



**REPUBLIC OF KENYA**  
**IN THE ENVIRONMENT AND LAND COURT**  
**AT NAIROBI**  
**MILIMANI LAW COURTS**  
**ELC. CASE NO. 357 OF 2016**

**NAMSI INTERIORS LIMITED.....PLAINTIFF**

**VERSUS**

**SAMEER BUSINESS PARK LIMITED.....DEFENDANT**

**RULING**

Coming up before me for determination is the Notice of Motion dated 13<sup>th</sup> April 2016 in which the Plaintiff/Applicant seeks for the following orders:

1. Spent
2. Spent
3. Spent
4. That the Honourable Court be pleased to grant an order of temporary injunction restraining the Defendant, whether by its servants, agents or any of them from selling by public auction or howsoever the Plaintiff's movable assets on 14<sup>th</sup> April 2016 as advertised in the Daily Nation Newspaper of 7<sup>th</sup> April 2016 or at all pending the hearing and determination of the suit;
5. Spent
6. That the cost of this Application be provided for.

The Application is premised upon the grounds appearing on its face together with the Supporting Affidavit of Cecilia Namsi, the Managing Director of the Plaintiff, sworn on 13<sup>th</sup> April 2016, in which she averred that the Plaintiff is a tenant of the Defendant at Sameer Business Park along Mombasa Road, Nairobi. She further averred that the Plaintiff has stocked imported kitchenettes and an assortment of related stock at the said demised premises. She further averred that in November 2015, the Defendant locked up the demised premises together with the stock inside and denied the Plaintiff the right of ingress and egress without notice or prior warning claiming that the Plaintiff should pay the rent arrears. She further averred that she sought an amicable settlement with the Defendant by proposing a scheme of payment of the rent arrears provided that the demised premises could be opened for business. She further averred that she was shocked when the Defendant advertised that it would auction the Plaintiff's

moveable assets on 14<sup>th</sup> April 2016 in an advertisement carried in the Daily Nation Newspaper dated 7<sup>th</sup> April 2016. She averred that no proclamation and forfeiture notice had been served upon her as required and therefore the planned public auction was illegal.

The Application is contested. The Defendant/Respondent filed the Replying Affidavit of Daniel Angoyia, its Finance Officer, sworn on 20<sup>th</sup> April 2016, in which he averred that at all material times, the Plaintiff/Applicant was a tenant of the Defendant/Respondent occupying all those premises known as Sameer Business Park Block A Units 1, 2, 3 and 4 on the first floor on Land Reference Number 12081/10 (the “demised premises”) by virtue of a Lease Agreement dated 13<sup>th</sup> November 2014, for a lease term of 6 years commencing on 1<sup>st</sup> December 2014. He further averred that soon after taking possession of the demised premises, the Plaintiff/Applicant fell into arrears which continued to accumulate very fast because it was not making any effort to meet its obligation to pay rent as and when it fell due. He added that the Plaintiff’s many promises and proposals to settle the accumulating arrears all came to nought. He averred further that on 7<sup>th</sup> October 2015, the Defendant issued and served a demand and distress notice upon the Plaintiff/Applicant giving it 30 days to pay the rent arrears failing which the Defendant would distress for rent and retake possession of the demised premises. He annexed a copy of that notice which was received and duly stamped by the Plaintiff/Applicant on 8<sup>th</sup> October 2015. He further averred that instead of complying with the notice by paying the demanded amount, the Plaintiff/Applicant locked up the demised premises in an illegal attempt to frustrate the Defendant/Respondent’s contractual and statutory right of distress. He added that the Defendant/Respondent proceeded to instruct its auctioneer to proceed with levying distress as allowed by law. He added that the Auctioneer obtained a court order to access the demised premises whereupon he proclaimed and issued the requisite notices to the Plaintiff/Applicant. He annexed copies of the stated notices and the court order. He further stated that as at 12<sup>th</sup> November 2015, the Plaintiff/Applicant was in rent arrears of Kshs. 8,643,299.55, a fact that was at all material times known to the Plaintiff/Applicant. He stated further that this Application should be denied for the reason that the Plaintiff/Applicant is in huge arrears of rent, valid notices were issued and properly served upon it, the Defendant’s right of distress has properly crystallized and has been lawfully and regularly exercised, the Plaintiff is guilty of material non-disclosure for failing to disclose that it was duly served with all the required notices, the Plaintiff has accordingly come to court with unclean hands and the court lacks any basis to interfere with the contractual and statutory rights of the parties herein and should allow the law to take its own course. He further stated that the Defendant/Respondent, as an investor, has lost rental income since November 2015 and continues to incur more losses as long as the demised premises remain unoccupied at the instance of the Plaintiff/Applicant whilst the rent arrears continue to accumulate. In the circumstances, he sought for this Application to be dismissed with costs.

