



REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA AT NAIROBI

CIVIL CASE NO. 348 OF 2014

MICHAEL MURIMI WACHIRA.....PLAINTIFF

VERSUS

1. FELICINA WANGUI THIONGO

2. JENEN AUCTIONEERS.....DEFENDANTS

RULING

1. Before this Court, is the Plaintiff's Notice of Motion dated 24th October, 2014 brought under Order 4 Rules, 1, 2 and 3 of the Civil Procedure Rules and Section 1 1A and 3A of the Civil Procedure Act. The Plaintiff seeks orders that:-

a) The Defendants be ordered to return the Plaintiff's goods.

b) The 1st Defendant be ordered to reinstate the Plaintiff into his shop and be restrained from interfering with his occupation of the suit premises pending hearing and determination of this suit.

2. The application is premised on the grounds on the face of the application, the supporting affidavit and supplementary affidavit of the Plaintiff sworn on 24th October, 2014 and 10th December, 2014 respectively. He avers that he and the 1st Defendant entered into an oral tenancy agreement whose subject was a shop on Ongata Rongai House, Gaberone Road. The monthly rent for the shop was KShs. 18,000/-. At the beginning of the tenancy he paid a goodwill of KShs. 50,000/- and rent deposit of KShs. 74,000/-. In May, 2014, the 1st Defendant gave him an oral two months' notice to vacate. On 14th July, 2014, an inquiry was made by the 1st Defendant's agent whether he was ready to vacate. He said he was ready to vacate and requested for his refund of the goodwill and rent deposit. The 1st Defendant's agent having not come back, he continued occupying the shop and paid rent. On 28th August, 2014, the 1st Defendant in company of the 2nd Defendant went to his shop to inquire whether he had paid rent or not. He showed them a bank deposit slip for the payment. He however, later that day i.e. on 28th August, 2014, found a proclamation slipped under the door. The Defendant on 10th October, 2014 broke into his shop and took his stock of the drinks a laptop and some money. He stated that despite having paid rent for the month of August, 2014 and September, 2014, the Defendants evicted him and refused to return his goods. He averred that whereas his tenancy is controlled, he was unable to be reinstated and awarded damages by the Business Premises Rent Tribunal. He further stated that the business was his only source of livelihood and that the Defendants have threatened to sell his goods and that the eviction was effected without a breaking in nor eviction order. In his supplementary affidavit, the Plaintiff contended that the premise was handed over to him by the 1st Defendant and that she told her to refund Antony K. Maina the goodwill he

had paid instead of him paying the 1st Defendant the goodwill. He contended that he paid a deposit of KShs. 54,000/- to the 1st Defendant but when the date of vacation came, the 1st Defendant was unable to refund the monies. The 1st Defendant then told him to continue occupying the premise. She stated that the premise was only locked on the day the 2nd Defendant broke into it and not any other day as alleged. He stated that he was informed by the 1st Defendant's advocate that the 1st Defendant was not interested in rent rather she wanted the Plaintiff to vacate the premise. He maintained that he was not in arrears by the time the distress was levied. He faulted the manner in which the 2nd Defendant levied distress stating that if he was levying distress then the 2nd Defendant could not have handed over the goods to the 1st Defendant. He disputed that he ought not to have been asked to pay rent for November, 2014 since he was not in occupation of the premise then. He lamented that the 1st Defendant removed all the shelves in the premise. He in the end termed the Defendants' mode of eviction as unlawful.

