

REPUBLIC OF KENYA
IN THE HIGH COURT OF KENYA AT NAIROBI
MISC CIVIL CASE NO 630 OF 2004

JENNIFER MOIKO PLAINTIFF

VERSUS

JOYCE MOIKO AND

FOUR OTHERS DEFENDANT

RULING

The application dated 24th May 2005 seeks a temporary injunction to restrain the defendants from entering and/or evicting the plaintiff, removing any assets or locking the rented premises belonging to the applicant.

The grounds are:-

- 1) That the defendants have threatened to throw out the plaintiff from the rented premises which are controlled under the Landlord and Tenant Act cap 301 (shortened) 2) That the 5th defendant has been instructed to levy distress for rent a move which is illegal as the applicant has no rent arrears
- 3) That the goods have been proclaimed
- 4) That the applicant has lodged a complaint with the Business Tribunal under case No 7/2003 and in that case the tribunal did order that the applicant should enjoy quiet possession.

The main points are that the applicant says that she is not in arrears whereas the defendants contend that she is in arrears and the second point is that the applicant contends that levy of distress for rent in respect of a controlled tenancy cannot be permitted without the Tribunals approval in the face of S 12 (1) (h) of the Landlord and Tenant Act (for short) cap 301.

For the defendants it has been argued that under Cap 301 there is no provision for a notice before levying distress for rent – and that Distress for Rent Act Cap 293 applied to both controlled and uncontrolled tenancies where there are arears of rent and therefore the respondents are entitled to distrain by appointing a bailiff or auctioneer under the Auctioneers Act. The cases of NTHENGE v WAMBU (1984) KLR 795 has been relied on including CA 97/76 PROVIDENT SECURITIES LTD v TRIMFIT LTD and HC (CA) 34/89 RIUNGU v RIUNGU on the point that the distress can be levied notwithstanding the provision of S 12(1)(h) of the Landlord and Tenant Act which empowers the Tribunal to permit levy of distress.

Without in any way adjudicating on the merits at this stage I think the applicants point concerning S 12(i)(h) as read with S 4 which in turn does appear to exclude other Acts and the additional point that one of the grounds for termination is 2 months rent in arrears, the jurisdiction of the Business Tribunal appears well fortified by the Act in order to regulate the desired control. Notwithstanding Justice Simpson's finding in one of the cases and I agree with him that the English common law on distress does apply to us, I have considerable doubt whether a specific provision of an Act meant to protect tenants can be circumvented by an older Act which came into operation on 1st June, 1938 whereas the later Act, the Landlord and Tenant Act 301 came into operation on 1st November, 1965. In addition the applicant claims to have paid the rent in full. For this reason I find that the applicant has on the principles of Gieulla v Cassman Brown established a prima facie case with a probability of success.

Displacing the tenant would cause considerable damage this being business premises. Damages would not immediately be adequate in the circumstances. In the event of doubt on this I think I am entitled to consider the third factor, ie balance of convenience which obviously tilts in favour of the tenant who is still in possession. For the above reason I grant orders in terms of prayer 2 until the determination of the suit.

As regards costs in view of the unsettled state of the law and the assertions by each party on this point I order that costs be in the cause.

DATED and delivered at Nairobi this 16th day of July 2004.

J G NYAMU

JUDGE