



REPUBLIC OF KENYA
IN THE HIGH COURT OF KENYA

AT NAKURU

Civil Case 76 of 2003

IBRESS MOTOR AGENCIES LTD.....PLAINTIFF/APPLICANT

VERSUS

BENSON MWANGI.....DEFENDANT/RESPONDENT

RULING

The applicant filed an application dated 26/9/2005 by way of a notice of motion brought under Order XXXIX Rules 2A of the Civil Procedure Rules and Section 3A of the Civil Procedure Act seeking two main orders:-

- (a) An interlocutory injunction to restrain the respondent from removing and or carrying away all or any of the proclaimed property in **Nakuru Municipality Block 1/755** from the applicant's business premises or interfering with the said business in any way whatsoever.
- (b) Committal of the respondent to prison for a term not exceeding six months for contempt of court and or attachment of his property until he purges the contempt complained of.

The application was made on the grounds that the court had issued orders against the respondent herein on 4th June 2003 restraining him from attaching the applicant's property and the said orders were duly served upon the respondent and they were still in force. However, the respondent had unlawfully moved to attach the applicant's property and interfere with his business, it was claimed.

The application was supported by an affidavit sworn by Mr. Ibrahim Ndwiga, a director of the applicant company. He annexed a copy of the aforesaid order that was issued in favour of Hotel Marvelon Limited. Mr. Mwangi stated that on or about the 29th of June, 2004 the respondent filed HCCC No. 193 of 2004 demanding rent arrears from him personally and on the 13th May, 2005, the court ordered that the applicant be added as a party to the aforesaid suit which was done. He said that the rent for the suit premises was Kshs.20,000/- and the applicant had paid all the arrears that had been outstanding but the respondent had been demanding rent at the rate of Kshs.171,000/- per month based on this court's ruling delivered on 4th June, 2004. He further stated that the respondent had proceeded to instruct an auctioneer to attach the applicant's property. The respondent's counsel filed grounds of opposition to the said applicant and stated that the same was incompetent and legally unsustainable, was frivolous and vexatious and an abuse of the court process. He further stated that the application had no merits and was totally misconceived.

On 4th June, 2004, this court determined that the monthly rent payable in respect of the suit premises was

Kshs.171,000/- with effect from 1st December, 2003. The tenant had been served with a notice to alter terms of tenancy of the suit premises whereby the monthly rent was to be increased from Kshs.20,000/- to 171,000/- but the tenant chose not to oppose the said notice and so the notice took effect on the aforesaid date. On 9th June, 2004 Hotel Marvelon Ltd filed an application seeking leave to appeal against the aforesaid ruling and the application was granted and a notice of appeal was filed. However, no stay of execution of the said ruling was sought.

On 13th May, 2005 the court ordered that Ibress Motor Agencies Limited be added as a party to the aforesaid suit. It was not clear who the actual tenant was as both Hotel Marvelon Limited and Ibress Motor Agencies Ltd were occupying the same premises. It is not in dispute that the two are sister companies and Mr. Ibrahim Ndwiga is a common director in both of them. In an affidavit sworn by Mr. Ibrahim Ndwiga on 16th May 2003 he deposed:-

- “1. That I am a director of the plaintiff company (Hotel Marvelon Ltd) and I am duly authorised to depone this affidavit.***
- 2. That the plaintiff is an associate company of Ibress Motor Agencies Ltd a company of which I am also a director.***
- 3. That the shareholders of the two associate companies are the same. (Annexed hereto and marked Exh.IN1 are copies of the Articles of both companies).***
- 4. That the plaintiff is a tenant on Plot No. Nakuru Municipality Block 1/755 situate along Kanu Street within Nakuru Municipality.***
- 5. That the plaintiff leased the premises through its associate company from the Public Trustee in November 2001.”***

That affidavit had been sworn in support of an application by Hotel Marvelon Ltd seeking injunctive orders to restrain the landlord (defendant) from evicting it from the suit premises on the ground that the Hotel was not a tenant of the defendant. The relevant prayers in the application that was dated 16th May 2003 are as follows:-

- “2. That the defendant by themselves, servants be restrained by temporary injunction from evicting or attaching the moveable property within the plaintiff’s business or otherwise interfering with the plaintiff’s business pending the hearing and determination of this application.***
- 3. That the defendant by themselves, servants or agents be restrained by temporary injunction from evicting or attaching the movable property within the plaintiff’s business or otherwise interfering with the plaintiff’s business pending the hearing and determination of this suit.”***

