

REPUBLIC OF KENYA
IN THE HIGH COURT OF KENYA AT NAIROBI
CIVIL DIVISION
CIVIL CASE NO. E187 OF 2020

STEPHEN MUNGAI GACHERUPLAINTIFF

-VERSUS-

JOSEPH MUNGAI GIKONYO

T/A GARAM INVESTMENTS AUCTIONEERS.....1ST

DEFENDANT

SUSAN NYANDIA NJAU.....2ND DEFENDANT

OLIVE JOYCARE LTD REALTORS aka

OLIVE JOYCARE ESTATE AND

PROPERTY MANAGERS LTD.....3RD

DEFENDANT

JUDGMENT

Pleadings

1. By a Plaint dated **13/11/2020**, **Stephen Mungai Gacheru** (*hereafter the Plaintiff*) sued **Joseph Mungai Gikonyo t/a Garam Investments Auctioneers, Susan Nyandia Njau** and **Olive Joycare Ltd Realtors aka Olive Joycare Estate & Property Managers Ltd** (*hereafter the 1st, 2nd & 3rd Defendants*) seeking judgment against them jointly and severally for-;

- a) *Kshs. 14,038,964/- being the value in respect of costs goods, freight costs, marine cargo insurance and the tax levied thereon;*
- b) *Loss of earnings amounting to Kshs. 20,356,095/-;*
- c) *General damages for conversion;*
- d) *Interest on (a), (b) & (c) at commercial rates;*

- e) *Costs of this suit together with interest thereon at such rate and for such period of time as the honorable Court may deem fit to grant; and*
- f) *Any such other or further relief that the Court may deem appropriate.*

2. The Plaintiff averred that at all material times, he was a tenant in the 2nd Defendant's property known as **Shop Number 2 & 3 on LR. NO. Dagoretti/Karandini/19 Karandini Market Nairobi** (*hereafter the suit premises*) on a lease term of three (3) years from 01/04/2012 to 31/03/2015 at a monthly rent of Kshs. 30,000/-.
3. That on 18/02/2016 and later 02/03/2016, the 3rd Defendant wrote to the Plaintiff claiming arrears on rent and threatening distress, for the sum Kshs. 363,000/- going back to April 2015, premised on alleged rental increase of Kshs. 50,000/-. Yet, the lease expired 31/03/2015 and no subsequent lease varying the rent of the premises was executed whereas being a protected tenant any such increment on rent could only be effected by way of a written notice to the Plaintiff.
4. On 11/03/2016, the 1st Defendant on instructions of the 2nd & 3rd Defendants proclaimed the Plaintiff's property of an approximate value of Kshs. 20,000,000/- in respect of purported rent arrears of Kshs. 568,000/-. That on 19/09/2016, the Plaintiff moved the Business Premises Rent Tribunal (BPRT) by way of reference to have the issue of the purported rent increment determined and to stop the unlawful distress. However, on 16/01/2017, the 1st Defendant broke into the suit premises while the goods that had not been

proclaimed in distress were strewn all over the suit premises, with some missing.

5. Upon inquiry the Plaintiff was informed that the suit premises had been leased out to another party as of 01/11/2016, whereas at the time, the 2nd & 3rd Defendant were aware of a claim against them before the BPRT challenging purported rent arrears and not possession of the premises, a consequence, to wit, the Defendants actions were unlawful and occasioned damage to the Plaintiff's property.
6. That on 17/11/2017, the BPRT delivered a judgment directing the 1st & 2nd Defendant to release the Plaintiffs' distrained property subject to payment of arrears, as per the initial lease as at 11/03/2016. Nevertheless, on 11/07/2018, in complete disregard of the orders of the BPRT, the 1st & 2nd Defendants proceeded to dispose of the Plaintiff's proclaimed property in a public auction at a meager sum of Kshs. 771,000/- as against distrained property valued at Kshs. 20,000,000/-, which actions were illegal, unprofessional, deceitful and intent of stripping the Plaintiff of his property.
7. Following the sale, the 1st Defendant forwarded the purported balance on sale in the sum of Kshs. 62,222.80/- to the 3rd Defendant that has since appropriated to itself contrary and in contempt of the BPRT's orders. It was further averred that the public auction was irregular having been advertised in "The People Daily", a publication of limited circulation and audience, intent on depriving the Plaintiff of his property
8. The **1st Defendant** filed a statement of **defence dated 09/04/2021** denying the key averments in the plaint. He goes

on to state that as at proclamation, he was unaware of any orders that injuncted him from attachment, to wit, the distraintment for rent was lawful and carried out in accordance with the law. That despite being served with an order from the BPRT, there still remained his fees and storage charges which were duly communicated to the Plaintiff. Given the Plaintiff's disinterest to have his items back, and despite communication of the 1st Defendant's fees and storage charges, it behooved upon the latter to mitigate the same whereupon he advertised the sale of the Plaintiff's property upon causing a valuation of the property, in order to ascertain their value. That the Plaintiff's claim as to the purported value of the attached property, is a ruse geared towards unjust enrichment whereas his refusal to pay auctioneer's costs led to the eventual auction of the distrained items.

