REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA AT NAIROBI

CIVIL CASE NO 1712 OF 1986

SUKWOGA.....PLAINTIFF

VERSUS

NAIROBI HOMES LTD & ANOTHER.....DEFENDANT

JUDGMENT

March 24, 1988 **Akiwumi J** delivered the following Judgment.

According to the Plaintiff, the Consulate of Iceland which I shall call "the Consulate", leased from the 1st defendant the premises known as LR NO.7741/126 at Kitisuru Estate, Nairobi for a term of one year from 6th august, 1985. After the termination of the lease by the Consulate in November, 1985, the Consulate, upon the 1st defendant refusing to take possession of the premises, allowed the plaintiff to stay on in the premises and take care of the premises and its contents until such time as the landlord took possession of the premises. It was under these arrangements, that the plaintiff stayed on in a room in the servants' quarters of the premises as a lodger. The Consulate gave him the keys to the premises and left. He himself, had in his possession, a Peugeot 305 motor car, registration number UXB 736 which belonged to a brother, one John Upor, who had previously lodged at the premises, one National Radio and three empty crates. On 17th May, 1986, the 2nd Defendant acting on the instructions of the 1st defendant, illegally levied distress on the crate, the Peugeot 305 and the National Radio for rent alleged to be due from the Consulate to the 1st defendant. The plaintiff therefore claimed damages for illegal distress and for the return to him to the Peugeot car, the National Radio and the three empty crates, belonging to his brother, Upor.

The defendants countered that the Consulate was at the material time, still the tenant of the premises and that the lease had not been properly terminated by the consulate; that the plaintiff and his brother were subtenants of the consulate; that he Consulate was in arrears with the payment of rents thereby giving the 1st defendant who were acting on behalf of the actual landlords of the premises, Treca Enterprises Ltd, the right to levy distress for the unpaid rent in arrears of shs 124,699/35, and that this court was incompetent to deal with the matter since the plaintiff could have brought his action against the Defendants in a subordinate court under SS 19 and 20 of the Distress for Rent Act. The last objection was, however, not pressed during the trial of the suit.

The plaintiff's evidence was to be somewhat different from the facts as set out in the plaint. The plaintiff stated that the radio belonged to him and not to his brother, John Upor; that the motor car though registered in the name of another brother, Toketa Alli, actually belonged to Upor's wife, Victoria; and that the empty crates had been left on the premises.

With respect to the motor car, the plaintiff explained that it had been left in his possession in December, 1985, for repairs and for him to arrange for its dispatch to Lusaka where Victoria then lived, and that

pending this, he had the use of the car. Indeed, he had the use of the car from December, 1985, until distress was levied on it in May, 1986.

As regards the circumstances under which he came to stay in the premises, the plaintiff in his evidence elaborated on but did not depart from the facts as set out in his plaint. A political refugee from Uganda and desparate for accommodation, he found refuge in a room in the servants' quarters of the premises which he occupied with the permission of the Consulate.

His brother, Upor, also lived in the premises. The Consulate terminated the lease of the premises and left; then his brother, Upor, also left. He the plaintiff, however, had no where to go and decided to stay put until the landlord came. In the meantime, the consulate asked him to guard the premises and its contents and to hand over the keys to the landlord whenever he should come for them. On 17th May, 1986, distress was levied on the car, radio and empty crates. The plaintiff, however, continued to live in the room in the servants' quarters of the premises until nearly a month later on 13th June, 1986, when the landlord brought in his own guards. It was then that the plaintiff, not knowing whom the landlord was, took the keys of the premises to the consulate. The plaintiff's evidence as to his presence in the premises, was in my view not shaken by the brief cross-examination directed at him on this issue.

After the evidence of the plaintiff, no further evidence was called either for the plaintiff or the defendants in addition to the pleadings filed on behalf of either of the parties. Mr Hayanga for the plaintiff, submitted that at the material time, the consulate was no longer the tenant of the 1st defendant and there was no rents in arrears, since the lease had been properly terminated; that the plaintiff who occupied a room in the servants' quarters of the premises, was only a lodger guarding the premises on the instructions of the Consulate; that the plaintiff was not a sub-tenant of the consulate and could not become one since the lease had been validly terminated and if not, could not have become one without the written consent of the 1st defendant; and that as a lodger, present with the knowledge of the 1st defendant, property in the possession of the plaintiff was exempt from the levying of distress.

