



REPUBLIC OF KENYA

IN THE ENVIRONMENT AND LAND COURT OF KENYA

AT MOMBASA

ELC NO. 138 OF 2020

MARYAM JUMA & 4 OTHERS.....PLAINTIFFS

VERSUS

SHANAAZ AHMED & ANOTHER.....DEFENDANTS

RULING

(Application for injunction; plaintiffs claiming that defendants have levied illegal distress inter alia because they are not in rent arrears; plaintiffs not producing evidence of payment of rent to date; doubtful if the plaintiffs have been paying rent; court not able to exercise its discretion in favour of the plaintiffs in light of the fact that they have not demonstrated that they are up to date with their payments of rent; application dismissed)

1. Through a plaint filed on 25 September 2020, the plaintiffs do plead that the defendants have proceeded to levy illegal distress. The plaintiffs aver that they have built permanent houses on the plot 211/VI/MN belonging to the 1st defendant and that the 1st, 2nd, 4th and 5th plaintiffs have been paying ground rent of Kshs. 300/= per month whereas the 3rd plaintiff has been paying ground rent of Kshs. 500/= per month on a house without land arrangement. The 1st defendant, through the 2nd defendant, a licenced auctioneer, did levy distress and did advertise in the Star Newspaper of 1 September 2020, that they would proceed to sell the houses belonging to the plaintiffs on 16 September 2020, though the plaintiffs state that no sale took place. The plaintiffs claim that this distress for rent is unjustified because no demand was ever made for payment of any arrears; that the amounts are grossly exaggerated; that no notice of any increment of rent was ever given to them; that the proclamation was specifically for movable property. They contend that this is a scheme by the defendants to evict them from the land which they have occupied for over 40 years. In the suit, the plaintiffs seek orders for a mandatory injunction to restrain the defendants from selling their houses on the suit land; a declaration that any purported sale is illegal; costs of the suit and interest.

2. Together with the plaint, the plaintiffs filed an application seeking orders of injunction to stop the defendants from selling their houses pending hearing and determination of this suit. It is that application which is the subject of this ruling. The supporting affidavit is sworn by Maryam Juma, the 1st plaintiff. She has stated inter alia that if there are any arrears of rent, the same is due to the fact that for a long time there was nobody to collect the rent since the 1st defendant's brother died. She has stated that they have otherwise been paying rent and has annexed some receipts. She has stated that the 3rd plaintiff paid Kshs. 70,000/= on 18 September 2020 but the receipt issued does not indicate the rent arrears. She has deposed that on 6 July 2020, the 2nd defendant's agent issued a proclamation showing what she contends are exaggerated sums due to them. She has said that no notice of increment of rent has ever been issued and that it is unfair to target their houses for sale when the amounts due are not known. She has deposed that the 1st defendant has refused to meet with them and most do not even know her.

3. The defendants filed a joint statement of defence and filed a replying affidavit sworn by the 1st defendant to oppose the motion. In the defence, it is pleaded that there are about 200 tenants on the suit land and that it is only the plaintiffs who have defaulted in paying rent and that they are serial defaulters. It is pleaded that it is due to their refusal to pay rent that an auctioneer was instructed to levy distress and that the procedure under the Distress for Rent Act, Cap 293, Laws of Kenya, was strictly followed.

4. In the replying affidavit, the 1st defendant has deposed that she is the administrator of the estate of Roshankhan Hussein Ahmed (deceased). She has deposed that the 1st plaintiff is lessee of house No. 87 and she has arrears of rent of Kshs. 144,000/= translating to over 20 years of none payment of rent. She has deposed that whatever she (1st plaintiff) has annexed shows an erratic pattern of payment of rent. She has deposed that the 2nd plaintiff lives and works in Germany and she doubted whether he had given the 1st plaintiff any authority to swear the affidavit. She has averred that she has found no claim or relief that the 2nd plaintiff seeks. For the 3rd plaintiff, she has deposed that 5 spaces being houses numbers 9B, 32, 66, 68 and 93, were leased to one Mbuvi Kamuti who is now deceased and that there has been default for over 20 years. She has stated that the rent owed for each space is Kshs. 156,000/= translating to arrears of Kshs. 780,000/=. She deposed that upon levying distress, the 3rd plaintiff paid the sum of Kshs. 70,000/= on 11 September 2020, leaving him with a balance of Kshs. 710,000/= and auctioneer's fees. She doubts that the 1st plaintiff has the consent of the 3rd plaintiff to institute this suit or present this

application and stated that there is no verifying affidavit accompanying the pleadings. With regard to the 4th and 5th defendant, it is her deposition that they owe Kshs. 156,000/= and Kshs. 174,000/= respectively in unpaid rent.

