

REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA

AT NAKURU

Civil Case 259 of 2007

JAMES MAINA KARIUKI.....PLAINTIFF

VERSUS

FRANK OWEN WAINAINA.....DEFENDANT

RULING

The plaintiff, James Maina Kariuki filed suit against the defendant, Frank Owen Wainaina seeking, *inter alia*, an order of perpetual injunction to restrain the defendant from ever levying distress or otherwise interfering with the plaintiff's occupation, use and enjoyment of the business premises located on the parcel of land in title No. **Nakuru Municipality/Block 10/321** (*hereinafter referred to as the suit premises*) on the basis of non-payment of rent as the plaintiff was not in rent arrears so as to entitle the defendant to distress for rent. Contemporaneous with filing the suit, the plaintiff made an application under **Order XXXIX Rules 1, 2, 3 and 9** of the **Civil Procedure Rules** seeking an order of injunction to restrain the defendant from levying distress against his properties in the suit premises. The grounds in support of the application are on the face of the application. The main ground is the plaintiff's contention that he was not a tenant of the defendant but was rather a tenant of one Steve Wainaina Kamonjo whom he has been paying rent since the year 1999. The plaintiff contended that the defendant was not his landlord and therefore could not levy distress against him.

The application is opposed. The defendant filed a replying affidavit in opposition to the application. He deponed that he was the registered owner of the suit premises. He annexed a copy of the certificate of lease in respect of the suit land in his replying affidavit. He deponed that it was apparent that the plaintiff had been duped by the said Steve Wainaina Kamonjo into believing that he was his landlord. As a registered owner of the suit premises, the defendant deponed that he was entitled to be paid rent by the plaintiff. He deponed that the plaintiff had not paid him rent and therefore he was entitled to recover the rent arrears by distressing for the same. He deponed that he could not be restrained from being paid rent as he was the registered owner of the suit land.

At the hearing of the application, I heard the rival submission made by Mr. Mulindi on behalf of the plaintiff and by Mr. Karanja on behalf of the defendant. I have carefully considered the said submissions made and also considered the pleadings filed by the parties in support of their respective positions. The issue for determination by this court is whether the plaintiff established a case to enable this court grant him the order of injunction sought. The principles to be considered by this court in deciding whether or not to grant an order of injunction are well settled. In **Kenya Commercial Finance Co. Ltd vs Afraha Education Society [2001]1 EA 86** at page 89, the Court of Appeal held that;

“The sequence of granting interlocutory injunction is firstly that an applicant must show a prima facie case with a probability of success if this discretion will inure in his favour. Secondly, that such an injunction will not normally be granted unless the applicant might otherwise suffer irreparable injury and thirdly where the court is in doubt it will decide the application on a balance of convenience.”

The facts of this case are more or less not in dispute. It is not disputed that the defendant is the registered owner of the suit premises. The defendant has been so registered since the 14th February 2002. The plaintiff deponed that he has been in occupation on the suit premises as a tenant of one Steve Wainaina Kamonjo. He annexed receipts to his affidavit in his bid to establish that he has been paying rent to the

said Steve Wainaina Kamonjo. The defendant on his part deponed that the plaintiff appeared to have been duped into paying rent to a stranger. What is however clear to this court is that the plaintiff rented the suit premises before the defendant was registered as the owner thereof. There is no evidence to suggest that the defendant demanded to be paid rent by the plaintiff from the time he was registered to the time that he instructed Merrs. Legacy Auctioneering Services to distress for rent against the plaintiff. The defendant has not exhibited any agreement to show that there exists or existed a landlord and tenant relationship between himself and the plaintiff.

There is no evidence to suggest that the plaintiff and the defendant had agreed on the monthly rent to be paid. Although the defendant is the registered owner of the suit premises, he failed to establish that he is the landlord of the plaintiff to entitle him levy distress. This court upon evaluating the facts of this case is of the view that the defendant during the course of this year decided to assert his propriety rights over the suit parcel of land. However in asserting his rights, the defendant did not take into consideration the rights of other persons who were in occupation of the suit premises pursuant to agreements entered with other persons. It was evident that the plaintiff paid rent to one Steve Wainaina Kamonjo before the defendant sought to assert his propriety rights. It appeared that the defendant is seeking to take possession of the suit premises by levying distress against the plaintiff who was put in the suit premises by the said Steve Wainaina Kamonjo.

In the circumstances of this case therefore, I think the best course of action is to put the plaintiff and the defendant in a position where neither the plaintiff nor the defendant can suffer any injury. I will grant the order of injunction restraining the defendant from levying distress or interfering with the plaintiff's occupation of the suit premises for a period of three months. During this period, the plaintiff shall negotiate with the defendant, who is the registered owner of the suit premises, on the rent to be paid. The plaintiff shall commence paying rent to the defendant with effect from 1st January 2008, if he will decide to continue with the tenancy. The plaintiff shall be at liberty to vacate the suit premises if he will not agree with the defendant on the monthly rent to be paid. The defendant cannot claim any rent prior to 1st January 2008 because there was no landlord and tenancy agreement between him and the plaintiff. The plaintiff shall have the costs of this application.

DATED at NAKURU this 14th day of December 2007

L. KIMARU

JUDGE