

REPUBLIC OF KENYA
IN THE HIGH COURT OF KENYA
AT MOMBASA
CIVIL CASE NO. 419 OF 2002

ANTONY KYALO MUTUNE PLAINTIFF

- Versus -

GATHECA HOLDINGS LIMITED DEFENDANT

R U L I N G

The Plaintiff tenant came to court to restrain landlord defendant from levying distress on the only ground that the Plaintiff was entitled to settle of against rents on amount he had incurred in repairs to premises. Expenditure he said amounts to shs. 325,000/= see affidavit sworn on 20th November 2002. At that time the landlord was claiming rent amounting to shs. 314,664/=. The court considered the application for interlocutory injunction and rejected the same on the grounds that such an amount of expenditure if proved can be paid to the tenant by the landlord and therefore in the circumstances it is liquidated money claim.

The tenant has now approached the court seeking stay of the said dismissal of interlocutory application saying that he intends and has already filed a Notice of Appeal to the Court of Appeal. It is to be noted that the order of dismissal is a negative order and nothing to be stayed in fact the applicant tenant is seeking an order to restrain the landlord once again from threatening or actually levying distress. The Court of Appeal has power to grant injunction in order to preserve the right of appeal of parties.

In the present case under order 41 rule 4 the court is bound to find that substantial loss is likely to be suffered by the applicant. In the circumstances of this case, I do not find that any substantial loss shall be suffered by the applicant. The applicant is bound by law of landlord and tenant to pay rent of the premises he occupies as it becomes due. The landlord swears that up to 4/6/2003 rent outstanding amounts to shs. 385,598/= and by now it is shs. 460,958/00. It is obvious that rent will continue being due every month even when the proposed appeal is pending.

The right of landlord to demand rent is given under the Distress for Rent Act and the court cannot prevent or restrain the landlord from exercising his lawfully given right.

I therefore find that no substantial loss is shown. In the case of Kenya Shell Vs. B. Karuga it was stated that the foundation of the jurisdiction under order 41 rule 4 is substantial loss which has to be proved by the applicant. In this application no such loss has been proved. I am not inclined to grant stay in this matter. I dismiss the application with costs.

Dated this 11th day of July, 2003.

JOYCE KHAMINWA

JUDGE