



**Gangombe v Chikakaya & 2 others (Environment and Land Appeal
1 of 2023) [2024] KEELC 4140 (KLR) (8 April 2024) (Judgment)**

Neutral citation: [2024] KEELC 4140 (KLR)

**REPUBLIC OF KENYA
IN THE ENVIRONMENT AND LAND COURT AT KWALE
ENVIRONMENT AND LAND APPEAL 1 OF 2023**

AE DENA, J

APRIL 8, 2024

BETWEEN

SWALEH M GANGOMBE APPELLANT

AND

IMANI KEYA CHIKAKAYA 1ST RESPONDENT

PETER KINYUA T/A KINYUA & COO AUCTIONEERS 2ND RESPONDENT

FELIX WAMBUA NGULA 3RD RESPONDENT

JUDGMENT

Introduction

- 1 Vide a Memorandum of Appeal dated 17/2/2016, the Appellant appeals to this court challenging the Judgement dated 27/1/2016 delivered in Kwale Civil Suit No 69 Of 2012 Swaleh M Gangombe Versus Imani Keya Chikakaya & 2 Others wherein the court dismissed the Plaintiff [Appellant] suit seeking orders of mandatory injunction against the Defendants [Respondents] sale of a house without land erected on plot no Kwale/ukunda/3780.
- 2 A brief history of this suit is that the Plaintiff/Appellant alleged he was at all material times to the suit the owner of an incomplete house without land standing on a portion of land known as Plot No Kwale/Ukunda/3780 (hereinafter referred to as the house). The Plaintiff/Appellant states that he was paying rent to the 1st Defendant who was the owner of the land upon which the house was erected. On 30/9/2011 the 1st Defendant through a demand letter claimed Kshs 58,000/- as ground rent plus Kshs 400,000/- from the Appellant without any justification.
- 3 The Plaintiff/Appellant avers that on 14/10/2011 the 1st Respondent purported to levy distress for rent through the 2nd Respondent against the Appellant for a sum of Kshs 513,000/-. Consequently, the house was sold to the 3rd Respondent via an auction carried out by the 2nd Respondent for an unknown



amount. The Plaintiff/Appellant denies having any rent arrears owed to the 1st Respondent and sought for orders vacating the Respondents from the house and payment for damages for trespass.

- 4 The 1st Respondent admits the Plaintiff/Appellant was the owner of the house while she is the owner of the land parcel Kwale/ukunda/3780. That initially the Appellant was paying ground rent of Kshs 1000 but defaulted in payment from the month of December 2006 to November 2011. Upon demand of the said defaulted rent, the Appellant sought for time to pay and asked that the land be sold to him at a consideration of Kshs 400,000/-. However as at November 2011 the Appellant had failed to honour this agreement and the 1st Respondent instructed the 2nd Respondent to recover Kshs 458,000/- owed to her by the Appellant.
- 5 The 2nd Respondent in carrying out instructions sold the house and the land at a public auction to the 3rd Respondent. The 1st Respondent states that the sale was legal as all the processes were followed where the Appellant was served with a demand notice and later with a proclamation for attachment. He was well aware of the auction. It is confirmed that the 3rd Respondent took over ownership and occupation of the house and the land.
- 6 The matter was heard by Hon. C.M. Njagi Resident Magistrate and vide a Judgement dated 27/01/2016 the Plaintiffs case was dismissed hence the instant appeal.

The Appellant's Case

- 7 The Appellant's case in the Memorandum of Appeal filed on 18/2/2016 is as follows:
 1. That the learned Trial Magistrate erred in law and fact in dismissing the Plaintiffs suit against the weight of the overwhelming evidence on record.
 2. That the learned Trial Magistrate erred in law and fact in failing to comprehend the unique concept of house without land as it is practiced in coast region in respect to the dispute before court as a consequence of which she arrived at a wrong conclusion
 3. That the learned trial magistrate erred in law and fact by holding that the Defendant had a right to levy distress against the Plaintiff in the manner disclosed by the 1st Defendants evidence on record.
 4. That the learned Trial Magistrate erred by holding that the Plaintiff did not do anything to protect his rights when the evidence by the Plaintiff on record showed the contrary.
 5. That the learned Trial Magistrate erred by failing to find that the Defendants had conspired to unlawfully sale the Plaintiffs house in an irregular auction and the entire process was shrouded in fraud and illegalities.
 6. That the learned Trial Magistrate erred in failing to find that the 1st and 2nd Defendants had no right to levy distress against the Plaintiff for a sum of Kshs 458,000/- when the alleged arrears were for Kshs 58,000/-.
 7. That the learned Trial Magistrate erred in law and fact in failing to find that the purported auction was contrary to the law and did not meet the requirements for sale of immovable property by way of public auction.
 8. That the learned Trial Magistrate erred in relying on extraneous matters regarding the alleged existence of a gentleman's agreement between the parties when there was no such evidence on record



