REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA

AT KISUMU

Civil Appeal 2 of 2003

C.Y.O OWAYO ..... APPELLANT

AND

GEORGE HANNINGTON ZEPHANIA ADUDA

T/A ADUDA AUCTIONEERS.....1ST RESPONDENT

G.S. OKOTH T/A G.S. OKOTH & CO. ADVOCATES.....2ND RESPONDENT

(Appeal from a judgment of the High Court of Kenya

(Wambilyangah, J) dated 4th July, 2002

in
H.C.C.C No. 130 of 1999)
****
JUDGMENT OF THE COURT

The record in this appeal shows that one Claris Owayo, also known at her earlier business place as Damaris Owayo, was a tenant in a business premises owned by South Nyanza Teachers Co-operative Savings & Credit Society Limited (Sonyaco) situated in Homa Bay. That tenancy ended. She was wife to the appellant, C.Y.O. Owayo. The appellant is the owner of land parcel No. 3603, Got Rabuor, Homa Bay. On that land the appellant put up his home (commonly known as "*Lake Villa*"). He had three wives, Claris being the eldest and the appellant and Claris had a house in that villa as would be expected of a Luo polygamist. The tenancy/landlord relationship between Claris and SONYACO ended six years prior to the material date the genesis of the suit in the superior court. However, it would appear, for it is not denied that when Claris left her business premises, she had not cleared all her rent and was in arrears of Ksh.90,600/=. That rent arrears attracted interest and was in total Ksh.155,500/= by 15th February 1999. On 15th February 1999, Sonyaco wrote to the second respondent, G.S. Okoth & Co. Advocates who is now the only respondent as the first respondent is deceased and the appeal against him has abated. That letter was as follows:

"**G.S. Okoth & Co. Advocates,**

P. O. Box 495

HOMA BAY

Dear Sir,

RE: RENT ARREARS – KSHS.155,400/=

MRS. DAMAR OWAYO

The above named who was a tenant in our Plaza went away with our rent of Ksh.90,600 which has accrued interest to Ksh.155,500.

Please demand the same from her within 14 days.

You can reach her on P. O Box 30009, Nairobi or Tel. 22078

Yours faithfully,

M.M. OPIATA

G/Manager."

That letter couched as it was in what we may say plain language by a layman and which left all options on how to demand the arrears plus interest from Damar Owayo was treated, by the second respondent, as though it was an instruction to levy distress for rent. We say so because on 27th February 1999, the second respondent wrote to the first respondent G.Z. Aduda who was an auctioneer, now deceased as follows:

"**M/S G.H.Z. Aduda**

Auctioneer

P. O. Box 111

HOMA BAY

RE: THE ARREARS TO SONYACO SACCO SOCIETY

Your letter of 27th February 1999 refers. As you are already in possession of the said instruction please proceed and act upon the same.

Note that you observe the instructions and where there is need you can liaise with our client M/S S. N. Teachers Sacco Society Limited.

Yours faithfully,

G.S. Okoth & Co. Advocates

c.c. The General Manager,

SONYACO SACCO LTD."

That letter was in reply to a letter from the firm of Aduda Auctioneers which was stating that they had received warrant to levy distress but wanted confirmation to do so. Earlier, the same firm of G.S. Okoth, Advocates had written to Damaris on 5th February 1999 demanding payment of Ksh.100,845/= being rent arrears, Costs on demand notice and Advocate's collection fees. After the second respondent had

authorized the first respondent (now deceased) to proceed with levy of distress as indicated in the letter reproduced hereinabove, the first respondent alleges that he proceeded to the home of the appellant and in particular to the house of Claris in that home on that day. This does not appear logical as the letter confirming that he (first appellant) should proceed with levy of distress was actually dated 27th February 1999. Further, there is nothing to show that the goods in question were proclaimed on 26th February 1999 as the proclamation in the record bears the date 2nd March 1999 which is logical for it shows the auctioneer made the proclamation three days after the letter of instructions from the second respondent. Be that as it may, the first respondent carried out the levy for distress and carried away the household goods such as sofa set, television, and others from the matrimonial house of the appellant and Claris or Damaris, the appellant's wife, who was the defaulting tenant in a business premises in Homa Bay town. The appellant claims that he knew of the levy of distress upon the properties in his house on 11th March 1999 when one Joseph Makono, a driver with Environment and Natural Resources Ministry telephoned him and informed him that a court broker had taken away his household goods. That message prompted the appellant into action. He instructed Joseph Makono to contact the second respondent and Joseph Makono went to the second respondent and obtained a note that was handwritten on office memo and was addressed to the appellant. As it is, in our opinion, important in the entire case, we reproduce it herebelow:

