



REPUBLIC OF KENYA
IN THE HIGH COURT OF KENYA

AT MOMBASA

CIVIL SUIT NO.25B OF 2002

FLORINGO LTD PLAINTIFF

VERSUS

VIPINGO ESTATES LTD DEFENDANT

RULING

The Applicant is the tenant of certain premises belonging to the Defendant.

The Applicant filed suit claiming declaration that rent is payable in arrears and therefore the levy of distress made was unlawful and that the proposed auction should be prevented by an injunction.

Thereafter the Applicant filed this application under Order XXXIX rule 1(a) and order XLIX rule 3A and Section 3A Civil Procedure Act.

The orders sought are injunction pending hearing of the suit to restrain the landlord from levying distress by attachment and sale of the assets of the Applicant. And that the Landlord be restrained from evicting harassing or in any other way interfering with the Applicant's right to quiet and peaceful enjoyment of leased premises.

After perusing the material laid before the Court by both parties and upon considering the submissions of both counsel I have come to the conclusion that the dispute between the parties as disclosed in the plaint is the attempted levy of distress by the landlord against the Tenant (applicant). There is no dispute as to the rent payable but the applicant alleges that it is payable in arrears while the Respondent says the rent is payable in advance. (See annexure page 34 of the Respondent's affidavit).

There is also dispute as to the manner in which the Respondent proceeds to attach the assets in distress. I have come to the conclusion that the Applicant has not shown a prima facie case. The right of a Landlord to levy distress is given under Act 293 Laws of Kenya. The remedy for wrongful distress under that Act is in damages – see Section 8. In a situation where the tenant is not disputing the arrears of Rent he is not likely to succeed in a suit against the landlord. In this case I see even the Applicant has tried to settle the outstanding rent by post dated cheques but the Respondent has as he is entitled to do, rejected them. I find support in the authority of **Mina Restaurant vs. Plaza Trust Limited & Others HCC No.679 of 2001 at Nairobi** where Ringera J said that the remedy given by statute is in damages and the measure of such damages is prescribed. In that case there is the following quotation: –

“an injunction cannot be issued to prohibit the demand or enforcement by way of distress of payment of rent disputed by the tenant”

I am of the view then that no irreparable injury will be suffered that cannot be remedied by damages. I therefore dismiss the application with costs.

Dated at Mombasa this 19th Day of March, 2002.

J. KHAMINWA

COMMISSIONER OF ASSIZE

Delivered in the presence of:-

Vincent Omollo for Respondent.

No appearance for Applicant.

J. KHAMINWA

COMMISSIONER OF ASSIZE