



REPUBLIC OF KENYA
IN THE ENVIRONMENT AND LAND COURT

AT NAIROBI

ELC NO. 918 OF 2016

MILKAH CHEBOSIS SITATI.....1ST PLAINTIFF

GABRIEL MURIMI GATHITU.....2ND PLAINTIFF

VERSUS

NESCO SERVICES LIMITED.....DEFENDANT

RULING

The Plaintiffs' are the tenants of the Defendant in respect of apartments erected on the parcel of land known as L.R No. 209/13557. The 1st Plaintiff became a tenant of the Defendant pursuant to a lease agreement dated 23rd October, 2013 under which the Defendant leased to the 1st Plaintiff apartment known as Unit Beya Beya 2 No. 10 for a renewable term of one (1) year commencing on 5th November, 2013. The 2nd Plaintiff on the other hand became a tenant of the Defendant pursuant to a lease agreement dated 1st September, 2012 under which the Defendant let to the 2nd Plaintiff apartment known as Unit Beya Beya 2 Flat No. 1 for a renewable term of one year with effect from 1st September, 2012. The said premises were leased to the Plaintiffs on terms and conditions set out in the said leases. The 2nd Plaintiff's lease with the Defendant expired by effluxion of time on 31st August, 2013 while the 1st Plaintiff's lease expired on 1st October, 2014. The Plaintiffs remained in occupation of the suit properties after the expiry of the said leases on the same terms. The Defendant and the Plaintiffs have to date not agreed on the terms of the new leases for the premises occupied by the Plaintiffs. At all material times, the Defendant had an employee by the name of Boniface Odhiambo Okello who used to collect rent on behalf of the Defendant from its tenants, the Plaintiffs inclusive. The said Boniface Odhiambo Okello also used to give receipts for the payments made to him on behalf of the Defendant.

The Plaintiffs brought this suit on 29th July, 2016 seeking a permanent injunction to restrain the Defendant from levying distress, evicting, harassing, intimidating or trespassing or in any manner whatsoever interfering with the Plaintiffs' leases over the suit premises. Together with the plaint, the Plaintiffs filed an application by way of Notice of Motion dated 29th July, 2016 seeking a temporary injunction to restrain the Defendant from levying distress against them or evicting, harassing or interfering with their peaceful occupation of the suit premises pending the hearing and determination of this suit. The Plaintiffs' application was supported by separate affidavits sworn by the Plaintiffs on 29th July, 2016. The application was brought on the ground that the Defendant had instructed an auctioneer to levy distress for rent against the Plaintiffs in respect of the suit premises while there was no rent due by the Plaintiffs to the Defendant. The Plaintiffs contended that the said auctioneer had made a proclamation on the Plaintiffs' assets on the suit premises pursuant to the unlawful instructions from the Defendant.

The Plaintiffs contended that the distress levied against them was unlawful and that unless the injunction sought was granted the Defendant would proceed through the said auctioneer to remove the Plaintiffs' proclaimed goods from the suit premises for sale to recover non-existent rent arrears. The Plaintiffs contended that the bone of contention between them and the Defendant is the rent which they paid through M-pesa to the Defendant's employee Boniface Odhiambo Akello who failed to remit the same to the Defendant. The said employee was discharged of his duties with the Defendant on or about 6th May 2016 and a report made against him to the police regarding the monies which he received from the Plaintiffs on account of rent and in respect of which he did not account. The Plaintiffs annexed several documents to their affidavits in proof of the fact that they were not in rent arrears and that the distress for rent levied against them was unjustified.