"**11.3.99.**

From the Desk of G.S. Okoth

To C.W. O. Owayo

The distress warrant was levied in respect of rents outstanding for shop No. 5 owned by SONYACCO SOCIETY LTD.

The figures are made up as follows:

O/S Rent - 98,745.00

Accrued Interest

@ 14% for 6 years - 82,945.00

Legal fees thereon - 16,816.00

Auctioneer's Chargers - <u>80,000.00</u>

278,506.00

Please issue a bankers cheque in the name of G.S. Okoth & Co. Advocates to avoid sale.

Yours faithfully

Signature."

That note was dated 11th March 1999 as appears above. It was hand delivered to the appellant by Makono on 12th March 1999. Interestingly, 0n 3rd March 1999, the first respondent (now deceased) had prepared and addressed to All Concerned his Bill of Costs in respect of the levy of distress. It is interesting, because by that time proclamation had just been made the previous day. In that bill of costs, item No. 5 is seeking Ksh.28.000/= on account of "security after attachment by Imani Securico Company each 2 askaris day and night 1,000 day 1,000 night because of classic goods for 14 days i.e. 14 x 2000 = 28,000/=" However, after the appellant received the note reproduced hereinabove, on 12th March 1999, he instructed K.H. Osmond, Advocate, who on the same day, 12th March 1999 wrote to the second

respondent referring to the note and made it clear that the appellant was a stranger to the issue raised in that note. The appellant's advocates sought in that letter that the second respondent hold his gun and provide them with full details of the distress of rent particularly when the goods were proclaimed and on what date they were advertised for sale. Lastly, in that letter, the appellant's advocates intimated that the appellant would be filing an application for injunction under certificate of urgency claiming damages in conversion, detinue, wrongful distress, proved breach and general damages. It would however appear that on the same date or on a date prior to the same date, goods distrained had been sold. This is evidenced by the contents of a letter dated 12th March 1999, addressed to the second respondent by the first respondent (deceased). In that letter, Aduda Auctioneers wrote to the second respondent giving him a breakdown of what each item allegedly distrained fetched at a sale carried out on a date unspecified. That letter stated that all the distrained goods were sold at Ksh.50,400/= leaving a balance of Ksh.46,400/= which was remitted to the second respondent. The appellant, then obtained the services of Zakache Security Securicos Ltd. to investigate the entire saga. That was vide a letter dated 22nd March 1999 addressed to the security services limited. After the report from the security services company, the appellant filed a plaint in the superior court at Kisii dated 10th May 1999 in which he pleaded that several of his expensive and sentimentally valuable properties were illegally distrained by the first respondent on the express instructions of the second respondent. He sought judgment in that plaint against the respondents jointly and severally for:

"**(a) A declaration that the purported distress at the plaintiff's premises on Land Reference No. 3603, Got Rabuor, Homa Bay on 2nd March 1999 was illegal, wrongful, null and void.**

(b) Judgment for the plaintiff in the sum equivalent to the current replacement value of the goods listed at paragraph 5 of this plaint, such sums to be assessed by the court.

(c) Alternatively and without prejudice to prayer (b) above, judgment in the sum equivalent to the purchase price of the goods listed at paragraph 5 of this plaint.

(d) General damages and/or exemplary damages for illegal distress.

(e) Costs of this suit and interest on (b), (c) and (d) above from March 1999."

