



REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA
AT NAIROBI (MILIMANI COMMERCIAL COURTS)

Civil Case 442 of 2006

SAMUEL MUNYI KAMAU.....1ST PLAINTIFF
ROBERT NGUNDI.....2ND PLAINTIFF
MIRIAM NYAMBURA.....3RD PLAINTIFF
TERESIA MATURU.....4TH PLAINTIFF
HANNAH NJAMBI NGUNDI.....5TH PLAINTIFF
IBRAHIM MUHAMED ELMI.....6TH PLAINTIFF
PETER NGUGI NJARAMBA.....7TH PLAINTIFF
PAUL NJOROGE.....8TH PLAINTIFF
MWANGI KAHUTHIA.....9TH PLAINTIFF
MARY NYOKABI NDUNGU.....10TH PLAINTIFF
DAVID MURITHI KABABI.....11TH PLAINTIFF
JOSEPH KARINGA.....12TH PLAINTIFF
CHARITY NJERI.....13TH PLAINTIFF
EMILIO GATHURI.....14TH PLAINTIFF
ELIZABETH CHEGE.....15TH PLAINTIFF

VERSUS

CHARLES MWANGI KAGONIA.....1ST DEFENDANT
MANSUKHILAL D. POPAT.....2ND DEFENDANT
JITENDRA POPAT.....3RD DEFENDANT

RULING

In the plaint filed on 4.8.2006, the plaintiffs claim to be sub-tenants of the 1st defendant on the premises known as L.R. No.209/138/25 River Road Nairobi (hereafter "**the suit premises**") which premises are owned by the 2nd and 3rd defendants. It is pleaded that the plaintiffs have been paying rent of KShs.180,000.00 per month to the 1st defendant who has not been remitting the same to the 2nd and 3rd defendants as a result of which the 2nd and 3rd defendants without notice to the plaintiffs on or about 7.7.2006 proclaimed the plaintiffs' premises for non-payment of rent of KShs.770,000.00. And on 22.7.2006 attempted to evict and distress for the said rent arrears but which attempt the plaintiffs resisted. It is further pleaded that despite the resistance the defendants continue to threaten the plaintiffs with distress and eviction hence the suit to restrain the distress and the eviction and for an order that the plaintiffs be allowed to pay rent directly to the 2nd and 3rd defendants. The plaintiffs further seek an order that the standard rent be assessed by this court or the Business Premises Tribunal.

Simultaneously with the filing of the plaint the plaintiffs lodged an application craving for interlocutory injunctive and prohibitory reliefs expressed to be under the provisions of order XXXIX Rules 1, 2, 3 of the Civil Procedure Rules and Sections 3 and 3A of the Civil Procedure Act. The 1st principal prayer is expressed as follows:-

"That temporary injunction do issue restraining the 2nd and 3rd defendants or their servants or agents Valley Auctioneers from distressing (sic) the plaintiffs or the tenants of LR.No.209/138/25 commonly known as Tea Room Exhibition River road, Nairobi until the hearing and determination of this application."

A similar prayer is not sought pending the hearing of the suit. The order sought pending the hearing of the suit is expressed as follows:-

"That a temporary injunction do also issue against all the defendants from evicting the plaintiffs pending hearing and determination of this suit."

The primary reasons for the application are as follows:-

- 1) That the 1st defendant has been collecting rent to the tune of KShs.180,000.00 per month from the premises but the defendant has not remitted the same to the 2nd and 3rd defendants since May 2005.
- 2) That the 1st defendant is supposed to remit only KShs.55,000.00 per month to the 2nd and 3rd defendants but he has not done so and the rent of over 770,000.00 is being demanded by the 2nd and 3rd defendants which has already been paid.
- 3) That the 1st defendant has obtained over KShs.4 million as rent, deposits and goodwill for the same period but has not paid the 2nd and 3rd defendants for a long period who have now proclaimed on the plaintiffs' goods.
- 4) That to (sic) the interest of justice the plaintiffs should not be evicted or distressed (sic) which all the defendants have threatened to.
- 5) That the rent should be assessed and the standard rent as per Cap. 301 pronounced by this Honourable Court or in the alternative by the Business Premises Rent Tribunal when it is reconvened.
- 6) That since the plaintiffs have no lease with either of the defendants they are protected tenants and their tenancy falls under Cap.301. Hotels, Shops and Business Premises Act.

7) That no distress can therefore be carried out or eviction without leave of the tribunal whereas the plaintiffs are paying rent.

8) That more so rent should now be paid directly to the 2nd and 3rd defendants or deposited in an interest earning account when it falls down though it has been paid in advance.

