there will be no basis upon which the 3rd to 6th defendants can be sued on behalf of the estate of J.K. Mbugua. It means that the anchor on which the applicant has anchored the suit as well as the interim application is non existent. It is non existent because the lease was personal to the applicant and the landlord, and upon death of the landlord, to his estate through legal representative, in the absence of which the applicants stand non-suited.

The applicant has also relied on rent payment and produced receipts exhibited. Once again, in the absence of locus standi to receive the rent on behalf of the estate, the applicant is taken to have remitted the rent to unauthorized persons. Once the issue of locus standi of a person through whom the applicant has anchored his claim becomes questionable, or it is not proven, there is nothing to stand in the path of the 1st defendant as the current title holder which title in terms of section 23 of cap 281 of the laws of Kenya is proof of ownership and stands until declared otherwise to take appropriate steps to gain entry to his property. Since it has not been declared otherwise, it therefore follows that even if it can be taken that despite being the title holder, the 1st defendant could not distrain for rent, the existence of that title is sufficient to protect the 1st defendant from the issuance of the injunctive relief sought against him by the applicant.

As per provision of sections 15, of the distress for rent Act, cap 293 laws of Kenya, the applicants remedy lies in damages and not in an injunction. As for the relief sought against the 2nd defendant, this would have been taken to be a proper and valid complaint against the 2nd defendant, had it not been found to have been framed in general terms, and particulars of the items affected not being given. Its validity arises from the fact that, in the absence of a landlord and tenant relationship subsisting between the 1st defendant and the applicant, there is no right to distrain for rent. It would therefore mean that the instruction given to the 2nd defendant by the 1st defendant were not only invalid but unlawful. This being

the case, the court, would have gone a head to order the protection of the properties subject of prayer (c) had they been mentioned either in the prayer itself if they would be accommodated there in, or in a schedule attached to the affidavit as an annexure. In the absence of such particulars being given, issuing of a blanket order will be like casting a net into the sea, as it might catch big fish, small fish, crabs, snails, snakes etc.

The court is alive to the existence of annexure Bank 3 being log books for 3 vehicles namely KAC 997M, KUE 786 and KAA575D, allegedly the vehicles alleged to have been seized by the second defendant. Apart from the log books there is no back up information to show that these vehicles had been received at the applicant's garage for repairs and were in fact seized.

The court is alive to the fact that it is alleged that the premises where the applicant used to carry on business were razed down and may be documents pertaining to the inventory of the motor vehicles which were in the applicants possession either got lost or were mislaid. It was therefore necessary for the applicant to solicit an affidavit from the customers' who should have been named in connection with each vehicle, to confirm that indeed they had taken their vehicles to the applicants' garage, and that the same had been seized by the Auctioneer. In the absence deponents from the alleged customers there is nothing to oust the 2nd defendant's assertions, that indeed they distrained the said goods, but then the applicant came with a mob and carried away the distrained items or goods.

For the reasons given in the assessment, the court, declines to grant the interim relief sought in the applicants interim application dated 2nd April 2008 and filed on 4th April 2008 because of the following reasons prayers (b).

1st limb seeking an order of injunction to restrain the first defendants by himself servants or agents from trespassing or constructing or in any other way working on or transferring any portion of the land or parcel of land known as LR 209/1601 Muranga Road Nairobi cannot be issued because:-

- (i). The manner the 1st limb of the prayer is framed, the applicant seeks to challenge the 1st defendant's title to the suit property. Annexure J.K.N 1 to the first defendant affidavit reveals that title passed on to the first defendant on 20/6/2005. From that date section 23 of the Registration of titles, Act operates to shield the 1st defendants' ownership of the same until declared otherwise by a court of law.
- (ii). No court of law has declared the said title vested in the first defendant to be invalid. The proceedings purported to challenge the same namely Milimani commercial court CMCC 6190/2006 has not been finalized. Further the current status of the said proceeding is unknown. Also as noted earlier on herein the draft defence which was intended to champion the interests and claims of one J.K Mbugua did not have a counter claim seeking declaratory orders seeking to fault both the sale and transfer to the first defendant. In the absence of such challenge in a counter claim the existence of these proceedings do not favour the claim of either J.K Mbugua or the applicant.
- (iii). From the deponement and documentation on the record, the applicants' interest in the suit property is not in its title, but the lease hold interest. The court found the lease document invalid, none the less went on to hold that in its imperfect form it formed a basis for a month to month landlord/tenancy relationship because rent was paid and accepted on a monthly basis. This relationship can only be enforced against J.K Mbugua and the successors in title of J.K. Mbugua of whom the 1st defendant is not one of them. It therefore follows that the only persons who can champion that right on behalf of the applicant is J.K. Mbugua or his successors in title. The 3rd, 4th, 5th and 6th defendant should have been co plaintiffs and not defendants.
- (iv). The applicant by seeking to restrain the 1st defendant in the manner sought in prayer (b) he is trying to protect the interest of J.K. Mbugua in the said property, and in doing so at the same time protecting his tenancy. It is on record that one J.K. Mbugua is deceased. By virtue of J.K. Mbugua being dead, protection of his interest in the suit property together with others claiming through him and or his estate, can only be done by a person who holds a letter of representation to the estate of J.K. Mbugua.