That plaint was later amended. Prayer (b) was amended to include a specific claim for Ksh.1,805,640/= as claimed in paragraphs 5 and 8 of the plaint. Prayer (c) was also amended and a specific amount of Ksh.1,517,640/= claimed as alternative to prayer for Ksh.1,805,640/= in prayer (b) of the plaint. Save for those two substantial amendments, the original plaint remained intact with minor amendments only.

The respondents denied the claim in their joint statement of defence filed on 4th June 1999. They claimed that the second respondent acted on instructions from the landlord, and in so acting, the second respondent issued appropriate notice to the relevant parties that if they did not pay the outstanding rent, distress for rent would issue and that the appellant was duly informed of the then impending distress for rent and undertook to settle the claim. They also denied any allegations of illegality in the way the first respondent carried out his duties during the incident. Lastly, the respondents denied that the first respondent seized and carried away the goods as alleged in the plaint and maintained that the household goods distrained legally belonged to the appellant's wife Claris who was the defaulting tenant and against whom the warrant for distress was issued even though the same household properties were purchased by the appellant.

After reply to defence was filed by the appellant and issues were agreed upon by both parties, the matter was set down for hearing before the superior court (Wambilyangah J., as he then was). In a fairly short judgment, the learned Judge of the superior court dismissed the suit on the main ground that the appellant received the relevant notice regarding the attachment of his goods, but took no prompt action to safeguard his legal interests. He addressed himself thus:

"**In the premises I find and hold that the plaintiff promptly received the relevant notice regarding**

the attachment of his goods. It is not denied that he did not himself take a practical step to forestall the sale of the goods by auction. He had ample time to take a remedial step. He did not attempt to persuade this court why he failed to take any remedial step. S 26 of the Distress for Rent Act Cap 293 has a clear cut provision for an aggrieved party to seek an order for restoration of things. The plaintiff could have tried to liquidate his wife's indebtedness to Sonyaco or could have brought an action before a court of law and contended that the goods attached were his and not hers (his wife's) or could have argued as done by advocate Mr. Amuga in the present proceeding that distress for rent cannot be legally extended to goods kept in the residential premises. The law expects a reasonable man to be vigilant and to safeguard his interest. Such a reasonable man would be compelled to mitigate his loss. The plaintiff did not at all take any remedial steps shown above."

The learned Judge then referred to a passage in McGregor on Damages 16th Edn at paragraph 295 and 294 and then proceeded as follows in dismissing the appellant's suit:

"**That rule must be fully applied here where it is evident that the plaintiff could have averted the sale by auction of his goods whose value is alleged to be in the region of 2 million if he had paid to Sonyaco a sum of Sh. 298,000/= owed to them by his wife or if he had filed an a (sic) suit in court against the said attachment as aforementioned. But the plaintiff only sat back and allowed the avoidable loss to occur. Definitely he can not recover that which he seeks from the plaintiff (sic)."**

The appellant felt aggrieved by that judgment of the superior court and hence this appeal premised on seven grounds, a summary of which is that the learned Judge erred both in fact and in law in finding that the appellant promptly received notice of the attachment of his goods but took no remedial action to forestall the sale of the attached goods; that the learned Judge erred in law in dismissing the suit on grounds that the appellant should have paid to Sonyaco the total amount demanded which was allegedly owed by his wife to avert the sale of his goods; that the learned Judge erred in dismissing the suit on grounds that the appellant could have brought an action before a court of law despite the evidence on record that the subject rent was owed by a third party and that the levy of distress was dated more than six years back; that the learned Judge failed to appreciate that the distress complained of was illegal, wrongful and amounted to trespass; that the learned Judge erred in failing to assess damages in his judgment, in applying wrong principles, reaching conclusions not supported by the evidence on record and lastly in misdirecting himself in law and facts and applying the wrong principles in his decision of the entire suit.

The appeal came up for hearing before this Court differently constituted on 29th November, 2006 when the Court was informed that the first respondent, George Hannington Zephania Aduda t/a Aduda Auctioneers, passed on on 19th November 2004 and no substitution had been effected. The Court made an order on that day that the appeal against him abated. The appeal against the second respondent was then adjourned and was heard by us on 14th June 2007. This judgment is therefore only on the appeal as it affects the second respondent, G.S. Okoth t/a Okoth & Co. Advocates. Henceforth, the second respondent will be referred to as "**the respondent**" in this judgment.