The application is supported by an affidavit sworn by the 1st plaintiff who depones that he has also sworn the affidavit on the authority of the other plaintiffs. The affidavit elaborates the grounds in the chamber summons. The 1st plaintiff also swore a further affidavit on 16.10.2006. In that affidavit it is deponed inter alia that, the lease agreement between the 1st defendant and the 2nd and 3rd defendants is not valid for want of registration and as per the order of the court in HCCC No.95 of 2005 of 16.2.2006 between the defendants. It is also deponed that the plaintiffs are ready to pay the standard rent assessed for their stalls to the 2nd and 3rd defendants for the date and time when the 2nd and 3rd defendants will have been able to have the ground lease renewed to themselves. It is also deponed that as the issues stand the defendants cannot be able to distress or evict the plaintiffs as they have no valid ground lease as the lease unless renewed belongs to the Government of Kenya

can allocate it to other parties. It is also deponed that if the ground lease by the Government has been renewed the plaintiffs be allowed to pay the 2nd and 3rd defendants directly and that such rent be assessed by the Business Premises Tribunal. It is further deponed that in the meantime the plaintiffs be allowed to pay about KShs.30,000/= in court per month or in the tribunal until such assessment is done. There is another affidavit in support sworn by the 11th plaintiff David Murithi Kababi on 19.11.2007. In the affidavit, the averments of the 1st plaintiff are reiterated. In addition, the 11th plaintiff seeks the striking out of the annexures to the affidavit of the 2nd and 3rd defendants sworn on 21.8.2006.

The application is opposed and there is a replying affidavit of the 1st defendant and the said replying affidavit of the 2nd and 3rd defendants sworn on 21.8.2006. There is also a further affidavit sworn by the 3rd defendant on 8/3/07. That affidavit was also sworn with the authority of the 2nd defendant. The main points made in the affidavits are: that the plaintiffs are strangers and trespassers upon the suit premises; that the lease over the premises is between the 1st defendant and the 2nd and 3rd defendants which lease provides for prompt payment of rent and restriction on sub-leasing save with the consent of the 2nd and 3rd defendants which terms have been breached by the 1st defendant; that the 1st defendant has filed a similar suit being HCCC No.741 of 2006 in which he claims the same goods now claimed by the plaintiffs; that this suit is res judicata in view of HCCC No.96 of 2006. That the plaintiffs have no locus standi to bring this suit against the 2nd and 3rd defendants as they are not parties to the lease between the 1st defendant and the 2nd and 3rd defendants; that the defendants remedy is statutory and against the 1st defendant and in that regard the plaintiffs have complained in Criminal Case Number 1722 of 2006 against the 1st defendant who has been charged with obtaining money by false pretences. In the premises, the plaintiffs have not suffered or cannot suffer irreparable injury which cannot be compensated by damages; that it is the 2nd and 3rd defendants who have suffered and continue to suffer damage as they have received no rent sine May, 2005 and are also facing threat of prosecution from the City Counsel of Nairobi on account of illegal structures put up by the 1st defendant.

In the 1st defendants replying affidavit it is deponed that on obtaining the lease of the suit premises, the 1st defendant invested heavily on repairs, partitioning, repainting, electrical, telephone, plumbing works to the suit premises and subdivided the same into twenty class market stalls for subletting to subtenants with the Landlords' knowledge. It is further deponed that with a view of expanding the business the 1st defendant applied for a loan of

KShs.2,000,000.00 which was declined by the bank on the ground that the main lease had expired in 2002 a fact which was not disclosed by the 2nd and 3rd defendants. It is then deponed that the 1st defendant informed the 2nd and 3rd defendants that he would suspend payment of rent until the lease with the government was renewed which to date has not been done. It is also deponed that the 2nd and 3rd defendants levied distress on his property and he filed HCCC No.96 of 2005 which suit determined that the lease between the 1st defendant and the 2nd and 3rd defendants was illegal and unenforceable and further dismissed the counter claim of the 2nd and 3rd defendants who were claiming 440,000.00 as rent arrears. It is further deponed that despite that decision, the 2nd and 3rd defendants on 7.7.2006 again levied distress against his goods provoking the filing of HCCC No.741 of 2006 for injunctive relief which suit is still pending determination. It is then deponed that despite the above averments, he is willing to pay the rent arrears and has already paid KShs.150,000.00 and the balance of arrears would be paid by two installments the last being on 31.12.2006. In the premises according to the 1st defendant the purported fear that distress will be levied on the plaintiffs' goods has no basis and their application should be dismissed.

