



**REPUBLIC OF KENYA**

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

**CIVIL SUIT NO. 6 OF 2013**

**IMANI HOSPITAL ..... 1ST PLAINTIFF/APPLICANT**

**CEDAR HOSPITAL LIMITED .....2ND PLAINTIFF/APPLICANT**

**VERSUS**

**HASHAM LALJI PROPERTIES LTD.....DEFENDANT/RESPONDENT**

**RULING**

By Notice of Motion dated 15th February, 2013 brought under Order 40 Rule 1 and 2 of the Civil Procedure Rules and other Provisions of the law, the Plaintiffs seek the following main orders, namely:-

- (a) That a temporary injunction be issued restraining the Defendants, their servants, agent and/or employees with the Plaintiffs' enjoyment of tenancy over Eldoret Municipality Block 6/115 pending the hearing and determination of this suit.***
- (b) That the Plaintiff's motor vehicle KAN 878 S attached by Eshikhoni Agencies be released on a running attachment pending the hearing and determination of this application inter-parties and thereafter pending the hearing and determination of the suit.***
- (c) That costs be provided for.***

The application is premised on the following grounds:-

- (a) The Defendants through M/s Eshikhoni Agencies have attached the Defendants motor vehicle KAN 878 S on account of alleged distress of rent.***
- (b) The Plaintiffs are protected tenants and whose terms of tenancy can only be altered by a court order.***
- (c) The levying of distress was on the basis of unexecuted lease agreement.***
- (d) Motor vehicle KAN 878 S was attached without any valid court order.***
- (e) There are no outstanding rent arrears to warrant distress.***
- (f) The Plaintiffs have lodged a reference with the Business Premises Rent Tribunal vide Tribunal case No. 21 of 2013 complaining of harassment by the Defendant and arbitrary***

*and unilateral increment of rent and attachment of the Plaintiffs loose and movable assets.*

*(g) The distress is illegal, unlawful and unjustifiable.*

*(h) Any increment of rent should have emanated from the Business Premises Rent Tribunal.*

It is further supported by the affidavit of Doctor Jakaiti Charles Sang'alo the Plaintiffs' director sworn on 18th February, 2013. In summary, the deponent argues that the distress for rent was premised on an unexecuted lease agreement. That as such the Plaintiffs, became protected tenants whose terms of tenancy could not be altered without a court order.

The Defendant/Respondent has opposed the application and has relied on a Replying Affidavit sworn by Grace, Emisiko, the Defendant's legal officer on 15th April, 2013. She depones that distress for rent was done based on the negotiated increased rent of Kshs 160,000/=. She states that the Plaintiffs were aware of the rent increment but adamantly failed to pay the same. That instead, they paid a much lower rent of Kshs 100,000/= which was not agreed upon by the parties.

The application was canvassed before me on 6th November, 2013. Mr. Mwinamo advocate appeared for the Applicants while Mr. Korir was for the Respondent. Both counsel agreed to rely on the affidavits filed in support of and opposition to the application.

The Plaintiffs are tenants of the Defendant on premises known as Eldoret Municipality Block 6/115. In their plaints the plaintiffs aver that they had been

paying a rent of Kshs 93,410/= but without recourse to the Business Premises Rent Tribunal the Defendant unilaterally and arbitrarily increased the same. They add that, although they objected to the increment and communicated this to the Defendant, the Defendant seemed adamant to heed to their plea. As a result, they did not sign the proposed new lease agreement which would increase the rent to Kshs 160,000/= per month.

It is the Plaintiffs' case that the Defendants subsequently sent Eshikhoni Agencies, auctioneers who without a court order distressed for rent and attached the plaintiffs' motor vehicle registration No. KAN 878S. The Plaintiffs thereafter filed a reference to the Business Rent Tribunal, being case No. 21 of 2013.