9. The **2nd & 3rd Defendant on their part** filed a statement of **defence dated 21/04/2021** denying the key allegations in the plaint meanwhile averred that the BPRT did not state the distress for rent ought to be stopped but gave directions on how the rent arrears should be tabulated.
10. The suit proceeded to full hearing during which the parties hereto called evidence in support of the averments in their respective pleadings.

Plaintiffs Case and Evidence

11. The Plaintiff testified as **PW1**. He began by stating that he ran a bakery in the suit premises which he had leased from the 2nd Defendant for three (3) years. He proceeded to adopt his witness statement dated 13/11/2020 as his evidence in chief

meanwhile adduced the document appearing at Pg. 29-45 & 46-47 in Plaintiff trial bundle dated 27/06/2022 as **PExh.1**.

- 12.** It was his evidence that he bought the attached equipment from Turkiye, in the sum of Kshs. 12 million, upon obtaining a loan from Jamii Bora Bank. That the lease in respect of the suit premises ended in 2015 whereas there was no renewal. He went on to state that in 2016 the 1st Defendant claimed he owed rent arrears, to wit, upon proclamation, the dispute went to the BPRT whereafter judgment was delivered in his favour.
- 13. On cross examination**, he confirmed that the lease in respect of the suit premises was for three (3) years whereas after its expiry he continued to pay the rent as agreed. He did inveterate, as at proclamation there were injunctive orders however the 1st Defendant was not a party to the matter filed before the Tribunal. He further confirmed that the documents adduced in **PExh.1**. do not factor in depreciation of the proclaimed property, value of the property left at the premises after attachment and receipt sales quantifying loss of business.
- 14.** He also acceded to the fact that the proclaimed goods were with the 1st Defendant for more than a year meanwhile notified the latter of the judgment and the fact that his property ought not to be sold. That his property was eventually sold in 2018 while they were undertaking a tabulation of accounts however confirmed having not settled auctioneer costs in the sum of Kshs. 100,000/-
- 15. In re-examination**, he iterated that the BPRT ordered that his items should not be advertised or sold whereas the quantified value of the auctioned items encapsulates their value, marine

insurance and tax. That as at the decision of the BPRT, he was in arrears of Kshs. 60,000/- and that the 1st Defendant was served with the decision from the BPRT on 20/01/2018.

- 16. Tom Kinyua**, testified as **PW2**. He began by identifying himself as an accountant by profession with over thirteen (13) years of experience. He too adopted his witness statement dated 05/05/2023 as his evidence in chief meanwhile proceeded to adduce into evidence a schedule of the Plaintiff's loss of earnings appearing at Pg. 48 in Plaintiff's trial bundle dated 27/06/2022 as **PExh.2**.
- 17.** It was his evidence that he used years of the Plaintiff's data to prepare the sales, expenses and profit schedule and that he had audited the Plaintiff's business in previous years.
- 18. On cross examination**, he confirmed having not evinced his accountant certificate and that at the time he was not an active practitioner having not renewed his certificate for two (2) years. He further confirmed having neither evinced the primary documents nor annual returns used to prepare the schedule adduced and that information in the schedule consisted of projections. He stated that he had accounted for appreciation of the assets however the same did not form part of his documents. He acquiesced that **PExh.2** neither had a letter head, stamp nor a signature, and as such, was not authenticated.

1st Defendants Case and Evidence

- 19.** On behalf of the 1st Defendant, **Joseph Gikonyo**, identifying himself as a licensed auctioneer, and testified as **DW1**. He proceeded to adopt his witness statement dated 20/07/2022

as his evidence in chief meanwhile adduced into evidence the **bundle of documents** appearing in the **1st Defendant's list of documents dated 20/07/2022** as **DW1 Exh.1**.

20. On cross examination, DW1 stated that he received instructions from the 2nd Defendant to levy distress for rent however did not verify the accuracy of the arrears and he was later made aware of the matter before the BPRT. He confirmed having been served with an order dated 13/12/2017 to release the Plaintiff's goods. He advertised for the sale of the attached property which had a value of Kshs. 690,000/- as per a valuation over the property. He confirmed that the goods were not released to the Plaintiff despite the Court order whereas he issued a cheque of Kshs. 62,000/- to the 3rd Defendant being the balance from the proceeds of sale after deduction of his fees. That the sale was effected to recover rent and auctioneer charges.

21. In re-examination, he stated that as at levying of distress it was not his duty to confirm the rent arrears. He repeated that he was not a party to the BPRT proceedings and that he did not receive payment of his auctioneer fees and storage charges from the Plaintiff. He maintained that the sale was to recover his fees and rent arrears, to wit, his charges included storage fees whereas the sold property was valued prior to auction. He concluded by stating that the forced sale value of the goods was Kshs. 735,000/- and the accrued storage fees as at sale was Kshs. 465,000/-.