9. That the learned Trial Magistrate erred in law and in fact in holding that the 1st Defendant was the owner of the land when she did not have a valid grant of representation or certificate of confirmation of grant.
 10. That the learned Trial Magistrate erred in law and in fact by shifting the burden of proving that the auction was in compliance with the law to the appellant when such burden is clearly placed on the 2nd Respondent as the auctioneer and who did not defend the suit.
 11. That the learned Trial Magistrate erred in law and in fact in holding that the Plaintiff failed to take action against the auctioneer when the evidence on record was clear that the Plaintiff was never properly served with any valid notice of auction and his protests to the auctioneer were ignored.
 12. That the learned Trial Magistrate erred in law and in fact by failing to hold that the absence of a valuation report rendered the entire auction illegal null and void.
 13. That the learned Trial Magistrate erred in law and in fact in arriving at a decision that was contrary to the weight of the evidence on record.
- 8 The Appellant prays that the Judgement dated 27/1/2016 be set aside and substituted with Judgment against the Defendants jointly and severally for;
- a. A declaration that the Defendant's actions were illegal null and void ab initio.
 - b. An order of mandatory injunction directing the Defendants whether by themselves their agent's servants and/or employees to quit and vacate from the Plaintiff's house standing on a portion of plot known as Kwale/ukunda/3780 at Ukunda.
 - c. An order for payment of damages for trespass.
 - d. Costs of and/or incidentals to the suit and appeal herein.

Hearing

- 9 The matter was first placed before this court on 3/10/2023 having been transferred from Mombasa. The court was informed by Counsel for the Appellant that the file had been missing ever since the record of appeal was filed. Directions were sought. The appeal was certified ready for hearing and directions issued for the same to be disposed of by way of written submissions. The Appellant filed submissions on 12/01/24 while the 1st and 2nd Defendant filed theirs on 6/02/24.

Appellants Submissions

- 10 The Appellant submitted that Section 78 (2) of the *Civil Procedure Act* gives the Appellate Court the same powers and requires it to perform as nearly as may be the same duties as are conferred and imposed on the lower court as follows: -
- Subject as aforesaid, the Appellate Court shall have the same powers and shall perform as nearly as maybe the same duties as are conferred and imposed by this act on Courts of the original jurisdiction in respect of suits instituted therein”
- 11 It is submitted that the Plaintiff/Appellant was the owner of a House Without Land standing on a portion of KWALE/UKUNDA/3780 which portion he rented from the 1st Defendants mother at an initial ground rent of Kshs.500/=. The court was referred to the case of Christopher Baya and 2 Others. vs. Philip Kiluko and Another Mombasa HC Civil Appeal No. 64 of 2004__ where by Khaminwa, J



stated the concept of house without land meant the right to build on another's land under agreement which does not pass title to the land.

