REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA AT NAIROBI

CIVIL CASE NO. 1242 OF 1974

PETER NTHENGE.....PLAINTIFF

VERSUS

1. DANIEL ITUMO

2. J.M.KAIRIANJA.....DEFENDANTS

JUDGMENT

This is a claim for damages for unlawful distress.

The plaintiff is the tenant of certain premises in Machakos. The first defendant is the landlord. The second defendant is the bailiff who levied distress.

The plaintiff runs a small mechanical engineering school and sells the products such as water-tanks, dust-bins, buckets, braziers, etc.

He owns plot 510/909 and rented the adjacent plot 511/909 from one Mutisya. Some buildings having already been constructed by the plaintiff on plot 511, Mutisya charged him a nominal rent of Kshs 50 per month. The 1st defendant bought this plot from Mutisya and wrote to the plaintiff a letter dated March 16, 1973 increasing the rent to Kshs 300 per month with effect from March 1, 1973 (Exhibit 3). The plaintiff refused to pay and on January 29, 1974, in the absence of the plaintiff (who says he was prevented from appearing by a broken windscreen) the 1st defendant informed the Business Premises Rent Tribunal that rent at Kshs 300 per month was due for 11 months and obtained an order “Distress for Kshs 3,300 plus Kshs 93 costs.” The Tribunal had not been asked to assess the rent and at a further hearing on May 8, 1974 the Tribunal decided that the rent should be Kshs 50 per month as previously agreed between the plaintiff and Mutisya including arrears.

Meanwhile, however, the 1st defendant had acted promptly on the distress order. According to the plaintiff both defendants arrived at his premises plot No 12 in the Industrial Area Machakos (which is owned by the plaintiff) at about 11 am on January 31, 1974. They informed him that they had locked and sealed the main door of the building on plot 511/909 and had come to take his Datsun 1000 station wagon regd No KKY 739. They explained that this was for non-payment of rent amounting to Kshs 3,300. The Datsun was in a nearby garage for replacement of a broken windscreen. The plaintiff said he wrote out a cheque for Kshs 3,300 but the 2nd defendant refused to accept it saying he wanted cash. Although the bank was only half a mile away the plaintiff instead of going there at once – January 31, was a Thursday – said he would draw cash on the following Monday and bring it to the 2nd defendant in Nairobi. This also the 2nd defendant refused and because the plaintiff did not like to continue arguing and the 2nd

defendant pointed a small pistol at him (this after slight prompting by his advocate) he handed over the keys of the car.

The plaintiff then went to plot 511/909 and found that the building there had been entered by breaking the doors. Two locks and eight hinges had been broken. This is hardly consistent with his further evidence that the doors had been locked and sealed by the defendants. All his corrugated iron sheets had been removed and foodstuffs – cabbages, maize, beans, flour and curry powder – which he used for feeding his students – had been thrown out and hens were feeding on it. The value of the corrugated iron and the foodstuffs together came to Kshs 15,000 – Kshs 16,000 and because he had bought them together he was unable to break down the total. He offered to bring the receipts next day but failed to do so. He called no witnesses to support his allegations. The iron sheets he later said were for making dustbins and were in fact plain, not corrugated. This slight discrepancy was merely a question of interpretation of the word "*mabati*". They cost Kshs 43.50 each. Kshs 15,000 would buy approximately 350 sheets. All his iron sheets were in a lorry which accompanied the defendants when they came to his plot 12. The plaintiff's wife and son when asked if the iron sheets removed were corrugated or plain were obviously at a loss and compromised by replying some were plain, some were corrugated.

In the plaint the cost of repairs to doors and keys is stated to be Kshs 1,000 but the plaintiff in evidence gave no figure. He claimed Kshs 16,000 for the car while admitting that he bought it about August, 1973 (the log book shows April 19, 1973) for Kshs 6,000.

Attempts to make up the difference with a radio, cigarette lighter, four new tyres, floor mats and servicing were singularly unimpressive.

On the morning of February 2, 1974 the plaintiff said he left for Sultan Hamud. The story is taken up by his 20-year old son Charles Nthenge who said he was at the workshop on plot 12 when the second defendant arrived in a car with a 7-ton lorry and about 10 people. The 2nd defendant took the witness in his car together with one of two police constables who had been brought to the scene. The object apparently was to look for the plaintiff in and around Machakos, this despite the fact that the witness knew, according to his evidence, that the plaintiff had gone to Sultan Hamud.

