

REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA AT NAKURU

CIVIL DIVISION

CIVIL CASE NO. 58 of 2005

MARTIN M. ODHIAMBO

T/A EXPRESS INSURANCE SERVICES.....PLAINTIFF

VERSUS

MARSHALLS E. A. LTD.....1ST DEFENDANT

LEGACY AUCTIONEERING SERVICES.....2ND DEFENDANT

RULING

The plaintiff, Martin M. Odhiambo, filed suit against the defendants, Marshalls E. A. Ltd and Legacy Auctioneering Services seeking various reliefs as enumerated in his plaint. Contemporaneous with filing the suit, the plaintiff filed an application under the provisions of Order XXXIX rules 1, 2, 3 and 9 of the Civil Procedure rules, Sections 3, 3A and 63(c) and (e) of the Civil Procedure Act seeking the following substantive orders:-

(i) That the defendants be restrained jointly and severally by themselves, employees, servants and authorised agents from levying distress on alleged proclaimed properties dated the 11th of May 2005 until the final disposal of the application.

(ii) That there is a pending tribunal cases number 3 and 9 of 2004 before the Tribunal (Business Premises Tribunal) and Misc. Application No. 13 of 2004 before the Principal Magistrate's Court Kericho.

(iii) That the plaintiff be allowed to pay rent of Kshs 15,000/- per month to Marshalls E. A. Ltd with effect from May 2005 until the final disposal of this application as M/s Karigo Thuo & Co. Advocates had vacated the said suit premises without informing the plaintiff. The application is supported by the annexed affidavit of the plaintiff. The application is opposed. Parita Bid, a Manager of the 1st defendant has sworn a replying affidavit in opposition to the plaintiffs' application. At the hearing of the application, the plaintiff (who was acting in person) made submissions in support of his application. Mr Kuria, Learned Counsel for the defendants made submissions opposing the plaintiffs' application.

Having carefully considered the said submissions made and also read the pleading filed by the parties to this suit, the facts of the case are more or less not in dispute. The 1st defendant is the registered owner of Plot No. 631/IV/59 which is situated within the Municipality of Kericho. On the said plot is erected a commercial building which was leased out to several tenants. The 1st defendant has already sold the said premises to a company called Stage Mattresses Ltd. The 1st defendant and the new owners of the premises agreed that the new owners would only take possession after all the tenants whom the 1st defendant had leased the premises to had vacated the same. According to the 1st defendant, the only tenants whom it had leased the said premises to were three; namely, Mssrs Karigo Thuo & Company Advocates, Mssrs Bett, Kipyegon & Company Advocates and Mssrs C. K. Korir & Company Advocates. The 1st defendant states that it had issued notices terminating the tenancies of the said three tenants. The said tenants, save for Karigo Thuo & Company Advocates have voluntarily vacated the said premises. The 1st defendant denied that it was aware of the existence of a tenancy between itself and the plaintiff. The 1st defendant argued that when it sought to distrain for rent, it was only distraining for rent against the firm of Karigo Thuo & Company Advocates who had fallen in arrears to the sum of Kshs 96,000/=.

On his part, the plaintiff states that he is a lawful sub-tenant of Karigo Thuo & Company Advocates. The plaintiff contends that although he was a sub-tenant of Mssrs Karigo Thuo & Company Advocates, (the tenant of the 1st defendant), the 1st defendant ought to have given him notice, like any other tenants in the premises, because the 1st defendant was aware of his sub-tenancy. The plaintiff conceded that he was not aware if the said firm of Karigo Thuo & Company Advocates had obtained the consent from the 1st defendant before part of the said premises was sublet to him. He submitted that since the said premises was sublet to him in 1987, the 1st defendant was made aware of his sub-tenancy. The plaintiff submitted that there were two reference filed at the Business Premises Tribunal by the firm of Karigo Thuo & Company Advocates which the said firm had sought to terminate the plaintiff's sub-tenancy. The said references had not been disposed off. The plaintiff therefore sought orders of injunction against the 1st defendant to restrain it from distraining for rent against him which rent is owed by the firm of Karigo Thuo & Company Advocates and not the plaintiff. The plaintiff was prepared to pay rent directly to the 1st defendant pending the hearing and determination of the references at Business Premises Tribunal and pending the hearing and determination of this suit.