- 12 That it was the Appellant's evidence that he commenced construction of a permanent house where after the 1st Defendant increased rent to Kshs 1,000/= per month. The Appellant made a down payment of Kshs. 70,000/= at the time of leasing the land and that there was no ground rent arrears. In 2011 and after the death of the 1st Respondent's mother, the Appellant and the 1st Respondent disagreed on the issue of rent and sale of the portion of land. It is not in dispute that the 1st Respondent served the Appellant with a Demand letter dated 30th September, 2011 which alleged Rent Arrears in the sum of Kshs. 58,000/=. The 1st Respondent further demanded for a sum of Kshs. 400,000/= being purchase price for an undefined portion of land.
- 13 It is submitted that from the evidence no such agreement dictating the said sale was ever produced in support of the said allegation. The 1st Respondent was issued with summons to appear before the Chief which he ignored. Thereafter, the Appellant was served with Proclamation of attachment by the 2nd Respondent under the instructions of the 1st Respondent. The Appellant approached the 1st Respondent in respect to the unlawful distress, only to learn that his house was sold to the 3rd Respondent.
- 14 The Appellant reiterated that the 1st Respondent had no legal authority to deal with the Suit property belonging to the Estate of the late Grandfather. On the issue as to evidence as highlighted on grounds 1, 3, 4, 8, 11, 12 and 13, the Appellant cited the provisions of 107 and 108 of the *Evidence Act* on burden of proof. That during trial, there was no evidence to prove a definite breakdown of the demanded sum of Kshs. 58,000/= alleged as ground rent arrears. Further, there was no such agreement produced by the 1st Respondent on the alleged sale of a portion of the land to the Appellant and the demand for unpaid sum of Kshs. 400,000/= being purchase price was not proved neither was it substantiated. The Appellant gave evidence that a sum of 70,000/= was advanced to cover future rents and as such there was no such existence of any ground rent arrears.
- 15 It is further submitted that the 1st Respondent further failed to produce any such court order authorizing the sale of the Appellants house in an auction in recovery of an alleged amount in the sum of Kshs. 400,000/=. It is the Appellant's submission that the estate of a deceased person can only be dealt with by a person who is duly authorized to do so on behalf of the estate. In this case, it is the Appellant's submission no grant of letters of administration were taken by the 1st Respondent duly authorizing her to sell the said property on behalf of the Estate of her late grandfather as such the sell, if any, was not properly conducted. That the 1st Respondent had no capacity or locus to proceed with any such dealing in respect to the portion of land where the Appellant's house stood. Reliance is placed on the holding in *Yuda Imunya v Atanasio Kibara* [2021] eKLR.
- 16 The Appellant submits that the Respondents ought to have produced tangible evidence that would have in particular proved that indeed there was Rent Arrears which was due and that a purchase price arising from a valid agreement was not paid.
- 17 On the issue of Unlawful distress as pointed out under grounds 2, 5, 6, 7 and 10 it is submitted that distress can only be levied to recover Rent Arrears and not purchase price for a Plot as was done by the 1st Respondent. Under the *Distress for Rent Act* CAP 293 Laws of Kenya, a landlord is only entitled to levy distress upon goods and chattels for rent arrears that is due. Further the Appellant reiterates that the purchase price for a plot is not rent or in service arrears to entitle the Landlord to levy distress as provided under *Distress for Rent Act* and common Law. The court is referred to the case of *M/S Gusii Mwalimu Investment Co. Ltd & 2 Others V M/S Mwalimu Hotel Kisii Ltd* [1996] eKLR.



18 The Appellant submits that no demand or notice of distress or auction was ever issued or served upon the Appellant and the Appellant had no way of knowing that there was a planned auction. The trial Court also fell into grave error in holding that the auction was valid when there was no proof of the existence of rent arrears or debt for Kshs. 400,000/= alleged purchase price for the unsurveyed land. No valuation was placed before the Trial court to determine how the amount of Kshs. 458,000/= was arrived at as the value of the property neither was there any notice of auction as is required under the Land Act. Consequently, the finding by the Learned Magistrate that there was a lawful auction was completely wrong and against the weight of the evidence before her and the law and the same ought to be set aside.

1st & 3rd Respondents Submissions

19 It is submitted that the Appeal is misplaced and an abuse of the court process. Referring to page 126 paragraph 10 of the Record of Appeal it is submitted that the demand letter was produced as PEX1 and which the Appellant confirms receipt of the proclamation dated 14/10/11 for sale of incomplete house without land. The Appellant instead of making good the amount of Kshs. 458,000/= plus auctioneers fees decided to go and see the auctioneer. Reviewing the Appellants evidence, it is submitted that the Appellant admitted the auctioneer gave him a copy of the Star Newspaper advertising the incomplete house without land for sale and which was produced in court and against which the Appellant did nothing about and was guilty of laches.

20 It is further submitted that Hamisi Bakari Chirema is the registered owner of the land upon which the incomplete house without land stood. That the supplementary affidavit sworn on 21/5/12 by Imani Keya Chikakaya showed that vide Kadhis Succession Cause 211 of 2010 the 1st Respondent had the right to deal with the property. However this affidavit was deliberately left out of the record. Alternatively, that the Appellant ought to have dealt with the 1st Respondent mother Fatuma Hamisi Bakari which he did not. Referring to paragraph 6 of the plaint it is contended that the Appellant knew that the 1st Respondent had no legal authority yet he was paying rent. That if the rent was increased by the mother of the 1st Respondent then the said mother and the Appellant had no right to deal with the estate of the deceased. It is submitted if at all the transaction was done before authority was granted by the court, then the same were illegal ab initio and the suit herein an abuse of the court process. It is urged that the Appellant hands are tainted as he wants to benefit from an illegality which he participated in knowing that the land belonged to the mother of the 1st Respondent and for which the later had not obtained grant of letters of administration.