On their return to the workshops Charles saw that the doors had been forced open and all the contents except two small machines, one for rolling dustbins and one for cutting had been removed. He at first described them as large machines but quickly corrected himself, a correction which avoided a discrepancy on this point with the evidence of his father. The contents of the workshop were still on the lorry but he was afraid to check the load. Although many people were present watching this scene he knew none of them by name and none was called to give evidence. The plaintiff claimed that the value of machinery and tools removed from plot 12 was Kshs 70,000. In his plaint he claimed Kshs 119,850. His son was unable to support his evidence of the contents of the workshop being at the time a schoolboy who came to Machakos only at weekends.

Before considering the attempts of the plaintiff to value the items removed I shall deal with the defence case.

The 1st defendant said he took the 2nd defendant to plot 511 at about 10 am on January 31, 1974 but spoke to no-one and since the plaintiff was not there went immediately to plot 12 in the 2nd defendant's saloon car. There they found the plaintiff who was very hostile and threw a stone at them. The 1st defendant thereupon ran away to his shop and has no knowledge of any subsequent events that day or on February 2.

In cross-examination he stumbled from one contradiction to another and revealed himself as an entirely unreliable witness.

In the confusion of contradictions were admissions that the plaintiff knew nothing about the sale of the plot until he sent him the letter (Exhibit 3) dated March 16, 1973, that he did not show the Business Premises Rent Tribunal that letter nor did he tell the members that Kshs 300 was not an agreed rent, that

the plaintiff kept some machinery on plot 12 which he had moved there from plot 511 in 1973 after the sale of that plot, that the plaintiff had 10-20 workers who might have been students and that he went to Nairobi on February 17 and received Kshs 3,393 in cash from the 2nd defendant.

The 2nd defendant I found no more reliable than the 1st. He said he had a court broker's licence issued by the DC's office but had never seen a bailiff's licence. There is no such thing he added. The 1st defendant showed him a big workshop on plot 511 but the owner was not there. He asked the 1st defendant to show him the owner and was taken to another plot where the plaintiff was working with a number of young boys in the open air. The plaintiff showed him a motor car in a nearby workshop which was scrap as it had been involved in an accident. He had, fortuitously it seems, brought a breakdown with him belonging to an unnamed Bugandan with which he towed the wreck to Nairobi where it was sold on February 16 for Kshs 1,000.70. He was unable to produce a receipt – all his receipts he said were with the Income Tax department and he had made no attempt to get them for the purposes of the case – and it may not be without significance that in his defence he says with respect to the car that it "in any event could not be valued at over Kshs 3,000. The car was seized because it had been transferred from plot 511 to the garage. He did not know when but agreed it had been taken there for repairs.

On February 2 he returned to Machakos to plot 511 and seized one old gas welder, one old electric welder and one machine for rolling iron sheets. These were "being carried to plot 12" by the plaintiff's workers, they were "scattered outside where people were working". He saw the plaintiff "supervising the collection of things". The workers were "carrying electrical welding equipment into plot 12". They were "outside plot 12 from plot 511". They had not entered plot 12 … They were between (plots 511 and 12) on the road. "They were half way".

He produced a book containing lists of items which he had presumably seized from various people. Entries were not in date order and the entry relating to those articles seized from the plaintiff shows "both parties present and police". Questioned about this he said he had written the heading before he seized the goods and the lst defendant whom he had seen that morning had agreed to come. The heading indicated the time "10 am".

The 2nd defendant also produced hand-written and typewritten forms which he said were the advertisements of sale. He had no idea how many were produced or where they were posted.

He admitted receipt of a cheque for Kshs 2,650 from Messrs Waruhiu and Waruhiu and informing them that he agreed to stay the sale to February 13 at 10.30 am when the goods would be sold unless the balance of Kshs 2,850 was paid.

The purported advertisements oddly enough show the sale as taking place at 11.30 am on February 16, not 10.30 am on February 13. The total amount required by the 2nd defendants was Kshs 5,500. The total received by him – cheque and sales – was Kshs 4,586.70 yet he paid the 1st defendant his full claim Kshs 3,393 although he was Kshs 913.30 short.

I have given only a few examples of the discrepancies in the evidence of the 2nd defendant.

