



**REPUBLIC OF KENYA**

**IN THE HIGH COURT OF KENYA AT NAIROBI**

**CIVIL SUIT NO. 3040 OF 1994**

**JAMES GLENN RUSSELL CO. LTD. ....PLAINTIFF**

**VERSUS**

**PAN AFRICA INSURANCE CO. LTD..... DEFENDANT**

**JUDGEMENT**

**1. Evidence for the Plaintiff**

The Plaintiff in this suit was filed on 22<sup>nd</sup> August 1994 and the statement of defence was filed on 26<sup>th</sup> August, 1994. Hearing did not take place until 28<sup>th</sup> October, 2002 before the **Honourable Mr. Justice Hayanga**.

PW1, **Audrey Glenn Russell** was sworn and conducted through her evidence, on the first occasion of hearing. She testified that she was the Managing Director of the plaintiff company, and the defendants were her landlords. The plaintiff had taken up tenancy in 1979, and occupied office No. 440 at Uniafric House. The defendant had, on 17<sup>th</sup> August, 1994 sent Galaxy Auctioneers to levy distress on a company by the name **The Russell Co. Ltd**, but instead, the auctioneers came to **James Glenn Russell Co. Ltd**. (the plaintiff), when this latter company was not in arrears with its rent payment. At that time, The Russell Co. Ltd was not in existence. The pleas of the witness that James Glenn Russell Co. Ltd was a different company from the one targeted, were snubbed, and the auctioneers seized the entire property of the plaintiff. The plaintiff's staff were forced out of the plaintiff's offices. The auctioneers, who had given no notice prior to their operations, closed the plaintiff's office. The witness filed suit and secured an interlocutory injunction, but the defendant would still not allow the plaintiff back in office. When the plaintiff company changed its locks to reassert its rights, the defendant had the new locks removed and substituted. Contempt proceedings were brought against the defendant, and its senior officials were penalised; following which, 10 months later, the plaintiff was allowed back to its office. The witness averred that the interruptions by the defendant caused the plaintiff much financial loss; over the 10 months of exclusion from office, the plaintiff, it was averred, lost something in the order of Kshs.200,000/- — 253,000/- for each month. She averred that during the said closure of the plaintiff's office she lost access to office facilities and installations, and to her clients. She averred that the auctioneer had also taken away her files and correspondence. When the plaintiff was restored to its office by the Court, it turned out that its furniture was largely damaged or rusted and completely unserviceable; it had to be abandoned. The witness averred that she spent the sum of Kshs.450,000/= in the purchase of new furniture. PW1 said she was claiming damages for the 10 months that the plaintiff was kept out of its office; she was also claiming for the destroyed office furniture.

On cross-examination, the witness said the company known as **The Russell Co. Ltd** belonged to her husband, and she herself had been a director of the same until 1977. The Russell Co. Ltd had offices on the fourth floor of Uniafric House, the number of these offices being five-to-six, and occupying virtually

the whole floor of the building.

The second witness examined before **Mr. Justice Hayanga** was **James Nduati Warui**. He testified that he was a consultant, and did know the plaintiff, James Glenn Russell Co. Ltd. In June, 2002 he had been given instructions by the plaintiff company to reconstruct its monthly record of estimated income, based on some incomplete records. He relied on basic documents such as bank statements, and arrived at the conclusion that the plaintiff had been earning an average of Kshs.200,000 – 250,000 per month. He did prepare a report showing those estimates.

Upon cross-examination by learned counsel for the defendant, **Mr. Thangei**, the witness said he had been a consultant since 1995. He stated, that the figures on the plaintiff's turnover which he had presented were only estimates. He said that the auctioneers had forced out the plaintiff, on the claim that **The Russell Co. Ltd** had defaulted in paying rents. The auctioneers took away all things which they found in the office; and they took away the sum of Kshs.150,000 which was in the cash box which they took away. The plaintiff then sought Court orders of injunction; but while orders were made allowing the plaintiff back and the plaintiff did get back with the help of the police, it was again forced out on the following day. The witness testified that the operations of the auctioneer destroyed the office furniture, and it became necessary to replace the same at the cost of Kshs.450,000/-.