Mr. Amuga, the learned counsel for the appellant, in his submission, stated that the levy of distress carried out on the appellant's goods was illegal as the goods distrained belonged to a third party; and the distress was carried out outside the six year limitation period. He stated further that the distress was illegal because it was not carried out on the premises that was rented by the defaulting party. As to the failure by the appellant to take practical remedial step in time to arrest the sale, Mr. Amuga submitted that the proclamation and date of sale were not advertised nor was the appellant informed formally or in time to take action on the matter, but when he came to know of the illegal levy of distress warrant, he acted fast but by that time the sale had taken place. On the distrained goods, he maintained that more goods were taken away than what appeared in the proclamation. He ended his submission by stating that the learned Judge erred in failing to assess the damages that he could have awarded had he found for the appellant on liability. He agreed that the appellant did not produce receipts for all the goods he alleged were sold by the auctioneer, but stated that there were proforma invoices that were used as proof of value of the goods lost and the superior court should have considered those proforma invoices and should have assessed damages as pleaded in the plaint.

Mr. Masese, the learned counsel for the respondent, supported the findings and holdings by the learned Judge, that the appellant slept on his rights otherwise the damage would have been mitigated. He however conceded that the appellant, though instructed by Sonyaco, did not take proper action and agreed that levy of distress on goods in a different property was not proper in law. Mr. Masese however, contended that the goods recorded in the proclamation as having been attached were the only goods removed, and the appellant thus could not have been right in claiming in the plaint goods that were not seized by the first respondent (deceased). He emphasized that the goods that were proclaimed were witnessed by the appellant's daughter Alison, who signed for them. Thus in his submission, the special damages sought were exaggerated as the same claims were in respect of goods some of which were never recovered from the appellant's premises.

We have considered the pleadings, the evidence adduced in the superior court as it is our duty in law to do, this being a first appeal, even though it is also a last appeal. We have considered the record as a whole together with exhibits, the submissions by the learned counsel, the judgment and the law. The pleadings that were before the learned Judge of the superior court clearly raised the question as to whether the respondents were liable to the appellant in that they carried out an illegal levy of distress upon the appellant's goods at the appellant's home whereas the appellant was not a party to the matters giving rise to the levy of distress and whereas the appellant's house was not the premises in respect of which rent arrears accrued and where levy of distress should have been carried out. That question is on liability. The second question raised was the quantum of damages that the appellant was entitled to if the answer to the first question was positive. These were, in our view, the two main issues the superior court had to grapple with. We have carefully perused the judgment of the superior court. With respect, it is clear to us, that the learned Judge of the superior court dealt with the question as to whether the appellant was entitled to damages arising from what took place and having come to the conclusion that the appellant having been informed in good time of the goings on at his house, and having not acted quickly to avert any further loss, was not entitled to any damages claimed and so he dismissed the appellant's case. He never considered whether indeed the action taken by the respondents was legally tenable in law and thus whether the respondents were in law liable to the appellant for their action. In our view, with respect, the learned Judge was gravely in error. Whether a party is entitled to damages or not as against the other party presupposes that that other party is liable in law to the party seeking damages. Liability must first be established even if in the end no damages are awardable in law. In our view, the learned Judge failed to carry out in this case the most important part of his judicial work, namely to ascertain whether or not in law the respondents or either of them was legally liable to the appellant in executing the distress warrant upon the goods which the appellant claimed were his and at the home of the appellant.

The next issue he had to deal with was whether indeed the goods the appellant alleges were recovered from his home reflected the correct position or whether the goods removed were as per the proclamation.

