



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

**Civil Case 356 of 2006**

**MARK WACHIRA & 11 OTHERS..... PLAINTIFF/APPLICANTS**

**VERSUS**

**KENYA ROAD SERVICES LIMITED..... DEFENDANT/RESPONDENT**

**RULING**

This Ruling relates to chambers summons dated and filed on 06.04.06 brought under Order XXXIX rules 1, 2 and 9 of the Civil procedure Rules and sections 3A and 5 of the Civil Procedure Act, Cap.21. At the hearing of the chamber summons on 19.04.06, the plaintiffs/applicants were represented by learned counsel, Mrs K. Wanjau while the defendant/respondent was represented by learned counsel, Mr. N. Mugo. Applicants' counsel informed the court that what she was seeking at that hearing were prayers 4 and 5, namely:

**'4. That the defendant and or its auctioneers Ripco Auctioneers and or its agents and or its servants and or its employees be restrained by way of injunction from attaching the plaintiffs' goods in the business premises known as L.R. No.209/4562 and also from interfering with the plaintiffs' quiet possession of business premises known as L.R. 209/4562 save as provided in the Landlord and Tenant (Shops, Hotels and Catering Establishments) Act, Chapter 301 of the Laws of Kenya [until] this suit is heard and determined.**

**5. Costs of this application be provided for.'**

The grounds upon which the application is based are:-

1. The applicants are protected tenants per the Landlord and Tenant (Shops, Hotels and Catering Establishments) Act, Cap.301.
2. The respondent refused and/or failed and/or neglected and/or declined to accept rent from the applicants.
3. There are complaints in the Business Premises Tribunals, being Numbers 81 – 92 of 2006 wherein the issue of rent is pending hearing and determination.
4. It is only this honourable court that has jurisdiction to grant injunction in matters of protected tenants.
5. The respondent needed to seek leave to levy distress from the Business Premises Rent Tribunal, the applicants being protected tenants.

6. The distress herein is irregular and should be stopped *ex-debito judiciae* (as a matter of right).
7. The applicants shall suffer irreparable loss if this application is not granted.
8. The applicants have a *prima facie* case against the respondent.
9. That it is in the interest of justice that this application be granted.

The application is supported by the affidavit of plaintiff/applicant Mark Wachira sworn on his own behalf and on behalf of the other plaintiffs/applicants on 06.04.06.

In response to the application, the defendant/respondent company filed grounds of opposition on 13.04.06 as follows:-

1. That the application is misconceived and does not lie in law.
2. That the applicants have no reasonable cause of action against the defendant as there is no actual or threatened proclamation/distress/attachment against the plaintiffs and both the application and entire suit should be struck off with costs.
3. That the defendant is a stranger to the said 'RIPCO AUCTIONEERS' and the defendant has not at any given time instructed the said 'RIPCO AUCTIONEERS' to proclaim and/or levy distress against the plaintiffs or at all and the plaintiffs' allegations thereof are baseless.
4. That the applicants' suit is mischievous and unfounded, hence the plaintiffs have no *prima facie* case at all to warrant orders for injunction against the defendant.

Plaintiffs'/applicants' counsel referred this court to High Court (Nyeri) Civil Appeal No.40 of 1981, Tetu Farmers Co-operative society -vs- Gerald G. Gatheru & Another as well as Court of Appeal Civil Appeal No.205 of 1995, Narshidas & Company Limited -vs- Nyali Air Conditioning & Refrigeration Services Limited which I have borne in mind in addressing the issues raised in this application.

There is affidavit evidence by the first plaintiff/applicant, Mark Wachira on behalf of the other plaintiffs/applicants acknowledging that the defendant/respondent is the registered owner of the suit property. The affidavit also deposes that on or about 13.12.05, the defendant served the plaintiffs with a tenancy termination notice under section 4 of the Landlord and Tenant (Shops, Hotels and Catering Establishments) Act following which the plaintiffs filed references against the termination notice in the Business Premises Rent Tribunal (BPRT) under section 6 of the Act, being BPRT Numbers 11-13 of 2006 and 436 – 444 of 2005. Mark Wachira's affidavit adds that after the defendant company served the plaintiffs with termination notice, the defendant company proceeded to decline and/or refuse and/or neglect to collect and/or accept monthly rent from the plaintiffs and the plaintiffs filed complaints in the Business Premises Rent Tribunal (BPRT), being BPRT numbers 81 - 92 of 2006 and that both the references alluded to earlier and the complaints are still pending hearing and determination in the Business Premises Rent Tribunal.

The next deposition by Mark Wachira is at paragraph 5 of his aforesaid affidavit which states:

**'5. That on or about the 3<sup>rd</sup> day of April 2006 the defendant's agents and or servants and or employees M/S Ripco Auctioneers went to the plaintiffs' business premises and took an inventory of the plaintiffs' goods for the purpose of levying distress for unpaid rent which rent is not only unspecified but which rent the defendant has also declined to accept and or collect and the defendant declined and or failed and or refused and or neglected to serve the plaintiffs with Proclamation Notices.'**

My observation is that the purported distress levied by Ripco Auctioneers upon the plaintiffs'/applicants' goods on 13.04.06 in the circumstances deposed to above by Mark Wachira

irresistibly point to the defendant/respondent company as the hand behind the said purported distress. This presumption arising from an affidavit cannot in my view be rebutted by mere denial in grounds of opposition not backed up by an oath. The defendant/respondent company did itself injustice by taking the grounds of opposition route as opposed to resorting to filing a replying affidavit. The defendants'/respondent's grounds of opposition suggest that Ripco Auctioneers are impostors and that the defendant/respondent company has nothing to do with them. Since there is no dispute that the suit property is owned by the defendant/respondent company, on whose instructions could Ripco Auctioneers have been carrying out the purported levying of distress on the plaintiffs'/applicants' goods in the suit premises, if not on the defendants'/respondents' instructions' ?

On the evidence available to this court, I hold that there is a dispute whether or not the plaintiffs'/applicants' tenancy in the suit premises is a controlled tenancy; that Ripco Auctioneers purported to levy distress upon the plaintiffs'/applicants' goods in the suit premises; and that the purported levy of distress was carried out during the pendency of references and complaints regarding the termination of the plaintiffs'/applicants' tenancy of the suit premises. Since the matters in dispute are before the Tribunal appointed under the Landlord and Tenant (Shops, Hotels and Catering Establishments) Act, the Tribunal must be given the opportunity to adjudicate over them as the Tribunal is empowered so to do under the Act. This means the restraining orders sought by the plaintiffs'/applicants must issue. Accordingly, I grant prayer 4 in the chamber summons dated and filed on 06.04.06. The defendant/respondent company shall bear the plaintiffs'/applicants' costs of this application.

Orders accordingly.

**Delivered at Nairobi this 16<sup>th</sup> Day of June, 2006.**

**B.P. KUBO**

JUDGE