The application was canvassed before me on 30.4.2007 by Mr. Kahuthu Learned counsel for the plaintiffs, Mr. Mwangi Learned Counsel for the 1st defendant and Ms. Njuguna for the 2nd and 3rd defendants. I have considered the pleadings, the application, the affidavits filed both in support of the application and in opposition thereto together with the Grounds of Opposition. I have also given due consideration to the submissions made to me by the counsels appearing and the authorities cited to me. Having done so, I take the following view of the matter. The application being principally for injunctive relief, I will consider the same in the light of the well known principles laid down in the rule making case of **Giella -vs - Cassman Brown & Company Limited & Another [1973] EA 358**. The principles are as follows: First the applicant must show a *prima facie* case with a probability for success at the trial but if the court is in doubt it should decide the application on a balance of convenience. Secondly, normally an interlocutory injunction will not be granted unless the applicant would suffer an injury which cannot be compensated in damages.

It is convenient to first deal with what I consider a preliminary issue which is the objection taken by the plaintiffs with respect to the annexures to the replying affidavit sworn by the 3rd defendant on 21.8.2006. The plaintiffs argued that the annexures were not properly annexed and should be expunged from the affidavit in question. The plaintiffs argued that those annexures were not properly identified in the affidavit. In my view the objection has no merit as the annexures are clearly identified as a bundle and the manner of identification does not offend the provision of Order XVIII of the Civil Procedure Rules and the Oaths and Statutory Declarations Act. I dare say that even if the identification had been improper I would have overlooked the defect in view of Order XVIII Rule 7 which reads as follows:-

“7. The court may receive any affidavit sworn for the purpose of being used in any suit notwithstanding any defect by misdescription of the parties or otherwise in the title or other irregularity in the form thereof.”

I also find that the plaintiffs would not be prejudiced by such irregularity if indeed the same existed as the plaintiffs have referred to the same annexures as if they had been properly identified.

All the parties made heavy weather of the decision of Osiemo J in HCCC No.96 of 2005. For the plaintiffs it was contended that the Learned Judge in that case declared the lease between the 1st defendant and the 2nd and 3rd defendants illegal and therefore unenforceable. In the premises, according to the plaintiffs the 2nd and 3rd defendants had no legal basis to levy distress for rent or seek the eviction of the plaintiffs. For the 2nd and 3rd defendants it was contended that this suit is bad in law and is res judicata as the said HCCC No.96 of 2005

between the 1st defendant and the 2nd and 3rd defendants had determined the issue of distress for rent.

I will not revisit the issue of Res Judicata as I dealt with it in my ruling of 29.11.2006 on the defendants' preliminary objection. But can the plaintiffs challenge the lease between the 1st and 2nd and 3rd defendants on the basis of the Judgment of Osiemo J aforesaid? I think not, for the following reasons. First, the plaintiffs in paragraph 4 of their plaint averred that at all material times they were subtenants of the 1st defendant on the suit premises owned by the 2nd and 3rd defendants as the Landlords. The record does not show that the plaint has been amended to reflect the challenge made against the said lease. The plaint is the foundation of the plaintiffs' application. In my view it was not open to the plaintiffs to challenge the lease between the 1st and the 2nd and 3rd defendants in the face of the clear admission of its validity in their plaint. Secondly the 2nd and 3rd defendants have exhibited annexure "JP2" which is a letter of allotment issued to the 2nd defendant and others by the Commissioner of Lands. The letter refers to "**Renewal of Lease**" over the suit property. The term of the lease is indicated as 50 years from 1.9.2002. Also exhibited are receipts issued by the Commissioner of lands signifying acceptance of the renewal of the lease and payment of land rent. The 2nd and 3rd defendants have also exhibited documentary evidence to support their allegation that rates have been demanded of them in respect of the suit property even after the expiry of the old lease. In view of those documents, I am persuaded on a prima facie basis that the 2nd and 3rd defendants' interest in the suit property has been acknowledged by the Commissioner of Lands and the City Council of Nairobi. That interest in my view is superior to the interest of the plaintiffs. Thirdly, the 1st defendant in his replying affidavit sworn on 22nd of August 2006 in paragraph 15 deponed that despite the non renewal of the head lease, he was willing to pay the rent arrears and had already paid KShs.150,000/= and the balance would be paid on or before 31.12.2006. In the grounds of opposition filed on behalf of the 1st defendant it is stated that the plaintiffs are not parties to the lease agreement between the 1st defendant and the 2nd and 3rd defendants. In the event the 1st defendant seems in my view to recognize the superior interest of the 2nd and 3rd defendants over the suit property. In all those premises, I am of the persuasion at least on a prima facie basis that the challenge made against the lease between the 1st defendant and the 2nd and 3rd defendants has no merit.

