REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA

AT NAIROBI (NAIROBI LAW COURTS)

Civil Case 433 of 2007

HAILE SELASSIE LIBARA MUHALIA…..…....………PLAINTIFF

VERSUS

MURANG'A PROPERTIES LTD……….......….1ST DEFENDANT

METROCOSMO VALUERS LIMITED…..........2ND DEFENDANT

RULING

The Plaint have on record names HAILE SELASSIE LIBARA MUHALIA the applicant herein as the Plaintiff. The first defendant is named as MURANG'A PROPERTIES LIMITED while the second defendant is named as METRO COSMO VALUERS LTD. Despite this appearing in bold print, paragraph 2 of the plaint reads that the defendant is the Attorney General of the Republic of Kenya

on his own behalf and on behalf of both the Commissioner of Police and the Judicial Service Commission. The second defendant is described as a firm of valuers, Management and Real Estate Consultants based in Nairobi and who were at all material times the agents of the 1st defendant in leasing out the subject premises. The named first defendant Muranga'a Properties Ltd has not been described in its own individual capacity. There is no averment spelling out what the Attorney General, the Commissioner of Police and the Judicial Service Commission have done to the plaintiff in connection with this case. Neither has it been shown how these institutions are linked to the defendants named in connection with these proceedings when it is stated clearly in paragraph 2 that the second defendant is the managing agent of the 1st defendant. Paragraph 3 just mentions "*subject premises*". The property subject of the proceedings is not described. Paragraph 4 states that the Plaintiff is a tenant of the defendant but it does not sate which defendant, those named in the heading or those described in paragraph 2. There is no mention of the subject property in the body of the plaint. Neither is there mention of an injunction as one of the reliefs to be applied for both in the body of the application and prayers.

The plaint is accompanied by a chamber summons under Section 3A of the Civil Procedure Act and order 39 rules 1 and 2 of the Civil Procedure Rules. Prayer 2 thereof seeks an order that the defendants, their agents, servants or otherwise howsoever be restrained from levying distress or carrying away the plaintiffs goods or otherwise interfering with the plaintiffs user/occupation of office number BI, room 1 in Murang'a properties, building situated on L.R. 209/525/31 Accra Road Nairobi until this matter is heard and determined and that costs be provided for.

The grounds in support are set out in the body of the application, supporting affidavit and oral submissions in Court. The major grounds are that:-

(1) The Plaintiff/applicant is a protected tenant under the provisions of the Landlord Shops, Hotels and Catering Establishment Act Cap.301 Laws of Kenya.

(2) That since taking possession of the premises rent has been properly paid and there are no arrears outstanding to make the levy of distress for rent inevitable.

(3) They maintain that the distress for rent levied is illegal.

(4) No notice was issued before the same was levied.

(5) What is purported to be rent arrears is made up of illegal levies not provided for under Cap.301 Laws of Kenya hence the same were levied before they were properly sanctioned. Neither are they provided for in the lease agreement.

(6) The Respondents are guilty of a criminal offence as they are guilty of not keeping a rent book and this Court is urged not to consider the schedule of rent relied upon by the Respondent as it does not answer to the rent book envisaged by the law.

(7) They maintain they have come to Court with a genuine complaint and they have no intention of running away from their obligations shown by the fact, that they have deposited Kshs 19,500.00 into Court as Security.

In reply Counsel for the defendant respondent has opposed the application on the following grounds.

(1) Levy for distress was lawful as the applicant had failed to meet his obligations. The law allows the levying of distress where there are arrears.

(2) They content that leave is not required to levy distress unless a tenant affected by the distress has filed a reference to the rent restriction tribunal challenging rent.

(3) All levies made by the Respondent were within the contract as parties agreed on consequences of the late payment of rent.

(4) They maintain that the tenant has not been meeting his obligations as required by the terms of the contract.

(5) The applicant has no premia facie case with a probability of success as he was in rent arrears proved by the deposit of the same into court.

(6) An injunction cannot issue because it is now settled law that the remedy for unlawful distress is damages.

In reply to the Respondents Counsels' submissions Counsel stressed that this court has power to in and stop an illegality. They deposited the amount deposited as a sign of good faith and as ordered by court. They still maintain that the only appropriate intervening remedy herein is the issue of an injunction.

On the Courts assessment of the facts herein it is apparent from the prayers sought in the interim application that what the applicant is seeking is an interim injunctive relief. This being the case, in order to succeed the applicant has to pass both the technical and merit test. The technical test arises where questions arise whether it is properly laid under the correct provisions of the law firstly and secondly whether it is properly anchored in the plaint. The merit test arises where questions arise as to whether the facts presented by the applicant satisfy the ingredients established in the landmark case of **GIELLA VERSUS CASSMAN BROWN & CO. LTD [1973] E.A. 358** namely;-

(1) Establishment of a prima facie case with a probability of success.