The issue that I am called upon to determine is whether or not to issue an order of temporary injunction as sought by the Plaintiff/Applicant. In deciding whether or not to grant the temporary injunction, I wish to refer to and rely on the precedent set out in the case of **GIELLA versus CASSMAN BROWN (1973) EA 358** in which the conditions for the grant of an interlocutory injunction were settled as follows:

***“The conditions for the grant of an interlocutory injunction are now, I think, well settled in East Africa. First, an applicant must show a prima facie case with a probability of success. Secondly, an interlocutory injunction will not be normally granted unless the applicant might otherwise suffer irreparable injury which would not adequately be compensated by an award of damages. Thirdly, if the court is in doubt, it will decide an application on the balance of convenience.”***

Has the Plaintiff/Applicant made out a prima facie case with a probability of success? In the case of **MRAO versus FIRST AMERICAN BANK OF KENYA LIMITED & 2 OTHERS (2003) KLR 125**, a prima facie case was described as follows:

***“a prima facie case in a Civil Application includes but is not confined to a ‘genuine and arguable case’. It is a case which, on the material presented to the court, a tribunal properly directing itself will conclude that there exists a right which has apparently been infringed by the opposite party as to call for an explanation or rebuttal from the latter.”***

Does the Plaintiff/Applicant have a 'genuine and arguable case' and therefore a prima facie case? Before I can go any further to set out my deductions herein, I must point out to the parties that my findings herein are not conclusive and must await the full trial of this suit. This position is supported by the decision in **Airland Tours & Travels Ltd versus National Industrial Credit Bank Milimani High Court Civil Case No. 1234 of 2002** where the court held as follows:

***“In an interlocutory application, the court is not required to make any conclusive or definitive findings of fact or law, most certainly not on the basis of contradictory affidavit evidence or disputed provisions of the law.”***

With that background laid down, I turn to assessing whether or not the Plaintiff/Applicant has met the three conditions for the grant of a temporary injunction. Firstly, I must assess whether the Plaintiff has established a prima facie case with a probability of success at the main trial. This turns on whether the Defendant/Respondent has a right to distrain for rent.

**Section 3 and 4 of the Distress for Rent Act** provide as follows:

***3. (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.***

***4. (1) Where any goods or chattels are distrained for rent reserved and due upon a grant, demise, lease or contract, and the tenant or owner of the goods or chattels so distrained does not, within fourteen days after distress has been made, and notice thereof (stating the cause of the making of the distress) left on the premises charged with the rent distrained for, pay the rent together with the costs of the distress, or replevy them, with sufficient security to be given to the licensed auctioneer according to law, the person distraining may lawfully sell on the premises or remove and sell the goods and chattels so distrained for the best price which can be obtained for them, towards satisfaction of the rent for which they are distrained, and of the charges of the distress, removal and sale, handing over the surplus (if any) to the owner.***

***(2) If, before the expiration of the seven days after the distraint, the tenant or owner of the goods distrained, in writing, so requests, the goods and chattels distrained shall be removed to a public auction room or to some other fit and proper place specified in the request, and be there sold by public auction by a licensed auctioneer towards satisfaction of the rent for which they are distrained, and of the charges of the distress and sale, and the surplus (if any) shall be handed over to the owner; but the costs and expenses of removal, and any damage to the goods and chattels arising therefrom, shall be paid by the person requesting the removal.***

The Plaintiff/Applicant has admitted that she is in rent arrears. In the estimation of the Defendant/Respondent, as at 12<sup>th</sup> November 2015, the Plaintiff/Applicant was in rent arrears of Kshs. 8,643,299.55. As set out in section 3(1) of the Distress for Rent Act set out above, there is no doubt that in these circumstances, the Defendant/Respondent was entitled to distrain for rent as they did. The Plaintiff/Applicant has not paid *“the rent together with the costs of the distress, or replevy them, with sufficient security to be given to the licensed auctioneer according to law.”* Accordingly, as set out in section 4(1) of the Distress for Rent Act, *“the person distraining may lawfully sell on the premises or remove and sell the goods and chattels so distrained for the best price which can be obtained for them, towards satisfaction of the rent for which they are distrained, and of the charges of the distress, removal and sale, handing over the surplus (if any) to the owner”*.

In these circumstances, the Plaintiff/Applicant has failed to show this court that she has a genuine and arguable case and therefore a prima facie case with a probability of success at the main trial.

Since the Plaintiff/Applicant has failed to prove the first ground in the grounds set down in the celebrated case of *Giella versus Cassman Brown*, this Honourable Court need not venture into the other grounds.

This position was upheld in the Court of Appeal case of **Kenya Commercial Finance Co. Ltd versus Afraha Education Society (2001) 1 EA 86** as follows:

***“The sequence of granting an interlocutory injunction is firstly that an applicant must show a prima facie case with a probability of success if this discretionary remedy will inure in his favour. Secondly, that such an injunction will not normally be granted unless the applicant might otherwise suffer irreparable injury: and thirdly where the court is in doubt it will decide the application on a balance of convenience. See Giella vs. Cassman Brown and Co. Ltd 1973 EA at page 360 Letter E. These conditions are sequential so that the second condition can only be addressed if the first one is satisfied and when the court is in doubt then the third condition can be addressed.”***

Also, in the case of **Nguruman Ltd versus Jan Bonde Nielsen (2014) eKLR**, the Court of Appeal had this to say:

***“If prima facie case is not established, then irreparable injury and balance of convenience need no consideration.”***

In light of the foregoing, I hereby dismiss this Application with costs to the Defendant.

**DELIVERED, DATED AND SIGNED AT NAIROBI THIS 22<sup>ND</sup> DAY OF SEPTEMBER 2017.**

**MARY M. GITUMBI**

**JUDGE**