21 It is submitted on behalf of the Respondent that the Appellants evidence is selective in that whereas he did not produce the lease agreement between himself and the mother of the 1st Respondent yet he wants the 1st Respondent to produce the sale agreement for the portion of the land his incomplete house was standing. It is submitted that the Appellant did nothing to stop the sale and approached the court when the said incomplete house had been sold, construction completed and the same already occupied by the 3rd Respondent by January 2012. He cannot be given for free what he has not worked for.

22 In conclusion it is submitted that the Appellant failed to tender evidence to convince the court to render Judgement in his favor. He failed to prove his case on a balance of probability. The court is urged to uphold the Judgement of the lower court.



Determination

23 This being a first appeal, this court has a duty to re-evaluate, re-analyse and re-consider the evidence and draw its own conclusions while bearing in mind that unlike the trial court, it did not see the witnesses testifying and should therefore give due allowance for that. The court is also called upon to determine whether the conclusion reached upon by the trial court is consistent with the evidence on record and the applicable law. In the case of *Mursal & another v Manese (suing as the legal administrator of Dalphine Kanini Manesa) (Civil Appeal E20 of 2021)* [2022] KEHC 282 (KLR) (6 April 2022) (Judgment) Mativo J aptly stated as follows; -

A first appellate court is mandated to re-evaluate the evidence before the trial court as well as the judgment and arrive at its own independent judgment on whether or not to allow the appeal. A first appellate court is empowered to subject the whole of the evidence to a fresh and exhaustive scrutiny and make conclusions about it, bearing in mind that it did not have the opportunity of seeing and hearing the witnesses first hand. This duty was stated in *Selle & another v Associated Motor Boat Co. Ltd. & others*¹ and in *Peters v Sunday Post Limited*.”{{^}}

A first appellate court has jurisdiction to reverse or affirm the findings of the trial court. A first appeal is a valuable right of the parties and unless restricted by law, the whole case is therein open for rehearing both on questions of fact and law. The judgment of the appellate court, must, therefore, reflect its conscious application of mind and record findings supported by reasons, on all the issues arising along with the contentions put forth, and pressed by the parties for decision of the appellate court. While reversing a finding of fact the appellate court must come into close quarters with the reasoning assigned by the trial court and then assign its own reasons for arriving at a different finding. This would satisfy the court hearing a further appeal that the first appellate court had discharged the duty expected of it.{{^}}

A first appellate court is the final court of fact ordinarily and therefore a litigant is entitled to a full, fair, and independent consideration of the evidence at the appellate stage. Anything less is unjust.⁴ The first appeal has to be decided on facts as well as on law. In the first appeal parties have the right to be heard on both questions of law as also on facts and the first appellate court is required to address itself to all issues and decide the case by giving reasons. While considering the scope of Section 78 of *Civil Procedure Act*, a court of first appeal can appreciate the entire evidence and come to a different conclusion.”

24 Having looked at the Plaintiff, the defence filed, the evidence adduced during the hearing and the Judgement of the trial court. The main issue for determination in my view was whether the auction of the Plaintiffs house was lawful. I therefore agree with the trial court in this regard.

25 The trial court proceeded to highlight the legal definition of a house without land as explained in the case of *Abdukrazak Khalifa Salimu v Harun Rashid Khator & 2 others* [2018] eKLR where the court noted that the House without land concept is unique to the Kenyan Coast and has been judicially recognized. That the owner of the house is different from the owner of the land on which it stands. The said authorities likened the concept of a house without land to a lease where the rights of the Plaintiff would be limited to that of a tenant entitled to enjoy the use of the land on which his house is constructed.

26 The trial court upon reviewing the facts and evidence concluded thus;-

that there was no formal agreement between the parties and therefore the arrangements between the Plaintiff and the 1st defendant was a periodic tenancy and when the Plaintiffs stopped paying the rents and never topped up any other amounts, the defendant sought to recover her losses. The court went on to state ‘ here she was with a house on her land and the Plaintiff not paying or giving directions as



to what he was to do next on the land. The rents then accumulated to Kshs.58,000/-. Therefore, there being an issue of rents in arrears and no incoming amounts to the Defendant, I note she was within her right to levy for distress for rent.”

