



**REPUBLIC OF KENYA**

**IN THE HIGH COURT OF KENYA AT NAROK**

**CIVIL CASE NO. 4 OF 2017**

**EMMANUEL KOTOINE MAITAL.....PLAINTIFF**

**VERSUS**

**JOSEPH KISAKA.....1<sup>ST</sup> DEFENDANT**

**SARAJ NJOKI MUNGE T/A**

**SANJOMU AUCTIONEERS.....2<sup>ND</sup> DEFENDANT**

**J U D G M E N T**

**Introduction**

The plaintiff's claim against the defendants jointly and severally is for judgement to be entered for the following orders.

- 1) An order for a declaration that the distress for rent on 18<sup>th</sup> April 2016 and consequent eviction from the business premises (Embers Hotel) on plot No. 257 in Narok town was unlawful.
- 2) An order for the return of the distrained goods as per paragraph 6 of the plaint or their monetary value.
- 3) General damages for the unlawful distress and/or trespass.
- 4) loss of earnings for a period of fifty-four(54) days.
- 5) Interest on 1 to 4 at court's rates.

The defendant has denied the claim and has pleaded that the distress was lawful. He has therefore urged the court to dismiss the claim.

**The case for the plaintiff**

The plaintiff testified as Pw 1, in his own behalf and called no witnesses. He adopted both his witness statement and further statement as his evidence. Pw 1 testified that he was a tenant of the 1<sup>st</sup> defendant. The rent payable by him to the 1<sup>st</sup> defendant was KShs 60,000/= per month in respect of the defendant's premises situate on plot No 257 in Narok town. The agreement between the parties was oral. Pw 1 used those premises for hotel business.

In his further statement dated 17<sup>th</sup> October 2017, the plaintiff stated that he was served with notice to terminate the tenancy; which was to take effect on 1st May 2016, which he did not oppose. He just wanted to have the remaining time that is from 18<sup>th</sup> March 2016 to 1<sup>st</sup> May 2016. The case dragged for some time to the extent that the notice given vide the Business Premises Rent Tribunal took effect. He further stated that as a result the court discontinued his case for want of jurisdiction on 13<sup>th</sup> September 2016 with the result that his application to reinstate it was dismissed by the court on 1<sup>st</sup> November 2016. It is this dismissal that prompted him to file the instant suit in this court.

It was his evidence under cross examination that in January 2016 he paid Kshs 30,000/= leaving an unpaid balance of Kshs 30,000/=. In February 2016 he never paid his rent in the sum Kshs 60,000/=. On 18<sup>th</sup> March 2016 he paid Kshs 59,670/= leaving an unpaid balance of Kshs. 370/=.

Furthermore, Pw 1 continued to testify that the 2<sup>nd</sup> defendant did not prepare an inventory of the goods that it attached on 3<sup>rd</sup> March 2016.

It was his further evidence that by the end of February 2016, he had fully paid the outstanding rent. Later he contradicted himself in testifying that he had only paid Kshs 30,000/=.

The plaintiff admitted that he had not paid his rent between 1<sup>st</sup> March 2016 and 15<sup>th</sup> March 2016. He also admitted that the outstanding balance that had not been paid was Kshs. 150,000/=. According to him the proclamation by the 2<sup>nd</sup> defendant showed that he had not paid Kshs. 150,000/=. He also testified that he filed a case in the Chief Magistrate's Court, in which it was ordered that his attached goods be returned to him.

### **The submissions of the plaintiff.**

The plaintiff filed written submissions in support of his case. He submitted that there was no dispute that he was the tenant of the plaintiff. He also submitted that there was no dispute that the rent payable was Kshs 60,000/- per month and that this rent was payable in advance.

He submitted that the 1<sup>st</sup> defendant served him with a notice to terminate the tenancy, which was to take effect on 1st May 2016; but on 18<sup>th</sup> March 2016 the 1<sup>st</sup> defendant instructed the 2<sup>nd</sup> defendant to levy distress upon him.

The plaintiff also submitted that in the guise of levying distress, he was evicted. He was given a copy of the letter for distress for rent.

### **The case for the 1st defendant**

The 1<sup>st</sup> defendant adopted his undated witness statement as his evidence. He testified that the plaintiff was his tenant. As a tenant it was agreed that the rent payable monthly was Kshs. 60,000/-, payable on the second day of every month. He continued to testify that sometimes in January 2016, he received a notice dated 29<sup>th</sup> January 2016 to abate a nuisance from the Narok Sub County Public Health Office. The nuisance consisted of a discharge of waste water to the open storm water drainage, missing cistern, tables without non-absorbent tops, a broken chimney, a broken water closet and a blocked verandah.

It was his further evidence that he had not authorized the plaintiff to carry out repairs in his premises.