After setting out the facts of this case, albeit briefly, the issues that come to the fore for determination by this court are twofold; firstly, is there a privity of contract between the plaintiff and the 1st defendant? And, secondly, if so, has the plaintiff established a case to be granted the orders of injunction sought? I have carefully evaluated the facts placed before me. It is not in dispute that the plaintiff was a subtenant to the 1st defendant. The said tenant (the firm of Karigo Thuo & Company Advocates) recognised the plaintiff to the extent that it filed a reference to the Business Premises Tribunal to terminate his tenancy for persistently falling into arrears in paying the rent due. There is no evidence however that the 1st defendant was aware of the sub-tenancy of the plaintiff. The plaintiff has not exhibited any documentary evidence to establish that the 1st defendant was aware of his sub-tenancy or that the 1st defendant had consented to the firm of Karigo Thuo & Company Advocates to sublet part of the said premises leased to it to the plaintiff. From the evidence on record, it is clear that the said firm of Karigo Thuo & Company Advocates have already vacated the said leased premises at the time distress for rent was levied by the 1st defendant. The other tenants have also vacated the said premises after their leases were terminated by the 1st defendant. It is only the plaintiff who is still remaining in the said premises. The 1st defendant has taken advantage of the fact that the firm of Karigo Thuo & Company Advocates had not sought its consent before subletting the said premises, to evict the plaintiff from the said premises under the guise of distraining for rent against the firm of Karigo Thuo & Company Advocates. From the evidence on record, and the submissions made, it is clear that the 1st defendant was aware that the said firm of Karigo Thuo & Company Advocates had vacated the premises, leaving the plaintiff, its sub-tenant in the said premises. As stated earlier in this ruling, there is no privity of tenancy between the 1st defendant and the plaintiff. The rights of the plaintiff as a tenant only accrued to him on account of his sub-tenancy. The plaintiff's rights as a tenant were only protected in so far as it concerned his landlord – Mssrs Karigo Thuo & Company Advocates. If the plaintiff had established that the 1st defendant had consented to the sub-tenancy, then the rights of the plaintiff as a protected tenant would have secured as against the 1st defendant. The plaintiff has submitted that the 1st defendant was aware of his sub-tenancy. That may be so. However since it has been established that the 1st defendant's consent was not procured by the firm of Karigo Thuo & Company Advocates before the said firm entered into a sub-tenancy agreement with the plaintiff, in so far as the 1st defendant is concerned, the plaintiff is a stranger to it. I agree with the 1st defendant's argument in this regard.

In the circumstances of this case, I hold that the plaintiff has failed to establish a prima facie case to enable this court grant him the order of injunction sought. His application is therefore dismissed with costs. However, this court has observed that the 1st defendant is aware that the goods purportedly distrained for the rent defaulted do not belong to the firm of Mssrs Karigo Thuo & Company Advocates but to the plaintiff. The 1st defendant cannot therefore distrain for properties which do not belong to its lawful tenant. The said distress for rent was therefore unlawful and the same is set aside.

This court has found that there is no privity of tenancy between the plaintiff and the 1st defendant. In the circumstances of this case, the plaintiff is therefore in illegal occupation of the said premises. He is ordered to give vacant possession to the 1st defendant on or before the 31st of August 2005 in default the 1st defendant be at liberty to resort to the law to procure the plaintiff's eviction from the said premises.

It is so ordered.

DATED at NAKURU this 21st day of July 2005.

L. KIMARU

JUDGE