The application was opposed by the Defendant through a replying affidavit sworn by Harun Osoro Nyamboki on 1st August, 2016. In the said affidavit, the Defendant admitted that the Plaintiffs were its tenants on the suit premises and that their leases had expired. The Defendant stated that it had given the Plaintiffs offers of new leases at new rent of Kshs.45,000/- per month which according to the Defendant was the rent payable by the Plaintiffs. The Defendant averred that rent was to be paid by the Plaintiffs directly to the Defendant at its offices or to its bank account or by M-pesa through a designated number. The Defendant averred that the Plaintiffs were not supposed to pay rent to any third party. The Defendant contended that it did not authorize the Plaintiffs to pay rent to Boniface Odhiambo Akello and that the payments made to the said person were made in breach of the terms of the leases the Plaintiffs had entered into with the Defendant and with the intention of defrauding the Defendant. The Defendant contended that the said payments were made to Boniface Odhiambo Akello's (hereinafter referred to only as "Akello") private account which had never been designated by the Defendant for rent payment. The Defendant contended that the payments which were made by the Defendants to Akello were made through private arrangement without the Defendant's knowledge or permission. The Defendants averred that when it discovered the conspiracy which the Plaintiffs had engaged in with Mr. Akello through external auditors, the Defendant summoned the 1st Plaintiff to its office and informed her of what the audit had unearthed. The Defendant averred that the 1st Plaintiff admitted to having paid Mr. Akello Ksh.45,000/= which amount she agreed to pay to Defendant in monthly installments of Kshs. 10,000/=. The Defendant contended that the 1st Plaintiff did not make good her promise. The Defendant stated that the 2nd Plaintiff was also summoned to the Defendants' office at which he admitted having paid to Akello a sum of Kshs. 125,000/=. The Defendant contended that the 2nd Plaintiff also admitted being in rent arrears to the tune of Kshs.116,447/=. The Defendant averred that the 2nd Plaintiff had not paid the admitted sum of Kshs. 116,447/=. The Defendant averred that the 2nd Plaintiff had issued a cheque for Kshs.50,000/= in July 2016 in part payment of the outstanding rent but the cheque was returned unpaid for lack of funds. The Defendant averred that the 1st Plaintiff was in rent arrears to the tune of Kshs. 329,791/= as at 5th July, 2016 while the 2nd Plaintiff was in rent arrears to the tune of Kshs. 234,972/= as at that date. The Defendant annexed statements of account to its replying affidavit in proof of the rent claimed from the Plaintiffs. The Defendant admitted that Akello was its employee. It contended however that it was not responsible for the unauthorized payments which were made to Akello by the Plaintiffs. The Defendant averred that it was entitled to levy distress against the Plaintiffs for recovery of the outstanding rent. The Plaintiffs filed further affidavits in response to the replying affidavit by the Defendant. In her further affidavit sworn on 8th August, 2016 the 1st Plaintiff stated that she had agreed to pay to the Defendant the payments that she made to Akello by M-pesa through distress. The 1st Plaintiff contended that she was intimidated by the Defendant's director Mr. Harun Nyamboki into giving that commitment. The 1st Plaintiff reiterated that she was not in rent arrears. In his further affidavit also sworn on 8th August, 2016, the 2nd Plaintiff stated that he had not agreed to pay the rent of Kshs. 45,000/= which was proposed by the Defendant for the new lease. The 2nd Plaintiff contended that the payments made to Akello were proper as he was an employee of the Defendant and that he used to receive rent and issue receipts on behalf of the Defendant. The 2nd Plaintiff contended that the M-pesa number through which he made payment to Akello was provided by Akello in his capacity as an employee of the Defendant. The 2nd Plaintiff reiterated that he owed the Defendant no rent and as such the distress against him was not justified. The 2nd Plaintiff contended that since he has not entered into a

new lease agreement with the Defendant, the penalties being levied against him by the Defendant are not justified.

The Plaintiffs' application was argued orally before me on 29th August, 2016 when Mr. Gaita appeared for the Plaintiffs while Mr. Oyugi appeared for the Defendant. I have considered the application and the affidavits which were filed in support thereof. I have also considered the replying affidavit in opposition to the application. Finally I have considered the submissions by the respective advocates for the parties.

