



REPUBLIC OF KENYA
IN THE HIGH COURT OF KENYA AT NAIROBI
MILIMANI LAW COURTS
ENVIRONMENT AND LAND COURT
ELC.NO.564 OF 2015

DEBRA LIMITED.....PLAINTIFF/APPLICANT

-VERSUS-

THE BOARD OF TRUSTEES NATIONAL

SOCIAL SECURITIES FUND....1st DEFENDANT/RESPONDENT

REGENT AUCTIONEERS.....2nd DEFENDANT/RESPONDENT

RULING

The matter for determination is the Plaintiff/Applicant's *Notice of Motion* application dated **22nd June 2015**, brought under Order 40 Rules 1 and 2 of the Civil Procedure Rules.

The Plaintiff/Applicant has sought for the following orders:-

i. Spent

ii. Spent

iii. That pending the hearing and determination of this suit, the Defendants whether by themselves, agents, servants or otherwise howsoever be restrained from conducting distress for rent, evicting, harassing, or in any other form interfering with the Plaintiff's quiet possession of its office premises situated on L.R. No. 209/8595, View Park Towers, 18th Floor, Nairobi.

iv. Costs of this application to be provided for.

The application is based on the grounds stated on the face of the application and on the **Supporting Affidavit** of **David Njoroge**, the General Manager of the Plaintiff/Applicant Company herein. The grounds in support are:-

a) The Defendants have proclaimed the Defendant's goods on account of alleged rent arrears which include an illegal charge named "excess service charge" back dated to the year 2011.

b) The Defendant intends to levy distress on alleged rent arrears which is not rent but excess

service charge.

c) The Defendant's action is illegal and unlawful.

d) Service charge even when due is not rent and therefore the Defendant cannot levy distress on account of service charge.

e) It is unlawful for the Defendant to compute service charge by way of backdating the amount claimed.

f) Even if the Defendants were entitled to back dated excess service charge the apportionment of the service charge is unfair given that some tenants who enjoyed the services in year 2011, 2012, 2013 and 2014 vacated the premises and hence liability has been passed to the Plaintiff and the remaining tenants.

g) The Plaintiff has never been in any rent arrears.

The Plaintiff/Applicant's case is that the Plaintiff Company entered into a **Tenancy Agreement** with the 1st Defendant for a term of **6 years** with effect from **1st October 2010**. The agreement provided *inter alia* that a service charge would be due quarterly billed at the rate of **Kshs.55,632.00** per quarter. On **29th September 2014**, the 1st Defendant wrote to the tenants notifying them that after a service charge audit for the **years 2012, 2013 and 2014** showed the building expenses occurred were more than the service charge billed which had led to an excess service charge that was recoverable from the tenants on a pro rate basis. The Plaintiff further avers that the 1st Defendant forwarded an invoice for **Kshs.230,260.00** being their excess service charge **back dated to 2011**. Plaintiff alleges that despite efforts to obtain the audit statements, the 1st Defendant did not provide evidence of the audited accounts. The Plaintiff avers that, by a letter dated **4th June 2015**, the 1st Defendant demanded the excess service amount be paid. Further, that on or about **15th June 2015**, the 2nd Defendant proclaimed the Plaintiff's goods in the Plaintiff's office by levying distress for alleged rent arrears of **Kshs.230,260.00**.

The application is **opposed** by the 1st Defendant/Respondent only. The 2nd Defendant/Respondent even after being served with Summons to Enter Appearance, the Plaintiff and the Instant Application as is evident from the Affidavit of Service sworn on the **1st of March 2016**, by **Lawrence Maanzo Mutua, Court Process Server**, did not enter appearance nor file a Replying Affidavit to the Notice of Motion. The Application is therefore not opposed by the 2nd Defendant/Respondent hereon.

