



**REPUBLIC OF KENYA**  
**IN THE HIGH COURT OF KENYA**

**AT NAIROBI**

**CIVIL CASE NO. 2451 OF 1999**

**KENAWAYS LIMITED.....PLAINTIFF**

**VERSUS**

**AGRICULTURAL FINANCE CORPORATION.....1ST DEFENDANT**

**AGRICULTURAL DEVELOPMENT CORPORATION.....2ND DEFENDANT**

**LLOYD MASIKA LIMITED.....3RD DEFENDANT**

**RULING**

The Applicant was a Tenant of the Defendants under a Lease Agreement. The applicant's business was interrupted by the bomb blast of August, 1998 for a period of 3 months. The Applicant having defaulted in rent payment the Respondent sought to levy distress to recover the arrears.

**Evidence**

In the supporting affidavit the Applicant maintains that it was not in arrears and that the distress carried out was illegal. It says that because of the bomb blast, business had come to a standstill. During the hearing on behalf of the Applicant it was submitted that no valuation to ascertain the value of the goods was undertaken. In the affidavit the Applicant raises the issues of expenses it incurred and the issue of electricity.

The Respondent in reply to the applicant's contentions indicated that they are prepared to forego the rent for the months in which the business was affected by the bomb blast. They deny liability with regard to the sum claimed by the Applicant for the repairs to the wall. Equally, they deny liability with regard to the loss of the plaintiff's goods due to the alleged theft.

**Findings**

I have considered the evidence as contained in the parties affidavits together with the submissions by the Learned Counsels with regard to the distress and proclamation. I note that the main complaint is that the Auctioneers who carried out the proclamation did not value the goods. Whereas the Auctioneers Act require that such a valuation should be carried out before auctioning of the goods is carried out, I would not necessarily find the distress illegal because of this omission alone. The valuation is necessary before the auction of the goods which means that such a valuation can still be carried out before the auction as I understand that the goods have not been auctioned yet.

As to whether the applicant was in arrears when the distress was effected, the Respondents have attached to their reply a schedule of payment of the rent by the Applicant which shows that the Applicant was in arrears before the 7th August, 1998 – the day of the bomb blast.

The Respondents have indicated that they are willing to forego the rent for the months of August, September and October as the months in which the applicant's business was affected by the bomb blast. This being the case the Applicant's contention based on the reasons of the effects of the bomb blast cannot stand and I would find and hold that the Applicant was in arrears of rent even before the bomb blast. The Respondents have deponed that the rent arrears claimed do not include the service charges.

The Respondents annexed schedule of payment arrears Annexure DKM 2 in support. I therefore find that the rent claimed by the Respondents does not include service charge. The other matters raised by the Applicant related to the Renewal of the Lease and properties which were stolen from the premises. These are matters which would properly be raised during the hearing of the main suit as they require evidence.

On the whole I do not find that the applicant has not made a case for the remedies sought, as they do not meet the requirements for an injunction. The applicant can be adequately compensated with payment of damages in case it succeeds in its suit against the Respondents.

### **Ruling**

Based on the findings, I hold that the Applicant has not proved its case and the application is dismissed with costs to the Respondents.

Dated and delivered at Nairobi this 29th day of September, 2000.

**KASANGA MULWA**  
**JUDGE**