



**REPUBLIC OF KENYA**  
**IN THE HIGH COURT OF KENYA**  
**AT NAIROBI**  
**CIVIL SUIT NO. 1667 OF 2002**

**RIAZ KURJI.....PLAINTIFF**

**V E R S U S**

**HARAMBEE CO-OPERATIVE SAVINGS & CREDIT LIMITED.....DEFENDANT**

**R U L I N G**

The facts leading to this application are short. The plaintiff is a director of a company called Afro Electrical Supplies Ltd. The Company is a tenant of the Defendant in respect of the premises known as Maisonette No. J on L.R. No. 209/7551 Limuru road, Nairobi. There is a dispute pending between the two companies in respect of their tenancy by way of a H.C.C.S. No. 279/98.

The Defendant in pursuance to its entitlement levied distress against the arrears of rent. The proclamation was notified on 24th May, 2002 and gives general description of the proclaimed goods because the access to the house was denied as stated in the proclamation annexed to the affidavit in support of the application. It seeks temporary injunction to restrain the Defendant from attaching plaintiff's goods pending determination of the suit.

It is no doubt that the plaintiff occupies the premises as a director of the aforesaid company who has entered into a tenancy agreement with the Defendant. The court has not been disclosed the nature of the tenancy its duration, terms under which the tenancy is granted etc.

The proof of ownership of the goods attached whereof is sought to be restrained is not given, on the premises that the proclaimed goods are not specified. That contention contradicts the plaintiff's averments that proclaimed goods are his personal goods and not those of the tenant. Moreover, his contention of nonspecification cannot be totally correct as the proclamation mentions T.V, Fridge, Carpet, Radio, Cooker etc.

Mr. Nyamodi in opposition raised two grounds of opposition. I think the first objection, to the effect that the service of order and pleadings effected on the Defendant did not comply the provisions of Order XXXIX Rule (3) (3) as service of pleadings was made outside the stipulated period, cannot be raised. I say so for simple reason that the ex-parte order has been replaced by a subsequent order recorded by consent.

The second Objection was that the Defendant is entitled to distrain the goods belonging to a director of the limited company who is a tenant. He relied on section 19 (4) (b) (iv) of the Distress for Rent Act (Cap 293) for this contention.

In my humble opinion that provision deals with the situation which is not posed here. The provision deals with the goods belonging to the company being in the premises occupied by a Director or the Officer in the employment of the company who could be treated as an immediate tenant so far as the superior landlord (in this case the Defendant) is concerned . In the present case the occupier of the premises is a director of the company which is a tenant, but has contended that the goods do not belong to the company. I shall now turn to the merits or otherwise of the application. As earlier observed, the plaintiff except for an averment that he is a director of the tenant company, has failed short to prove prima facie that the goods proclaimed belong to him, despite the specific averment to that effect made in his affidavit

in support. I cannot presume that averment to be true only because no replying affidavit contravening that averment is filed. The onus to prove that contention squarely rests on the plaintiff and he has failed to discharge it, in this application.

I also observe here that as per section 8 of the Act, the plaintiff shall have adequate remedy to claim damages against the wrongful distraint, if any.

I also note that the plaintiff could have made declaration to the Defendant as to his claim as stipulated in section 19 (1) of the Act. In short I find that the plaintiff has failed to prove his application as per the requirements stipulated in the case of Geila V. Cassman Brothers and the application is thus dismissed with costs.

Dated and delivered at Nairobi this 4th day of April, 2003.

**K. H. RAWAL**

**JUDGE.**