



REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA

AT MOMBASA

CIVIL CASE 176 OF 2000

JOHN IBRAHIM AND 8 OTHERS ..... PLAINTIFFS

V E R S U S

TAL HOLDINGS LIMITED ..... 1ST DEFENDANT

GEORGE R. MAINGI T/A

MUGEMA ENTERPRISES..... 2nd DEFENDANT

R U L I N G

The Notice of Motion dated 4th October, 2000 is brought under the provisions of Order 6 rule 13 (a) and Order 35 rule 1 (b). The prayers sought are that the suit against 2nd defendant be dismissed on the ground that the 2nd defendant acted as agent of disclosed principal. It is also evident in Chamber Summons dated 10.4.2000 and Amended Defence and Counter claim. Therefore the plaint discloses no cause of action against the 2nd defendant.

I have perused the plaint and I notice paragraph 7 thereof pleads that the first defendant “did instruct 2nd defendant to issue a Distress Notice to the plaintiffs”. Only remedy sought against the 2nd defendant is for injunction to restrain him together with first defendant from distraining the plaintiffs goods.

In Chamber Summons dated the 10.4.2000 it is also disclosed that the second defendant was instructed by first defendant to levy distress against the plaintiffs goods . No wrong doing is alleged against the 2nd defendant. It is trite law that in case of a known principal and agent no liability attaches on the agent. The principal is to be sued himself as he bears all liability on behalf of his agent. I agreed with the counsel that the 2nd defendant is not liable and the suit against him is hereby dismissed with costs.

On the issue of summary judgment on the prayers in the counter claim, I have perused the file the defence to the counter claim raises the issue of the legality of the notice issued by the defendant. There is also the denial as to the vacant possession sought.

Order 35(1) (b) CPC gives power to obtain summary judgment against a tenant where “a term has expired or been determined by notice to quit, or been forfeited for non payment of rent or for breach of covenant ...”

In this case the relationship of landlord and tenant is not clear. It is asserted by defendant and denied by the plaintiff. It is stated that by the plaintiffs agreeing to release deposited money to the defendant it is an admission of the relation of landlord and tenant. It will be noted that this court (Hon. Waki J) has already

expressed doubt as to the liability of the tenants to pay any rent to the defendant for a certain period when no notice was given of any change of ownership in the property

Up to now the defendant has refused or failed to produce a document showing when the ownership changed hands.

After considering all the matters on record I am convinced that the plaintiffs are entitled to a hearing. I find there are triable issues between the parties which can only be determined by evidence at a full trial.

I, therefore, decline to grant the orders sought under Order 35 C.P.C. However, I have already said that the suit against the 2nd defendant must fail on the ground that in exercise of his powers of a Bailiff for distress for rent he incurs no liability, unless accused of personal wrong doing, and also that his principal is disclosed.

Costs of this application shall be in the cause.

Dated this 18th June, 2002.

J.KHAMINWA

COMMISSIONER OF ASSIZE

Mr. Kinyua for applicant.

J. KHAMINWA

COMMISSIONER OF ASSIZE