- 27 My first task is to look at the description of the subject matter, the arrangements between the Plaintiff and the 1st Defendant to establish if the concept apply in the circumstances of this case. The concept was elaborated by Ouko, J as he then was in *Famau Mwenye & 19 others vs. Mariam Binti Said*, Malindi H.C.C.C. No. 34 of 2005 as follows:

The dispute arises from land tenure unique ... to Mombasa which has baffled scholars, practitioners and even jurists. That land system is only referred to as ‘house without land’. That is, the owner of the house is different from the owner of the land on which it stands. It therefore defies the common law concept of land expressed in the Latin maxim, *cujus est solum ejus est usque ad coelum* [meaning, ‘whose is the soil, his is also that which is above it’].”

- 28 From the above description, it can be gathered that it is the norm in the coastal region that an individual is allowed to construct a house on a parcel of land not belonging to them leading to ownership of a house as erected on the said land but without ownership rights to the land. This scenario was what informed the suit before the lower court. Indeed the Plaintiff/Appellant pleads at paragraph 5 that he was the owner of an incomplete house without land which he built on Kwale/ukunda/3780 herein. It was PW1 testimony that the land did not belong to him and it was never sold to him neither was there an agreement that he would purchase the same at Kshs 400,000/ as alleged. In essence, the owner of the house pays ground rent while in occupation and use of the house on the said land. Upon cross examination PW1 told the court he paid a deposit of Kshs. 70,000/- and started paying ground rent in 2003. Cross examined DW1 stated the Plaintiff was to pay 1000/- per month for 2 years. Though the Plaintiff wanted to buy after 2 years, the two years ended and he had not bought the land though he had built on the land. For me naturally the arrangements would continue on the ground rent arrangements as the purported sale never crystalized. I note that no agreement was produced before the trial court in evidence of the Appellant’s intention to purchase the land at the Kshs. 400,000/-.

- 29 Based on the foregoing it is this court’s finding that there indeed existed a relationship between the Appellant and the 1st Respondent based on the concept of house without land there not being a formal agreement between them for the purchase of the land. The Appellant avers that the trial court misconstrued the concept of house without land thereby making a wrong finding against the Appellant. Having reviewed the trials court reason with regard to the concept I did not find any misconception, it is a lease for all purposes where the owner of the land authorizes the use of the land by another party without conferring title. It is as temporary as that.

- 30 I have also noted the attempt by counsel for the Plaintiff to question the title of the 1st Defendant to the land upon which the Plaintiffs house without land was erected. This argument cannot hold, the Plaintiff cannot have his cake and eat it as well. The court when faced with similar arguments in the case of *Abdukrazak Khalifa Salimu v Harun Rashid Khator & 2 others* [2018] eKLR stated thus; -

36. In the instant appeal, the appellant is attempting to question the title of the respondents by invoking Section 4 (2) of the *Limitation of Actions Act*. He is also challenging the respondents’ title by asserting that the trial court ought to have inquired who put Mr. Said A. Bawazir into possession of the suit property. In this context, the appellant as the owner of house without land and being a tenant is questioning the title of the respondents qua landlord. This he cannot do. The appellant is estopped from challenging the respondents’ title as landlord of the suit property. If a tenant denies or challenges the title of the landlord, the tenant must first



surrender the possession of the property back to landlord. He cannot on one hand oppose the landlord's title and on the other have possession of the property.