2nd & 3rd Defendants Case and Evidence

- 22.** On behalf of the 2nd & 3rd Defendant, **James Mwangi**, identifying himself as the managing director of the 3rd Defendant, testified as **DW2**. He proceeded to adopt his witness statement dated 08/01/2024 as his evidence in chief meanwhile adduced into evidence the **bundle of documents** appearing in the **2nd & 3rd Defendant's list of documents dated 08/01/2024** as **DW2 Exh.1 & 2**. The gist of his evidence was that 2nd Defendant was their client at the time and that the Plaintiff had moved the BPRT seeking payment of rent arrears premised on the amount in the initial lease. That their tabulation at the time captured that the Plaintiff had rent arrears of Kshs. 569,000/-.
- 23. On cross-examination, DW2** confirmed expiry of the tenancy meanwhile had no documentation evincing renewal. They issued instructions to the 1st Defendant to levy distress in the amount of Kshs. 569,000/- whereas they eventually received a cheque from the latter in the sum of Kshs. 62,000/-. He maintained that the amount owing from the Plaintiff was Kshs. 569,000/- as at the date of instructions, per their tabulation and guided by the Tribunal's judgment.
- 24.** At the close of the trial, parties were accorded an opportunity to file submissions. They duly complied.

Plaintiff's Submissions

- 25.** Counsel for the Plaintiff began his submissions by restating history of the matter, pleadings and evidence by the respective parties meanwhile condensed his submission into two (2) cogent issues. On whether the distraint was unlawful, dishonest, unprofessional and oppressive, while placing

reliance on the decisions in **C.Y.O Owayo v George Hannington Zephania Adudat/A Aduda Auctioneers & another [2007] KECA 508 (KLR)** and **Gusii Mwalimu Investment Co. Ltd & 2 Others v Muahimu Hotel Kisii Ltd [1996] KECA 69 (KLR)**, counsel submitted that the actual rent arrears was Kshs. 60,000/- whereas the claim for Kshs. 569,000/- was illegal. That the suit premise was handed over to a new tenant unlawfully, without regard to the Plaintiff's property. It further posited that the wrongful act committed at the beginning by seeking to levy distress, invalidates all subsequent actions by the Defendants.

- 26.** On whether the Plaintiff is entitled to the relief sought, counsel submitted that the value of the attached property premised on the Plaintiff's evidence was Kshs. 14,038,964/-. That the 1st Defendant's valuation as evinced before the Court was inaccurate meanwhile the Plaintiff was running a successful bakery business that underwent losses to the tune of Kshs. 20,356,095/- following the illegal distraint of goods by the 2nd and 3rd Defendant.
- 27.** That 2nd and 3rd Defendant's action of re-entering the premises and handing over the same to another tenant without considering his property which was still in the premises amounted to conversion, for which the Plaintiff claims damages. In conclusion, it was submitted that the Plaintiff has satisfactorily proved the distraint of goods was unlawful, dishonest, unprofessional and oppressive which led to the Plaintiff not only incurring massive loses but also wastage of goods thrown out of the premises therefore the suit ought to be allowed as prayed.

1st Defendant's Submissions

- 28.** On the part of the 1st Defendant, equally restating events leading hereto, the pleadings and evidence by the respective parties' counsel condensed his submission into five (5) salient issues for the Court's consideration.
- 29.** On whether the Plaintiff had made out a case as against the 1st Defendant, firstly, it was posited that the instructions to levy distress were lawful and there were no orders injuncting the 1st Defendant from carrying out its lawful duty. Secondly, the 1st Defendant took precautionary measures such as obtaining a break in order and booking the attached goods to a storage facility.
- 30.** Thirdly, it was submitted that the 1st Defendant was never a party to the proceedings before the BPRT meanwhile iterated there being no interlocutory order barring the 1st Defendant from disposing of the attached property. Counsel went on to posit that the judgment emanating from the BPRT, on 17/07/2017, despite directions on the release of the distressed goods, the latter was subject to payment of rent arrears and auctioneer charges. Counsel went on to argue that it was not until 31/01/2018 that attempts were made to notify the 1st Defendant, of the BPRT orders, whereas the latter only became aware of the same on 05/04/2018, the notification having been received into the 1st Defendant's spam folder.
- 31.** Fourthly, despite informing the Plaintiff of auctioneer fees and storage charges, the latter failed to take up the opportunity to salvage his goods, to wit, the 1st Defendant was obligated to mitigate the situation. Therefore, the Plaintiff cannot claim that

the distress and sale of his property was unlawful yet he refused to pay the auctioneer's costs.

- 32.** Fifthly, it was submitted that the Plaintiff's claim in respect of the value of the attached property and loss of business was not supported by any credible evidence. The decisions in **Okwaro v Okungu [2025] KEHC 6772 (KLR)** and **Permuga Auto Spares & Barclays Bank of Kenya Ltd v Margaret Korir Tagi [2015] KEHC 3406 (KLR)** were cited in the forestate regard. Penultimately, it was posited that the eventual sale of the distrained goods was not illegal but a lawful act to mitigate storage costs after the Plaintiff failed to comply with the BPRT's orders on payment of auctioneer's costs. In conclusion, the Court was urged to dismiss the Plaintiff's claim with costs.