As we have stated, being the first and last appellate court, we are in law enjoined to revisit the evidence that was before the trial court afresh, analyse it, evaluate it and come to our own independent conclusion but always bearing in mind that the trial court saw the demeanour of the witnesses, and heard them and so we must give allowance for that – see the case of **Selle and Another vs. Associated Motor Boat Company Ltd. and Others (1968) EA 123** where it was held:

"**An appeal to this Court from a trial by the High Court is by way of retrial and the principles upon which this Court acts in such an appeal are well settled. Briefly put they are that this Court must reconsider the evidence, evaluate it itself and draw its own conclusions though it should always bear in mind that it has neither seen nor heard the witnesses and should make due allowance in this respect. In particular this Court is not bound necessarily to follow the trial judge's findings of fact if it appears either that he has clearly failed on some point to take account of particular circumstances or probabilities materially to estimate the evidence or if the impression based on the demeanour of a witness is inconsistent with the evidence in the case generally (Abdul Hameed Saif v. Ali Mohamed Sholan (1955), 22 E.A.C.A. 270)."**

We now propose to do that in this appeal. First, from the evidence part of which we have reproduced hereinabove, there is no dispute that Claris Were Ochieng Owayo was the appellant's wife. She was the

first wife. Her matrimonial home was together with those of other wives at land parcel No. 3603 Got Rabuor, Homa Bay. Claris was trading from the premises owned by South Nyanza Teachers Co-operative Savings and Credit Society Ltd (Sonyaco). That premises was in Homa Bay Town. From the note from the respondent to the appellant we have reproduced hereinabove, that business ended six years prior to the material date. That in effect means that as on 15th February 1999, the rent areas had not been paid for a period of over six years. It is also not in dispute that on 15th February 1999, Sonyaco, in a letter instructed the respondent to "demand rent of Ksh.90,600/= plus interest accrued." We note that the former landlord of Claris did not instruct the respondent to levy distress for rent. All they instructed the respondent, who is an advocate to do, was to demand the arrears of rent plus interest. It would appear that the landlord knew that as the tenant had long vacated the subject premises, the rent arrears could only be recovered as an ordinary debt and not vide the provisions of Distress for Rent Act. However, the respondent did not think that way and it is admitted in evidence that on receipt of the landlord's instructions, he in turn instructed the auctioneer, Aduda Auctioneers, to proceed with the execution of the distress warrant. Aduda Auctioneers proceeded to the matrimonial home of the appellant in which the appellant and his wife Claris were living and having their household goods presumably jointly as husband and wife and in the absence of both Claris and the appellant, proclaimed the household goods. There was some allegation at the hearing that the appellant, being a Luo polygamist, must have bought and distributed properties to his wives and so what was in Claris's house ceased to belong to the appellant but became Claris's property. That view cannot find any basis in law. A husband shares with his wife whatever properties, particularly furniture, that are in his wives' houses no matter whether the same was acquired jointly or by one spouse and whether a husband is a polygamist what is in each house as household properties are shared between the husband and that wife. A wife cannot move out of a matrimonial house with the chairs and other furniture in that house simply because the same belong to her exclusively. That argument cannot hold and we find that the household properties in the house of Claris and the appellant as at the time the auctioneer visited that house were jointly owned by the appellant and his wife Claris as matrimonial household properties.

The other matter that needs attention is the allegation by the auctioneer in his evidence that he proclaimed the goods on 26th February 1999 in the presence of Damaris Claris Owayo, who refused to sign on the proclamation document and that he left a copy of the same with Mrs. Owayo. Dominic Juma Osoo, (PW 2) (Dominic) a gardener and a guard at the house of the appellant denied in his evidence that the auctioneer had been to that home on an occasion earlier than on 2nd March 1999. The only proclamation documents that were produced in evidence are three copies which in the record do not bear the date 26.2.1999. All the three are having the date 2nd March 1999 and the date 12th March 1999 as the date scheduled for auction and all are signed by Alison. One is bound to ask one question, and that is - where is the evidence of the proclamation having taken place on 26.2.1999? Other than what Aduda (Auctioneer) verbally stated in evidence unsupported as it is, none was produced in evidence. On our part, we cannot see any good reason why the learned Judge accepted the defence case on that aspect. We hold that the evidence on record shows that Dominic says the truth when he said the auctioneer visited the appellant's house on 2nd March 1999 only and on that day he proclaimed the goods and carried them away. The exhibits on record support him and we accept his evidence on that aspect.

