



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

Civil Case 208 of 2006

WACHIRA MURIITHI KIBUCHI.....PLAINTIFF

VERSUS

CHRISTINE NDAVI.....1ST DEFENDANT

DENNIS K. MWANGI T/A KENYA SHIELD AUCTIONEERS.....2ND DEFENDANT

RULING

This is an application for an injunction to restrain the 1st defendant from disposing of goods which were attached by the 2nd Defendant, on 12th April 2006. The said attachment was said to have been effected at BURUBURU PHASE IV, HOUSE NO. 78/283.

It is also the plaintiff's prayer that the defendants be ordered to return the attached goods to him.

And finally, the plaintiff asks that the 1st Defendant be restrained from giving up the suit premises to third parties, and also to restore all amenities until the suit is heard and determined.

There is no dispute about the fact that the premises in issue is not the main house, but an extension thereto. There is also no dispute about the fact that the plaintiff was a tenant at the premises, and that he operated a salon business therein.

It is the plaintiff's case that the landlady disconnected water and electricity from the premises in December 2005. That action prompted disputes as the plaintiff insisted that he was not in any arrears of rent, whilst the 1st Defendant was of the view that the plaintiff owed her the sum of KShs. 96,000/=, as at December 2005.

Arising from that dispute, the 1st defendant issued a Termination Notice to the plaintiff. The said notice is dated 31st January 2006, and it required the plaintiff to vacate the suit premises by 1st April 2006.

The reason advanced by the 1st defendant for giving the notice, was that the plaintiff had defaulted in the payment of rent, as from November 2005. It was also said that the plaintiff had not only been delaying in paying his monthly rents, but that he had also issued a "bouncing cheque".

Upon receipt of the notice to terminate the tenancy, the plaintiff informed the 1st defendant that he would not comply therewith, as he was not in arrears of rent.

It is apparent that the plaintiff did not vacate the suit premises, as on 12th April 2006, his goods which were within the said premises, were proclaimed by Mr. D.K. Mwangi trading as Kenya Shield Auctioneers.

According to the particulars on the face of the proclamation instrument, the auctioneers were instructed to levy distress for rent. The instructions so to do, were said to have been issued by the advocates for the 1st Defendant, through a letter dated 13th March 2006.

Although the plaintiff has said that the process of levying distress, or the attachment of his assets took place on 12th April 2006, the 2nd defendant has not deemed it necessary to swear any affidavit to counter that contention.

The only affidavit sworn by the 2nd defendant is one which was sworn in support of an application, by the 1st defendant, for an order to break-in to the suit premises. By that affidavit, the 2nd defendant states that the proclamation was effected on 16th March 2006.

First, that affidavit is not intended for use in this case, as a means of countering the plaintiff's assertion that the process of levying distress was effected on 12th April 2006. Secondly although there is a proclamation dated 16th March 2006 which has been exhibited before this court, the same expressly states that the suit premises were locked, whenever the 2nd defendant visited them, on 14th, 15th and 16th March 2006. That proclamation was for "**all goods contained in the premises.**"

In the circumstances, I doubt the veracity of the defendants' alleged proclamation on 16th March 2006.

However, even if it is factually accurate that the plaintiff's goods were proclaimed on 16th March 2006, and thereafter carried off on 12th April 2006, there still remains one fundamental issue of concern. To my mind, that is an issue which remains critical regardless of where the truth lay, as between the allegations and counter-allegations as between the plaintiff and the 1st defendant.

The issue that I allude to emanates from the 1st defendant's termination notice dated 31st January 2006. That notice was issued by the 1st defendant in a form produced by the Business Premises Rent Tribunal. It is a notice which says that it had been issued pursuant to the provisions of Section 4(2) of The Landlord and Tenant (Shops, Hotels and Catering Establishments) Act, Cap. 301.

As far as this court is concerned, the moment that the 1st defendant decided to issue that notice to terminate tenancy, she was saying that she well appreciated the fact that The Business Premises Rent Tribunal has jurisdiction over the premises in issue.

Pursuant to the provisions of Section 4(1) of the Landlord and Tenant (Shops, Hotels and Catering Establishments) Act;

"Notwithstanding the provisions of any other written law or anything contained in the terms and conditions of a controlled tenancy, no such tenancy shall terminate or be terminated, and no term or condition in, or right or service enjoyed by the tenant of, any such tenancy shall be altered, otherwise than in accordance with the following provisions of this Act."

Therefore, once the 1st defendant acknowledged that the Tribunal had jurisdiction over the suit premises, the only way that she could have terminated the plaintiff's tenancy was through the provisions of the Landlord and Tenant (Shops, Hotels and Catering Establishments) Act. That would imply that by seeking orders from the magistrate's court, instead of from the Tribunal, the 1st defendant was purporting

to remove the suit premises from the jurisdiction of the Tribunal.

By virtue of Section 4(3) of the Act, the notice which the 1st defendant issued on 31st January 2006, could only take effect after two months. Accordingly, the earliest date when the termination notice was to take effect was 1st April 2006. And the said notice would only have taken effect if the plaintiff had failed to file a reference to the Tribunal, before 1st April 2006.

But, in this case, even before the expiry of the notice period, the 1st defendant had taken action to levy distress and terminate the tenancy, in a manner that was not pursuant to the provisions of the appropriate statute. In the circumstances, I hold the considered view that it would be wrong of this court to recognise the legitimacy of the actions by the 1st defendant. By that I mean that although the 1st defendant contends that the tenancy of the plaintiff had now been terminated, it is important that the 1st defendant is made aware that her decision to adopt a self-help method, outside the Landlord and Tenant (Shops, Hotels and Catering Establishments) Act, rendered the process illegitimate.

For that reason, the 2nd defendant must now release the attached goods to the plaintiff, forthwith. The said return of the attached goods shall be unconditional. In other words, the 2nd defendant is not to demand from the plaintiff any charges whatsoever. I also award to the plaintiff, the costs of the application dated 19th April 2006. However, I decline to order the 1st defendant to desist from renting out the suit premises to third parties, as this court cannot issue orders in vain. I say so because it would appear that the premises have already been let out.

Dated and Delivered at Nairobi this 17th day of July 2006.

FRED A. OCHIENG

JUDGE