Having found that the 2nd and 3rd defendants had a superior interest in the suit property, I should now consider whether or not they were entitled to levy distress for rent. The short owner in my view is that they were. In their plaint the plaintiffs admit that although they had been paying rent to the 1st defendant, he did not remit the same to the 2nd and 3rd defendants and as from May, 2005 to July 2006 the arrears amounted to KShs.770,000.00. That averment is repeated in the supporting affidavit as follows:-

"7. That since the 1st defendant has not paid rent for over one and a half years whilst we continue to pay him without any arrears it is only fair and just that we pay the 2nd and 3rd defendants."

The default by the 1st defendant was admitted by himself in his replying affidavit aforesaid. He deponed at paragraph 6 that he subsequently wrote to the 2nd and 3rd defendants on 29.12.2004 informing them that he would suspend payment of rent arrears until the lease with the government was renewed. And in paragraph 15 he deponed that despite the non-renewal of the head lease, he was willing to pay the rent arrears and had paid KShs.150,000.00 and the balance would be paid by 31.12.2006.

I have no doubt in my mind that the 2nd and 3rd defendants were entitled to levy distress for rent as the rent arrears were clearly admitted. Notwithstanding the clear admission of the

arrears, are the plaintiffs' otherwise entitled to the Orders sought? The answer to that question has been furnished by the 1st defendant. First the first defendant has deponed in his replying affidavit in paragraph 13 that the 2nd and 3rd defendants levied distress on his property on 7.7.2006. He further deponed in paragraph 16 that the purported fear that distress will be levied on the plaintiffs' goods has no basis. That deposition is buttressed by the fact that the plaintiffs have not exhibited material to establish ownership of the property against which the distress for rent has been levied. Secondly the 1st defendant in his grounds of opposition states that there is pending HCCC No.741 of 2006 between the 1st defendant and the 2nd and 3rd defendants over the same subject matter in which similar prayers are sought. Consequently according to the 1st defendant the plaintiffs' application is fatally flawed. In ground number 2 it is stated that the plaintiffs application is also defective as the plaintiffs are strangers to the 2nd and 3rd defendants and can only litigate through the 1st defendant and in ground 3 it is stated that the plaintiffs are not parties to the lease agreement between the 1st defendant and the 2nd and 3rd defendants. If at the trial the 1st defendant succeeds in showing that the property involved is his and as the 2nd and 3rd defendants have already shown that the 1st defendant was in arrears at the time distress was levied I am not persuaded that the plaintiffs have a prima facie case with a probability of success at the trial.

I now turn to the second condition for the grant of an interlocutory injunction which is that where an award of damages would be an adequate remedy an interlocutory injunction will normally not be issued. In this case, I am of the view that even if a prima facie case had been shown the plaintiffs could be adequately be compensated in damages. The plaintiffs have a statutory remedy in Section 8 of the Distress for Rent Act Cap 293 which reads as follows:-

“If any distress and sale are made under this Act for rent pretended to be in arrears and due, when in truth no rent is in arrears or due to the person distraining then the owner of the goods or chattels distrainedshall be entitled to recover double the value of the goods and chattels so distrained and sold together with full costs of the suit from the person so distraining and the double value and costs of the suit may be recovered as a civil debt recoverable summarily.”

The plaintiffs' remedy as can clearly be discerned from the said section sound in damages and the quantification thereof is prescribed. Ringera J as he then was was of a similar view in **Minar – vs – Plaza Trust Limited and 2 Others: [HCCC No.679 of 2001] (UR)**. The Learned Judge expressed himself thus:

“In these circumstances an injunction cannot be issued to prohibit the demand or the enforcement by way of distress of (sic) payment of the rent disputed by the tenants.”

Having found that the plaintiffs do not have a prima facie case with a probability of success at the trial and that even if they had shown such a case, their loss could adequately be compensated in damages. I need not consider the third condition. However even if I were to consider this application on the balance of convenience, I would still decline the injunction sought. That is because, the 2nd and 3rd defendants have had no returns on their investment for over 1 ½ years. Secondly the plaintiffs have a clear remedy against the 1st defendant who has freely stated that the plaintiffs are strangers to the 2nd and 3rd defendants and were not parties to the lease agreement between the 1st defendant and the 2nd and 3rd defendants. Thirdly by their actions the plaintiffs have absolved the 2nd and 3rd defendants from liability. They have for instance, complained to the police against the 1st defendant against whom, a Charge of obtaining money by false pretence contrary to Section 313 of the Penal Code has been laid.

The upshot of the above consideration of the plaintiffs' application dated 3.8.2007 is that the

same is dismissed with costs to the 2nd and 3rd defendants. It is so ordered.

DATED AND DELIVERED AT NAIROBI THIS 28TH DAY OF MAY 2007.

F. AZANGALALA

JUDGE

Read in the presence of:-

Kahuthu for the applicants, Mwangi for the 1st respondent and Njuguna for the 2nd and 3rd defendants.

F. AZANGALALA

JUDGE

28/5/07