PW3 was **Mr. Edward Hamisi Mose**, who was an employee with the plaintiff company in 1994. He was a senior executive salesman. He testified that on 17<sup>th</sup> August, 1994, as he and other employees were in the course of their duties at the fourth floor of Uniafric House, auctioneers came and ordered them to vacate the office, as The Russell Co. Ltd. had defaulted in rent payment. His superior was in office at the time; and she told the auctioneers that they were not The Russell Co. Ltd.; but the auctioneers ordered them out hand took away all things which were in the office. The auctioneers also went with Kshs.150,000/= which was in the cash box which they took away. The plaintiff obtained injunctive relief, and in this way regained entry; but the defendant forced them out again the next morning. It became necessary to spend Kshs.450,000/- in the purchase of new furniture.

On cross-examination, the witness recalled that the plaintiff was occupying room No. 440. The witness said he did not know The Russell Co. Ltd. His main work was to receive and pay out money. He had received the sum of Kshs.150,000/= and had kept it in the cash box.

## 2. Evidence for the Defendant

Counsel then closed the plaintiff's case, and the defendant opened its case, this being heard before me, on 1<sup>st</sup> November, 2004. On that occasion I heard the examination-in-chief of **David Macharia Mugwe**, for the defendant (DW1). The witness said he was a property officer with a real estate firm known as Knight Frank (Kenya) Ltd., who were the agents of the defendant in the instant case. He testified that he had previously worked with the defendant, in its properties section, and that he was in the employ of the defendant in August 1994. During that time, DW1 came to know of a company known as The Russell Co. Ltd, and that this company was the tenant in Room No. 440 on the fourth floor of Uniafric House, and its landlord was the defendant. This tenancy had been held by The Russell Company Ltd since 1979 and possibly even before that date. The witness testified that The Russell Company Ltd was continuously a tenant of the defendant, and as at 1994 there was no evidence that this tenancy had been terminated. The memorandum of letting had been executed between The Russell company Ltd and Nairobi Homes Ltd, who were the defendant's letting agents at the time; this memorandum bore no date, but indicated that the lease was to commence on 1<sup>st</sup> May, 1980 and the lease was to run on for six years. The rent payable under the lease agreement was expressed to be revisable by 5 per cent each year. The witness said there was no evidence that the said lease was renewed at the end of the defined period, though it did provide for an option to renew.

Learned counsel for the plaintiff, **Mr. King'ara** had objections to the purported lease document being produced by the witness, as it was not the original. It turned out that the hearing of the suit had commenced without the process of discovery and inspection of documents being undertaken. Learned counsel for the defendant, **Mr. Thangei** acknowledged the validity of the objection, but was of the

view that the 20-year-old lease agreement referred to by the witness, could still be relied on to show how the tenancy relationship had started. He urged that the document be admitted as its background could be explained. I did, on this matter, rule that since the authenticity of the document cannot be established, other evidence should be used to prove the relevant matter.

DW1 who, as may be recalled, had indicated he was testifying about a tenant known as The Russell Company Limited, averred that as at August, 1994 that tenant was in arrears with rent payment to the tune of **Kshs.252,377/45**. It became necessary for the defendant to instruct M/s. Waruhiu & Muite Advocates to take action to have distress levied for the rent payments which were in arrears. The witness produced (Def's Exhibit No.1) the letter of instruction from M/s. Waruhiu & Muite to Galaxy Auctioneers, for the levying of distress against The Russell Company Ltd. The said auctioneers thereafter made a proclamation (Def's Exhibit No. 3) against The Russell Company Ltd's property, in respect of the unpaid sum of Kshs.252,377/45. The witness said that while the landlord was shown as Panafrican Insurance Co. Ltd and the tenant as The Russell Company Ltd, the proclamation served by Galaxy Auctioneers had been signed by **James Glenn Russell Company Ltd**. DW1 doubted the claim by the plaintiff, that the auctioneers at the time of levying distress as aforesaid, took away the sum of Kshs.150,000/-belonging to James Glenn Russell Company Ltd; because there was an inventory of the items distrained and among these, cash was not shown. The witness testified that the distress inventory had been witnessed by James Glenn Russell Co. Ltd. The witness testified that there was no evidence that the unpaid rent arrears were paid to the defendant. The witness did not know if the properties distrained were auctioned. He averred that The Russell Company Ltd took possession of the suit premises, and **Mr. Edward Mose** (Identity Card No. 8090498/70) who represented that company, collected two pairs of keys for Room 440, signing for them on 24<sup>th</sup> May, 1995, from the defendant.

