



REPUBLIC OF KENYA

IN THE ENVIRONMENT & LAND COURT

AT MOMBASA

ELC CASE NO 99 OF 2018

SPANISH COACH EXPRESS LTD..... PLAINTIFF

VERSUS

NAIROBI HOMES (MSA) LTD

DAVID OYUGI RIWA DULO..... DEFENDANTS

RULING

1. The plaintiff brought this claim against the two defendants vide her plaint dated 25th April 2018. Together with the suit, she moved the court by an application of even date premised on Section 3A of the Civil Procedure Act and order 40 of the Civil Procedure Rules. The plaintiff/applicant sought to be granted the following orders;

(a) Spent;

(b) Spent;

(c) That pending the hearing and determination of this suit, a temporary injunction be granted restraining the defendants either by themselves, their agents, servants and/or employees from selling, disposing off, transferring, using and/or dealing with the plaintiff/applicant's movable asset situated at the defendant/respondent's undeveloped land Plot No. 6627/MN Nyali Measuring approximately 0.2457.

(c) That the costs of this suit be borne by the respondent.

2. The motion is supported by several grounds on the face of it which includes the following;

(a) That owing to a disagreement by both parties to the aforesaid contract over the accrued amount due, the defendant/respondent now purports to use the Distress for Rent Act, in levying distress for rent over an undeveloped land/plot which has no dwelling place or a business premise and hence the aforementioned Distress for Rent Act, fails to suffice.

(b) That in the process, the respondents have proceeded to seize the assets in the form of bus seats situated inside the plot in undue regard to the proper procedures enshrined under the law.

(c) That the above matter cannot best be compensated by way of damages as the motor vehicle proclaimed is jointly co-owned with the plaintiff's financiers Stanbic CFC Bank and that the said attachment and sale is likely to leave the plaintiff in a worse off position than the performance of the lease agreement; and as a result the said damages shall be deemed inadequate hereof.

3. Mr Mohamed Moti also swore an affidavit in support of the orders sought. Mr. Moti deposed that the lease was in regard to an undeveloped land/plot no 6627/1/MN Nyali. That on the basis that the same was not developed, the suit premises did not fall within the confines of the Distress for Rent Act Cap 293. He deposed also that the proclaimed motor vehicle was not within the confines of the suit premises. Therefore the applicant being discontented on the accruals and the procedure used expressed their dissatisfaction vide their advocates letter dated 20th February 2018. That it is just and equitable to grant the orders sought.

4. The application is opposed by the respondents through the replying affidavit of Solomon Mutungi. Mr Mutungi deposed that the lease entered between them and the plaintiff was for a parking yard and other related business. That the land was wall fenced complete with a store

house which the applicant was to use as he wanted. That the applicant fell in to arrears of rent as at December 2017 amounting to Kshs801,300/=. Further instead of paying the monthly rent of Kshs100,000/= as agreed, the plaintiff started making payments in small sums as shown in the Mpesa statement now annexed as **SMM -4**.

5. The respondents deposed that there is no dispute that the applicant owes rent in arrears and despite being served with notice she also failed to pay rent for January 2018 on time as stipulated. Consequently the respondents instructed Mugema Auctioneers to levy for distress on 1st February 2018 which instructions the auctioneers duly executed – **SMM8**. However on 14th August 2018, the applicant wrote through their advocates that they had moved out of the suit premises. That the applicant is thus seeking the protection of the court to defeat the 2nd respondent's right to recover the debt.

6. The respondent deposed that the applicant cannot purport to suffer irreparable loss when it willingly signed the tenancy agreement and has refused to pay due rents from June 2017. Thirdly that the applicant vacated the suit premises without notice or payment of rent in lieu of notice. The respondent accuses the plaintiff of coming to court with dirty hands. They urged the court to dismiss the application with costs.

7. Parties filed written submissions which I have read and considered. The applicant submitted that the Distress for Rent Act is not applicable because the leased premises was undeveloped. That Cap 293 is confined to dwelling premises as set out under Sections 9, 12, 13, 14, 19, 22 & 23 of the Act. On whether the applicant came to court with unclean hands, it is submitted that the applicant only wants lawful procedure to be followed by the 1st respondent in recovering his debt. It is also their submission that their application meets the criteria for granting of temporary injunction.

8. The respondents on their part submitted that this court lacks jurisdiction to hear and entertain this application. That they acted within the parameters of Cap 293 and the applicant having vacated the suit premises, the usage of the land is no longer in dispute. The respondents urged the court to be guided by the provisions of Section 3 of Cap 293.

9. From the pleadings as filed, the plaintiff has made no mention on the arrears being claimed by the respondent. The application is premised on the issue of law that the procedure adopted by the respondents in recovery of the rent arrears was unlawful. The applicant referred the court to the provisions of Section 9, 12, 13, 14, 19, 22 and 23 of the Distress for Rent Act Cap 293. In the preamble to this act, **“An Act of Parliament relating to Distress for Rent”**. Section 3 deals with the right to distress stating that 3(1) subject to the provisions of this Act and any other written law, any person having any rent in arrears due upon a grant, lease, demise or contract shall have **the same remedy by distress** for the recovery of that rent as is given under the common law of England in a similar case.

10. Section 9 provides that a landlord may distrain and sell goods fraudulently carried away from the premises. Section 12 refers to power to distrain stock or crops on premises for arrears. Section 14, 19, 22 and 23 are not in consonant to the issue at hand. For instance, Section 19 refers to under-tenant or lodger. The applicant annexed a copy of a lease agreement executed between them on 25th February 2016. The applicant referred to the definition of premises as given by Black's Law Dictionary 2nd edition to mean **“in real estate, land and improvements on it, a building, store, shop apartment or other designated structure.”**

11. From the definition given by the applicant, premises include land and improvements on it. The key word here being land. I do not understand why the applicant thinks land on by itself is insufficient. The respondent deposed that the premises had a wall fence and a store which the plaintiff was at liberty to use. This was not denied by the applicant and a wall in my view constitutes wall in my view part of an improvement on land. The applicant in essence is misinterpreting the purpose of Distress for Rent Act when she submits that it was not applicable to the demised premises merely because the land is undeveloped and which preposition is not true by virtue of the existence of a wall fence.

12. The applicant further accused the respondent of committing illegalities by attempting to attach a bus that was not in the suit premises. The respondent replied and said the proclamation was carried out before the applicant left the suit premises. Under Section 9 of Cap 293, the landlord is permitted to distrain and sell goods fraudulently carried off from the premises. The respondents agent Mugema Auctioneers is thus permitted by this section to seize and sell the Motor vehicle KCA 300R that had been proclaimed.

13. Since the rent due is not denied by the applicant and given my finding on the applicability of the Distress for Rent Act to the tenancy agreement between the plaintiff and the respondents, I do hereby safely conclude that the application does not meet the threshold of proof of a prima facie case with a probability of succeeding. Since the law does not compel me to consider all the three principles for granting of an application for injunction, it is my opinion and I so hold that it is not in the interest of justice to grant the orders sought. The balance of convenience tilts in favour of the respondents whose money is owing and unsecured due to the fact of the applicant stating that it left the demised premises.

14. For the reasons stated herein above, the application is dismissed for want of merit with costs to the respondents.

Dated, Signed and Delivered at Mombasa this 21st day of June 2019.

A. OMOLLO

JUDGE.