- 31 Having resolved the issue of the purchase of the land what remained in dispute is the alleged default of ground rent payment by the Appellant and the legality of the distress/auction herein. Cross examined the Plaintiff who gave evidence as PW1 testified he stopped paying rent in 2005 to 30/9/11 though to him there was no outstanding rent due to the down payment of the Kshs. 70,000/- he had made and which was for ground rent. The burden of proof lay on the Plaintiff to prove that he was not in arrears. I have reviewed the evidence this was not proved as he did not call any witness to corroborate the evidence that he initially paid Kshs. 70,000/-. What is clear to me however is that ground rent was expected to be paid monthly which has been admitted as having not been paid.
- 32 The 1st Defendant having been left with a house standing on their land and there being no payment of the ground rent, the question that follows is whether the 1st Respondent had the right to distress for the ground rent and in the manner they did. I agree that the 1st Defendant was entitled to recover what she was owed in terms of ground rent arrears. The 1st Respondents case before the trial court was that upon failure to remit the ground rent and the purchase price for the land upon which the house was erected, she had no option but to instruct the 2nd Respondent to distress for rent. Indeed, PW1 admitted in cross examination that he owed Imani Keya Kshs.60,000/- but stated they never agreed on purchase of the portion of land.
- 33 The provisions cited to defend the distress and auction were Section 3 of the [Distress for Rent Act](#) on the right to distress and which provides as follows;
- Right of distress
- (1) Subject to the provisions of this Act and any other written law, any person having any rent or rent service in arrear and due upon a grant, lease, demise or contract shall have the same remedy by distress for the recovery of that rent or rent service as is given by the common law of England in a similar case.
- 34 The concept of house without land having been likened to a lease, it is my finding that the above provisions applied. Counsel for the Plaintiff sought to impugn the distress and attendant auction of the Plaintiff house without land. It is stated that the house is not a chattel but ought to have been auctioned in the manner an immoveable property would be. The Trial Magistrate did not dwell into this discourse. I was not led into any case law to cement this argument. I noted from the proceedings that the Plaintiff had not yet moved into the house without land. It was incomplete. There was nothing to attach in terms of household goods.
- 35 Let me state that it has already been stated in precedent that the concept of house without land defies the very definition of land and the rights attendant thereto. The Plaintiffs interest was limited to the incomplete house, full stop. He has confirmed both in his evidence and pleadings that he did not purchase the land. The house therefore was moveable for purposes of the arrangements of a house without land. Infact under ordinary parlance the Plaintiff would have been required to remove the said incomplete house and leave the portion of the land it was standing on vacant. My hands are tied and it is my finding that the house without land was a moveable for purposes of the distress for rent.
- 36 Additionally the process is faulted for the reason that there was no agreement for sale of the portion. I have already made a finding there was none. So what happened in the present case? Produced in evidence by the Plaintiff was 1) demand letter dated 30/9/2011 addressed to the Plaintiff by Imani Keya the 1st Defendant, it entails a demand for Kshs.58,000/- Land Rent and Kshs.400,000/- land sell and copied to the 2nd defendant) Proclamation of Attachment/Repossession/Distrait of Moveable



property Creditors – it is for distress for Ground Rent Kshs. 458,000 + 55,000 pursuant to letter of instruction dated 13/10/2011. The schedule of proclaimed movable property is House without land on Plot 3780 shown to be incomplete and the description is given, 3) Copy of auction Advertisement on weekend STAR

37 My review of the above documents is that it lumps the entire sum as ground rent arrears. The trial court found that the Plaintiff had not proved that ‘the sale of the house without land was illegal and noted that the Defendant was only salvaging the amounts that were due to her and in the process also sold the land as well the house.’ I think this is the point where there is a departure between this court and the trial court. What baffles this court is why the 1st Respondent would instruct the 2nd Respondent to distress for rent plus a figure deemed to be the purchase price of the land when in the first place no agreement had been entered into. The 1st Defendant was only entitled to levy distress for the ground rent in arrears.

38 What constitutes illegality of distress for rent was discussed in the case of Cyo Owaya vs. George Hannington Zephania Aduda T/a Aduda Auctioneers & Another (2007) where the Court of Appeal held;

Under Section 3(1) of the *Distress for Rent Act*, in looking at what constitutes illegality of distress for rent, the court must not only consider our laws, but must also consider what in England would be considered an illegality in the levy of distress. An illegal distress is one which is wrongful at the very outset, that to say either where there is no right to distrain or where a wrongful act was committed at the beginning of the levy invalidating all subsequent proceedings.” The following are instances of illegal distress;

“A distress by a landlord after he has parted with his reversion; a distress by a person in whom the reversion is not vested; a distress when no rent is in arrears; or for a claim or debt which is not rent; as a payment for the hire of chattels; a distress made after a valid tender of rent has been made; a second distress for the same rent; a distress off the premises or on the highway; a distress in the night that is between sunset and sunrise a distress levied or proceeded with contrary to the Law of Distress.”

39 Guided by the above dictum, amongst the instances of illegal distress is where a claim or debt that is not rent is distressed. The alleged agreement purchase of the land having not been proved or even materialized or crystalized there was no legal basis upon which to include the purchase price of the portion of the land the house was standing on into the amount proclaimed. In any event it is clear the Kshs 400,000/- which was the expected purchase price of the land is certainly not rent arrears or a debt over rent for that matter. If the 1st Respondent was to issue instructions for distress then the same would have been for the Kshs 58,000/- ground rent, the 2nd Respondent on the other hand would have known better before the distress.

