

REPUBLIC OF KENYA

IN THE ENVIRONMENT AND LAND COURT OF KENYA AT ELDORET

E & L APPEAL CASE NO. 5 OF 2015

JULIUS CHERUIYOT KIBWALEI.....APPELLANT

VERSUS

FELIX KIPCHOGE LAGAT.....RESPONDENT

JUDGMENT

This is an appeal by Julius Cheruiyot Kibwalei (*hereinafter referred to as the appellant*) against the decision of the Hon. T. Olando, Resident Magistrate, Eldoret in Chief Magistrate's Civil Application No. 27 of 2015 between *Julius Cheruiyot Kibwalei Vs Felix Kiprotich Lagat* made on 28.5.2015. The genesis of the matter was the application dated 28.4.2015 whereby Felix Kipchoge Lagat (*hereinafter referred to as the respondent*) applied for orders to break into a house in Elgon View Estate within land parcel No. Eldoret Municipality/Block 13/739 for purposes of distressing for rent.

The respondent further applied for orders that the Police Officer Commanding, Eldoret Station to aid and assist the applicant or his authorized agent to carry out the orders.

The application was based on grounds that the appellant was truly indebted to the respondent in lieu of rent owing to the tune of Kshs. 891,250, being arrears of rent from July, 2014 to April, 2015. That the appellant was planning to leave the said premises but had not paid the amount stated herein above. The appellant had frustrated the respondent's attempt to distress for rent by locking the said premises. The respondents and/or its agents cannot distress for rent unless and until they gain entry into the said premises and therefore it was just that the orders sought therein be granted to enable the respondent to recover the said balance of rent rightly owing to it.

In the supporting affidavit, the respondent stated that he was responsible and the registered owner of the residential house in Elgon View Estate within land parcel number Eldoret Municipality Block 13/739 occupied by the appellant. That the appellant resided in the said residential house for a monthly rent of Kshs.100,000.00 together with VAT as per the lease agreement. The appellant last paid rent on 3rd April, 2014. That the appellant has attempted to distress for rent in vain.

The appellant had not remitted to the respondent, the sum of Kshs.891,250.00 being the rent arrears from July, 2014 to April, 2015. That the appellant had locked up the said premises and was likely to vacate the same without remitting the said balance owing.

The respondent has on several occasions demanded payment of rent but the same has fell on deaf ears. That the appellant issued a cheque to the respondent on 25th November, 2014 which upon presentation to the bank, it bounced. The auctioneers could not distress for rent unless the orders sought are granted.

In the replying affidavit, the appellant stated that the Notice of Motion was incompetent as the respondent lacked locus standi as the application can only be made by a licenced auctioneer duly instructed to levy distress for rent arrears under the provision of Rule 9 of the Auctioneers (Amendment) Rules, 2009. According to the respondent, Section 11 of the Distress for Rent Act, Cap. 292 does not confer jurisdiction on the court to grant break in orders to applicant or any other person. He was protected as the lease expired. Rent could not be distrained without leave of the court. The property in the proclamation was not his.

After hearing the application and considering the submissions of the parties, the honorable Magistrate gave orders to the respondent to break in and gain entry into his house in Elgon View Estate on the suit property in possession of the appellant for purposes of distressing for rent. The court further ordered the O.C.S., Eldoret Police Station to assist the respondent.

The appellant appeals against this decision on grounds that the learned Magistrate erred in law and fact in failing to find that by dint of Rule 9 of the Auctioneers (Amendment) Rules, 2009, only a licenced auctioneer could apply for the orders of Police assistance and breaking in the premises. The respondent lacked locus standi. The learned Magistrate failed to find that the appellant was a protected tenant. The appellant prays that the decision of the court be set aside and substituted thereof with a finding dismissing the Motion dated 28.4.2015 with costs to the appellant. Appellant prays for costs of the appeal.

I have considered the appeal and Rule 9 of the Auctioneers (Revised in 2017) Rules, 2009 and do find that only a licenced auctioneer can apply for breaking in on police assistance and therefore, the respondent lacked the locus standi to apply for break in orders and police protection.

The issue as to whether the appellant was a protected tenant was not determined by the Lower Court and therefore, I do find the same not ripe for appeal.

The upshot of the above is that the appeal is allowed and the decision of the court is hereby set aside and substituted thereof with a finding dismissing the Motion dated 28.4.2015 with costs to the appellant.

Dated and delivered at Eldoret this 20th day of March, 2019.

A. OMBWAYO

JUDGE