Thus levy of distress was done on 2nd March 1999. There is no evidence that the date of sale was publicised although Aduda says he did so by distributing hand bills which he claimed he pinned all over. He said as the time available was short, he could not advertise in the newspaper. In short, even if he was to be believed, the advertisement alleged could not have reached the appellant who was then in Nairobi. But did he distribute the alleged handbills? Not even a single one was produced as exhibit. It is hard to believe he did so. Further, there is no evidence that he contacted the appellant in Nairobi on his own. There is, to cut the long story short, nothing to show that the appellant was put on notice by the respondents on the seizure of his properties until 11th March 1999 when through Joseph Otieno Makono (PW 3), he got vague information of what had transpired. This was confirmed the next day when a note dated 11th March 99 from the respondent was conveyed to him by the same Joseph Otieno Makono.

The scenario above shows first, that the appellant's household goods were attached and sold by the auctioneer on the instructions of the respondent to recover rent arrears that were incurred by the

appellant's wife in respect of the business carried out in a building in Homa Bay town and not at the appellant's house. The goods were proclaimed and carried away on 2nd March 1999 and sold on 12th March 1999 whereas the appellant was only informed through his own inquiries on 12th March 1999. Lastly, the distress for rent was being carried out after six years since the same rent became due and was being carried out over six years after the alleged tenant had left the suit premises. In our view, the appellant had no proper notice to enable him take any remedial action to forestall the sale.

Was that distress for rent legal? We do not think so. First, according to the note from the respondent to the appellant we have reproduced hereinabove, the interest claimed was for six years, meaning that the rent arrears for which distress was carried out had been outstanding for slightly over six years. Mr. Amuga said in his submission that six years had expired since Claris left the subject business premises. **Section 8** of the **Limitation of Actions Act Chapter 22** Laws of Kenya states:

"**8. An action may not be brought, and distress may not be made, to recover arrears of rent, or damages in respect thereof, after the end of six years from the date on which the arrears became due."**

That, in effect means that even if the goods taken were those of Claris and taken from the right premises, still by virtue of that legal provision, the distress carried out by the auctioneer at the behest of the respondent was illegal as it was statutorily time barred.

Further, **section 5** of the **Distress for Rent Act Chapter 293** is right on that point and deals, in our view, with the situation obtaining in this suit. It states:

"**Any person having rent in arrears and due upon a demise, lease or contract after the ending or determination of a demise, lease, or contract, may distrain for arrears after the ending or determination in the same manner as he might have done if the demise, lease or contract had not been ended or determined:**

Provided that distress under this section shall be made within the space of six months after determination of the demise, lease or contract and during the continuance of the Landlord's title or interest, and during the possession of the tenant for which the arrears became due."

In this case, the tenancy appears to have been determined some six years before the subject distress and the tenant Claris was no longer in possession of the premises. Even if she had been in possession, her goods in the premises could only have been distrained within six months after the determination of the tenancy.

That the respondent instructed the auctioneer to distrain the appellant's goods after six years after the determination of the tenancy, was in itself illegal as such an action was time barred both under the Limitation of Actions Act (supra) and Distress for Rent Act (supra). That alone rendered the action of both the respondent and the auctioneer (deceased first appellant) illegal, and would have been enough ground for allowing this appeal on liability.

However, the illegality of their action did not end there and that brings us to the second reason why we feel the actions of the respondent and auctioneer were illegal. It is not controverted that the premises in which Claris was a tenant and in respect of which rent arrears was accumulated was a building in Homa Bay town owned by Sonyaco. That was where in law the distress for rent should have been levied. However, the auctioneer, with the knowledge and approval of the respondent levied distress upon the appellant's house on Land Parcel No. 3603, Got Rabuor. That was a different building altogether. In fact it was a residential house and not a business premises. In the case of **Kassamali Bhogadia vs. M.A. Nasser (1963) EA 610**, Bennet J. stated as follows:

"**The defendant levied distress not on the plaintiff's goods in the flat but on the plaintiff's office furniture in his office at No. 1 Wilson Street. Since the rent of the office was not in arrear, and Jagjivan Mulji & Bros Ltd. was not the landlord of the office, the distress was plainly illegal."**

In this case, the goods upon which distress was levied were household properties of a different person and from his residential house and not properties held by Claris at her former place of business. Although the above decision was by a Judge of the High Court of Uganda, we are persuaded that he proceeded on the right legal principles and we adopt it. The levy of distress to recover rent arrears for a business premises on a residential house was plainly illegal.

