



REPUBLIC OF KENYA
IN THE HIGH COURT OF KENYA

AT MOMBASA

CIVIL SUIT NO. 27 OF 2013

AJESH KUMAR AGRAVAT & HASMIYA

T/A AGRAVAT & CO.PLAINTIFF

VERSUS

NAZERALI HASSANALI & 7 OTHERSDEFENDANTS

RULING

By way of a chamber summons application dated 25th March, 2013 and expressed to be brought under order 40 and section 3A of the Civil Procedure Act and rules the applicant seeks an order restraining the Defendants from levying distress upon the plaintiffs property until hearing and determination of the suit.

The grounds are that the plaintiffs are protected tenants in a suit premises that is controlled by the Business Rent Restriction Tribunal. Secondly that the plaintiffs application for leave to file a reference out of time has been filed and is pending before the Rent Premises Rent Tribunal and further that the auctioneers upon instructions from the Defendant had served the plaintiff with notice of distress for rent.

That this is the only court with jurisdiction to issue an injunction for protected tenants and unless an injunction is granted the plaintiffs would suffer irreparable damage.

The application is supported by the affidavit of Ajesh Kumar Agravat who depones that from July, 2012 to October, 2012 they received 3 notices for increase of rent in quick succession and following the said notices.

That this scenario created lots of confusion and bewilderment even after a new notice dated 1st October, 2012 was served as they were not sure whether a letter withdrawing the notice would follow.

That the landlord had accepted rent from January to March 2013 which action confirmed the notice of 1st October, 2012 was withdrawn.

That they were shocked when they received proclamation of attachment dated 18th March, 2013.

Further that they have filed an application for leave to file a reference out of time with the tribunal.

In the replying affidavit of Amiruddin 'A' Chakera it is deponed that only two notices were issued and later on withdrawn and that the 3rd notice was not withdrawn and therefore there was no confusion

caused.

It is further contended that the application to file a reference out of time at the tribunal in BPRTC No. 15 of 2013 was dismissed on 26th of April, 2013. It is also contended that defendants had received a letter from the Tribunal confirming that no reference had been filed on 12th February, 2013 and that the Tenant had paid rent for January to March, 2013 in January 2013 one month before the letter from the tribunal was received hence the old rent was accepted in January 2013 as the Advocates were awaiting confirmation whether a reference had been filed or not at the Business Rent Tribunal.

Further that if the Defendants intended to withdraw the notice dated 1st October, 2012 they would have withdrawn it through a letter as they had done with the previous ones.

It is argued that the plaintiff conveniently did not annex the Defendants notice and letter of 20th February, 2012 demanding the new rent.

Further that the plaintiff received a notice and did not file a reference, the notice took effect and thereafter he was notified by the Defendants that new rent was payable. The plaintiffs chose to ignore the letter dated 20th February, 2013 until the distress was levied one month later after which they rushed to this court for an injunction.

The plaintiffs submission is that the last notice dated the 1st October, 2012 whose effective date was 1st January, 2013 was also withdrawn due to the actions of the landlord by accepting the old rent for January, February and March 2013 thereby waiving the notice issued and that it mattered not whether a reference had been filed or not. The submission is further that their application before the Business Premises Rent Tribunal was dismissed without reasons being given.

That if rents increased it would force the applicant out of business and make it impossible for him to survive.

That they have made a case with probability of success. That the distress is illegal as there are no arrears of rent as the Respondent waived the notice dated 1st October, 2012 by accepting the old rent thereby renewing the old tenancy.

Counsel for the plaintiff Miss Moolraj has cited the case of **Arotho – Vs- Ngotho & Ano. 1991 KLR 178.**

Counsel for the Defendant submits that the application filed before the Business Premises Rent Tribunal seeking for leave to file reference out of time was dismissed on 26th April, 2013 hence there is no application pending before the tribunal and consequently new rent is payable. On the proposition that it is only the High court that can grant an injunction to protected tenants, its submitted that rule 8 of Cap 308 does provide for issuance of prohibitive orders. It is further submitted that none of the prayers sought nor the grounds found in the chamber summons allude to the distress being unlawful or illegal.

For an injunction to be granted the applicant must satisfy the requirements and principles as enunciated in the case of **Giella – Vs- Casman Brown.**

“(1)That there is a prima facie case with probability of success.

(2) irreparable injury that cannot be compensated by way of damages

(3) If in doubts on a balance of convenience”.

It is alleged that the Defendants waived the notice dated 1st October, 2012 by accepting the old rent.

The Defendant did issue a notice to the plaintiff dated 1st October, 2012. The Defendant was to be notified as to whether the tenant had filed a reference. The tribunal vide their letter dated 8th February,

2013 did inform the Defendant that no reference had been filed. By this time the rent for January, February and March 2013 had already been paid quarterly in January. There is evidence that upon notification the Defendant did write to the plaintiff demanding the new rent vide a letter dated 20th February, 2013. An invoice followed on 25th February, 2013 on the new rent. Nothing was done till the Defendants levied distress.

On the issue of irreparable injury that cannot be compensated by damages. This dispute is that of rent increment. Which sum can be liquidated, the damage cannot be said to be irreparable as it can be compensated by way of damages. This application does not meet the threshold of the principles in the case of **Giella – Vs- Casman Brown**.

On the issue of Balance of Convenience, this matter about the increase of rent but not conviction and or termination of lease. I have already found that no prima facie case has been made out as there was no waiver of the notice as alleged and secondly that rent can be liquidated and hence can be compensated by way of damages.

The application has no merit and its dismissed with costs. The ruling and order in this file to apply mutatis mutandis Civil Case No. 26 of 2013.

Ruling delivered dated and signed this **5th** day of **November, 2013**.

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M. MUYA

JUDGE

5TH NOVEMBER, 2013

In the presence of:-

Counsel for the Plaintiff Mooraj

Counsel for the Defendant Miss Ali

Court clerk Musundi

M. MUYA

JUDGE

5TH NOVEMBER, 2013

Miss Moolraj: I apply for copies of the ruling.

Court: Same to be furnished to both parties.

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M. MUYA

JUDGE

5TH NOVEMBER, 2013.