

REPUBLIC OF KENYA
IN THE HIGH COURT OF KENYA
AT MOMBASA

Misc Civil Appli 302 of 2005

RUKIYA MOHAMMED SALEH.....APPLICANT

VERSUS

FIRDOZ HABIBRESPONDENT

R U L I N G

This suit was commenced as miscellaneous Notice of Motion seeking orders that the landlord be granted leave to levying distress. This would have been a requirement under Rent Restriction Act Cap 296. The other order sought was to allow the landlord to take possession of the premises in dispute.

This application should have been made in the Rent Restriction Tribunal. The grounds set out are that there are arrears of rent amounting to Sh. 244,800/= from 1993 June to April 2005. That the tenant has refused to pay rent but whenever asked she says she pays to her advocate who is not known to the landlady. That the landlord depends on the income from the rent paid from the flat having no other source of income and she is a poor widow. That the Respondent has actually put in the disputed premises her own tenants charging higher rent.

Supporting affidavit sworn by the landlord shows (paragraph 4) that rent outstanding is Sh. 244,800/=. Paragraph 5 states that she says she is depositing the money with unknown advocate on the ground that the landlord has to take out letter of administration for her husband's estate. This is false because the property in question is already registered in landlord's name. Paragraph 16 alleges that the correct forum is the Rent Tribunal which is now not sitting for 3 years and this court has jurisdiction.

The court ordered service on the Respondent. There is an affidavit of service sworn on the June 2nd 2005 only on service of Hearing Notice. Exparte orders were granted on 16.6.2005. it now transpires in the application of Respondent filed on 21.6.2005 to set aside orders granted exparte that there are very serious material nondisclosure and untruths made before the court.

Firstly, it is not true that the Tribunal in which jurisdiction to deal with protected tenancies is not in operation. Secondly, that there is now pending HCC No. 692 of 1993 between landlord and another relating to the ownership of the same property as a consequence of which the tenant has been paying rent which she says was a direction of the applicant/landlord who alleged to have sold the property to one Ayub Salyani and his family. Indeed a copy of the plaint is exhibited. In that plaint there is a demand against this landlord in the sum of Sh. 1,365,000/=. There is confirmation that the tenant has been depositing the money to Marende advocate of the plaintiff Salyanis up to date and no arrears are existing.

Therefore the allegations of the landlord that rent is in arrears is false. They admit that this other suit is not determined. Upon hearing the submissions of both counsel and upon reading the material laid before the court I find that the whole of this suit was based on untruths. The advocate of landlord in the other case is the same here and he should have known where the rent is going. The landlord herself is guilty of making false and untrue statements. She must be aware of the dispute as to the payment of rents and that the same is being paid to Marende Advocates for Salyanis – the plaintiffs in HCC 692 /93.

I find that there are no arrears of rent in respect of the premises occupied by the tenant and the order to levy distress should not have been made at all.

The issue of service of these proceedings is questioned. Firstly, it is sworn that service was effected of Hearing Notice only. No service of the application was effected. Of hearing notice the tenant says in court that she was not served. I believe her consequently the order for vacant possession should not have been made.

I find there is sufficient reason to set aside the exparte orders made. There was deliberate non-disclosure and untruths that there were arrears of rent while it turns out not to be the case. It is sworn that the tenant has sublet the premises, this is also false. As to the conduct of the landlady and his advocate and agents thereafter, it is despicable. They acted contrary to law in everyway. They used force to violate the rights of the tenant.

For these reasons I grant orders prayed for in terms of prayer 2, prayer 3, prayer 4, prayer 5 and all costs occasioned to the tenant in this application shall be paid to her by the landlord.

Dated the 22nd July 2005

J. KHAMINWA

J U D G E