The witness averred that during the time he was in the employ of the defendant, the tenant occupying Room 440 in Uniafric House was **The Russell Company Ltd**; he did not know about **James Glenn Russell Company Ltd**. He averred that at the time distress was levied by the auctioneers, **The Russell Company Ltd** was in arrears with rent payment. The witness remarked that the organization which seems to be in occupation of the suit premises at the moment is James Glenn Russell Co. Ltd. He said both companies are limited liability companies, and the only common factor between them seems to be the name **Russell**.

On cross-examination, DW1 said it was The Russell Company Ltd who by Court order (of 20<sup>th</sup> November, 1994) was to be allowed back in the suit premises by the defendant. The plaintiff, however, had been James Glenn Russell Company Ltd. He said the High Court had found the officers of the defendant guilty of contempt of Court. At that time, the witness said, **James Glenn Russell Co. Ltd** were tenants not in Room **440**, but in Rooms **436** and **438** of Uniafric House. However, Room 440 is now occupied by James Glenn Russell Co. Ltd. The witness said that each of the rooms, **436**, **438** and **440** are let separately, as single units. The witness, referring to the Record of Appeal in Civil Appeal No. 87 of 1996, said that James Glenn Russell Co. Ltd had on 30<sup>th</sup> October, 1980 written to Nairobi Homes Ltd, saying that since its incorporation it had been occupying Room No. **440** which is a small one and measures only 12ft by 10ft. From the Record of Appeal aforementioned, James Glenn Russell Co. Ltd had extended their operations to Room No. **431**, and Nairobi Homes Ltd by its letter of 21<sup>st</sup> October, 1980 was threatening to forcefully take possession of that particular room. The witness averred that Nairobi Homes Ltd. had been the agents of the defendant. The witness testified that The Russell Company Ltd had been the tenant, as at 1980, in Rooms No. **438** and **436**; but James Glenn Russell Co. Ltd was occupying Room No. **440**. He said there was rent owing in respect of Room No. **440**; and the demand in that respect was made upon The Russell Co. Ltd.

On re-examination, DW1 said he had not known that James Glenn Russell Co. Ltd was the tenant in Room No. **440**. In departure from his earlier evidence, the witness now said that Rooms **436** and **438** were occupied by James Glenn Russell Co. Ltd.

## **2. Submissions for the Defendant**

Learned counsel, **Mr. Thangei**, submitted that whereas the plaintiff, James Glenn Russell Company Ltd

alleges that it was the tenant in Room No. **440** situate on the fourth floor of Uniafric House, the defendant maintains that whereas it was the landlord in respect of Room No. **440**, its tenant therein was *The Russell Company Ltd.*

Counsel submitted that there was a burden resting on the plaintiff to show that it was a lawful tenant of the defendant at the suit premises, and that illegal distress was levied against it by the defendant; and further, that as a result of the illegal distress, the plaintiff suffered special and exemplary damages. *Mr. Thangei* submitted that no evidence had been adduced by the plaintiff's three witnesses to prove that it was a lawful tenant of the defendant at the suit premises. The plaintiff had produced no lease agreement, rent-payment receipts, or other memoranda relating to the period in respect of which the dispute had arisen.

*Mr. Thangei* submitted that the plaintiff had relied on rather indecisive oral testimony, and on previous Court proceedings to show that it was a tenant of the defendant, and this reliance included the production of the record of appeal in Civil Appeal No. 87 of 1996 – a matter in which the question for decision was to do with contempt of Court. Counsel submitted that the fact, by and of itself, that the plaintiff had felt it was truly a tenant of the defendant, and by dint thereof took out proceedings against the defendant, *did not prove* that the plaintiff was a lawful tenant; and in any event, tenancy was not the issue for determination in any of the previous proceedings sought to be relied on by the plaintiff. Counsel submitted that the plaintiff had been unable to prove lawful tenancy, and so its suit should be held to fail.