Neither the applicant nor the 3rd, 4th, 5th and 6th respondents have exhibited a certificate of death nor a grant of representation. In the absence of such documents, the applicant stand non suited in so far as his intention to protect the suit property against the 1st defendant is concerned.

(v). Issue was raised about the orders in Nairobi Milimani commercial court CMCC 6190/2006 where by the eviction orders were set aside. It is on record that the said proceedings were filed by counsel on behalf of the said J.K. Mbugua. In the absence of exhibition of certificate of death and grant of representation to his estate, there is nothing to show that the said proceedings were undertaken during his life time. And if they were undertaken after his death, the orders granted in his favour are invalid, and if invalid, then it means tat the eviction orders still stand.

(vi). It is correctly argued and found that the purported distress for rent was unlawful for the reasons given in the body of the ruling. That notwithstanding the remedy for an aggrieved party or a victim of unlawful distress is not an injunctive relief but a remedy in damages as provided for in section 15 of the distress for rent Act cap 293 laws of Kenya.

Prayer (b) 2nd limb

Prayer (b) second limb, the applicant sought mandatory injunction which can only issue in clear and straight forward cases. In the circumstances of this case the applicant 2nd limb of prayer (b) does not qualify for the grant of this relief, because the circumstances of the case are not clear, straight forward by reason of what has been stated as reasons for declining to grant the first limb of prayer b.

2. Prayer C has also been refused because of the following reasons.

(i). It is framed in a general manner as it has not specified what items were taken. It was necessary for it to specify either in the prayer, or in an attached schedule the items which belonged to the plaintiff and which items belonged to each customer. Failure to so particularize, disentitled the applicant to this relief as the court, cannot issue an order in a blanket form by reasons of there being a danger of netting in that which may not be the subject of these proceedings.

(ii). Documentary proof such as an inventory to confirm that indeed such items were on the premises was necessary proof. In its absence deponement from the customers, themselves that indeed they had taken their properties to the applicants' garage and these were carried away.

(iii). Indeed three log books have been exhibited. In the absence of the inventory that these were in the garage, or deponement from the customers, there is nothing on record to oust the 2nd respondents' assertion that the items seized had infact been reclaimed by the applicant in the company of a mob. Such a situation is one which is not ideal for an interim relief. It requires cross examination of the parties and production of evidence in order to determine which of them is telling the truth.

(iv). Any injury or damage caused by the 2nd defendant /respondent in the course of execution of its duties is covered under section 15 of cap 293 laws of Kenya afore said as he was a duly authorized agent of the 1st defendant.

(3.) Other findings generally on this interim proceedings are as follows:

(i) **Replying affidavit of the 3rd defendant/respondent.** This affidavit is alleged to have been deponed by the 3rd defendant/respondent on behalf of and with the authority of the 4th, 5th and 6th defendants/respondents. In order for this authority to be effective, the 3rd, 4th, 5th and 6th defendants/respondents ought to have complied with the requirement of the provisions of order 1 rule 12(2) Civil Procedure Rules which states: "*The authority shall be in writing, signed by the person giving it and shall be filed in the case*". The requirement is mandatory because of the use of the words "*sall*" the Court of Appeal has confirmed that this is the correct position on its decision delivered on 27th day of

April 2007 in the case of **RESEARCH INTERNATIONAL EAST AFRICA LIMITED VERSUS JULIUS ARISI AND 213 OTHERS NAIROBI CA 321 OF 2003.**

No such authority was annexed to the said affidavit. It therefore, follows that in the absence of such a compliance, the said affidavits is deemed to operate for the 3rd defendants/respondents only. The 4th, 5th and 6th defendants/respondents are deemed not to be in opposition to the application.

