



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

Civil Case 239 of 2008

MICHAEL MALUKIPLAINTIFF

t/a Dawntech Computer Training Services

V E R S U S

POSTA INVESTMENT CO-OPERATIVE SOCIETY LIMITED ...DEFENDANT

R U L I N G

The Plaintiff herein is the Defendant's tenant in some business premises within Nairobi. The tenancy appears to be a month-to-month one. The Defendant levied distress for rent under the Distress for Rent Act, Cap 293, promoting the Plaintiff to come to court. The main relief sought in the plaint dated 11th June, 2008 is a permanent injunction

“against the Defendant's agents and/or servants to stop interfering with the Plaintiff's premises”.

Together with the plaint the Plaintiff filed chamber summons dated 11th June, 2008. The main order sought was an injunction

“against the servants and/or agents of the Defendant from interfering with Plaintiff's demised premises”.

The Plaintiff went *ex parte* before the Duty Judge on 12th June, 2008. The application was certified urgent and fixed for hearing *inter partes* on 21st June, 2008. Unfortunately that date fell on a Saturday. The Plaintiff then went before the Duty Judge again on 11th July, 2008. He had by then, without any order of the court, deposited the sum of KShs 145,000/00 in court. He claimed that this sum was arrears of rent that was in dispute. His application by chamber summons dated 11th June, 2008 was then fixed for hearing *inter partes* on 18th July, 2008. On that date there was no appearance for him and the chamber summons dated 11th June, 2008 was dismissed with costs.

The Plaintiff then filed another application by chamber summons dated 4th August, 2008. He sought the main order that he be allowed to deposit all future rent in court until final determination of this suit. He went before the Vacation Judge on 4th August, 2008 and the application was certified urgent and fixed for hearing on 13th August, 2008. For one reason or another, the application was not heard until 10th November, 2008. In the meantime the Plaintiff filed two other applications. These are notice of motion dated 14th August, 2008 (in which he sought reinstatement of the chamber summons dated 11th June, 2008), and chamber summons dated 29th October, 2008 (in which he sought the same orders as those

sought in the chamber summons dated 4th August, 2008). These two further applications were also heard on 10th November, 2008. This ruling therefore concerns three applications, all by the Plaintiff: the chamber summons dated 4th August 2008, notice of motion dated 14th August, 2008 and chamber summons dated 29th October, 2008. They have all been opposed by the Defendant. I have read all the affidavits sworn in support of and in opposition to the applications. I have also considered the submissions of the learned counsels appearing. No authorities were cited.

As already noted, the Plaintiff is the Defendant's month-to-month tenant. The material now before the court discloses that the monthly rent is KShs 30,000/00 from 1st August, 2007. The Plaintiff acknowledges that he is in arrears of rent, though he states that he does not know by how much. He claims that he effected some repairs to the premises, but he has not exhibited any consent by the Defendant or authority of the Business Premises Rent Tribunal for such repairs. In any event, he has not claimed in his plaint the costs of any such repairs.

The material now before the court further shows that the Plaintiff was in arrears of rent in the sum of KShs. 355,000/00 as at 30th November, 2008. Though he claims that the Defendant had refused to accept rent, there is no evidence of such refusal. The Defendant itself has denied that it refused to accept rent.

After the applications were heard the parties recorded a consent order in the following terms:-

“ORDER: By consent the sum of KShs 145,000/00 deposited by the Plaintiff in court shall be forthwith released to the Defendant through its advocates on record. The same is deemed to be arrears of rent but shall be taken into account when resolving the existing dispute as set out in the present suit. It is also agreed that the Plaintiff shall pay all future rents at KShs 30,000/= per month directly to the Defendant w.e.f. the month of November 2008.”

In light of this consent there is no cause to grant the chamber summons dated 4th August, 2008 or the chamber summons dated 29th October, 2008. As already seen, these two applications seek the main order that the Plaintiff be permitted to deposit future rents in court. By the consent order quoted above, the parties have agreed that all future rents be paid directly to the Defendant.

The two applications also contain the curious prayer that:-

“there be stay of execution pending the final determination of this matter”.

It has not been stated what is being executed. Is it an order of the court? If this was meant to be a prayer for a temporary injunction to restrain the Defendant from levying distress, it has not been so pleaded. In any case, as all evidence now available shows that the Plaintiff is in arrears of rent, there would be no justification to restrain the Defendant from exercising its statutory right to levy distress under Cap 293 aforesaid. It may be added that the statute provides an adequate remedy to a tenant for any distress for rent unlawfully levied.

That leaves only the notice of motion dated 14th August, 2008 which seeks reinstatement of the Plaintiff's application by chamber summons dated 11th June, 2008. As already seen, that application sought, in effect, to prevent the Defendant from levying distress. The hearing date for that application, that is 18th July, 2008, had been taken by the Plaintiff's counsel before the Duty Judge. There was no attendance, either by the counsel or the Plaintiff himself. The reason for failure to attend court given by the Plaintiff's learned counsel, ADERA OYOMBE, Esq., in the supporting affidavit sworn by him, is that the matter was not listed and that efforts to trace the file on that day were in vain. That cannot be true as the matter was indeed in the cause list of 18th July, 2008. The Defendant's counsel saw it there and attended court. He had not been served with hearing notice. The dismissal was on 18th July, 2008, not on 21st August, 2008 as stated in the application! No credible reason has been given for failure to attend court on 18th July, 2008.

In the event, all the three applications by the Plaintiff, that is the chamber summons dated 4th August, 2008, the notice of motion dated 14th August, 2008, and the chamber summons dated 29th October, 2008, have no merit. They are hereby dismissed with costs to the Defendant. It is so ordered.

DATED AT NAIROBI THIS 17TH DAY OF DECEMBER, 2008

H. P. G. WAWERU

J U D G E

DELIVERED THIS 19TH DAY OF DECEMBER, 2008