On the part of the Defendant/Respondent, it is its case that the Plaintiffs occupied its premises known as Eldoret Municipality Block 6/115 for a period of five years and two months after which the lease expired by effluxion of time. It argues that the Plaintiffs negotiated the new terms for rent whose commencement amount was Kshs 160,000/= plus VAT subject to 10% annual increment.

The defendant further states that the first lease agreement was taken outside the purview of the Landlord and Tenant (Shops, Hotels and Catering Establishments) Act, Cap 301, Laws of Kenya and hence did not require the authority of the Business Premises Rent Tribunal to negotiate fresh terms.

The Defendant accepted that distress for rent had been levied but for the rent that had been negotiated by the parties and tabulated in the new lease agreement running from 1st November 2012 until the Plaintiffs deliver vacant possession of the premises.

In view of the foregoing, it is this court's task to determine whether the Plaintiffs are entitled to the order they seek.

The celebrated case of **GIELLA -VS- CASSMAN BROWN (1973) E.A, 358** lays down the principles to be considered in granting an injunction. They are:-

(a) The Applicant must demonstrate that he is likely to succeed on merit.

(b) He must demonstrate that he will suffer imminent irreparable harm if the injunction is not granted, and

(c) That on a balance of convenience, granting of the injunction tilts in his favour.

Applying the above principles to the instant case, it is clear that the Plaintiffs have demonstrated they are likely to prevail in the case on merit for the following reasons:-

First, the Defendant undertook to distress for rent based on lease agreement that did not exist.

Second, the two warring parties, notwithstanding that the purported new lease agreement had not been reduced into writing, had also not settled by mutual agreement what the new payable rent would be. It is clear that a copy of the new lease agreement purposed to commence on 1st November, 2012 was not signed by either the landlord or the tenant. Therefore, the step taken by the Defendant to purport to distress for rent based on an unexecuted lease agreement was illegal abinitio.

Third, taking into account that the first tenancy agreement had expired, any tenancy subsisting thereafter, was a '**controlled tenancy**' within the meaning of Section 2 of the Landlord and Tenant (Shops, Hotels and Catering, Establishments) Act, Cap 301, Laws of Kenya (hereafter the Act) which defines a controlled tenancy as:-

***“ Means a tenancy of a shop, hotel or catering establishment -***

***(a) Which has not been reduced into writing***

***(b) Which has been reduced into writing and which -***

***(i) is for a period not exceeding five years.***

***(ii) Contains provision for termination, otherwise than for breach of covenant, within five years from commencement thereof; or***

***(iii) relates to premises of a class specified under subsection (2) of this section.***

***Provided that no tenancy to which the government, the community or a local authority is a party, whether as landlord or as tenant, shall be a controlled tenancy,”***

In this case, termination of, and alteration of, the terms and conditions of the tenancy ought to be in accordance with Section 4 of the Act. The Respondent, unfortunately did not issue the notice of termination or alteration of the tenancy under the provision but straight forth undertook to distress for rent pegged on a non-existent tenancy agreement. Such distress for rent could certainly not hold in the circumstances.

As for any loss to be incurred by the Applicants, record has it that on 27th February, 2013 parties had agreed that the attached motor vehicle be returned to the Applicants. For this reason, no loss has so far been incurred by the Applicants.

Fourth, all factors taken into consideration and considering the observations I have made herein above, the balance of convenience still tilts in favour of the Applicants, to grant the injunction. After all, although the dispute revolves around increment of the rent, the Applicants have continued to pay the standard rent. In this case, the Respondent too stand to suffer no loss until such a time that the dispute is settled.

In the upshot, I allow the application in terms of prayer (c) of the Notice of Motion dated 15th February, 2013. Costs of the application shall however be in the cause.

**DATED** and **DELIVERED** at **ELDORET** this 11th day of March, 2014.

**G. W. NGENYE - MACHARIA**

**JUDGE**

**In the presence of:**

Mwaniki holding brief for Mwinamo for the Plaintiffs/Applicants

Mr. Korir for the Defendant/Respondent