



REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA AT NAIROBI
MILIMANI COMMERCIAL COURTS
CIVIL SUIT NO. 1207 OF 2001

JOSEPH MBUI MAGARIPLAINTIFF

VERSUS

KWAMESA LIMITED DEFENDANT

RULING

In the Plaintiff dated 18th July 2001 and filed into the court on 2nd August 2001, the Plaintiff/Applicant herein is claiming K.shs 1,732,290/- being the amount of rent arrears from the Defendant pursuant to an agreement for lease over L.R. No. 13324/94 belonging to the Plaintiff and let and occupied by the Defendant. The main defence is that any amount that is legally due to the Plaintiff from the Defendant has been liquidated fully by the several distress carried out against the Defendant.

At the close of the pleadings the Plaintiff/Applicant has brought this application seeking that the defence be struck out as it is scandalous, frivolous, vexatious and an abuse of the process of court and that it may prejudice, embarrass and/or delay the fair trial of the action. He is also seeking in the alternative that judgment on admission be entered for the Plaintiff as prayed in the Plaintiff against Defendant. The grounds for the same application are that the Defendant has not denied being indebted to the Plaintiff, that three levy distress have been carried out but only a little money was recovered on one occasion; that the Defendant has previously in two letters admitted being in the arrears of rent but has not made any efforts to clear the same arrears and lastly that the statement of Defence raises no triable issues. The application is supported by an Affidavit sworn by the Plaintiff and several annexures to the same affidavit.

The Defendant/Respondent filed Grounds of Opposition in which he says that paragraph 2 of the Defence raises triable issues, and that there are no statements of accounts from auctioneers on the distressed goods. In the Replying affidavit sworn by Elizabeth Mayieka, a Director of the Defendant, that Defendant states in brief that the Defendant is not in occupation of the suit premises which the Plaintiff gave to one Redemptor G. Bwoma who is not in any way connected to the Defendant and is not a party to this suit; that the goods were distressed but no statement of account has been availed whereas the distressed goods value was far in excess of the sum that may lawfully be due to the Plaintiff and that there are serious triable issues.

I have considered this application, the Grounds of the application, the affidavits both in support and in opposition, the grounds of opposition and the annexures. I have also considered the able submissions by the learned counsels.

I do agree that the debt claimed is due and payable by the Respondent to the Plaintiff/Applicant. This in effect means that I do find the Defence is scandalous, and frivolous and vexatious.

The Applicant states in his Complaint clearly the amount that it has received as a result of the attempts to levy distress. The Defendant says that many levies of distresses have been carried out and the proceeds of the same should have been enough. He does not state what goods were taken away and sold and their value, whereas the Plaintiff states clearly in his affidavit that of the three levies of distress attempts, the first one did not end in any goods being taken away as the defendants paid K.shs 148,000 in two instalments. Second distress did not end in any tangible results as the auctioneer did not state whether he carried out any levy of distress or not.

The Defendant does not challenge that allegation which is made clear at paragraph 6 of the Supporting affidavit. The third distress did not end with the auctioneer in any way taking away of the goods distressed by the auctioneer as the goods proclaimed on 20th March 2000 were carried away by the Defendant and so the auctioneer did not sell the said goods as they never got hold of them. This again is not denied. That being the case, then one may ask which several distresses liquidated any amount that the Defendant admits was legally due to the Plaintiff? Secondly the Defendant says it has not received the accounts of the distressed goods. Which goods are these? It does not state what account he needed when the Plaintiff has come out and clearly stated what amount he has received and annexed receipts.

Thirdly, the Defendant says it left the premises and the same was handed out to Redemptor Bwoma by the Applicant and they state:

“The same Redemptor G. Bwoma is not a party to this suit and is not our Manager, Agent or Servant in any manner”.

They have not stated when they vacated the premises and whether they did properly hand over the premises and whether they gave the notices required.

The lease proposals the Defendant accepted on 26.4.96 specifically stated that the lease was to be for 72 months with effect from 1st January 1996 with option to renew for a further term. That lease should have expired on 31st December 2001. According to Starline auctioneer's letter to S. Thuo Muhia & Co. advocates, the Defendants vacated the premises on 27th March 2000.

I note however that the same Redemptor Bwoma the Defendant is now stating is not their servant, or Agent or related to them in any manner did write a letter to the same S. Thuo Muhia on 25th July 1999, on the same property and did make payment for K.shs 50,000 towards rent reduction.

Receipt No. 0059 is annexed. This has not been denied by the Defendant.

How then was this “completely unrelated Redemptor Bwoma” paying rent for the Defendant even when the Defendant was still in the suit premises in 1999? Is the court being told the whole truth by Defendant in its affidavit? I do not think so.

I allow the application. The Defence is struck out. Judgment is entered for the Plaintiff/Applicant as prayed in the Complaint. Costs of this application to the Plaintiff/Applicant. Orders accordingly.

Dated and delivered at Nairobi this 8th day of February 2002.

ONYANGO OTIENO

JUDGE