

REPUBLIC OF KENYA
IN THE HIGH COURT OF KENYA AT MACHAKOS
CIVIL CASE NO. 235 OF 2000

DIXON WATUKA MBITHI :::::::::::::::::::: PLAINTIFF

VERSUS

JUMA MUTUNGA

EASTERN (K) AUCTIONEERS :::::::::::::::::::: DEFENDANT

R U L I N G

The plaintiff who is a tenant of the 1st defendant filed a suit against the 1st defendant and auctioneers 2nd defendant seeking orders of a declaration that the distress for rent dated 24.11.2000 and 29.11.2000 are void and illegal and that an injunction do issue permanently restraining the defendants from distressing the plaintiffs property or in any other way interfering with the peaceful and quiet enjoyment of the suit premises.

The defendant filed a defence denying that the distress was unlawful. The defendant has filed an application dated 13.3.2001 in which he prays that the plaint be struck out for being an abuse of the court process because the prayer for declaration is no longer available as the defendant admitted he was in arrears of rent as from June 1998 at the time of filing suit and that the plaintiff has settled the outstanding arrears from July 1998 to January 2001; that the plaintiff was abusing court process. The application is supported by the affidavit of Abubakar Juma Mutunga who claims to be Managing Director of the 1st defendant in which he says that the plaintiff had failed to pay rent and that is why they instructed the auctioneers and they deny authorizing the attachment of the lorry and they corrected that mistake by asking the auctioneers not to proclaim the said lorry.

The plaintiff filed an affidavit in opposition to the application in which he depones that the suit has triable issues in that they have denied that the debt for which distress was carried out and that payment of the debt did not mean admission but was meant to avoid consequences of an illegal distress.

The reasons that the plaintiff stopped paying rent was that when they attempted to pay rent to 1st defendant, the 1st defendant denied that they were the landlord. The plaintiffs made reference to the Business Premises Rent Tribunal No. 7/1999 in which the chairman ruled that the 1st defendant had been receiving rents previous to that date and 1st defendant was therefore the landlord. That decision has not been reversed by any court. It still stands. The issue of who is the landlord does not arise.

In that ruling of the Tribunal dated 8.2.2000 it was ordered that rents could be paid to the tribunal. When this suit was filed the plaintiff also filed an application for injunction in which a ruling was given by Justice Mwera dated 22.2.2001. In it the judge observed that by the time distress was done in November 2000 no rents had been paid either to 1st defendant or to the tribunal as ordered on 8.2.2000.

If the excuse given by the plaintiff for not paying rents was that 1st defendant had refused to accept rent, that issue was settled in the ruling of the tribunal of 8.2.2000. If the plaintiff were genuine about their plight, rents should have been immediately paid to the tribunal but about 10 months down the line they had made no efforts to deposit the rents in the tribunal as ordered. The rents were therefore due when distress was done on November 2000.

The defendants do accept that payment has been made to avoid any illegal distress but that can not be so. I do agree that the prayer for declaration is not available to the plaintiff. They have done what they should have done much earlier. The fact that a lorry was distressed wrongly can not vitiate the distress. It was never sold. They can only ask for costs if any were incurred.

With a prayer for declaration, was a prayer for permanent injunction to restrain the defendant from levying distress or interfering with plaintiffs quiet enjoyment of the suit premises. That prayer can not be granted because that would be denying the defendants their rights. If the plaintiffs default in payment of rent, the defendants have a right to distress for rent and such a prayer of permanent nature cannot be granted in the circumstances.

I do find that there is nothing left to be heard at the full hearing and the plaint is hereby struck out with costs to the defendants/applicants.

Dated, read and delivered at Machakos this 4th day of May, 2004.

R. V. WENDOH

JUDGE