

REPUBLIC OF KENYA

HIGH COURT AT MACHAKOS

Civil Case No 65 of 2004

DR. MWENDA MAKI PLAINTIFF

VERSUS

PETER M. KIITI1ST DEFENDANT

LEONARD MUNYAO KIITI 2ND DEFENDANT

R U L I N G

The plaintiff filed this suit on 24.5.2004 against the defendant seeking orders of injunction to restrain the defendants, their agents or servants from levying distress against the plaintiff, evicting him from suit premises pending determination of rent dispute in the Business Premises Rent Tribunal; General damages for unlawful interference with plaintiff's premises and for affliction and mental torture and anguish and costs of the suit and interest. Along with the suit was filed an application under certificate of urgency seeking temporary orders of injunction restraining the defendants from interfering with plaintiff's occupation of the suit plot Machakos Municipality Block 11/71 and also being restrained from levying distress. The defendant/respondent filed a replying affidavit on 9.6.2004 and a notice of preliminary objection dated 9.6.2004.

In a nutshell the preliminary objection raised is to the effect that the orders sought have been overtaken by events since the distress has already taken place and plaintiff evicted and there is therefore no cause of action and orders cannot be made in vain. The objection was opposed on grounds that it addresses facts as opposed to points of law and that counsel should have filed a replying affidavit to expound on his allegations that there is no cause of action. According to counsel the plaintiff/applicant is still a tenant in the premises.

When the applicant came to court on 24.5.2004 a notice of distress for rent had been issued to the plaintiff/applicant. It is annexed to affidavit in support of the application and marked MM4. It is dated 13.5.2004. It is what prompted the applicant to move the court seeking orders of injunction to stop the threatened distress. In the further affidavit of the applicant filed in court on 22.6.2004 dated 21.6.2004 at para 9 thereof the applicant depones that in his absence between 25.5.2004 and 29.5.2004 the premises were broken into and the distressed goods were carried away by court bailiffs. Under Section 3 of Distress for Act gives the landlord the automatic right of distress once there is arrears of rent. Applicant depones at para 7 of the further affidavit that this being a controlled tenancy under the Landlord Tenant Act, the permission of the Business Premises Rent Tribunal should have been sought before the levying of such distress. That is true because under the Landlord and Tenant Act Cap 301, Section 12 (1) it is provided that one of the powers of the Business Premises Tribunal is to permit the distress of Rent. If no permission was given by the Tribunal what recourse does the applicant have? If indeed rent was due then Section 15 of the Distress for Rent Act provides that in the event of any irregularity or unlawful act being done during or after the distress the party aggrieved or applicant in this case can file a suit to recover damages from the said unlawful acts.

From the applicant's own affidavit distress has been carried out, goods carried away and the applicant is evicted from the premises as they were broken into in applicant's absence. Rent arrears is one of the grounds upon which a landlord can seek to terminate a tenancy as per provisions of Section 7 (b) of the Landlord and Tenants Act. The question here is whether rent was owing and whether distress was properly carried out. As things stand the chamber summons dated 21.5.2004 is overtaken by events. The applicant can not be awarded any of the orders of injunction as prayed. Courts will not give orders in

vain. Prayer 5 of the plaint cannot be granted having been overtaken by events. However the plaintiff has a chance to amend his proceedings and the court would find it too harsh to strike out the plaint at this stage. However the application dated 21.5.2004 is struck out with costs to the respondent.

Dated, read and delivered at Machakos this 7th day of July 2004.

R. V. WENDOH

JUDGE