Thirdly, the levy of distress was executed upon matrimonial goods that belonged to the appellant and his wife and not solely to Claris. That made the action by the respondent and the auctioneer illegal. We have made our views known on the allegation that the goods were given to Claris by the appellant who was a polygamist and we have made a finding that the goods distrained and sold were matrimonial household goods of the couple.

Lastly, we have made a finding above that the goods were proclaimed on 2nd March 1999 and not on 26th February, 1999 as alleged by the auctioneer. The effect of this is that as the goods were removed from the premises before seven days had expired from the date of proclamation on 2nd March 1999, without any request for the appellant or for that matter without the request from Claris and as the same goods were sold on 12th March 1999, before the expiry of Fourteen (14) days as required by **section 4(1)** of the **Distress for Rent Act** (**see section 4 of the Act**) the removal and sale of the goods was illegal and that also rendered the entire distress for rent carried out on the goods of the appellant and sale of the same goods illegal.

Section 3(1) of the Distress for Rent Act states as follows:

"**3(1) Subject to the provisions of this Act, any person having any 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 is given by the Common Law of England in a similar case."**

Thus, in looking into what constitutes illegality of distress for rent, we must not only consider our laws, but must also consider what in England would be considered an illegality in the levy of distress. In Halsbury's Laws of England, 4th Edition Volume 13 paragraph 368 it is stated:

" **368. <u>Circumstance in which distress is illegal</u>**

An illegal distress is one which is wrongful at the very outset, that is to say either where there was no right to distrain or where a wrongful act was committed at the beginning of the levy invalidating all subsequent proceedings.

The following are instances of illegal distress; a distress by a landlord after he has parted with his reversion; a distress by a person in whom the reversion is not vested; a distress when no rent is in arrear; or for a claim or debt which is not rent; as a payment for the hire of chartels; a distress made after a valid tender of rent has been made; a second distress for the same rent; a distress off the premises or on the highway; a distress in the night that is between sunset and sunrise …… a distress levied or proceeded with contrary to the law of Distress……."

In our view, the distress that was carried out by the auctioneer (deceased) on instructions of the respondent together with the sale of the goods distressed was plainly illegal and the respondent cannot escape liability to the appellant for his instructions to the auctioneer to carry out that distress for rent upon the appellant's goods which should not have been the subject of such levy of distress and in blatant disregard of the legal provisions in place for levy of distress for rent. We hold the respondent liable to the appellant. The appellant had no duty to take the remedial actions enumerated by the superior court as he was not himself in arrears and he had no proper notice of the illegal distress carried out on his properties.

The next aspect we need to consider is the damages. The appellant, in his amended plaint claimed at paragraph 5 thereof, that several goods were removed from his house and sold in execution of the illegal distress for rent. He set out their value and at the end his prayers were, as we have stated above that a

declaration be made that the purported distress was illegal, wrongful, null and void; that judgment be entered in the sum of Ksh.1,805,640/= being special damages equivalent to the current replacement value of the goods listed in the plaint and in the alternative that an amount of Ksh.1,517,640/= being the equivalent of the purchase price of the same goods be awarded to him. He also prayed for general damages and/or exemplary damages for illegal distress. Lastly, he sought interest on the special damages and general damages from 2nd March 1999. The learned Judge never considered damages to be awarded to the appellant, for to him, the appellant deserved no award as the appellant failed to take any remedial action in time to stop the sale of his goods, notwithstanding that the appellant had a notice of the action by the auctioneer and the respondent. We have stated hereinabove that that approach was not legally tenable. The law required the Judge even if he was minded to dismiss the suit, to consider the quantum of damages he would have awarded, had he made a finding on liability in favour of the appellant. He did not do so and did not even make an attempt to do so. He was, in our view, in error.