2nd & 3rd Defendant's Submissions

- 33.** On the part of the 2nd & 3rd Defendants, equally restating events leading hereto, the pleadings and evidence by the respective parties' counsel condensed his submission into two (2) cogent issues. On whether the 2nd & 3rd Defendant were entitled to recover rent arrears, while calling to aid **Section 3** of the **Distress for Rent Act** and the decision in **Royal Garden Hospital v Ebrahim Omanyi Ambwere & Another [2018] KEHC 4891 (KLR)**, counsel submitted that the purport of the final decision of the BPRT was that the Plaintiff was obligated to settle all outstanding rent arrears upon which the Defendants would release all distrained goods. That the Plaintiff having been in rent arrears, as confirmed by the evidence before Court, the 2nd and 3rd Defendant were well

within their rights to distress for rent, of which they did, upon recovery of Kshs. 62,222/- received from the 1st Defendant.

- 34.** On whether the Plaintiff is entitled to the reliefs sought, counsel placed reliance on the decisions in **Joseph Ochieng & 2 Others trading as Aquiline Agencies v First National Bank of Chicago [1995] KECA 31 (KLR)** and **Capital Fish Kenya Limited v The Kenya Power and Lighting Company Limited [2016] KECA 56 (KLR)** to submit that the Plaintiff failed to particularize with precision and particularity the sums of Kshs. 14,038,964/- being the total value of the auctioned equipment and Kshs. 20,356,095/- being the value of loss of earnings, was arrived at. That the 2nd and 3rd Defendant having proven on a balance of probabilities that they were well within their rights to distrain for rent, the Plaintiff is not entitled to any general damages whatsoever. That Plaintiff having admitted that he was in rent arrears no violation was visited upon him on account of the 2nd & 3rd Defendant's actions. Counsel urged the Court to dismiss the claims with costs.

Analysis and Determination

- 35.** The Court has carefully considered the respective parties' pleadings, the evidence adduced by respective witnesses, and the parties' written submissions. **Issues for determination concern-;**

- a. *Whether the Plaintiff has made out a case as against the Defendants on a balance of probabilities?*
- b. *Whether the Plaintiff is entitled to the reliefs sought?*
- c. *Who ought to bear costs?*

Whether the Plaintiff has made out a case as against the Defendants on a balance of probabilities?

- 36.** Pertinent to the determination of the said issue at fore are the pleadings, which form the basis of the respective parties' case before this Court. See-; **Wareham t/a A.F. Wareham & 2 Others v Kenya Post Office Savings Bank [2004] 2 KLR 91.** Akin to pleadings is evidence in support of the pleadings. The applicable law as to the burden of proof is found in **Section 107, 108 and 109** of the **Evidence Act.** In **Karugi & Another v Kabiya & 3 Others (1987) KLR 347** the Court of Appeal stated that-:

“[T]he burden on a plaintiff to prove his case remains the same throughout the case even though that burden may become easier to discharge where the matter is not validly defended and that the burden of proof is in no way lessened because the case is heard by way of formal proof....The plaintiff must adduce evidence which, in the absence of rebuttal evidence by the defendant convinces the court that on a balance of probabilities it proves the claim.”

- 37.** At the heart of the dispute, is whether the distraint for rent, proclamation, attachment and eventual auction of the Plaintiff's property was unlawful or irregular, to wit, the claim for damages in the sum of Kshs. 14,038,964/- being the total value of the auctioned equipment, Kshs. 20,356,095/- being the value of loss of earnings and general damages for conversion, as sought, are awardable.

- 38.** To the forestated end, the undisputed facts as can be gathered from the respective parties' pleadings and evidence is as follows:
- 39.** By dint of a three (3) year lease agreement running from 01/04/2012 to 31/03/2015, the Plaintiff was a tenant in the suit premises owned by the 2nd Defendant and at the time managed by the 3rd Defendant. That it was an agreed term during the subsistence of the lease tenancy, that the Plaintiff would pay a monthly rent of Kshs. 30,000/- per month. It would appear that sometime in February or March of 2016, upon termination of the lease, a dispute as to rent arrears arose, to wit, the 2nd & 3rd Defendant made a demand for the same and eventually instructed the 1st Defendant to levy distress on rent arrears.
- 40.** The dispute was initially presented by the Plaintiff before the Chief Magistrates Court, wherein he sought injunctive reliefs, however it would seem that the cause was dismissed for non-attendance, on the part of the Plaintiff's counsel.
- 41.** Nevertheless, the Plaintiff thereafter moved the **BPRT** vide **Cause No. 761 of 2016** pursuant to **Section 12** of the **Landlord and Tenant (Shops, Hotels and Catering Establishments) Act**, which cause was eventually determined on 17/11/2017. The Court will address the purport of the latter determination later in this judgment. That said, in light of the undisputed facts, the Court must determine whether the Defendants actions were justified in light of the forestated.
- 42.** At the outset, it is not contested that upon the 2nd & 3rd Defendant issuing instructions to 1st Defendant to levy distress

for rent arrears as against the Plaintiff, the lease period running from 01/04/2012 to 31/03/2015, had since demised.

