

REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA AT NAIROBI
CIVIL CASE NO.157 OF 2003

EDICK OMONDI ANYANGA.....PLAINTIFF

V E R S U S

NATIONAL SOCIAL SECURITY

FUND BOARD1ST DEFENDANT

DEKEMWA ENTERPRISED LTD2ND DEFENDANT

R U L I N G

By chamber summons of 14-2-2003 the applicant prays temporary injunction to restrain 1st defendant (NSSF) Board of Trustees from selling, alienating, detaining and continuing to detain and disposing of applicants goods until further orders (2) to have distained goods returned and (3) restrain the defendant from entering the premises or evicting plaintiff from blocking plaintiffs free impress egress and access into the suit premises. The supporting affidavit by Erick O. Anyango sworn on 14-2-02 shows that the plaintiff carries a supermarket business at NSSF building ground floor that he had paid all rent due but that defendant refuses to accept the latest payment of KShs.200,000 and has distrained the goods and further that there is no written lease hence the applicant is a protected tenant; but in a replying affidavit by Nduku Mbithi sworn on 26-03-03 confirms the tenancy between the defendant and the plaintiff and that as at 30-06-02 the plaintiff had outstanding arrears of rent of KSh.482,584.98.

The parties argued this matter strenuously but the argument was centred more on the prayers for prohibitive injunction and not mandatory injunction.

Both remedies however rely on the principle of *Giella v Cassman Brown and Co. Ltd* 1978 EA 358 and are discretionary but for mandatory injunction to issue however, the court must exercise great restraint and should not grant same easily but almost with reluctance.

Mr. Ogola and Mr. Olubai rendered substantial submission in support and the legal points they raised are that the premises are controlled. Indeed this is importance. The defendant do not deny this in fact the replying affidavit by Nduku do not deny it and says there is a tenancy because of the existence of offer and acceptance that being the case eviction cannot be exercised without a court order.

The second point raised in the argument is that there was a surrender of lease. Now counsel for the defendant did not show what nature of surrender was alluded to a surrender has been described as “a yielding up of the term to the immediate reversioner. Hence the owner of the surrender must be the owner of the term and the owner of the immediate reversioner. There must be privity of estate between surrenderer and the surrenderee. A surrender may be express all express surrender must be by deed or in writing and surrender by operation of law or implied surrender occurs when one party does, and the other assents to an act which is inconsistent with the continuance of the lease or tenancy. Like where tenant delivers possession to the Landlord who accepts the possession. Here there is no evidence of what mode of surrender was effected. Such may not be established. The third point is the claim by the plaintiff that he has paid all the rent and by a cheque of KShs.200,000.00 dated 25-07-02. He paid the said amount.

The defendant has not commented on this and in fact has ignored it and not said why they refused to receive the cheque.

This is an interlocutory application and the plaintiff has to ...show that he has a prima facie case with

probability of success although illegal distress can claim damages nevertheless I think to deny distress in a business like a supermarket is to close the business entirely. I think the balance of convenience would justify stopping the landlord from levying distress and evicting the applicant. To do so is to ignore the principle stated by the court of appeal in the Ms Gusii Mwalimu Investment Co. Ltd & An. Vs Ms. Ms Mwalimu Hotel Kisii Ltd Civil Appeal No.160 of 1995. So that to refuse the application would have the effect of supporting unlawful and disregardful acts of the defendant.

For these reasons I grant the application as prayed with costs.

Delivered this 9th day of May 2003

A. I. HAYANGA

J U D G E

Read to Mr. Olubai for respondent