The appellant did not produce receipts to prove strictly the value of each of the goods that were distrained and sold. He produced proforma invoices in respect of some of the goods but not in respect of others. Further, his list of the goods removed and sold was not in consonance with the goods entered in the proclamation dated 2nd March 1999 which was allegedly signed by one Alison said to be the appellant's daughter. Alison was not called by the appellant to deny or confirm what was actually carried away from the appellant's house, nor did the respondent call her for the same purpose. We are however, certain, in our view, that goods belonging to the appellant were illegally distrained, and that the appellant suffered loss on that account. At least the goods in the proclamation were removed. That is conceded. We are also certain in our mind that the illegal distress amounted to a trespass and the appellant is in law entitled to general damages arising from the trespass upon his premises and his goods. In the case of **Interoven Store Co. Ltd. vs. Hibbard and Another (1) (1936) 1 All ER at page 270** Hilbery J. stated:

"**An illegal distress has always been a trespass and an action would always lie. (See note to Trespass to Goods, 1868, Bullen & Leak P. 114) And where there is a trespass to goods, though no actual damage results, the law gives a right to recover damages not limited to actual damages sustained, but a right to recover substantial damages even though that is no proof of actual loss."**

In this case, there is, as we have stated, proof of actual loss as indeed goods were taken and although no receipts were produced in court to ensure strict proof, proforma invoices were produced in respect of some goods. The auctioneer alleges that he sold the goods he admittedly removed which were one old sofa set with four pieces, one big coffee table, and four small ones also old, one old Sony T.V., one old round drum, ten old table chairs, two table chairs, one big wall coffee frame and remote control for the T.V at a total of Ksh.50,400.00/=. Of course that could not have been the market value. The appellant says first that the goods taken were more than what was entered in the proclamation. Alison who signed as a witness was not called to testify as we have stated. The appellant was not there at the time the goods were removed and so could only go by what he found missing from the house later after the distress but could not for certain say as to whether all that was missing was taken away by the auctioneer. PW 2 Dominic says the lorry was so fully loaded with the household property to the extent that some household properties were carried by the auctioneer's men who were on foot. That does not help us as he did not specifically say in his evidence what were actually carried away. This is important on the face of denial by the auctioneer that they carried away certain goods claimed by the appellant to have been carried away and the allegation by the auctioneer that he went there in a pick up and not a lorry. Doing the best we can in the circumstances, we feel that an award of **Ksh.300,000/=** in respect of special loss would meet the ends of justice. We also award **Ksh.400,000/=** as general damages for trespass to goods. From what we have stated above, it is clear that the respondent was only instructed by Sonyaco to demand rent from Damaris. As a lawyer, Sonyaco relied on him to take the most appropriate legal action in recovering the same rent and/or giving it the best legal advice. Instead, the respondent threw all the legal ways to the window and chose an obviously illegal approach to the issue knowing fully well that such action could end up in the appellant not only illegally losing his properties but also undergoing serious embarrassment. In our view, he acted recklessly. We feel, under the circumstances of this case, that exemplary damages are called for. We award Ksh.10,000/= as exemplary damages. The three awards carry interest at court rates from the date the suit was filed till payment in full. The appellant will have

the costs of the appeal and of the superior court.

To conclude, the appeal is allowed and the judgment of the superior court is hereby set aside. We enter judgment for the appellant in the total sum of **Ksh.710,000/=** plus interest at court rates from **10th May 1999**. We order that costs of the appeal and of the superior court be awarded to the appellant. Judgment accordingly.

Dated and delivered at Nairobi this 13th day of July, 2007.

E.O O'KUBASU

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JUDGE OF APPEAL

J.W. ONYANGO OTIENO

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JUDGE OF APPEAL

W.S. DEVERELL

……..

JUDGE OF APPEAL

I certify that this is a true copy of the original.

DEPUTY REGISTRAR