*Mr. Thangei* submitted that the plaintiff had been unable to prove that it had suffered any special damages. Counsel submitted, correctly, with respect, that the governing law on special damages is that they must be pleaded and strictly proved. The relevant authority on this point is the Court of Appeal decision in *Idi Ayub Omari Shabani (an infant suing by his next friend) and Yusufu Juma v. City Council of Nairobi and Daniel Nachela Kahungu* (1982 – 88) 1KAR 681. The principles in that case are restated in yet another decision of the Court of Appeal, *David Bagine v. Martin Bundi*, Civil Appeal No. 283 of 1996; and part of their lordships' judgement in this case may be set out here:

**“It has been held time and again by this Court that special damages must be pleaded and strictly proved. We refer to the remarks by this Court in the case of *Mariam Maghema Ali v. Jackson M. Nyambu t/a Sisera Store*, Civil Appeal No. 5 of 1990...and *Idi Ayub Shabani v. City Council of Nairobi* (1982 – 88) 1KAR 681 at page 684:**

**‘...special damages in addition to being pleaded, must be strictly proved as was stated by Lord Goddard, C.J. in *Bonham Carter v. Hyde Part Hotel Ltd* [1948] 64 TLR 177 thus:**

**“Plaintiffs must understand that if they bring actions for damages it is for them to prove damage, it is not enough to write down the particulars and, so to speak, throw them at the head of the Court, saying ‘this is what I have lost, I ask you to give me these damages’. They have to prove it.”**

**“We also refer to the cases of *Ouma v. Nairobi City Council* [1976] KLR 297, 304 and *Kenya Bus Services v. Mayende* (1991) 2 KAR 232, 235.**

**“The evidence before the learned Judge on the question of loss of user was just ‘thrown at him’. The respondent had stated that his profit margin was Kshs.5000/= to Kshs.9000/= per day from the sale of potatoes. [The] learned Judge said there was not a single receipt to show or prove those figures...”**

On the foregoing principles, counsel submitted, and in my view, with eminent justification, that in the instant suit “no special damages have been pleaded in the body of the plaint, [nor] in the prayers.” He urged that the claim for special damages must fail, and the attempt to prove what was not in the first place pleaded, was an act in futility. The plaintiff also claimed exemplary general damages. For these, as *Mr. Thangei* submitted, no evidence had been called to lay a foundation; and the plaintiff gave evidence that it was in occupation of the suit premises, and this should be held to defeat the plaintiff's further

prayer for orders of injunction.

### 3. Submissions for the Plaintiff

Learned counsel for the plaintiff, **Mr. King'ara**, submitted that the defendant had wrongfully caused distress to be levied against the plaintiff. He contended that the levying of distress was done when the plaintiff was not at all indebted to the defendant. Counsel contended that if the defendant had any right to levy distress, such a right would have been against **The Russell company Ltd** and not against **James Glenn Russell Company Limited**, and so there was a wrongful levying of distress which entitled the plaintiff to damages. Counsel submitted that the plaintiff had lost some Kshs.200,000/- — 300,000/- every month, over a period of 10 months, and that this should be recompensed in damages. Counsel submitted that the plaintiff's furniture worth Kshs.450,000/- had been destroyed and had had to be replaced; and so the defendant should make recompense in damages. He also contended that the defendant had taken away the sum of Kshs.150,000/= belonging to the plaintiff, and this should be repaid as damages.

### 4. Analysis and Orders

The decade-long period that has elapsed since this suit was filed may have hopelessly scattered the evidence. There is total confusion between **The Russell Company Limited** and the **James Glenn Russell Company Limited** (the plaintiff). There is evidence that there used to be a contract of lease between the defendant and **The Russell Company Ltd**; but no valid contractual documents have been produced. It is not known at what point in time this Russell Company Ltd ceased to exist, but it is stated for the plaintiff that it no longer exists. What was the relationship between the two companies? This has not been stated. But evidence is given that when the defendant sent auctioneers to distrain for rent, against **The Russell Company Ltd**, those who signed the proclamation were not members of that company but instead, members of **James Glenn Russell Co. Ltd**. Why would they sign documents that were intended **for The Russell Company Ltd**. This has not been explained, but it shows that if the veils of the two corporate entities were lifted, it would be found that they were *one and the same thing*: therefore, formal differentiation of the two may be seen as a stratagem of self-serving causes.