The said application was heard and determined on 4th June, 2003 by Lesiit J. and she stated as follows:-

“On the issue of irreparable loss or damage, I do find that the applicant will suffer irreparably if the injunction is not issued. It is the sitting tenant, running a unique business and having boilers and advance bookings including boarders. The loss he stands to suffer in my view is irreparable. Even if the loss could be compensated by an award of damages as the respondent submitted, on a balance of convenience I would still find that it favours the applicant rather than the respondent. The applicant is in occupation. It has residents, lodgers and boilers who depend on the premises. It has a tenancy that is still subsisting. It would be highly and prejudicially inconvenienced if the application is not granted.

On these two grounds I will allow the application. It is allowed in terms of prayer 3 of this application.”

From the above, it is clear that the threatened eviction and/or attachment of the tenant's goods had nothing to do with the issue of rent.

Following the determination of the monthly rent as being Kshs.171,000/- the landlord, Benson Mwangi (the defendant herein) filed HCCC No. 193 of 2004 against the two companies aforesaid seeking to recover a sum of Kshs.1,057,000/- being arrears of rent for the period December, 2003 to June 2004 at the rate of Kshs.171,000/- per month. That matter is still pending in court. The tenants in the suit premises have adamantly continued to pay rent at the rate of Kshs.20,000/- per month and have persistently insisted that it is the lawful rent. To them, this court's determination regarding the rent is of no consequence although they have appealed against it. They have not obtained any stay order either from this court or from the Court of Appeal. In the absence of such an order, there is nothing to stop the landlord from insisting on payment by his tenants of the rent as determined by the court.

Mr. Waiganjo quoted several authorities in support of his submission that distress for rent cannot issue where there is a dispute as to the rent payable. Such authorities included *KENYA OIL CO. LTD VS FUAD M. MOHAMED & 2 OTHERS* Milimani Commercial Court at Nairobi HCCC No. 533 of 2003 (unreported). I agree that is the position in law as I know it. However, as was rightly submitted by Mr. Okeke for the landlord, there is no valid dispute as to what the rent is as the issue was determined by this court after full arguments by both counsel. The tenants may not have agreed with that determination and that is why they exercised their constitutional right of appeal. It is trite law that no appeal can operate as a stay of execution except in so far as the court appealed from my order or the court to which such appeal is preferred. In this matter there is already an appeal to the Court of Appeal because Order XLI Rule 4(4) states as follows:-

“For the purposes of this rule an appeal to the Court of Appeal shall be deemed to have been filed when under the rules of that court notice of appeal has been given.”

The said notice of appeal was filed on 16th June, 2004. In the absence of any stay having been granted, I hold that the distress for rent was not unlawful. Even if HCCC No. 193 of 2004 is not yet determined, the defendant (landlord) is seeking to distress for rent for a period which is not covered by the claim in the said suit.

As for the orders which were issued by Lesiit J. on 4th June, 2003, I have already given the background in which they were issued and the plaintiff herein cannot purport to be protected by them. Those orders had nothing to do with payment of rent. The landlord then was threatening to evict Hotel Marvelon Limited arguing that it was not its tenant but the court held otherwise. The defendant, in instructing auctioneers to levy distress for rent, is not seeking to evict either Hotel Marvelon Limited or Ibress Motor Agencies Ltd, the twin tenants in the suit premises. He is merely seeking to recover arrears of rent that are lawfully due. Ibress Motor Agencies Ltd cannot seek refuge in the said orders that were granted to Hotel Marvelon Ltd for totally different reasons. The tenants should pay the rent that is lawfully due. If they succeed in their appeal, they can always get a refund of the amount that they will have paid. The order of injunction as sought by the plaintiff cannot therefore issue. The defendant is also not guilty of contempt of any court order as alleged by the plaintiff.

In the result, I dismiss with costs the plaintiff's application dated 26th September, 2005.

DATED, SIGNED AND DELIVERED at Nakuru this 23rd day of November, 2005.

D. MUSINGA

JUDGE

23/11/2005

Ruling delivered in open court in the presence of Mr. Waiganjo for the applicant and Mr. Okeke for the

respondent.

D. MUSINGA

JUDGE

23/11/2005