

REPUBLIC OF KENYA

IN THE ENVIRONMENT AND LAND COURT

AT MOMBASA

ELC CASE NO. 408 OF 2017

MOHANSONS (KENYA) LIMITED.....PLAINTIFF

VERSES

KENYA RAILWAY CORPORATION.....DEFENDANT

JUDGEMENT

By a plaint dated 9th November 2017, the Plaintiff states that they are a Sub-Lessee of the Defendant under a Sub Lease registered as MSA/Block XVIII/108 in respect of a piece of land situate at Mbaraki, Mombasa and improvements thereon on terms and conditions contained in the Sub-Lease. That they acquired the property in 1986 and has since then dutifully and diligently paid the outstanding annual rent due and owing by it to the Defendant at the rate of Kenya Shillings Thirty Thousand (Kshs.30,000.00) per annum. That the Defendant previously engaged Auctioneers to levy distress against the Plaintiff's moveable property, between 2010 and 2013 when the Defendant availed to the Plaintiff's statement of account which not only failed to reflect and take into account payments made by the Plaintiff to the Defendant on account of the amounts outstanding. From the various correspondence received by the Plaintiff from the Defendant, it further transpired that the Defendant had opted unilaterally, and without any justifiable basis whatsoever, to purportedly increase the annual rent from Kenya Shillings Thirty Thousand (Kshs.30,000.00) to Kenya Shillings Two Hundred and Ninety Thousand (290,000.00) and was, in the absence of any agreement or lawful basis, also imposing penalties on Defendant without any justification whatsoever, conduct which the plaintiff protested at. The Defendant, following such protest on the part of the Plaintiff, did not pursue the distress levied any further. The Defendant has now instituted a fresh levy of distress for alleged rent arrears amounting to Kenya Shillings Two Million Two Hundred and Eighty One Thousand One Hundred and Forty Two Thirty Cents (Kshs.2,281,142.30) purportedly due and owing and in breach of the terms of The Distress for Rent Act, unlawfully and illegally attempted to levy distress on the Plaintiff's immoveable property without even identifying this or, indeed, dating or signing the purported proclamation of attachment. The Plaintiff avers that the Defendant and its Auctioneers' conduct is unlawful and illegal for want of compliance with Provisions of the Auctioneers' Act. The Plaintiff further avers that it does not owe the Defendant the sum Kshs.2,281,142.30 whether as claimed or at all. The Plaintiff states that in any event, the purported proclamation now issued for distress of purported rent contravenes the provisions of sections 4 and 16 of The Distress for Rent Act by purporting to attach and proclaim the Plaintiff's and '...the remainder of its term...' in respect of its immoveable property which can neither be classified as goods nor a Chattel. In the premises, the purported distress is unlawful, illegal and a nullity as well as an abuse of the process of law. The Plaintiff further states that its constitutional rights under Articles 40 and 47 of The Constitution have been or are likely to be infringed. However, in spite of protests and demand by the Plaintiff, the Defendant has failed or neglected to withdraw the unlawful and illegal distress. The Plaintiff avers that it has paid all rent lawfully due and payable under the Sub-Lease, there are no arrears of rent due by it to the Defendant as wrongfully demanded by the Defendant or at all, consequently the purported levy of distress is unlawful. The Plaintiff further avers that the distress is also wholly, irregular in that the proclamation of distress does not bear any date and consequently does not have a starting point from which the time within which to make payment begins to run. The plaintiff prays for;

- a) A declaration that the purported distress levied and the Proclamation of Attachment made pursuant thereto is unlawful, illegal and a nullity in law;
- b) the Defendant be restrained whether by itself or through its employees, servants, agents and/or Auctioneers or otherwise howsoever from demanding and levying or continuing to demand, persist with wrongful and illegal distress levied to recover alleged arrears of rent in the sum of Kenya Shillings Two Million Two Hundred and Forth Two and Thirty Cents Only (2,281,142.30) unlawfully demanded by the defendant and to payable by the plaintiff.
- c) Costs of this suit.

This court has considered the evidence and the submissions therein. The defendant was served but failed to attend court or file any papers. PW1 testified how they are a Sub-Lessee of the Defendant under a Sub Lease registered as MSA/Block XVIII/108 in respect of a piece of land situate at Mbaraki, Mombasa and improvements thereon on terms and conditions contained in the Sub-Lease. That they acquired the property in 1986 and has since then dutifully and diligently paid the outstanding annual rent due and owing by it to the Defendant at the rate of Kenya Shillings Thirty Thousand (Kshs.30,000.00) per annum. Between 2010 and 2013 the Defendant availed to the Plaintiff's Statement of Account which not only failed to reflect and take into account payments made by the Plaintiff to the Defendant on account of the amounts outstanding. The defendant increased the annual rent from Kenya Shillings Thirty Thousand (Kshs.30,000.00) to Kenya Shillings Two Hundred and Ninety Thousand (290,000.00) in the absence of any agreement with the plaintiff. The defendant then proceeded to levy distress. I find that the plaintiff's evidence has not been controverted. In this case, I find that the Plaintiff, by issuing demand letters containing different terms on rents, unilaterally introduced terms which constituted a variation on the terms of the agreement. In the case of *Kenya Breweries vs Kiambu General Transport Agency Limited NBI Civil Appeal No. 9 of 2000 eKLR* the court stated as follows:

“A variation of an existing contract involves an alteration as a matter of contract of the contractual relations between the parties; hence the agreement for variation must itself possess the characteristics of a valid contract. To effect a variation therefore, the parties must be ad idem in the same sense as for the formation of a contract and the agreement for the variation must be supported

by consideration. If the agreement for the variation is mere nudum pactum it would give no cause of action for breach particularly if its effect was to give a voluntary indulgence to the other party to the agreement..."

By presenting demand letters with fresh terms of payment, the Defendant was in effect making a fresh offer. In order for it to be effective, there had to be a meeting of minds which is an essential component for the formation of an enforceable contract. The plaintiff states he never accepted the same. I find that the plaintiff has established his case on a balance of probabilities and I grant the orders sought with no orders as to costs as the suit was undefended.

It is so ordered.

DELIVERED, DATED AND SIGNED AT MOMBASA THIS 7TH DECEMBER 2021.

N.A. MATHEKA

JUDGE