The 1st Defendant/Respondent filed a Replying Affidavit on the **11th August 2016**, sworn by one **Arnold Muturi**, a valuer and property agent with **Lustman & Co. Limited**. He avers the demand for payment of the excess charge by the 1st Defendant is within contractual bounds permitted by the tenancy agreement between the Plaintiff and the 1st Defendant. He further claims that the reimbursement sought through the excess service charge is justified and reasonable as the Plaintiff had enjoyed the services over the above the monies paid. He claimed that the Plaintiff had been issued with the audited accounts but refused receipt. He affirmed that they were entitled to levy distress for the demanded unpaid excess service charge which remains outstanding without any lawful cause and that the Defendant is not under any duty to accept partial payment or rent and service charge. The 1st Defendant further states that the Plaintiff has not raised any Valid challenge to the computation of the excess service charge and argued that the application was an abuse of the court process.

The Plaintiff/Applicant herein filed a supplementary affidavit dated **29th September 2016**, and averred that the 1st Defendant sought to mislead and confuse the Court by failing to annex any documentary evidence while filing their Replying Affidavit. Further that the accounts purported in their Replying Affidavit do not show the total service charge levied from all the tenants. The Plaintiff argues that it is only through a balance sheet that one may determine whether the alleged service charge was in excess. The Plaintiff stated that for the above reasons, they would apply to have **Arnold Muturi** cross-examined

in his **Replying Affidavit**.

The application was **canvassed** by way of **Written Submissions** which this Court has carefully read and considered. The Court has also considered the pleadings in general and the annexures thereto. The Court will make the following findings;

There is no doubt that the Plaintiff/Applicant herein is a tenant of the 1st Defendant/Respondent having been offered such lease vide a **Letter of Offer** dated **6th September 2010**. There is also no doubt that the Rent payment was stipulated in **Clause 5** of the said Letter of offer. It is evident that the Plaintiff has been paying rent regularly as stipulated in the Letter of Offer. The bone of contention herein is the arrears of service charges amounting to **Kshs.230,260/=**. There is no doubt that the 1st Defendant/Respondent instructed Regent Auctioneers to levy distress upon the Plaintiff/Applicant and on or about **15th June 2015**, the 2nd Defendant proclaimed goods belonging to the Plaintiff/Applicant. **Section 3(1)** of the **Distress for Rent Act** provides that:-

“..... 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 services as is given by the common Law of England in a similar case.”

It is therefore evident from the above provisions of law that distress for rent or right to distress accrues once the tenant is in arrears of rent and rent services.

There is no doubt that the 1st Defendant levied distress upon the Plaintiff/Applicant because of the arrears for service charge. Service charge is not rent as service charge is a debt which can be demanded from and recovered as a civil debt. In the instant case, trying to recover arrears of service charge through distress for rent is therefore a wrong move. The Court of Appeal in the case of **C.Y.O Owayo..Vs..George Zephania & Adudata T/A Aduda Auctioneers (2007) eKLR** held that:-

“Thus in looking into what constitutes illegality of distress for rent, we must not only consider our laws, but must also consider what in England would be considered an illegality in the levy of distress. In Halsbury Laws of England, 4th Edition volume 12, Page 368, it is stated:-

An illegal distress is one which is wrought at every outset that is to say either where there was no right to distrain or where a wrongful act was committed at the beginning of the levy invalidating all subsequent proceedings. The following are instances of illegal distress, a distress by a Landlord after he has parted with reversion, a distress by a person in whom the reversion is not vested, a distress whom no rent is in arrears or for a claim or debt which is not rent.....”

Considering the available evidence, the Plaintiff/Applicant herein is not in rent arrears but the claim by the 1st Defendant is for service charge arrears which is a claim or debt which is not rent. Therefore, the Court finds that the Plaintiff/Applicant herein has **been able to establish** that it has a **prima-facie** case with probability of success at the trial as elucidated in the case of **Giella..Vs..Cassman Brown & Co. Ltd 1973 EA 358**.

Having now carefully considered the **Notice of Motion** dated **22nd June 2015** by the Plaintiff/Applicant, the Court finds it **merited**. Consequently, the Court **allows** the said **Notice of Motion** entirely in terms of **Prayer No.3** with **costs being in the cause**.

It is so ordered.

Dated, Signed and Delivered at NAIROBI this 31st day of August, 2017.

L. GACHERU

JUDGE

31/8/2017

In the presence of

Mr. Mwalimu holding brief for E. K. Mutua for Plaintiff/Applicant

No appearance for Defendants/Respondents

Catherine - Court clerk.

L. GACHERU

JUDGE

31/8/2017