



REPUBLIC OF KENYA
IN THE HIGH COURT OF KENYA AT NAIROBI
MILIMANI COMMERCIAL COURTS
CIVIL CASE NO. 365 OF 2000

NTIRAMPEBA ALURENT PLAINTIFF

VERSUS

CHUNILAL R. PARMAR T/A QUARZO DEFENDANT

RULING

On 30.6.2000, the parties herein recorded a consent order in the following terms, besides others:-

- “1. That the sum of Kshs.375,000/= be deposited in Court by the Plaintiff forthwith;***
- 2. That the sum of Kshs.150,000/= being rent for April, May, June, 2000 be paid to the Defendant’s Counsel forthwith ;***
- 3. That the Plaintiff do continue paying to the LandLord all rents as they fall due;***
- 4. That an injunction be and is hereby issued restraining Defendant/Respondent by Himself, His Servants, and/or Agents from evicting the Plaintiff/Applicant from the pre mises rented from the Defendant/Respondent being, MAISONETTE NO. 11 on PLOT NO. 21/129 NAIROBI and from distraining, selling and/or disposing of the Plaintiff’s/Applicant’s goods until the suit is heard and determined;***
- 5. That the suit be fixed for Hearing ;***
- 6. That the Auctioneers do release the attached goods forthwith;***
- 7. That the issue as to whether the Auctioneers are entitled to recover the Charges from the Plaintiff to be argued on the 14 th day of July, 2000;***
- 8. That this Order be served upon the Auct ioneers.”***

The order did not specify what would happen if the plaintiff did not pay the rent on its due dates.

The defendant who is the landlord now complains that the plaintiff has failed to pay rent as agreed and that the rent for the month of August 2000 upto date is not paid. By reason of the plaintiff’s alleged failure to pay rent as agreed, the defendant has brought this application for leave of this court to levy distress against the plaintiff.

Though the plaintiff opposes the application, he has not denied that he is in arrears on the rental payment and has consequently breached the terms of the consent order. He has instead sought to fight the application on two technical grounds namely:-

(a) That the applicant seeks to vary a consent order on insufficient grounds;

(b) That the application is incompetent in that the order sought to be varied is not annexed to the application.

Mr. Masese who argued the application on behalf of the Respondent appeared to equate the instant application with one for setting aside a consent judgment. He submitted that the only ground upon which the order could be varied was collusion. In my view the comparison is incorrect and inappropriate.

What the defendant is saying in this application is that since the plaintiff has failed to honour his obligations under the consent order, the court should free the defendant from the restrictions placed on him by the same order so that he can take action to recover from the plaintiff through distress rent which the plaintiff was required to pay under the same consent order. If the matter is viewed from that point, it becomes clear that this is strictly not an application for review of the consent order but an attempt to enforce it by compelling the plaintiff to pay the rent which by virtue of the consent order he undertook to pay. For that reason, the authorities cited by Mr. Masese, which deal with setting aside consent judgments have no application in this application.

With regard to the second point, I do not think it was necessary in the circumstances of this matter to annex a copy of the order giving rise to this application. As observed above, this is really not an application to vary the order but to enforce it. Secondly, the order was formally drawn and dictated by counsel to the court. It is on the record and consequently no practical purpose would be served by annexing it to the application. For that reason, the submission that the order ought to have been annexed to the application lacks substance and is rejected.

In the event, I agree with the defendant that in view of the plaintiff's failure to honour his part of the consent order, it is necessary and clearly in the interests of justice and fair play, to grant leave to the defendant to levy distress against the plaintiff to recover rent that has become due since the order of 30.6.2000. It is so ordered.

The plaintiff will bear the defendant's costs of this application.

Dated at Nairobi this 16th day of March 2001.

T. MBALUTO

JUDGE