The defendant also testified that the plaintiff reared a bull on the suit premises, which the defendant fed on the hotel waste vegetables. It was his further evidence that the plaintiff fell in arrears of rent and as a result he instructed the 2<sup>nd</sup> defendant to levy distress; which was done.

The attached property was worth Kshs 100,000/=. The auctioneer advertised the sale of the attached property in the Standard newspaper of 22<sup>nd</sup> March 2016.

It was also the evidence of DW 1 that he had served a notice to vacate the premises upon the defendant which he did not oppose. The plaintiff vacated the rental premises on his own volition on 1<sup>st</sup> May 2016, by which time he had only paid Kshs. 59,670/= as rent. The outstanding arrears of rent was Kshs 150,000/=.

Finally, the defendant testified that when he went to the auctioneer to be paid his rent from the proceeds of the auction, the auctioneer told him that the proceeds of sale were not enough to cover her charges.

### **THE SUBMISSIONS OF THE 1<sup>ST</sup> DEFENDANT.**

The 1<sup>st</sup> defendant filed written submissions in support of his case. He submitted that there is no dispute that the plaintiff was his tenant. There is also no dispute that the rent payable was Kshs 60,000/= per month, payable in advance.

Furthermore, the next issue upon which the defendant submitted was whether the distress was lawful. In his testimony, the plaintiff testified that he was duly served with notice to vacate in January 2016. The notice was to take effect on 1<sup>st</sup> May 2016; which notice was in line with the Landlord and Tenant (Shops, Hotels and Catering Establishment) Act (Cap 301) Laws of Kenya. He did not challenge the notice.

There is no dispute that the plaintiff was served with a legal notice to distress for rent of Kshs 150,000/= on 2<sup>nd</sup> March 2016. The Kshs 150,000/= was made up as follows.

- a) Kshs 30,000/= being the unpaid rent for January 2016.
- b) Kshs 60,000/=rent for February 2016.
- c)Kshs 60,000/=for March 2016.

The letter for distress was not contested and the plaintiff conceded owing the defendant Kshs. 150,000/=. I therefore find that the distress for rent was lawful.

On 18<sup>th</sup> March 2016 the plaintiff paid as rent only Kshs 59,670/=by way of M-pesa when the auctioneer distrained for rent. The defendant has also submitted that the plaintiff obtained *ex parte* orders restraining the defendant from carrying out his duties as an auctioneer, but did not serve them. The copies of the inventory and the newspaper advertisement dated 22<sup>nd</sup> March 2016 are attached to the 1<sup>st</sup> defendant's

statement.

The plaintiff filed several suits and obtained *ex parte* orders that he never served upon the 1<sup>st</sup> defendant.

The defendant has therefore urged the court to dismiss the plaintiff's claim.

**The case for the 2<sup>nd</sup> defendant.**

The 2<sup>nd</sup> defendant did not participate in these proceedings.

**ISSUES FOR DETERMINATION.**

I have considered the evidence of both parties. I have also considered the submissions of both counsel. As a result, I find the following to be the issues for determination.

- 1) Whether the distress for rent was lawful.
- 2) Whether the claim for general damages for unlawful distress was proved.
- 3) Whether loss of earnings has been proved.
- 4) Who bears the costs of this suit?

**Issue 1**

I have considered the entire evidence of both the plaintiff and the defendant. I saw and heard both of testify. I found the plaintiff to be an intelligent but untruthful witness. While under cross examination the plaintiff testified that by the end of February 2016 he had fully paid the outstanding rent. Later he contradicted himself in testifying that he had only paid Kshs 30,000/=. Furthermore, he also testified that he had not paid his rent between 1<sup>st</sup> March 2016 and 15<sup>th</sup> March 2016 and that he had an outstanding unpaid rent in the sum of Kshs 150,000/=.

The defendant struck me as a simple soft spoken and truthful witness. There is ample documentary evidence that supports his claim as shown herein below.

The plaintiff admitted that he was in arrears of rent to the tune of Kshs. 150,000/=:, which he had not paid the defendant as at 2<sup>nd</sup> March 2016. I find as a fact that the defendant was in arrears for three months and that he owed the defendant Kshs 150,000/=. Moreover, the defendant had also served him with a notice to terminate the tenancy (exhibit 1), which he did not challenge with the result that the notice took effect on 1<sup>st</sup> May 2016. I therefore find that the distress was lawful.

**Issue 2**

Since the distress was lawful general damages are not awardable.

**Issue 3**

The plaintiff did not prove loss of business and moreover the distress was lawful.

**Issue 4**

The defendant has successfully defended the claim. He is therefore entitled to the costs of the suit.

In the premises, the plaintiff's claim fails in its entirety and is hereby dismissed with costs to the defendant.

**Judgment signed, dated and delivered in open court at Narok this 14<sup>th</sup> day of May, 2020 in the absence of the plaintiff and counsel for the defendant**

**J M Bwonwong'a**

**Judge**

**14/05/2020**