



**REPUBLIC OF KENYA**

**IN THE ENVIRONMENT AND LAND COURT AT NAIROBI**

**ELC SUIT NO. 396 OF 2017**

**BILLY KIKONDE MULL.....PLAINTIFF**

**VERSUS**

**REGISTERED TRUSTEES OF KENYA RAILWAYS**

**STAFF RETIREMENT BENEFITS SCHEME.....DEFENDANT**

**RULING**

The Plaintiff brought his suit on 14<sup>th</sup> June, 2017 seeking the following reliefs against the defendant:

- (i) A permanent injunction to restrain the defendant from levying distress for rent, harassing or evicting the plaintiff from Muthurwa Railway Police Canteen (hereinafter referred to as “the suit property”);
- (ii) An order for the Plaintiff to deposit rent in court;
- (iii) Costs of the suit.

In the plaint, the plaintiff averred that at all material time he was and still is the defendant’s tenant in respect of the suit property at a monthly rent of Kshs. 15,000/= . The plaintiff averred that following a notice that was served upon him by the defendant of its intention to terminate his tenancy, he filed a suit against the defendant at the Business Premises Rent Tribunal (BPRT) which was determined in his favour on 17<sup>th</sup> May, 2010. The plaintiff averred that for a period of about 7 years from the date on which the said BPRT dispute was determined, the defendant declined to accept rent from the plaintiff until 28<sup>th</sup> March, 2017 when the defendant issued him with an invoice for Kshs.1,275,000/= for alleged rent arrears. The plaintiff averred that he made two (2) lump sum payments to the defendant in the sum of Kshs.330,000/= and Kshs.250,000/= the latter payment having been made on 29<sup>th</sup> May, 2017. The plaintiff averred that the sum of Kshs.1,275,000/= being claimed by the defendant as rent arrears is disputed and is a ruse by the defendant to evict him from the suit property. The plaintiff averred that despite the dispute over the said rent arrears, the defendant instructed Nyalgunga Auctioneers on 7<sup>th</sup> June, 2017 to levy distress against the plaintiff to recover the alleged rent arrears. The plaintiff averred that he would suffer irreparable loss if the defendant was not restrained from continuing with the said distress for rent.

Together with the plaint, the plaintiff filed an application by way of Notice of Motion dated 12<sup>th</sup> June, 2017 seeking a temporary injunction to restrain the defendant from levying distress for rent, evicting, harassing or in any other way interfering with the his quiet possession of the suit property pending the hearing and determination of the suit. The application was supported by the affidavit of the plaintiff sworn on 12<sup>th</sup> June, 2017 in which he reiterated the contents of the plaint.

The application was opposed by the defendant through a replying affidavit sworn by the defendant’s Chief Executive Officer, Simon Nyakundi on 30<sup>th</sup> August, 2017. In response to the plaintiff’s claim, the defendant averred that the plaintiff had not paid rent for several years a fact that was admitted by the plaintiff. The defendant averred that the last payment that was made by the plaintiff on account of rent was made in June, 2016. The defendant averred that the plaintiff refused to pay rent alleging that he had obtained a court order that authorized him not to pay rent to the defendant. The defendant averred that as at 6/6/2017, the plaintiff was indebted to the defendant to the tune of Kshs.1,327,200/= being rent arrears for a period of 84 months. The defendant averred that the demand that was sent to the plaintiff to pay the said rent arrears did not elicit positive response leaving the defendant with no alternative but to levy distress for the recovery thereof. The defendant averred that since the plaintiff had admitted that he was in rent arrears, the injunction application has no basis.

The application was argued by way of written submissions. The defendant filed its submissions on 13<sup>th</sup> November, 2017 while the plaintiff filed his submissions on 30<sup>th</sup> November, 2017. In his submissions, the plaintiff submitted that although there may be rent due to the defendant, the distress that was levied by the defendant was unlawful on the grounds that the distress was levied in respect of rent that was in dispute and for rent that had been outstanding for more than six (6) years. The plaintiff submitted that he had paid Kshs.330,000/= on 13<sup>th</sup>

October, 2010 and Kshs.225,000/= on 29<sup>th</sup> May, 2017 which the defendant did not take into account while levying the said distress. The plaintiff submitted further that the distress by the defendant was not levied in good faith. The plaintiff submitted that the defendant had declined to furnish him with the account of the outstanding rent and had also attempted to cancel his licence.

In reply, the defendant submitted that the plaintiff was in rent arrears to the tune of Kshs.1,119,600/= as at July,2017 and that the plaintiff had failed to pay the said amount despite several demand letters to him. The defendant submitted that the plaintiff was guilty of material non disclosure. The defendant submitted that the plaintiff failed to disclose to the court that he was in rent arrears and that demand had been made upon him to pay the same. The defendant submitted that the plaintiff had failed to establish a prima facie case and to demonstrate that he would suffer irreparable harm if the injunction sought was not granted.

I have considered the application, the affidavit filed in opposition thereto and the submissions of counsel. What is before me is an application for a temporary injunction. The principles upon which the court exercises its discretion in applications for temporary injunction are settled. As was held in the case of Giella v. Cassman Brown & Co. Ltd. (1973) E.A 358, an applicant for a temporary injunction must establish a prima facie case against the respondent and must also demonstrate that he stands to suffer irreparable harm that cannot be compensated in damages if the orders are not granted.

On the material before me, I am satisfied that the plaintiff has established a prima facie case with a probability of success against the defendant. It is not disputed that the amount of Kshs.1,327,200/= in respect of which distress was levied by the defendant was inclusive of rent that had been outstanding for over six (6) years. The recovery of that rent may be time barred under section 8 of the Limitation of Action Act, Chapter 22 Laws of Kenya. The plaintiff has also established that the defendant did not give him credit for the sum of Kshs.225,000/= that was paid on 31<sup>st</sup> May, 2017 by a cheque dated 27<sup>th</sup> May, 2017. I am in agreement with the plaintiff that distress levied for rent which is not payable or which has been paid is unlawful. I am satisfied that a prima facie case for unlawful distress has been established against the defendant.

I am also satisfied that the plaintiff would suffer irreparable harm if the injunction sought is not granted. The plaintiff is running a canteen business and is not likely to raise the sum of Kshs.1,327,000/= claimed by the defendant. If the injunction sought is not granted and the defendant continues with the distress, the plaintiff's business would be completely ruined having regard to the items that had been attached by the defendant.

For the foregoing reasons, it is my finding that the plaintiff has satisfied the conditions for granting a temporary injunction. The court will however grant the injunction conditionally. In paragraph 20 of the plaintiff's affidavit in support of the application, the plaintiff has admitted that he was in rent arrears for 44 months (October 2013 to June, 2017) in the sum of Ksh.660,0000/=. There is no reason why this admitted rent should not be paid to the plaintiff.

In conclusion, the Notice of Motion dated 12<sup>th</sup> June, 2017 is allowed on the following terms:

1) The defendant whether by its servants, employees or agents are restrained from levying distress for rent against the plaintiff in respect of the suit property on condition that the plaintiff pays to the defendant a sum of Kshs.660,000/= being the admitted rent arrears from October, 2013 to June, 2017 and all rent accruing from July, 2017 to date within 60 days from the date hereof and to continue paying rent as and when the same falls due in default of which the injunction granted herein shall automatically stand discharged.

2) The costs of the application to be in the cause.

**Delivered and Dated at Nairobi this 12<sup>th</sup> Day of July 2018**

**S. OKONG'O**

**JUDGE**

**Ruling read in open court in presence of:**

N/A for the Plaintiff

Mr. Wafula for the Defendant

Catherine Court Assistant