



**Peter Muchiri Kariuki t/a Airways Auctioneers v Mwihaki (Miscellaneous Application 197 of 2023) [2023] KEMC 307 (KLR) (3 August 2023) (Ruling)**

Neutral citation: [2023] KEMC 307 (KLR)

**REPUBLIC OF KENYA  
IN THE NAKURU LAW COURTS  
MISCELLANEOUS APPLICATION 197 OF 2023  
PA NDEGE, SPM  
AUGUST 3, 2023**

**BETWEEN**  
**PETER MUCHIRI KARIUKI T/A AIRWAYS AUCTIONEERS ..... APPLICANT**  
**AND**  
**BEATRICE MWIHAKI ..... RESPONDENT**

**RULING**

1. The applicant moved this court by way of notice of motion application dated 7/7/2023. It seeks the following orders: -
  1. That this application be certified as urgent and be heard ex- parte
  2. That the applicant be granted order to levy distress against the respondent for rent arrears amounting Kshs 163,000/=
  3. That the Honorable Magistrate do order the officer commanding Mwariki police Station to authorize his police to escort Peter Muchiri Kariuki t/a Airways Auctioneers to the respondents premises of one Beatrice Mwihaki Respondent herein for the purposes of maintaining peace and order while breaking open the tenants premises at Naka Estate Nakuru Plot No 23/278 House No. D 5 and carry the proclaimed goods.
  4. That the defendant has failed to pay the rent arrears since the expiry of the Notice and she is violent and locking up his premises making it impossible for the auctioneer to physically remove the proclaimed goods.
2. With the application also came supporting affidavit dated 7th day of July 2023 sworn by Peter Muchiri Kariuki, the applicant which reiterate the grounds for application. Having considered the pleading and supporting affidavit, I got persuaded that this matter is urgent.



3. It is evidenced by the affidavit of service sworn on 14th day of July 2023 that the respondent herein was served in person by the server of this honorable court and she accepted the service but failed to sign but remained with the copies. She has however failed to reply and didn't enter appearance. Considering that the applicant filed the affidavit of service as required by *civil procedure rules* order 10 rule 2, I did permit the applicant to proceed with the application herein *ex parte*.
4. Distress is a right to the landlord for recovery of his rent arrears. Therefore, the landlord is at liberty to do so as it was held in the case of *John Nthumbi Kamwithi v Asha Akumu Juma* [2018] eKLR. The high court while setting aside the principal magistrate court decision in its entirety held that: -

... I find no obligation to seek permission from the tribunal to levy distress. The fact that the tenancy is controlled doesn't mean that the landlord applies to the tribunal for levy distress. Distress is a right the landlord is entitled to recovery of his rent.
5. Therefore, the landlord has to recover his rent as per procedures provided in in the *Distress Rent Act*. Under section 4 (1) of the *Distress Rent Act* it is provided that where any goods or chattels are distrained for rent reserved and due upon a grant, demise, lease ,contract and the tenant or owner of the goods or chattels so distrained does not, within 14dys after distress has been made and notice thereof (stating the cause of the making of distress) left with the rent restrained for, pay the rent together with the costs of distress or replevy them, with sufficient security to be given to the licensed auctioneer according to law , the person distraining may lawfully sell on the premises or remove and sell the goods and chattels so distrained for best price which can be obtained from them towards satisfaction of the rent for which they were distrained and of the charges of distress, removal and sale, handing over surplus (if any) to owner
6. The respondent herein was issued a 14dys notice attached herein as PMK3 by the licensed auctioneer which stated cause of making distress as required by section 4 (1) of the *Distress Rent Act*. The respondent failed to comply as per the notice given to her to pay the rent arrears and instead locked up the house. Bearing in mind that the respondent has failed to file a reply and has also defaulted to enter appearance and that Jojean Properties ltd has already found a licensed auctioneer to carry out the distress, I do grant the following orders;
  1. That the applicant has been granted order to distress levy for rent arrears amounting to Kshs 163, 000/=
  2. That the officer commanding Mwariki police Station, subject to the payment of any fee for use of police for private purposes, to authorize his officers to escort Peter Muchiri Kariuki t/a Airways Auctioneer to the respondents premises limited for purpose of orderly, maintaining peace and order while breaking open the tenants premises at Naka Estate Nakuru Plot No 23/783 House No.D. 5 and carry the proclaimed goods.

**DATED, DELIVERED, AND SIGNED AT NAKURU IN OPEN COURT THIS 03<sup>RD</sup> DAY OF AUGUST, 2023**

**ALOYCE PETER NDEGE**

**SENIOR PRINCIPAL MAGISTRATE**

Ruling delivered in the presence of;

Applicant: N/A

Respondent: N/A



Court assistant: Janet