The principles upon which this court exercises its discretion on applications for interlocutory injunction are well settled. As was held in the case of Giella vs. Cassman Brown & Co. Ltd. (1973) E. A 358, an applicant for a temporary injunction must establish a prima facie case with a probability of success against the Respondent. He must also demonstrate that unless the order is granted, he will suffer irreparable harm which cannot be compensated in damages. If the court is in doubt as to the foregoing, the application would be determined on a balance of convenience. On the material before me, I am satisfied that the Plaintiffs have established a prima facie case with a probability of success against the Defendant. The Plaintiffs' complaint in these proceedings is that the Defendant has levied illegal distress for rent against them. The Plaintiffs have contended that the rent claimed to be in arrears by the Defendant and in respect of which distress has been levied includes the rent which the Plaintiffs had paid to the Defendant's caretaker, Akello and the amounts which are not due and payable by the Plaintiffs as the same had not been agreed upon. The Defendant has admitted that the Plaintiffs made some payments to Akello who was its employee on account of rent. The Defendant has contended however that these payments were unauthorized and were not remitted to the Defendant and as such the Defendant cannot take responsibility for the same. It is common ground that the Defendant has made a report to the police concerning the monies which Akello received from the Plaintiff and pilfered. It is arguable whether the rent that was paid to Akello by the Plaintiffs is deemed to have been paid to and received by the Defendant. This is an issue which the court cannot determine at this stage. The much I can say is that Akello having been an employee of the Defendant must be taken to have been acting on the Defendant's instructions unless the contrary is proved. As was rightly submitted by the Plaintiffs' Advocates, as a general rule, a principal is responsible for all acts of his agent within the authority of the agent whether the responsibility is contractual or tortious. On the material before me, I am not persuaded that Akello had no authority from the Defendant to receive payment of rent from the Plaintiffs. I have noted that Akello did issue receipts in the name of the Defendant for some of the contentious payments which were made by the Plaintiffs through M-pesa. I am satisfied that the Plaintiffs have a prima facie case against the Defendant on the validity of the distress for rent in respect of the rent which had been paid to the Defendant through Akello. The other aspect of the Plaintiffs' complaints which applies more to the 2nd Plaintiff is that the Defendant has levied distress against him on account of rent which has not been agreed upon. It is not disputed that the lease between the 2nd Plaintiff and the Defendant expired on 31st August, 2013 and that the parties have not entered into another lease agreement. The 2nd Plaintiff who has remained in occupation of the suit premises pursuant to the expired lease must be taken to be occupying the same on the same terms as the expired lease until new terms have been agreed upon or the 2nd Plaintiff vacates the premises if no agreement is reached. I am in agreement with the submissions by the 2nd Plaintiff that the Defendant has no right to impose new rent which has not been agreed upon him. Once again, I am satisfied that the 2nd Plaintiff has established a prima facie case against the Defendant with regard to the validity of the rent of Kshs. 45,000/= per month which the Defendant has been levying from 1st May 2016.

As to whether the Plaintiffs would suffer irreparable harm which cannot be compensated in damages, I am in agreement that, that would be the case. The auctioneer instructed by the Defendant has already proclaimed on the Plaintiff's household goods and the same would be removed for sale if the orders sought are not granted. The inventory of the proclaimed goods shows that the items distressed are for everyday use in the house. The removal of the same from the suit premises by the auctioneers would cause serious inconvenience to the Plaintiffs which cannot be compensated in costs. In any event, I am of the view that a party cannot be allowed to proceed with distress for rent which seems to be illegal because he can pay damages.

Due to the foregoing, I am satisfied that the Plaintiffs have met the conditions for grant of a temporary injunction. The Plaintiffs' application dated 29th July, 2016 is therefore allowed on the following terms:-

1. Pending the hearing and determination of this suit, the Defendant is restrained from levying distress against the Plaintiffs with respect to the disputed rent which was paid by the Plaintiffs to the Defendant's former employee, Boniface Odhiambo Akello.
2. Pending the hearing and determination of this suit, the Defendant is restrained from levying distress against the 2nd Plaintiff based on the increased rent of Kshs. 45,000/= per month.
3. The orders given herein shall not release the Plaintiffs from their obligations to pay the agreed rent as and when the same falls due for payment neither shall it be deemed to prohibit the Defendant from levying distress for rent lawfully due.
4. The costs of the application shall be in the cause.

Delivered and signed at Nairobi this 27th day of June, 2017

S. OKONG'O

JUDGE

Ruling delivered in open court in the presence of:

N/A for the Plaintiffs

Mr. Manyara h/b for Oyugi for the Defendant

Kajuju Court Assistant