43. That said, it necessitates a reminder that on the basis of witness testimony presented before this Court, for all intents and purposes the tenancy in question was controlled. Further, as concerns, the lapse of the tenancy or the purported rental increment and or whether the 2nd and 3rd Defendant could levy distress for rent, the issues were addressed by the BPRT in its determination rendered on 17/11/2017, adduced by the respective parties.

44. Yet, for the benefit of the parties and the Court, **Section 2** of the **Landlord and Tenant (Shops, Hotels and Catering Establishments) Act** defines a “controlled tenancy” in respect of a shop, hotel or catering establishment to mean-;

(a) which has not been reduced into writing; or

(b) which has been reduced into writing and which—

(i) is for a period not exceeding five years; or

(ii) contains provision for termination, otherwise than for breach of covenant, within five years from the commencement thereof; or

(iii) relates to premises of a class specified under subsection (2) of this section:

Provided that no tenancy to which the Government, the Community or a local authority is a party, whether as landlord or as tenant, shall be a controlled tenancy;

45. Whereas Section 4(1), (2) & (6) of the Act provides that-;

“(1) Notwithstanding the provisions of any other written law or anything contained in the terms and conditions of a controlled tenancy, no such tenancy shall terminate or be terminated, and no term or condition in, or right or service enjoyed by the tenant of, any such tenancy shall be altered, otherwise than in accordance with the following provisions of this Act.

(2) 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 a tenancy, shall give notice in that behalf to the tenant in the prescribed form.

(3)

(4)

(5)

(6) A tenancy notice may be given to the receiving party by delivering it to him personally, or to an adult member of his family, or to any other servant residing within or employed in the premises concerned, or to his employer, or by sending it by prepaid registered post to his last known address, and any such notice shall be deemed to have been given on the date on which it was so delivered, or on the date of the postal receipt given by a person receiving the letter from the postal authorities, as the case may be.”

46. Meanwhile, given the dispute presented before this Court, the above provisions must be understood in the prism of **Section 3** of the **Distress for Rent Act**, which provides that-;

(1) Subject to the provisions of this Act and any other written law, any person having any rent or rent service in arrear and due upon a grant, lease, demise or contract shall have the same remedy by distress for the recovery of that rent or rent service as is given by the common law of England in a similar case.

(2) No distress shall be levied between sunset and sunrise or on any Sunday.

47. Notably, concerning notice, the question was succinctly addressed by the **Court of Appeal in South C Fruit Shop Limited v Housing Finance Company of Kenya Limited [2013] KECA 330 (KLR)** wherein it stated that a controlled tenancy can only be terminated by issuing the notice prescribed under The Landlord and Tenant (Shops, Hotels and Catering Establishments) Act. That said, earlier **A.B. Shah, JA. in Gusii Mwalimu Investment Co. Ltd & 2 Others v Muahimu Hotel Kisii Ltd [1996] KECA 69 (KLR)** observed stated -;

“To obtain possession by carrying out illegal distress is per se wrong. ...if what the landlord did in the case is allowed to happen we will reach a situation where the landlord will simply walk into the demised premises exercising his right of re-entry and obtaining possession extra-judicially. A court of law cannot allow such state of affairs whereby the law of the jungle takes over. It is a trite law that unless a tenant consents or agrees to give possessions, the landlord has to obtain all orders from a competent court or statutory tribunal (as appropriate) to obtain an order for possession”.

48. Here, the Court opts to tread lightly, so as not to sit on appeal over the decision of the BPRT. The latter notwithstanding, having taken the liberty of reviewing the BPRT finding on the question of notice, in the Court's estimation, determination on the issue was sound given the facts. Nevertheless, the Court must remind itself the contestation presently before it, turns on whether the sale by auction of the Plaintiff's property was irregular and unlawful and not an interrogation concerning the Plaintiff's tenancy.
49. By the Plaintiff's evidence adduced as PExh.1, there was no demonstration of the fact that between 11/03/2016, as at when the 1st Defendant was instructed by the 2nd & 3rd Defendant, and as at determination of BPRT Cause No. 761 of 2016 on 17/11/2017, there existed and or subsisted any injunctive orders as against the Defendants barring the exercise of **Section 3 of the Distress for Rent Act**.
50. Still, the determination of **BPRT Cause No. 761 of 2016** was to the effect that, and I quote ad verbum-;
- “All in all upon consideration of all the facts the tribunal makes the following orders*
- 1) *The landlord and his agent Joseph Gikonyo t/a Garam Auctioneers are ordered to release the tenant's distrained properties subject to the tenant paying any arrears of rent, if any, at the rate of Kshs. 30,000/- as at 11/03/2015.*
 - 2) *The tenant shall pay auctioneers charges, if any, based on the outstanding arrears of rent at Kshs. 30,000/- and if no arrears of rent were outstanding*

as at 11/03/2016 at the monthly rate of Kshs. 30,000/- the landlord shall bear auctioneer charges.

3) The landlord shall refund the tenant any rent paid over and above the monthly rent of Kshs. 30,000/- within 30 days from the date hereof.