(2) Proving or showing that if an injunction is not granted the applicant will suffer irreparable harm.

(3) That the balance of convenience tilts in their favour.

The first to be considered is the technical test. From the body of the application the injunctive reliefs are sought to prevent the defendants from interfering with the plaintiff's user of room office number BI in Murang'a property building situated on L.R. 209/525/31. This property is a stranger to the plaint as it is not named anywhere in the plaint. It is just referred to as the "subject premises". Without it being laid in the plaint no orders can issue from this court in respect of the same.

From the heading of the application, the same is brought under Order 39 Rules 1 and 2. Rule 1(a) applies where the property in dispute is in danger of being wasted, damaged or alienated by any party to the suit or wrongfully sold in execution of a decree. Rule 1 (b) on the other hand applies where the defendant threatens or intends to remove or dispose off his property in circumstances affording reasonable probability that the plaintiff will or may be obstructed or delayed in the execution of any decree that may be passed against the defendant in the suit. Applying the forgoing to the facts herein it is clear that none of the ingredients in order 39 rules 1 (a) (b) apply to the situation subject of this ruling as what we are dealing with is levying of un lawful distress arising from a lease agreement duly signed but not registered. Sub rule 2 is the one which covers the situation herein. The relevant portion of the same are as follows:-

"*In any suit for restraining the defendant from committing a breach of contract or other injury of any kind ……….the plaintiff may at any time after the commencement of the suit and either before or after judgment apply to the court for a temporary injunction to restrain the defendant from committing the breach of contract or injury complained of, or any injury of a like kind arising out of the same contract or relating to the same property or right."*

A tenant agreement whether by way of lease agreement or by conduct of the parties creating a month to month agreement is a contract. A threat of levying unlawful or illegal distress falls under injury of any kind. The applicant has therefore an apparent grievance for which he can seek vindication. The only problem that he has to deal with is whether the same relief is properly presented to this court. Courts of this kind have laid down principles on how this relief is to be presented. In the case of **KIHARA VERSUS BARCLAYS BANK (K) LTD [2001] 2 E.A. 420** it was held inter alia by Ringera J. as he then was that whether interlocutory injunctive relief can or cannot issue depends on the nature of the suit instituted and the procedural rules on which the application for interlocutory relief is granted. When the application is brought under any of the sub-rules of order 39 rules of the Civil Procedure Rules there is no requirement that the suit in which the temporary injunction is sought must be one which itself seeks any restraining orders. Where the application is under Order 39 rule 2 of the Civil Procedure Rules, it is an express requirement that the suit in which the temporary injunction is sought must be one for restraining the defendant from committing a breach of contract or committing the tort complained of.

That the Plaintiffs application for interlocutory relief did not sound under rules 1 (a) (b) although both rules had been invoked but fell squarely under rule 2. Though this had been maintained by Counsel the plaint had not been amended and the application for an interim injunction was incompetent as the plaintiff did not seek any relief in the form of a permanent injunction in the plaint.

The foregoing decision was reiterated in the case of **MORRIS & CO. LTD VERSUS KENYA COMMERCIAL BANK AND 2** OTHERS **NAIROBI MILIMANI COMMERCIAL COURT CASE NO. 729 OF 2003** decided on 19th December 2003 by the same justice Ringera as he then was. At page 7 of the ruling the learned judge as stated that he had upheld the objection in the **KIHARA CASE SUPRA** because an application for a temporary injunction under rule 2 can only be made in a suit where in the relief of a permanent injunction is made.

Applying that to the application herein it is clear that although rule 1 was cited the facts displayed do

not fall under sub rule 1. They fall under sub rule 2. This being the case the plaintiff/applicant was required to cement or anchor his interim relief in a relief of permanent injunction in the plaint. Failure to do so renders the application incompetent and it has to be struck out.

Since the application has been found to be incompetent there is no need to go into the other merits of the application as to whether the ingredients for the granting of an injunction have been established or not as that will be an exercise in futility.

Also to be considered is the ambiguity in paragraph 2 and 3 of the plaint as to which party is the correct defendant. The application cannot survive.

In conclusion the application is found to be incompetent and is struck out for the following reasons:-

(1) The subject property in respect of which the injunctive relief is sought is a stranger to the proceedings as it is not mentioned anywhere in the plaint.

(2) Since the relief sought falls under sub rule 2 of order 39 it can not stand as it is not anchored on a claim of a permanent injunction in the plaint.

(3) There is confusion as to which party is the correct defendant as averred in paragraph 2 and 3 of the plaint.

(4) The costs of the struck out application are to be paid by Counsel for the applicant for he is the one who drew the incompetent application.

DATED, READ AND DELIVERED AT NAIROBI THIS 13TH DAY OF JULY 2007.

R.N. NAMBUYE

JUDGE