Mutisya was called as a witness by the defendants but his evidence was of no value to them.

I find that the 1st defendant obtained a distress order by misrepresentation and instructed the 2nd defendant to levy distress on the property of the plaintiff on plot 12 and the garage where the Datsun was under repair as well as plot 511, that the 2nd defendant had no licence to act as bailiff under the Distress for Rent Act (cap 293), that he seized the plaintiff's car from a garage where it was under repair and a substantial amount of tools and equipment from plot 12, that neither the car nor the tools and equipment had been fraudulently removed from plot 511, that the second defendants failed to give the plaintiff an inventory of these goods, and that if he sold any of them by public auction (which I doubt) he failed to account for the sale.

Section 18 of the Distress for Rent Act provides for the issue by the Registrar, deputy registrar or district

registrar of the High Court of certificates in writing to act as a bailiff to levy distress and provides penalties for anyone so acting without a certificate issued under that section and anyone authorising any such person to levy distress "in addition to any other liability which he may have incurred by his proceedings".

The second defendant held a certificate issued by the Business Premises Rent Tribunal pursuant to section 12(1)(h) of the Landlord and Tenant (Shops, Hotels and Catering Establishments) Act (cap 301) stating that the second defendant was thereby:

"authorised/permitted to act as a bailiff to levy distress for rent on the premises of Peter Nthenge of box 352 Machakos.

This is in the form prescribed by rules made under cap 301 (Form H in the Schedule). It purports to authorise the plaintiff to act as a bailiff whereas section 12(1)(h) empowers the tribunal only "to permit the levy of distress for rent."

The tribunal is not empowered by the Act to authorise any person to act as bailiff. This power lies with the High Court only as provided in section 18 of the Distress for Rent Act.

Section 18(1) of that Act provides that certificates "may be granted at any time in such manner as may be prescribed by rules made under this Act".

Section 18(2) reads:

"The registrar, a deputy registrar or a district registrar of the High Court may grant certificates in cases in which they may be authorised to do so by rules made under this Act."

The Distress for Rent Rules (LN 14/1959) provide the forms of certificate which may be special or general. A special certificate may be granted by a judge or registrar but a general certificate can only be granted by a judge.

It would appear that the form of permit prescribed in the Landlord and Tenant (Shops, Hotels and Catering Establishments) (Tribunal) (Forms and Procedures) Regulations is *ultra vires* the provisions of that Act and inconsistent with the provisions of the Distress for Rent Act and the rules made thereunder. Be that as it may it is clear that it is unlawful for anyone to levy distress without holding a certificate issued under the Distress for Rent Act.

The second defendant claimed to be a court broker although he produced no authority and said he was appointed by the DC which suggests that he was an ordinary broker licensed under the Brokers Act (cap 527).

Assuming however that he is a duly appointed court broker he nevertheless required a certificate issued under the Distress for Rent Act before he could act as a bailiff to levy distress.

Thus the distress was illegal and both defendants are liable (see *Eastern Radio Service v RJ Patel* [1962] EA 818 at page 828-9).

Section 3 of the Distress for Rent Act gives a landlord the same remedy by distress for the recovery of rent in arrear as is given by the common law of England.

The following statements of the common law appears in *Halsbury's Laws of England*, 4th Edition, Vol 13 at page 107 (paragraph 212).

"The Common law remedy. The right of the landlord to distrain for arrears of rent arises at common law and need not be expressly reserved. It enables the landlord to secure the payment of rent by seizing goods and chattels found upon the premises in respect of which the rent or obligations are due. Formerly, the

right to distress was a right of some importance to the landlord and was often exercised, but it has now largely fallen into disuse."

The landlord in the present case therefore had a right to seize the plaintiff's goods and chattels situated in plot 511 only and the tribunal should have so limited the permit issued by them instead of specifying a box number.

In addition sections 9 and 11 of the Distress for Rent Act gives the landlord certain powers to seize and sell goods or chattels fraudulently or clandestinely conveyed or carried away. The power (which is included) to break open and enter yards and buildings may only be exercised with the assistance of a police officer not below the rank of sub-inspector. Further safeguards apply in the case of dwelling houses.

Since I am satisfied that no goods were fraudulently or clandestinely carried away from plot 511 the seizure of the car in the garage and the tools and equipment on plot 12 was illegal on this ground also.

