



**REPUBLIC OF KENYA**  
**IN THE HIGH COURT OF KENYA**  
**AT NAIROBI COMMERCIAL DIVISION, MILIMANI**  
**CIVIL CASE 365 OF 2000**

**NTIRAMPEBA LAURENT.....PLAINTIFF**

**VERSUS**

**CHUNILAL R. PARMAR T/A QUARZO.....DEFENDANT**

**R U L I N G**

This is an application (by notice of motion dated 26th January, 2005) by the Defendant seeking the following main orders:-

- (1) That the court do award the Defendant costs of the suit, which suit has abated.
- (2) That the sum of Kshs.750,000/00, “the rent arrears owing at the filing of this suit and deposited in a joint interest-earning account at Stanbic Bank Kenya Limited, Account Number 0123028901901 together with all the interest that accrued thereon” be released to the Defendant.
- (3) .....
- (4) .....

The grounds for the application are:-

- (i) that the Plaintiff died on 5th January, 2003 and no application has been made to substitute his legal representative in his place;***
- (ii) that the suit has therefore abated and costs are payable to the Defendant; and***
- (iii) that the amount deposited at Stanbic Bank Kenya Limited in the joint account was for the benefit of the Defendant as it “had been deposited in order to avoid the levying of distress for the rent arrears that were accruing at the time of filing suit”.***

There is a supporting affidavit sworn by the Defendant.

The application is opposed upon the grounds set out in the grounds of opposition dated 5th April, 2005, among them being the grounds that the monies deposited in the joint account were not so deposited on account of rent arrears; that no determination has been made by the court regarding those monies; and that the monies belong to the estate of the deceased Plaintiff. It is conceded that indeed the suit has abated and that the Defendant is entitled to costs against the deceased Plaintiff’s estate. There is no replying affidavit.

I have perused the court record. I have also given due consideration to the submissions of the learned counsels appearing. No authorities were cited. The Plaintiff was the Defendant's tenant in the suit premises. In his suit he sought, inter alia, an injunction to restrain the Defendant from evicting him "and or selling or otherwise disposing of the Plaintiff's goods". In the alternative he sought an order that his goods attached by the Defendant in levy of distress be released to him forthwith. Together with the plaintiff the Plaintiff filed an application for temporary injunctive reliefs which were in the first instance granted *ex parte*. When the application came up for hearing *inter partes* on 6.6.2000 the following consent order was entered:-

**"BY CONSENT**

- 1. The Plaintiff/Applicant to deposit Kshs.375,000/00 with court within 10 days of the date hereof.**
- 2. The Plaintiff/Applicant to pay rent for 3 months amounting to Kshs.150,000/00 to the Defendant on or before 30.6.2000.**
- 3. The Plaintiff/Applicant to pay all bills (telephone, electricity and water) on or before 30.6.2000.**
- 4. Both parties be at liberty to file further affidavits.**
- 5. Interim orders extended to 30.6.2000.**
- 6. In default of any payment on its due date interim order to stand discharged."**

On 30th June, 2000 a further consent order was entered as follows:-

**"BY CONSENT**

- 1. (A further) sum of Kshs.375,000/00 be deposited in court by the Plaintiff.**
- 2. The sum of Kshs.150,000/00 being rent for April, May and June 2000 be paid to the Defendant's advocates forthwith.**
- 3. The Plaintiff to continue paying to the landlord all rents as they (fall) due.**
- 4. The application dated 29.2.2000 in so far as it relates to the issue of an interim injunction be and is hereby granted until the suit is heard and determined.**
- 5. The suit be fixed for hearing.**
- 6. The auctioneers do release the attached goods forthwith.**
- 7. (the) issue as to whether the auctioneers are entitled to recover their charges from the Plaintiff to be argued on 14.7.2000.**
- 8. This order to be served upon the auctioneers."**

It was the total sum of Kshs.750,000/00 deposited in court by the Plaintiff pursuant to these consent orders that was subsequently banked in the joint account. In the meantime the Plaintiff had filed an amended plaint dated 28th June, 2000. In it he pleaded a certain business transaction with the Defendant upon which he was entitled to Kshs.4,200,000/00 from the Defendant, *inter alia*. He also pleaded that it was agreed by the parties that in lieu of payment of that sum the Defendant would forgo rent for the months that the Plaintiff would stay in the Defendant's premises. He therefore sought judgment for the said sum of Kshs.4,200,000/00 on account of the Defendant having reneged on the agreement, in addition

to the reliefs he had sought in the original plaint.

The Defendant had filed a statement of defence dated 17th March, 2000. He filed an amended statement of defence on 10th July, 2000. He denied the business transaction pleaded by the Plaintiff or that he owed him the sum of Kshs.4,200,000/00. Significantly, he did not counterclaim for any arrears of rent. Nor, it appears, did he sue the Plaintiff in any other suit for arrears of rent.

It appears to me that the deposit of Kshs.750,000/00 by the Plaintiff into court pursuant to the consent orders quoted in full above was the negotiated price that the Plaintiff had to pay for the lifting of the distress for rent levied by the Defendant. He did not thereby admit that he owed the Defendant any arrears of rent. If he made such admission why was the money not paid to Defendant as part of the consent? Furthermore, as already noted, there was no counterclaim by the Defendant for arrears of rent. And even if there had been, unless admitted by the Plaintiff, the matter of arrears of rent would have had to be ventilated in a trial of the action.

As it happened the Plaintiff died before his suit was heard. There was no substitution of his legal representative in his place and the suit has abated. The Defendant is entitled to costs for the suit and I hereby award the same to him. Prayer 2 of the application, however, cannot be granted. The Defendant never counterclaimed for any arrears of rent. The Plaintiff never admitted any arrears of rent. And there is no judgment in favour of the Defendant for the sum of Kshs.750,000/00 or any part thereof. That sum and all interest accrued upon it, belongs to the estate of the deceased Plaintiff. Prayer No. 2 of the application is therefore dismissed. The Defendant having only partially succeeded in this application, there will be no order as to the costs of the application. It is so ordered.

**DATED AND SIGNED AT NAIROBI THIS 16TH DAY OF JUNE, 2005.**

**H.P.G. WAWERU**

**JUDGE**