REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA AT NAIROBI

HIGH COURT CIVIL CASE NO.114 OF 2004

URBAN OASIS LTD ……..…..…….……PLAINTIFF

VERSUS

UPPER HILL MEDICAL CENTRE & OTHERS……. DEFENDANT

RULING

The Applicant applies for an order restraining the Respondent from levying distress for rent on the ground that the Applicant has not defaulted in paying rent, that the proclamation is invalid and that the leave of the Business Premises Tribunal has not be obtained to distrain.

In the supporting affidavit the Applicant exhibited a Statement of Account showing a balance of Shs.927,630=70 due for rent as at the 1/9/2003 in favour of the Respondent. There is also a copy of the minutes of a meeting held on the 9/5/2003 showing that the Respondent agreed to the Applicant paying half the rent for a period of six month. The outstanding rent was agreed at Shs. 1 Million of which 400,000/= was to be paid immediately and the balance within two months.

From the Statement of Account if shows that Shs.400,000/= was paid but not the balance of the Shs.600,000/= within the two months in that the next credit appears on the 31/7/2003 for Shs.25,360=00.

In the Replying Affidavit the Respondent exhibited an account up to the 14/1/2004 showing a balance due of Shs.2, 008,445=10 In a further affidavit in Reply the Applicant in paragraph 4 depones to the fact that a sum of Shs.850, 000/= was paid towards the rent arrears leaving a balance of Shs.150,000/= outstanding. However as Miss Mwangi deponed these payments were not in accordance with the agreed condition for repayment. The main dispute arises out of the Respondent resisting the credit of Shs.748,850=00 which Miss Mwangi says was conditional on the sum of shs.1,000,000/= for arrears being paid in the manner agreed.

Even giving credit to the Applicant for Shs.748,850/= there is still a substantial sum due to the Respondent for rent. I do not accept the submissions that arrears of rent, even if agreed to be paid in a particular manner, are not nevertheless rent in respect of which distress can be levied. Accepting the Respondent's account as correct and deducting the sum of Shs.748,850/= there is still due a sum of Shs.1,259,525=10. Mr. Joshi raised two other matters. The proclamation of the 5/2/2004 in its body refers to the removal of the Applicants goods within 7 days. Under the Distress for Rent Act the goods may be taken away and sold after the expiration of a period of 14 days. In this case the goods are still with the Applicant well after the expiry of the 14 days. Had the Respondent's agent taken the goods away after only seven days then could it could be said that that act was unlawful. However it does not arise in this case.

Mr. Joshi submitted that the distress can only be levied with the permission of the Business Premises

Tribunal.

There is no dispute that the Applicants tenancy is a controlled one under the provisions of the Landlord & Tenant (Shops Hotels and Catering Establishment) Act (The Act).

Section 12 of the Act sets out the Tribunal Powers in respect of which it is to exercise its jurisdiction. Sub-Section 12 (1) (l) states that (The Tribunal) has power ***"to permit the levy of distress "***

This is a curious Provision as there is nothing in the Distress for Rent Act, which limits the type of premises in respect of which Distress can be levied.

Nor is there any provision in the Act forbidding distress to be levied in respect of a controlled tenancy.

It is difficult to see why if distress can be carried out in respect of all types of tenancies, the Tribunal is given power to permit it. The Tribunal has no power to issue restraining orders, which can only be granted by a court of law, so that if distress is levied in respect of rent arising out of a controlled tenancy the Tribunal would be powerless to stop it.

Having regard to the fact that there is no prohibition on the Distress for Rent Act forbidding distress in the case of a Controlled Tenancy I am of the view that the permission of the tribunal is not a condition precedent to distress being levied for rent due in respect of a controlled tenancy.

In his Judgment in High Court No.34 of 1989 Mr. Justice Oguk took the same view. I therefore think that in so far as the sum of shs.748,850=00 is concerned this should be deposited in an interest bearing account in the name of the parties advocates with a reputable Bank within 14 days from today to await the final determination of this suit.. The balance of Shs.1,259,595=10 shall be paid to the Respondent within 14 days from today failing which distress can continue.

If at the end of the day it is found that this sum is too much then it can be adjusted between the parties in this suit. In the meanwhile the Applicant to pay his rent on due date. Costs in cause.

Dated and delivered at Nairobi this 14th day of June 2004

P.J. RANSLEY

JUDGE