4) The landlord shall give the tenant unlimited access to the premises to remove any furniture and fittings which may be in the suit premises in the presence of the O.C.S who has jurisdiction in the area of the suit premises.

5) Any other dispute between the parties shall be dealt with by a civil court of competent jurisdiction.

6..... ” (sic)

51. *Ex facie*, the implication of the above order was self-evident. Firstly, there was no pronouncement by the BPRT on the amount of rent arrears outstanding from the Plaintiff. All the BRPT ordered was the *modus* of calculating rent arrears, if any. Secondly, the 1st Defendant was to release the Plaintiff's distrained property upon the latter paying any rent arrears as at 11/03/2016. Thirdly, the Plaintiff was to pay auctioneer charges, on the premise, of any outstanding rent arrears.

52. By the respective parties' evidence, there is no indication as to whether the parties agreed and or attempted to agree on a tabulation of the Plaintiff's rent arrears. **PW1** by his testimony, states that he was in arrears of Kshs. 60,000/-. No evidence was tendered to shore up the said position. Meanwhile, the arrears or payment as evinced by **DW2** cannot easily be discerned from the rent statement appearing in **DW2 Exh.2**. The document was inconclusive as to its intent.

53. By **DW1**'s own admission, he only came to learn of the BPRT decisions on 05/04/2018. It can further be gathered from the evidence on record that the sale of the Plaintiff's goods was conducted by public auction on 11/07/2018. Which yielded, a total of Kshs. 771,000/-, upon which a cheque in the sum of Kshs. 62,222.80/- was remitted to the 3rd Defendant.

54. I find it useful to quote in part the contents of the 1st Defendant's letter dated 16/07/2018, concerning the public auction, appearing in **DW1 Exh.1**. It reads in part as follows-;

"...Further to our advertisement in the newspaper we on 11.07.2018 at 11.00am proceeded to Auto Gallery - Westlands with a view to auction goods earlier attached at the above premises. These were sold as follows.....

Enclosed please find and kindly acknowledge receipt of our cheque for Kshs. 62,222.80 (sixty two thousand two hundred twenty two cents eighty only) being the sale proceeds after deduction of our fees"

NB: Goods attached and left at the premises which were due to be sold in-situ at the premises were not sold as the amount realized was sufficient to cater for the storage, auctioneer's fees and arrears as per the Court order.

55. The Plaintiff equally contends that he had overpaid his rent arrears in the sum of Kshs. 190,000/- however no material was adduced to buttress the assertion. It is also apparent that the Plaintiff's property was in storage and accrued storage charges, to wit, overtures were made to the Plaintiff to settle the same. However, his response through counsel, via a letter

dated 23/05/2018 appearing in **DW1 Exh.1**, was that he was only liable to settle Kshs. 10,000/- .

- 56.** Consequently, was **1st Defendant** justified to proceed as he did in light of the aforestated?
- 57.** Despite being alive to the purport of the BPRT order as at 05/04/2018 and prior to the public auction on 11/07/2018, save for his letter dated 13/06/2017 inquiring on to the position of the Chief Magistrate Court matter, no attempts appear to have been advanced by the 1st Defendant to ascertain the Plaintiff's rent arrears, in light of the BPRT decision.
- 58.** Invariably, **Rule 7** of the **Auctioneer Rules** does provide that a debtor shall pay charges of the Auctioneer. Thus, on the backdrop of the 2nd and 3rd Defendant instructions to the 1st Defendant to levy distress, it was statutorily obligated of the Plaintiff to settle the 1st Defendants fees. However, it would seem that as per the letter dated 22/01/2018 and subsequent letter dated 23/05/2018, there was a dispute, as to the 1st Defendant fees alongside lack of consensus on rent arrears payable.
- 59.** As to, the former, the Auctioneer's rules is overt as to *modus*, to wit, a dispute on Auctioneer's fees is settled. **Rule 55(1)** of the **Auctioneer Rules** provides that-;

Except as may be provided by any other written law or by contract the fees set out in the Fourth Schedule payable to the auctioneer for the attachment, repossession and sale of movable and immovable property under court warrants or letters of instructions shall be charged in accordance with these Rules.

60. Whereas **Sub-Rule (3)** of **Rule 55** states that-;

In any other case where a dispute arises as to the amount of fees payable to an auctioneer, a magistrate or the Board may, on the application of any party to the dispute, assess the fees payable.

My understanding of the above provisions is that, given the dispute as to 1st Defendants fees, the latter ought to have in the first instance ascertained rent arrears due to the 2nd and 3rd Defendant and thereafter submitted his bill of costs for assessment before a Magistrate. Rather than unilaterally proceeding to sell off the Plaintiff's property through public auction and afterwards recovering from the proceeds, storage charges and his fees and thereafter remitting the balance thereof to the 3rd Defendant, towards offsetting rent arrears.

61. Proper practice would have dictated, of the 1st Defendant, to first remit the total sum on the rent arrears from the proceeds of the

auction sale before settling his fees, of which further proper practice, would have required of him to exercise the same after assessment of his costs, given the dispute on his fees.