Mr Kamau Kuria for the defendants, submitted that the plaintiff was not entitled to general damages because he had given no evidence at all as to what damages he had suffered; that since the plaintiff was on the premises in respect of which rent was due, property found on the premises could be distrained upon; that not being the recognized agent of Upor, the Plaintiff could not sue for damages concerning, and the return of, the Peugeot car; that the Plaintiff holding the keys to the premises when the lease had not been validly terminated according to its terms, was in continuing tenancy and his properties were liable to the distrained upon.

In his evidence, the plaintiff stated that although the Peogeot car had been brought to Nairobi in December, 1985, for the purpose of making arrangements to have it sent to Victoria in Lusaka, he had the use of the car and was driving it until May, 1986, when it was distrained, for at least five months, the plaintiff had the use of this car and would have continued to do so until such time as he was able to get the car sent to Lusaka. Even though the plaintiff did say that the car ostensibly belonged to Toketa Alli and in reality to Vicotria, and not as averred in the plaint as belonging to his brother, Upor, the unchallenged fact remains that the plaintiff had the use of the car which belonged to either his brother or sister in law, for a period of time which would have continued if it had not been interrupted by the actions of the 2nd defendant. I accept this and think therefore that the plaintiff was sufficiently interested and had sufficient enjoyment in the car, to give him a right of action against a wrong doer. The plaintiff I am satisfied, can therefore maintain this action in his own right on the assumption that there has been illegal distraint. If the plaintiff's possession is disturbed, he may maintain an action in regard to the disturbance of his possession. See *Fell v Whittaker* (1871) LR 7 QB 120 and *Saffer v Mulcahy* [1933] 1KB at pa 609.

On 6th August, 1985, the landlord of the premises namely the principals of the 1st defendant, entered into a lease agreement with the consulate to let the premises for one year. The rent reserved was Shs 11,500/= a month. The lease contained a special conditions clause which allowed the consulate at its option, to determine the lease by giving 30 days prior notice n writing, upon the following special conditions. These are if the Consulate leaves, Kenya, if it is decided to change the grade of the Consulate, if the government of Kenya required consulate to reduce its diplomatic staff or to cease its activities in Kenya or if the

Consulate should acquire its own property in Nairobi. On 30th November 1985, the Consulate purporting to act under the conditions clause, gave the landlord thirty days notice determining the lease in the following terms.

> "The Consulate of Iceland, Nairobi regrets to inform, that owing to circumstances now arising under "SPECIAL CONDITIONS" of the rental agreement made on 6th August, 1985 for the above mentioned premises, that it hereby wishes to use its option to determine the term thereby created by giving you the required Thirty days notice."

This obscure notice did not specify the special condition or conditions under which, the Consulate was exercising its option to determine the lease. When the 1st defendat not unnaturally, sought clarification from consulate and wrote the letter of 5th December, 1985, and drew the consulate's attention to the fact that it considered the lease still effective until 5th August, 1986, the Consulate sent a most unhelpful reply dated 11th December 1985, to the 1st defendant in which, far from specifying which special condition or conditions applied, stated that the Kenya Ministry of Foreign Affairs was aware of the special conditions involved and went on to inform the 1st defendant that it would entertain no further correspondence with the 1st defendant and intended to hand over the premises to the 1st defendant on 6th January, 1986. Of course it into the business of the 1st defendant to chase the Kenya Ministry of Foreign Affairs to find out why the Consulate had elected to exercise its option to determine the lease.

It would seem to me to be the duty of the Consulate to give the information. After all, the Kenya Ministry of Foreign Affairs was not a party to the lease. As it is, even this court is in the dark as to the special conditions which the consulate applied. Secondly, the consulate did not hand over the premises to the 1st defendant on 6th January, 1986 or afterwards as the consulate had so vauntingly proclaimed in its note of 11th December, 1985. Copies of the notes of the Consulate dated 30th November, 1985 and 11th December, 1985, a copy of the letter from the 1st defendant to the consulate dated 5th December, 1985, and a copy of the lease were all annexed to the affidavit of one James Kamau Kanja, the managing Director of the 1st defendant filed on 24th June, 1986. It would seem that even if the consulate had given effective notice, it did not hand over the premises to the 1st defendant and could therefore be regarded as being still in occupation after 6th January, 1986, until 13th June, 1986, when the 1st defendant brought his own security guards to the premises.

