



**REPUBLIC OF KENYA**  
**IN THE ENVIRONMENT AND LAND COURT**

**AT NAIROBI**

**ELC CIVIL CASE NO. 1627 OF 2016**

**RUTH WAMBUI NJENGA.....PLAINTIFF/APPLICANT**

**=VERSUS=**

**JOHN KAMAU NDUGIRE.....1<sup>ST</sup> DEFENDANT/RESPONDENT**

**MR. JOSEPH NDIRITU**

**T/A JOGAN DRIES AUCTIONEERS.....2<sup>ND</sup> DEFENDANT/RESPONDENT**

**RULING**

1. This is the Notice of Motion dated 22<sup>nd</sup> December 2016 brought under Order 40 Rule 1, 2 and 3 of the Civil Procedure Rules.
2. It seeks order:-
  - (a) *Spent*
  - (b) *Spent*
  - (c) *Spent*
  - (d) *Spent*
  - (e) *That pending the hearing of the suit the defendant not to interfere with the plaintiff's occupation and hotel business.*
  - (f) *That the attached goods of the plaintiff be returned to her in good working order and the defendants do incur the expenses of returning them.*
  - (g) *That costs be in the cause.*
3. The grounds are on the face of the application and are set out in paragraphs 1 to 5.
4. The application is supported by the affidavit of Ruth Wambui Njenga, the plaintiff/applicant herein, sworn on the 22<sup>nd</sup> December 2016 and a further affidavit sworn on the 9<sup>th</sup> May 2017.
5. The application is opposed. There is a replying affidavit sworn by John Kamau Ndugire, the 1<sup>st</sup> defendant/respondent sworn on the 30<sup>th</sup> March 2017.
6. On the 18<sup>th</sup> December 2017, the court directed that the notice of motion be canvassed by way of written submissions.
7. It is the plaintiff's/applicant's case that the notice given by the 1<sup>st</sup> defendant/respondent did not satisfy the requirements of Section 4(4) of the Land Lord and Tenant (Shops, Hotels and Catering Establishments) Act Cap 301 which provides that a tenant must be given two months' notice. The plaintiff/applicant denies receiving any notice to terminate tenancy. The plaintiff was not served with any application for distress. Further that service upon a Miss Waitira was false as she had no such employee.

8. That the 2<sup>nd</sup> defendant contravened the court order dated 10<sup>th</sup> November 2016 and Section 16 (1) (d) (e) of the Distress for Rent Act as he detained perishable food stuff. The police and the defendant/respondent committed trespass on the plaintiff's premises by entering and plundering the plaintiff's/applicant's goods and carrying them away. The court order was in respect of Plot No. 14/4 Githunguri town hence the distress on Plot No. 16/4 was illegal. She has put forward the case of **Ripples Limited vs Kamau Mucuha Nairobi HCCC No. 4522 of 1992**. She prays that the orders granted on 23<sup>rd</sup> December 2016 be confirmed pending the hearing and determination of the suit.

9. The 1<sup>st</sup> defendant/respondent was represented in court on 18<sup>th</sup> December 2017 but neglected to file written submissions.

10. I have considered the notice of motion, the affidavit in support and the annexures. I have also considered the replying affidavit and the annexures, the written submissions of counsel and the authorities cited. The issues for determination are:-

**(i) Whether or not the distress for rent was unlawful.**

**(ii) Whether or not a mandatory notice was issued as provided for in Section 4 (2) of the Landlord and Tenant (Shops, Hotels and Catering Establishments) Act Cap 301.**

11. I have gone through the lease agreement dated 27<sup>th</sup> December 2013. The same is for a period of five (5) years with effect from 1<sup>st</sup> January 2014 to 31<sup>st</sup> December 2018. The monthly rent was Kshs.6,000/-. The plaintiff/applicant has annexed deposit slips to her supporting affidavit showing that the rent had been paid in full. She was not in any rent arrears. In paragraph 4 of the supporting affidavit, the plaintiff/applicant deposes that she and the deceased James Nduigere Muchina entered into an agreement to repair a collapsing toilet at the premises. This averment has not been rebutted by the 1<sup>st</sup> defendant/respondent. I find that the levy of distress and eviction carried out on 22<sup>nd</sup> December 2016 was unlawful. No evidence was adduced by the 1<sup>st</sup> defendant/respondent to show that the plaintiff/applicant had not paid rent on time.

12. I have seen the court order in Githunguri Principal Magistrate's Court Miscellaneous Case No. 20 of 2016. I find that the premises referred to on the court order is Plot NO. 14/4 Githunguri town and not Plot 16/4 Githunguri Town. It is not in doubt that the distress for rent in the plaintiff/applicant's hotel was illegal. I also find that the 2<sup>nd</sup> defendant/respondent contravened Section 16 (1) (d) (e) of the Distress for Rent Act by distraining perishable food stuffs. It is not in doubt that the distress for rent was unlawful as the plaintiff/applicant was not in any rent arrears.

13. From the lease agreement there is no doubt that this was a controlled tenancy within the meaning of Section 2(1) of the Landlord and Tenant (Shops, Hotels and Catering Establishments) Act. Cap 301 Laws of Kenya. Section 4(2) of the Act provides that:

***"A landlord who wishes to terminate a controlled tenancy; or to alter, to the detriment of the tenant, any term or condition in or right or service enjoyed by the tenant under such tenancy shall give notice in that behalf to the tenant in the prescribed form".***

Subsection 4 provides that;

***"No tenancy notice shall take effect until such date, not being less than two months after receipt thereof, by the receiving party, as shall be specified therein....."***

14. The above provisions are set in mandatory terms. The plaintiff/applicant has denied that she was issued with any notice to terminate tenancy whether in the prescribed form or otherwise. The 1<sup>st</sup> defendant/applicant has not put forth any material before this court to show that such notice was served.

15. It is not in doubt therefore that the eviction of the plaintiff/applicant from the hotel was unlawful. In the Case of **Ripples Limited vs Kamau Mucuha Nairobi HCCC 4522 of 1992**, it was held that;

***".....the effect this court gives now is that as the plaintiff/applicant claims that it was wrongly evicted from the premises as well as bearing the distress for rents which it says were never in arrears, and whereas the defendants/respondents did those acts on the premises that rents were indeed outstanding the two parties have a trial issue which this court will need to dispose of at a full hearing....."***

The court further observed;

***"The landlord should only take one course against the defaulting tenant i.e either to distrain for rent or institute an action for forfeiture of the lease/tenancy and repossession. Here the defendant/response took both reliefs to his benefit. It cannot be. The law does not permit it and this court cannot allow it."***

16. All in all, I find that the plaintiff/applicant has established a prima facie case against the defendants/respondents. I grant the orders sought namely:-

***(a) That an order is hereby issued restraining the defendants/respondents from interfering with the plaintiff's/applicant's occupation of the premises and hotel business pending the hearing and determination of this suit.***

***(b) That the attached goods be returned to the plaintiff/applicant in good working order and the defendants/respondents do incur***

*the expenses of returning them.*

*(c) That the costs of this application be in the cause.*

It is so ordered.

**Dated, signed and delivered in Nairobi on this 26<sup>TH</sup> day of MARCH 2019.**

.....

**L. KOMINGOI**

**JUDGE**

**In the presence of:-**

.....Advocate for the Plaintiff

.....Advocate for the 1<sup>st</sup> & 2<sup>nd</sup> Defendants

.....Court Assistant