62. Can it therefore be stated that the 1st Defendant and by extension the 2nd and 3rd Defendants are guilty of conversion, given the circumstances of the matter?

63. By his plaint, **PW1** sought damages for conversion. That said, reading **Order 2 Rule 4 of the Civil Procedure Rules (CPR)**, it is trite that particulars such as negligence, fraud, release, payment must be pleaded with particularity. PW1 pleaded that the totality of the Defendants action was by design, and always been, to disenfranchise him and wrest his property.

64. That said, **Winfield and Jolowicz on Tort 15th Edn. Pg 588**, state that conversion occurs through acts of

“Wrongfully taking possession of goods, by wrongfully disposing them, by wrongfully destroying them or simply refusing to give them up when demanded.”

65. Halsbury's Laws of England, 4th Edition Pg 355 Para 548, the authors explain the various forms of conversion, or theft for that matter, namely:

“To constitute the first form of conversion there must be a positive wrongful act of dealing with the goods in a manner inconsistent with the owner's rights and an intention in doing so to deny the owner's rights or to assert a right inconsistent with them. This inconsistency is the gist of the action. There need not be any knowledge on the part of the person sued that the goods belong to someone else; nor need there be any positive intention to challenge the true owner's rights. Liability in conversion is strict and fraud or other dishonesty is not a necessary ingredient in the action....”

66. It is trite that while the mere taking of possession of another's chattels may amount to trespass, it is not conversion unless the act is accompanied by the intention to assert rights over the goods that are inconsistent with the rights of the owner of the goods.

67. In this case, and as earlier discussed, it is apparent that the actions and intentions inconsistent with the Plaintiffs' rights to the auctioned property, has undoubtedly been demonstrated against the Defendants. Thus, in my estimation the Defendants

are liable for the loss thereof as incurred by the Plaintiff as at when the public auction was conducted-; prior to ascertaining the rent arrears payable; in disregard of the release order by the BPRT; and upon utilization of proceeds therefrom to settle the 1st Defendant fees prior to assessment of his costs.

Whether the Plaintiff is entitled to the reliefs sought?

68. It was affirmed by Githinji J (as he then was) in the case of **W.N. Kimani t/a Kencity Auctioneers v The Chief City Inspectorates Superintendent & Another [1998] eKLR**, the right of a Plaintiff in a claim for conversion to recover the value of goods taken from his possession, but held that “***on the principle of restituo integrum (such plaintiff) is entitled to be compensated for the financial loss he has actually suffered***”.

69. Emukule J, (as he then was) while dealing with a claim for conversion set out the damages available to the claimant as follows:

“40. The issue that then follows for determination is the question of damages to be awarded to the Plaintiff. In determining this question, I am guided by the passage in Halsbury's Laws of England (supra) at Pg 389 Para 616 on the measure of damages. The authors' state: -

615. Nominal measure of damages. ... In general, damages in conversion are compensatory, their object being to repair the actual loss, which the claimant suffers by reason of the conversion. This conforms to the general rule that damages in tort must (so far as money can do so) put the person

whose right has been invaded in the same position as if it had been respected. Accordingly, an award of damages in conversion must operate neither by way of penalty to the Defendant nor by way of windfall to the claimant. In general, there must also be a causal connection between the act of conversion and the loss sustained, and proof of actual loss.

616. Conventional measure: value of goods. The conventional measure of damages in conversion is the value of the goods converted together with any consequential loss which is not too remote. That measure normally applies where the conversion takes the form of a wrongful deprivation or misappropriation, and the goods are not returned later”.

41. The Plaintiffs are therefore entitled to compensation for the value of the property as at the time of the conversion. In addition to reimbursement of the cost of the goods, they are also entitled to an award for the profit they could have made save for the unlawful acts of the Defendant”.

70. However, before proceeding to address the above, the Court wishes to first dispose of the twin claims of Kshs. 14,038,964/- being the value in respect of costs goods, freight costs, marine cargo insurance and the tax levied thereon; and loss of earnings amounting to Kshs. 20,356,095/-.

71. On the latter, the Court of Appeal in **S J v Francesco Di Nello & another [2015] KECA 606 (KLR)**, though addressing itself to a personal injury claim, distilled the distinction between “loss of earnings” and “loss of earning capacity”. It observed that: -

“..... Loss of income which may be defined as real or actual loss is loss of future earnings. Loss of income or future earnings is compensated for real assessable loss which is proved by evidence. the position enunciated in *FAIRLEY V JOHN THOMSON LTD* [1973] 2 *LLYOD’S LAW REPORTS* 40 at pg. 14 wherein Lord Denning M.R. said as follows:

“..... Compensation for loss of future earnings is awarded for real assessable loss proved by evidence.”

72. The Court proceeded to state that -:

“The correct position as in the Fairley case (*supra*) was restated by this court in the case of **Cecilia Mwangi & Another v Ruth W. Mwangi CA No. 251 of 1996** as hereunder:

“Loss of earnings is a special damage claim. It must be specifically pleaded and strictly proved.”