Lastly, if the consulate had determined the lease as from 6th January, 1986, what business was it of the Consulate to keep someone in the servants' quarters albeit, as an askari to look after the premises for mearly six months until 13th June, 1986, when according to the plaintiff, he, inspite of the fact that the landlord had brought in his own *askaris*, nevertheless, handed the keys of the premises over to the consulate. This could suggest that the Consulate had not effectively determined the lease. But for the reasons which I shall give, I do not think that I am called upon to determine whether or not the lease was effectively determined or not by the consulate. The question which I have to determine is rather whether the plaintiff was a lodger as he claims or not, for if he is , then the properties in his possession may not be distrained and he can sue for damages.

From the evidence adduced before me, even if the consulate was still the tenant of the premises, the plaintiff was not a subtentna of the consulate. The plaintiff I gather, was apolitical refuge from Uganda and having experienced difficulties in finding a place to stay, was not averse to hanging on to the room in the servants' quarters of the premises even if it meant doubling as an *askari*, for as long as he would be allowed to stay and to take his chances. In requesting him to guard the house and in giving him the keys to the premises, the consulate created what my be termed as informal relationship of master and servant but not one of tenant and subtenant. To my mind, no legal tenancy was intended to be created and none I would say, was created. It also seems to me that the consulate in allowing the plaintiff to stay in the servants' quarters under colour of employment was here continuing to extend the generosity which it had initially shown to the plaintiff in allowing him to lodge there.

The question whether a person is merely a lodger or whether premises have been let to him so that he is a tenant is a question of fact. The term "lodg r" is has been said imports that a lodger must lodge in the house of another and with him. The same also applied if the tenant retains to himself the right to interfere

and control. But it was held in the case of *facchine v Byson* 1952 1TLR 1386, that special circumstances such as an act of friendship or generosity may negative any intention to create a tenancy. It was also held in the case of *White v Bayley* (1861) 10 CB (N.S.) 227, that a servant allowed to occupy premises belonging to his master acquired no interest therein. In the case of *R v Spurrell* (1865) LR10 QB 72, it was held that if the servant's occupation of the premises was necessary for the performance of his duties then the occupation is that of his master. The true test seems to be whether the plaintiff as the servant of the consulate had occupation of the room in the servants' quarter for his own purposes or whether he occupied the room for the purposes of performing the Consulate's services on the premises.

The plaintiff's evidence on this score was not contradicted. He said he was allowed to stay in the room and given the keys to the premises so that the could look after the premises. Significantly, when he was leaving, he returned the keys to the consulate and not to the landlord. On the evidence before me, the position of the plaintiff can be summarized in this way.

The plaintiff was the servant of the consulate to guard the premises. At the same time too, I feel that the plaintiff having regard to his circumstances, was prepared to continue to occupy the room until such time as he was made to move and that the giving of the keys of the premises to him gave him additional legitimacy for being on the premises.

The consulate's action seems to me to be a mixture of generosity to the plaintiff and his employment as the consulate's *askari*. In neither case, does this make the plaintiff a subtenant of the consulate. Moreover, there was no demise legal or equitable and the plaintiff to my mind, was merely a lodger and as such, succeeds in this suit.It has also been proved that the Peugeot 305 motor car does not belong to the plaintiff but to his sister in law, another stranger to the landlord. I have already given my reasons why the plaintiff's interest in the Peugeot motor car 305 registration number UXB 736, entitled him to bring this action in respect of that vehicle as well as his national radio, and hereby order that both be restored to the plaintiff. With respect to the general damages claimed, I have no doubt that the plaintiff suffered damages as a result of the interference of his enjoyment of the radio and car.

No evidence has, however, been led to prove any actual damage but where there has been trespass to property, there is a right to recover damages even though there be no proof of actual loss (see *Interoven Stove Co v Hibbared* [1936] 1 All ER 263). The plaintiff lost the use of the Peugeot motor car from 17th May, 1986, when it was the subject of distress until the time he left Nairobi five months later in December, 1986, and I would assess general damages for loss of use taking into account that the plaintiff was a luckless refugee who would not be expected to be affluent and who according to his own evidence worked as an *askari* for the Consulate for about one month, at Shs 700/=a month and for the five months at Shs 3,500/=.

I will therefore enter judgment for the plaintiff against the defendants jointly and severally as follows:

(a) The National radio and the Peugeot motor car 305 registration number UXB 736 to be returned to him,

(b) general damages to the plaintiff the sum of Shs 3,5000/=

(c) Costs for the plaintiff

(d) Interest on (b) and (c).

Dated and delivered at Nairobi this 24th day of March, 1988

A.M AKIWUMI

JUDGE