Counsel for the plaintiff submitted that the distress was also irregular, in particular through non-compliance with the provisions of section 4 of the Act but since the distress was illegal *ab initio* it is pointless to consider irregularities in the method of levying it.

The plaintiff is entitled to damages, the assessment of which however has not been facilitated by the plaintiff's gross exaggeration and failure to keep an inventory of his tools and equipment. One would have expected the lawyer in Machakos when he first instructed to advise him to prepare one for the purposes of this case at least.

Illegal distress however involves trespass to goods and proof of the actual loss sustained is not necessary.

As Hilbery J said in *Interoven Stove Co v Hibbard* (1936) 1 All ER 263 at page 270.

"And where there is trespass to goods, though no actual damage results, the law gives a right to recover damages not limited to actual damage sustained, but a right to recover substantial damages even though there is no proof of actual loss."

I propose nevertheless to base my award on a rough estimate of the actual damage sustained made mainly from documentary evidence.

I am not satisfied that the building on plot 511 was broken open as the plaintiff described nor that any iron sheets were stored there and removed by the defendants.

The plaintiff I accept paid Kshs 6,000 for the car. He used it for about 9 months at a time when the value of second-hand cars tended to depreciate if at all only minimally. I consider a fair valuation would be Kshs 6,000, the purchase price.

The plaintiff (not without occasional assistance form his counsel) listed a large number of articles which he said had been removed from plot 12. He could produce no recent invoices or inventories.

He produced a list marked "Machakos 1949" and "Training Centre Carpenters Section". A file produced with a view to demonstrating the amount of work done by the school showed the sale of a substantial number of metal articles but no carpentry work. I am not satisfied that any carpentry tools were in his possession in 1974.

Another list was dated 1956 and shows tools issued to Kitui Trades School which was then being run by the plaintiff. These tools he said had been brought to Machakos subsequently but he admitted that tools were always being lost and taken by students. I cannot place any reliance on a list made 18 years before the seizure.

Some reliance can I think be placed on a list of items to the value of Kshs 6,130 mortgaged as security for an Industrial Development Corporation loan of Kshs 10,000 in March, 1967. This includes a case of hand-tools valued at Kshs 2,000 which would appear to be the large box of tools claimed by the plaintiff to be worth about Kshs 16,000.

There is also an invoice dated April 29, 1967 showing the purchase of tools worth Kshs 5,675 presumably with the ICD loan. Among these items is a welding plant costing Kshs 1,700.

In February 1971 Community Development issued a number of items including anvils, chisels, blacksmith's tongs, hacksaws, files, hammers, vices, clamps, screwdrivers and pincers.

The plaintiff said he had tools for 150 students and sufficient to repair 10 vehicles at a time. His visitor's book contains references to 25 students and 20 trade test passes in a year and his file shows no payments for vehicle repairs as far as I could ascertain.

There appears to have been no significant decrease in the volume of work after the illegal distress and entries in the visitor's book contains references to lack of space but none of lack of tools and equipment. The plaintiff said he brought all his tools from Sultan Hamud to make up the deficiencies but produced no list of these.

I am unable to believe that everything was taken except a machine for rolling dustbins and a cutting machine.

On the other hand I do not accept the evidence of the 2nd defendant that he only took a gas welder, an electric welder and what he described as a thread pressing iron which he sold for Kshs 200, Kshs 436 and Kshs 300 respectively.

I am satisfied that these items were worth very much more than the alleged selling prices and that they were not the only articles seized.

On the basis of the documentary evidence produced I think a fair valuation of the plaintiff's tools and equipment and any finished products on the premises would be Kshs 20,000. From this I have to make a deduction for items which were not seized and the plaintiff's debt of Kshs 3,393 less the payment of Kshs 2,650 ie Kshs 743. The 2nd defendant is not entitled to his charges and expenses. I have also to add the value of the car which I have already assessed at Kshs 6,000.

I take into account the manner in which the distress was carried out, the interruption of school instruction, the loss of profits and the effect on the plaintiff's reputation and I assess damages for illegal distress, trespass and conversion at Kshs 18,000.

There will be judgment for the plaintiff against the defendants jointly and severally for Kshs 18,000 with interest at court rates from the date hereof until payment in full and together with costs and interest thereon.

Dated and Delivered at Nairobi this 31st day of March 1976

A.H.SIMPSON

JUDGE