(i) Complaint was raised by counsel for the 1st and 2nd defendants/respondents that the 3rd defendant's affidavit is based on bear grounds. The remedy for this is striking out of the offending paragraphs. Counsel aggrieved should have invited the court, before argument to strike out the offending paragraphs. A generalized complaint will not surface.

4. Competence of the interim application. This was raised by counsel for the 1st and 2nd defendants, that the application is incompetent as it was brought by a chamber summons instead of it being brought by a notice of motion since it sought relief, of an interlocutory injunction as well as prohibitive and mandatory injunctions. The assertion is correct as shown by the case law cited especially the decision by Azangalala J. Although this should have been raised as a preliminary objection, it cannot be ignored. It follows that even if the applicant had succeeded on prayer (b) and (c) he would have become disentitled to the reliefs, on the basis that the mode of presentation of the same to court, is incompetent. He should have resorted to the mode of presentation by way of a notice of motion as opposed to the chamber summons.

5. Proceedings in Milimani Commercial Court CMCC 6190/2006

(i) These were filed by 1st defendant against one Joseph Kiarie Mbugua. The court was informed he died during pendency of these proceedings which are alleged to be still pending. It was alleged that restraint orders granted therein are still operational, and the 2nd defendant moving against the applicant in the manner he did, him and his agent, the second defendant are in contempt of the said orders, and they should be punished. In order for the 3rd, 4th, 5th and 6th defendants to take refuge under those orders, it has to be shown that they have been enjoined to those proceedings. No order enjoining them to the said proceedings has been exhibited. In the absence of that no reliance can be placed on those orders.

Secondly there is a clear distinct procedure laid down in this courts jurisdiction as regards the manner of invoking the court powers to punish a party for contempt of court. These are laid down in section 5 of the judicature Act Cap 8 Laws of Kenya. They cannot therefore be incorporated in the order 39 Civil Procedure Rules procedures. More so when they have not arisen under rule 4 of order 39 which donates power for the same court, to punish for contempt of an injunctive order, issued under order 39 Civil Procedure Rules in the same proceedings. Herein no such orders have been issued herein. Neither have those issued in the lower court been transferred here in for enforcement.

6. Entitlement to rental dues from the suit premises who is to get the same. Is it the 1st defendant upon purchase and transfer or is it JK Mbugua?

(i) The law is that the owner of the title is the one to reap the fruits unless he assigns the same. It follows that the 1st defendant became entitled from the date of purchase and transfer.. But he should have issued notification of change of ownership and demand for the same before moving to levy distress.

(ii) From the date of transfer, one J.K Mbugua was not entitled to receive the same. His move to challenge the eviction did not entitle the said Mbugua to the rents. If there was a move to challenge the title, then the court would have taken measures to preserve the rent in some neutral place pending the resolving of the ownership issues. It therefore follows that the 3rd, 4th, 5th and 6th defendants should not have continued to receive the same. That however is not a matter to be resolved in an interim application such as this one.

7. Relevance of case law cited. The case

(i) of Mawji versus US International University and another (1976) KLR 185 on the doctrine of lis pendens, has no application to these proceedings as the doctrine operates to protect a litigant asserting title to immovable property. Here in the applicant is not claiming ownership of the immovable property.

(ii) Kamau Mucuha Versus The Ripples Ltd Nairobi CA 186/1992 (Nai 77/92 UR) is relevant as the central principle in it is that, a mandatory injunction can be granted in an interlocutory application as well as at the hearing if, the defendant attempted to steal a match on the plaintiff; though applicable here, the applicant has not met the requirements for the reasons given.

(iii) The case of John Ibrahim and 8 others versus TAI Holdings Limited and another mombasa HCCC 176/2000, is relevant but cannot aid the first defendant because he never issued a notification to the tenant/tenants that he was now the new owner of the suit premises. Secondly, he never issued demand notice requiring rents to be paid to him. Thirdly he never issued notice to pay rent to him failing which an eviction would issue.

(iv) The case of Florence Makotsi T/A our connection and another versus Fortune Properties Limited and another Nairobi Milimani Commercial Court HCC NO 353 of 2006 on the mode of presentation of an application seeking both interlocutory and mandatory injunctive reliefs. The mode is by way of notice of motion. The decision aids the 1st and 2nd defendant in that the applicant's application as presented has been faulted.

8. The first and second defendant will have costs of the dismissed application which also qualifies to be struck out on account of being incompetent by reason that the mode of presentation is wrong.

DATED, READ AND DELIVERED AT NAIROBI THIS 4TH DAY OF NOVEMBER 2008

R.N. NAMBUYE

JUDGE