5. A supplementary affidavit sworn by Maryam Juma was filed. In it she has annexed an authority to plead from the 2nd, 3rd, 4th and 5th plaintiffs. She has denied that the 1st defendant leased to the plaintiffs the houses and claims that the arrangement they have is one of "house without land" and what they pay is ground rent. She has reiterated that they pay Kshs. 500/= and Kshs. 300/= per month. She deposes that the 1st defendant purports to have increased the ground rent payable without having served any notices or informing the plaintiffs of such increment. She avers that distress cannot issue where there is a dispute on the amount of rent payable.

6. Counsel filed written submissions to canvass the application, and I have taken account of the same before arriving at my decision.

7. There are some technicalities raised by the defendant on the affidavit of the 1st plaintiff and whether she had authority but I chose to ignore that and I will go straight to the substance of the application.

8. It is apparent to me that the 1st defendant is lessor, whereas the plaintiffs are lessees, and to me, it doesn't really matter whether it is lease of houses or whether it is a lease of ground only on a "house without land" basis. The bottom line is that there is rent that the plaintiffs are supposed to pay to the 1st defendant. Whereas the plaintiffs claim that they have been paying their rent, the 1st defendant asserts that they are in arrears of rent and therefore fully entitled to levy distress for recovery of the arrears. The plaintiffs also contend that there have been rent increases without notice and generally assert that they defendants cannot levy any distress. They claim that rent for the 3rd plaintiff is Kshs. 500/= whereas for the rest of them is Kshs. 300/= which they of course say they have been paying, although I do note that in the plaint, there is a pleading that for some time rent was not paid because the person who used to collect the rent had died.

9. It should not be forgotten that this is the case of the plaintiffs and it is incumbent upon them to demonstrate that they have a prima facie case with a probability of success if they are to be entitled to an order of injunction. The first thing that they need to demonstrate is that their rent is Kshs. 300/= and Kshs. 500/= as they claim and that this is fully paid up. I have no evidence of a tenancy agreement from either party. I have thus been forced to sift through the documents provided to find out the probable position. I can only see one receipt attached by the 1st plaintiff which is dated 13 December 2019. It is for Kshs. 1,500/= and it states that it is payment of rent for February and June 2008. It thus does appear, that whatever the amount of rent, the 1st plaintiff was paying rent of the year 2008 in the year 2019. I have not seen any evidence of any other rent having been paid for the subsequent years, that is between 2008 and 2020. I do not see how I can exercise my discretionary power to favour the 1st plaintiff who appears not to have paid rent for the years after 2008 to the date of filing of this suit.

10. For the 2nd, 4th and 5th plaintiffs, I have seen no receipt of payment of any rent meaning therefore that the 2nd, 4th and 5th plaintiffs have not demonstrated to this court that they have been paying any rent to the 1st defendant. Again, I do not see how I can exercise my discretion in favour of a litigant who has not demonstrated that he/she has been paying rent. In respect of the 3rd plaintiff, I can see that he paid the sum of Kshs. 70,000/= on 11 September 2020, just before the filing of this suit. There is no other evidence of any payment of rent prior to that. This payment has been explained by the 1st defendant to be payment of arrears of rent, and indeed, the receipt issued does show that it is payment of rent arrears. No proof of payment of rent prior to this date has been displayed. I therefore have serious doubts on the allegation that the 2nd plaintiff has been paying rent and is fully paid up. At this moment in time, subject to being convinced otherwise at the hearing, I am more inclined to accept the explanation of the 1st defendant that the plaintiffs have not been paying rent and they are in rent arrears and that is why distress was levied.

11. Given the above, I am not persuaded that the plaintiffs have demonstrated to this court a prima facie case with a probability of success to entitle them to an order of injunction. With this finding, I have little option but to dismiss this application and it is so dismissed with costs. The result is that the plaintiffs will have to litigate without the benefit of an order of injunction.

12. Orders accordingly.

DATED AND DELIVERED THIS 18TH DAY OF MAY 2021.

JUSTICE MUNYAO SILA

JUDGE, ENVIRONMENT AND LAND COURT OF KENYA

AT MOMBASA