REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA AT NAKURU

CIVIL DIVISION

CIVIL CASE NO. 67 OF 2005

HEZRON KIMELI CHERUIYOT……..……PLAINTIFF

VERSUS

ANDREW K. MURSOI…….……...…DEFENDANT

RULING

The plaintiff, Hezron Kimeli Cheruiyot, has made an application under the provisions of Order XXXIX rules 1, 2 and 3 of the Civil Procedure rules seeking the orders of the court to restrain the defendant, Andrew K. Mursoi, by himself, his servants or agents from levying distress for rent against the plaintiff or in any other manner interfering with the plaintiff's quiet enjoyment of parcel number L.R. No. 631/1954, pending the hearing and determination of the suit filed herein. The grounds in support of the application are stated on the face of the application. The plaintiff has stated that he was a buyer of the said suit property and not a tenant. He stated that the defendant's attempt to levy distress against him was therefore illegal and would cause him irreparable damage which could not be compensated in monetary terms. The application is supported by the annexed affidavit of the plaintiff.

The application is opposed. Andrew K. Mursoi, the defendant has sworn a lengthy replying affidavit in opposition to the application. In essence, the defendant has deponed that the plaintiff had initially entered into an agreement to purchase the suit property, paid a deposit, but was unable to pay the balance of the purchase consideration. Due to this default, the defendant requested the plaintiff for the deposit paid to be converted to rent for the period that the plaintiff was to be in occupation of the said premises. The defendant acceded to the plaintiff's request and duly converted the said deposit to rent. The said amount had however been used up forcing the defendant to levy distress when the plaintiff failed to pay the monthly rent due. I heard the submission made by Mr Siele, Learned Counsel for the plaintiff and Mr Munyao, Learned Counsel for the defendant. I have carefully considered the said submissions and read all the pleadings filed by the parties to this application. The issue for determination by this court is whether the plaintiff has established sufficient grounds to enable this court grant the said order of injunction sought.

The genesis of the dispute between the plaintiff and the defendant is not in dispute . On the 19th of November 2003, the plaintiff and the defendant entered into a sale agreement whereby the defendant agreed to sell to the plaintiff the parcel of land known as L.R. No. 631/1954 (situated within Kericho Municipality) upon which is erected a five bedroomed house (see annexture "HKC1"). The purchase consideration was agreed at Kshs 3,500,000/- plus stamp duty of Kshs 140,000/-. The plaintiff paid a deposit of Kshs 300,000/- on the day the agreement was executed. It was agreed that the defendant was to pay the balance of Kshs 2,000,000/- by the 17th of January 2004 and the final instalment of Kshs 1,040,000/- was to be paid by the 28th of February 2004. It is apparent that the plaintiff took possession of the premises situated on the said parcel of land.

From the evidence on record the plaintiff did not pay the balance of the purchase consideration. Other than the deposit of sum of Kshs 300,000/-, the plaintiff did not pay any other amount. The defendant waited for the balance of the purchase consideration to be paid in vain. By a letter written by his advocate Mssrs Achieng Owuor & Company Advocates, the defendant rescinded the sale agreement. He proposed that the deposit paid be converted to rent for the period that the plaintiff occupied the said premises (see annexture "AKM 2"). The plaintiff through his advocate, Mssrs Siele Sigira & Company Advocates

accepted the defendants proposal for the conversion of the said amount deposited as purchase consideration as rent (see annexture "AKM3" being the letter dated 16th of September 2004). Paragraphs 2 and 3 of the said letter are instructive. They state as follows:

"2. THAT the house is in bad state and is not habitable to warrant a ridiculous amount of Kshs 25000/= monthly rent. Our client's figure is Kshs 15,000/= but is willing to raise it to Kshs 20,000/= per month.

3. THAT in view of paragraph 2 above our client will therefore occupy the premises upto the 31st of March 2005. However (he) intends to vacate by 31st of December 2004 and therefore your client will have to refund Kshs 60,000/= to ours."

In the two correspondences referred to above, the plaintiff and the defendant reached consensus ad idem to rescind the said sale agreement entered into on the 19th of November 2003. The only issue that they did not agree on was the figure proposed to be the monthly rent payable. Whilst the defendant suggested Kshs 25,000/=, the plaintiff was willing to pay upto Kshs 20,000/=. Even if this court were to take the figure suggested by the plaintiff as monthly rent, the said sum deposited would have been used up by the 31st of March 2005, a fact which the plaintiff himself conceded in his letter dated the 16th of September 2004. The plaintiff was willing to vacate the premises, having agreed to the rescission of the sale agreement.

This court fails to understand now why the plaintiff has changed his story. The plaintiff knows that he has resided in the said premises owned by the defendant for a period of four months without paying rent. If the court were to accept his suggested monthly rent payable, by his own admission the plaintiff now owes the defendant Kshs 80,000/= in rent arrears. The plaintiff having accepted that he was a tenant in the said premises owned by the defendant now claims that he is a purchaser. The plaintiff is being dishonest. He ceased to be a purchaser once he accepted the rescission of the sale agreement by his letter to the defendant dated the 16th of September 1994. The plaintiff cannot resist the defendant's legitimate bid to recover the rent arrears owed by distress for rent being levied against him. The facts of this case do not disclose that the plaintiff has a prima facie case. The plaintiff has not established a prima facie case as envisaged in the case of Giella –vs- Cassman Brown [1973]E.A. 358. His application for injunction cannot therefore succeed. The same is hereby dismissed with costs to the defendant.

DATED at NAKURU this 22nd day of July 2005.

L. KIMARU

JUDGE