40 For the foregoing reasons it is this court’s finding that the sell and which included the purported purchase price for the land was unlawful. This therefore renders the sale of the Appellant’s house unlawful. The trial court made a finding that the Plaintiff did nothing to protect his house by stopping the sale but this is not the issue. This then leads me to address the plight of the 3rd Defendant who purchased the said house.

41 The Plaintiff has sued the 3rd Defendant as the house herein was sold to him for an unknown amount at the auction carried out by the 2nd Defendant. That the distress and auction were an illegal attempt to disposes the Plaintiff of his house and wants the 3rd Defendant to vacate the house. It is the 3rd Defendants (DW2) testimony that his plan was to buy a house or a plot. That on 29/11/2011 he saw a notice in the newspaper for sale of house by the 2nd Defendant whereupon he visited their offices and



was shown the house which he liked but was halfway built. That on 5/11/11 he attended the auction in Mombasa and he was the highest bidder at Kshs. 458,000/- which he paid in cash. That a receipt was issued and thereafter he was issued with a consent by the 1st Defendant. The consent was before court produced as DEX 3.No one opposed the auction. He then proceeded to finish the house. That he roofed, plastered, put windows, painted and connected electricity and water and moved into the house in March 2012 where he lived.

- 42 In cross examination he reiterated there were other people during the auction and though he paid the auctioneers the above money he did not produce the receipt in court. That he did not have a certificate of completion of sale. He reiterated that the house was being sold for ground rent arrears but which he could not state the amount. He conceded he did not know the value of the incomplete house and was not given a valuation report for the same though he supposed the Kshs. 458,000/- was the value for the incomplete house.
- 43 Looking at the pleadings the only mistake that is alleged against the 3rd Defendant is that he purchased following an illegal process. If the figure was already placed in the advert for me the rest of the issues rested with the 1st Defendant and the auctioneers. Where does he stand in view of the finding that auction was unlawful? It is not in dispute that the 3rd Defendant finished the construction and he is in possession. The Plaintiff also sought for an order of mandatory injunction directing the defendants or their agents to vacate the Plaintiff house.
- 44 I'm aware that nothing comes out of an illegality. However this is also a court of equity that is enjoined to look at both parties. Clearly there is an injustice that occurred to the Plaintiff. It has been urged that equity aids the vigilant and not the indolent. But the way I see it, the owner of the house without land was entitled to the value of the unfinished house and not to lose out everything on account of Kshs. 58,000/- ground rent arrears. It is stated by the 3rd Defendant that the amount of Kshs. 458,000 was paid. DW1 also testified that she received the cash from the auctioneer. It therefore follows that the 1st Defendant should bear the cost of the unfinished house which in my view cannot have been Kshs 58,000/- in view of the evidence tendered. The court appreciates the Plaintiff did not give any estimate of the unfinished house and I would go with the amount the 3rd Defendants evidence where he supposed the Kshs. 458,000/- was the value for the incomplete house. However this should be less the Kshs. 58,000/- which has featured as the ground rent arrears.
- 45 Following the earlier observations calling in the doctrine of equity I find the most reasonable remedy to give in the circumstances of this case is the Kshs. 400,000/-. It is not disputed that the Appellant had constructed an unfinished house on the land and which house was sold at a sum of Kshs 400,000/-. This should also suffice for the unlawful distress.
- 46 This court therefore sets aside the Judgement of the Resident Magistrate of 27/1/2016 and substitute it therefor with Judgement in favour of the Plaintiff Appellants against the 1st Defendant and make the following order; -
- i. A declaration that the distress for rent to include a purchase price for the portion of the land the Plaintiff Appellant house without land was built on was unlawful.
 - ii. The 1st Defendant shall pay to the Plaintiff Kshs. 400,000/- to carter as compensation for the unfinished house. Since the ground arrears were recovered without interest this court will not make an order for interest.
 - iii. Each party shall bear their own costs.

Orders accordingly.



RULING DATED SIGNED AND DELIVERED THIS 8TH DAY OF APRIL 2024.

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A.E DENA

JUDGE

Ms. Juma Holding brief for Mr. Mutubia for the Appellant

Mr. Ngaira for the Respondent.

Mr. Daniel Disii Court Assistant