3. The 1st Defendant opposed the application vide a replying affidavit sworn on 1st December, 2014. She contended that she had no agreement with the Plaintiff as alleged but rather, the Plaintiff's brother Antony K. Maina, whom she had an agreement with handed over the business and subject premise to the Plaintiff without her knowledge. She contended that she was not paid goodwill and that the Plaintiff continually defaulted in paying rent. Due to the Plaintiff's continued default, she issued the Plaintiff with a notice to terminate the tenancy dated 12th May, 2014 under the Business Premises Tribunal as prescribed in Form A (R4). She stated that she was informed by his agent by the name Boniface Mwangi that the Plaintiff threw away that notice. She denied that the Plaintiff paid rent for the month of August and September, 2014 as alleged and was therefore in occupation of her premises illegally. She stated that she properly levied distress but each time the 2nd Defendant visited the premises, it was locked. That the premises having been locked, she could not know the Plaintiff's intention. She stated that the 2nd Defendant applied for police assistance and proclamation was done before distress was levied hence no law was violated. She denied the allegation that the Plaintiff's laptop and money were taken. She further stated that the Plaintiff had written a letter withdrawing his demand letter of 13th October, 2014 and promised to pay the outstanding rent and the auctioneer's fees for his items to be released.

4. The 2nd Defendant opposed the application vide a replying affidavit of Joseph Njenga Njoroge sworn on 1st December, 2014. The 2nd Defendant reiterated the 1st Defendant's averments and added that he proclaimed the Plaintiff's goods on 26th August, 2014 and gave the Plaintiff fourteen (14) days within which to clear the rent arrears plus costs and interests. The Plaintiff refused to take the proclamation. When he was taken to the 1st Defendant's advocates' offices, the Plaintiff was unable to prove payments and was duly issued with a proclamation. Fourteen (14) days lapsed without the Plaintiff communicating or clearing the arrears. When he went to the premise on 10th, 17th and 30th September, 2014 with a view to attach the proclaimed goods, he found the door to the premise locked. He subsequently filed an application which was allowed vide ***Milimani Commercial Court, C.M.C.C Miscellaneous Application No. 952 of 2014, Joseph Njenga Njoroge & Felicitia Thiong'o v. Michael Murimi*** seeking police assistance during the levying of distress. He stated that it was ruled that being an auctioneer he needed no police assistance in the process. He stated that he is authorized to break into premises that are locked. He stated that the auctioneers came to the premises at the time he was in but he walked away thereafter. He denied having taken the Plaintiff's laptop and money.

5. The application was canvassed by written submissions which reiterated the averments in the affidavits. I have considered the rival depositions and submissions. The applicable principles in an application were well set in the case of ***Giella v Cassman Brown (1973) EA 358***. The principles are that an applicant must establish a prima facie case with probability of success, irreparable loss and when the court is in doubt on the foregoing, it shall determine the matter on balance of convenience. A prima facie case was defined in the case of ***Mrao v. First American Bank (K) Ltd (2003) KLR 125*** as where an applicant has established that his legal right has been infringed by the respondent thereby calling for a rebuttal.

6. **Halsbury's Laws of England 4th Edition at pages 543 to 551** on the common law principles regarding illegal or irregular distress and the remedies therein where the authors state:-

“An illegal distress is one which is wrongful at the very outset, that is to say either where there was no right to distraint 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 when no rent is in arrears...a distress made after a valid tender of rent has been made... a distress made in an unlawful manner...”

7. The Plaintiff indicated that the Defendants proclaimed items yet he had paid rent. Receipts dated 10th September, 2014 and 11th August, 2014 both for KShs. 18,000/= were annexed to establish that he was not in arrears of the rent. The receipts indicate that the payments were made in favour of the 1st Defendant which fact has not been rebutted. Secondly, the 2nd Defendant annexed no court order to illustrate that truly he obtained one before distress could be levied. There being no evidence in rebuttal prima facie, the Plaintiff has established that the distress levied was wrongful and illegal. The Plaintiff prayed that he be reinstated to the premises. In order to grant such an order, this matter ought to be, in my view, heard on its merits. In the circumstances I allow the application in the following terms:-

(a) The Defendants are hereby ordered to unconditionally return the Plaintiff's proclaimed goods.

(b) Costs to the Plaintiff.

Orders accordingly.

Dated, Signed and Delivered in open court this 10th day of March, 2015.

J. K. SERGON

JUDGE

In the presence of:

Kimani for the Plaintiff.

No appearance for the 1st Defendants

No appearance for the 2nd Defendants