73. It is since settled within our jurisdiction that a claim premised on special damages must be specifically pleaded and proved. See **David Bagine vs. Martin Bundi [1997] KECA 54 (KLR) and Ouma v Nairobi City Council (1976) KLR 304**. Here, the Plaintiff made a claim for loss of earnings amounting to Kshs. 20,356,095/-. In support of the claim, the Plaintiff relied on evidence from PW2 and PExh.2. PW2 in his evidence acceded to the fact there were no supporting documents in respect of PExh.2 whereas the same merely constituted projections and was not premised on actual data. He further acquiesced that the document had neither a letter, stamp nor a signature to authenticate its authorship.

- 74.** A review of PExh.2, the document was heavily assailed and or impeached by the Defendants. As rightly contended, the document merely constituted a print out without any supporting documents or report demonstrating the Plaintiff's audited profit and loss accounts, bank records, financial statement & position, receipts, business license, client contracts and or annual tax returns prior to his property being distrained.
- 75.** For one to prove loss of earnings some industry ought to have been employed towards shoring up PExh.2, by evincing support documents for the purported projections. PW2, having stated that he was an accountant with over thirteen (13) years of experience, though not having a current practicing certificate, ought to **have known** better and or applied himself better to the evidence. As is, the evidence tremendously falls short of proving loss of earnings amounting to Kshs. 20,356,095/-. To wit, the same is accordingly declined.
- 76.** With respect to the claim of Kshs. 14,038,964/- being the value in respect of costs goods, freight costs, marine cargo insurance & tax, in respect of the attached property. PW1 relied on PExh.1, which consisted of Letter of Credit, Freight Invoices, Bakery Machine Proforma, KRA Import declaration form, Insurance and Charge securing letter of credit. While the above may have represented importation of bakery equipment, the same did not necessarily translate into the actual value of the distrained Plaintiff's property. There was no valuation report evinced by the Plaintiff and or insurance policy, to visibly, quantify the value of the property the Plaintiff avers he

lost as a result of the Defendant's actions. The only valuation report on the distrained property was filed by the 1st Defendant in DW1 Exh.1. Consequently, applying my mind to the dicta in David Bagine (supra) and Ouma (supra) the Plaintiff failed to prove the sum of Kshs. 14,038,964/- as being the actual value of the attached property, to wit, the claim is equally declined.

77. Thus, returning to the claim for damages for conversion, the Court of Appeal in **Diamond Trust Bank Kenya Ltd v Said Hamad Shamisi & 2 others [2015] KECA 717 (KLR)** addressed itself to the issue as follows-;

“There is no real disagreement between Shamisi and the Bank that prima facie the measure of damages for conversion is the market value of the goods at the date of conversion..... The general rule in award of damages is that the claimant is entitled to only what is necessary to compensate his actual loss. As Lord Templeman stated in BBMB FINANCE (HONG KONG) LTD V. EDA HOLDINGS LTD (1991) 2 ALL ER 129, at p. 132, the purpose of award of damages for conversion is to compensate, not to punish and therefore cannot be awarded as a penalty.

.....
Decisions abound where the agreed purchase price of a chattel has been treated as its reasonable value. In AKAMBA PUBLIC ROAD SERVICES LTD V. TABITHA KERUBO OMAMBIA, CA NO 89 of 2010 (Kisumu) this Court upheld a decision of the High Court in which, the price paid for a matatu that was written off in an accident shortly after purchase, was treated as its value. Similarly in BBMB FINANCE (HONG KONG) LTD V. EDA HOLDINGS LTD

(supra), the Privy Council accepted as a general rule the proposition that where goods are irregularly converted and were not recovered, the measure of damages was the value of the goods at the time of the conversion, and therefore the plaintiffs were entitled to damages for conversion equal to the market price of the goods at the date of conversion.

- 78.** Applying my mind to the above dicta, at the risk of repetition, the Plaintiff offered no valuation report of the distrained property prior to their auction. Whereas, the only valuation availed before the Court was the one supplied by the 1st Defendant. Nevertheless, it is not in dispute that vide the 1st Defendant's letter dated 16/07/2018, the latter duly informed the 3rd Defendant of the successful auction of the Plaintiff's property and the forced sale value received for the property at the time.
- 79.** In the absence of any other evidence as to the value of the auctioned property, the Court is constrained to award the Plaintiff damages in the sum of Kshs. 771,000/- for conversion, this being the forced value and amount fetched for the Plaintiff's property, sold at auction.
- 80. In the end, the Court finds and holds the Defendants jointly and severally liable for conversion of the Plaintiffs property and enters judgment accordingly as hereunder -:**
- a. General damages for conversion - Kshs. 771,000/-**
- 81. The above amount shall attract interest at Court rates from the date of this judgment until full settlement.**

82. Finally, on costs, applying my mind to the provision of Section 27 of the Civil Procedure Act, I award costs of the suit in favour of the Plaintiff to be borne by the Defendants Orders accordingly.

Delivered Dated and Signed at Nairobi this 5th March, 2026.

.....

JANET MULWA.

JUDGE

ORIGINAL