Did **The Russell Company Ltd**, when it existed, have a valid contract of lease with the defendant? Maybe. But in that case, where is the evidence? None. Did **James Glenn Russell Co. Ltd** have a contract of lease with the defendant? If so, where is the evidence? None. A lease is defined in **Black's Law Dictionary**, 7<sup>th</sup> ed (1999) as follows (p.898):

**“A contract by which a rightful possessor of real property conveys the right to use and occupy that property in exchange for consideration, usually rent.”**

And the same dictionary (p.1477) defines tenancy as follows:

**“The possession or occupancy of land by right or title, especially under a lease; a leasehold interest in real estate.”**

No tenancy or lease could thus have been created in the purely informal manner being suggested by the plaintiff, in the instant case. It is most important that the plaintiff should be able to show the *contractual basis* upon which it did become the occupant of the suit premises. From the evidence, it is not for certain whether it was **The Russell Company Ltd** or **James Glenn Russell Co. Ltd** which was the occupant of Room No. **440** in Uniafric House; neither is it clear which one of them did occupy Room **431, 436** or **438** on the same floor of Uniafric House. No proof has been provided; and in the circumstances it is impossible to conclude that James Glenn Russell Co. Ltd was a lawful tenant of Room No. **440** which lies at the centre of this dispute.

I have to conclude that the plaintiff's case is, in terms of established legal rights, essentially a limping one. In so far as the plaintiff has failed to prove its legal right to be in occupation of *any particular room* owned by the defendant, I am unable to say that for some 10 months the defendant wrongfully kept the

plaintiff out of the suit premises; and so there is no basis for awarding damages for the alleged 10 months. Moreover, it is only vaguely asserted that the plaintiff while occupying the suit premises was earning Kshs.200,000/- — 300,000/- per month. This is not proved. As in *Ayub Shabani v. City Council of Nairobi* (1982 –88) 1KAR 681, this question of loss of monthly earnings is simply being “thrown at the Court.” In line with the governing authorities, I must reject this claim for pecuniary loss over a period of 10 months at the rate of Kshs.200,000/- — 300,000/- per month.

It is also claimed that the auctioneers who came at the behest of the defendants, took away Kshs.150,000/- belonging to the plaintiff. This is disputed. Such money did not figure in the inventory of distrained goods. I have no basis for believing that claim.

The plaintiff also claims that it used the sum of Kshs.450,000/- in purchasing new furniture to replace that taken away by the auctioneers and thereafter damaged, or at any rate, not accounted for. Of course, there has been no accounting for the furniture taken away; and DW1 averred that he had no knowledge whether or not this furniture was sold to defray the rent arrears. I am prepared to take this element in favour of the plaintiff, as this is not contradicted by any evidence on record.

I have to point out that the parties to this suit will need to identify the properties which are the subject of their agreement, and regulate their affairs more carefully by the terms of contract. Unless this is done, much unproductive litigation will be the consequence, and this is likely to frustrate the parties themselves, apart from clogging Court time quite unnecessarily.

In my orders, I refuse the plaintiffs claim for Shs.150,000/- as moneys that were allegedly taken away wrongfully by the auctioneers. Similarly I refuse the claim for Kshs.200,000/- — 300,000/- per week for a period of 10 months. But I allow the plaintiff’s claim for Kshs.450,000/- in respect of furniture taken away under the direction of the defendant, and subsequently not accounted for.

Each party shall bear its own costs.

Orders accordingly.

**DATED and DELIVERED at Nairobi this 18<sup>th</sup> day of February, 2005.**

**J. B. OJWANG**

**JUDGE**

**Coram: Ojwang, J.**

**Court clerk: Mwangi**

**For the Plaintiff: Mr. Kingara, instructed by M/s. Gichuki Kingara & Co. Advocates**

**For the Defendant: Mr. Thangei, instructed by M/s. Waruhiu K’Owade & Nganga Advocates.**