



REPUBLIC OF KENYA
IN THE HIGH COURT OF KENYA AT NAIROBI
MILIMANI LAW COURTS
ENVIRONMENT AND LAND COURT

ELC. CASE NO. 23 OF 2016

SOPHIA WAIRIMU T/A CLUB TEMBO.....APPELLANT

VERSUS

JOSEPH KAMAU KAMAU.....1ST RESPONDENT

**NICHOLAS NJENGA KARIUKI (T/A PATLAND PROPERTIES AGENCIES....2ND
RESPONDENT**

RULING

Coming up before me for determination is the Notice of Motion dated 18th September 2014 in which the Appellant/Applicant seeks for an order for committal into civil jail of the Respondents for a period of 6 months for failing to obey an order issued by Hon. Justice Onyancha (as he then was) issued on 2nd September 2014.

The Application is premised on the grounds appearing on its face together with the Supporting Affidavit of the Appellant/Applicant, Sophia Wairimu, sworn on 18th September 2014, in which she averred that she is a tenant in the premises known as Plot No. 6 Ruaka Shopping Centre, Kiambu County (hereinafter referred to as the “suit premises”) where she has been carrying on the business of a pub and restaurant known as Club Tembo for the last 7 years. She further averred that this is an Appeal against the Ruling of Hon. D.S. Mboroki issued in the Business Premises Rent Tribunal. She averred further that in this Appeal, she filed Notice of Motion dated 29th August 2014 in which the Hon. Justice Onyancha (as he then was) issued an order restraining the Respondents from distressing her movable goods until this Appeal is heard and determined. She further averred that the said orders were duly served upon the Respondents’ Advocate Messrs Mbichire & Co. Advocates. In support of that assertion, she annexed the said order bearing the stamp of the said law firm as well as an affidavit of service of the said order sworn by the process server. She averred further that in total disregard of the said orders, the Respondents went ahead to distress the Appellant/Applicant’s movable goods in the suit premises. On those grounds, she sought for the Respondents to be committed to civil jail for contempt of this court’s order.

The Application is contested. The 1st Respondent, Joseph Kamau Kamau, filed his Replying Affidavit sworn on 16th October 2014 in which he averred that he was not personally served with the Notice of Motion dated 29th August 2014 and the orders issuing therefrom and that service of the same to the firm of Messrs. Mbichire & Co. Advocates could not constitute proper service as he had not instructed that law

firm to act for him in this matter. He further averred that the orders issued were in variance with the orders prayed for in that application. He highlighted that the prayers in that application were as follows:

1. Spent
2. That pending the hearing and determination of the application interpartes, this Honourable court be pleased to issue a temporary order of injunction restraining the respondents, their agents or servants from levying distress, evicting, locking up or otherwise interfering with the applicant's quiet occupation of that property known as Plot No. 6 Ruaka Shopping Centre, Kiambu County.
3. That pending the hearing and determination of the intended Appeal, this Honourable court be pleased to issue an order for injunction restraining the Respondents, their agents or servants from levying distress, evicting, locking up or otherwise interfering with the applicant's quiet occupation of that property known as Plot N. 6 Ruaka Shopping Center, Kiambu County.
4. That the OCS Karuri Police Station be directed to ensure compliance.
5. That the costs of the application be provided.

He further averred that the orders issued by Hon. Justice Onyancha (as he then was) were as follows:

1. That stay be and is hereby granted until the appeal is heard and determined.
2. That the Applicant/Appellant to continue paying rent of Kshs. 20,000/- until the issue is determined by the result of the appeal.
3. That payment be directly to the Landlord or through Landlord's Advocates.

It was his averment that these orders did not explicitly restrain the levying of distress which had accumulated to Kshs. 180,000/- being 6 months' rent arrears as the Appellant had misled the court that she had been paying rent Kshs. 20,000/- which was not the case. On those grounds, he sought for this Application to be dismissed with costs.

Both the Appellant/Applicant and the Respondents filed their respective written submissions.

The issue coming up for determination is whether or not to commit the Respondents to civil jail for 6 months for contempt of court comprising the disobedience of Hon. Justice Onyancha's order issued on 2nd September 2014. The Respondents implicitly admit that they did indeed levy distress on the Appellant/Applicant but insist that this was in no way irregular as firstly they were not served with a court order prohibiting such an action and secondly, the court order issued by Justice Onyancha on 2nd September 2014 did not prohibit the levying of distress upon the Appellant/Applicant.

As set out above, the Appellant/Applicant sought for orders of temporary injunction to be issued against the Respondents restraining, inter alia, the levying of distress against her. However, the orders issued by Justice Onyancha were in variance with those prayers. I will set out below once again the orders issued by the Judge:

1. That stay be and is hereby granted until the appeal is heard and determined.
2. That the Applicant/Appellant to continue paying rent of Kshs. 20,000/- until the issue is determined by the result of the appeal.
3. That payment be directly to the Landlord or through Landlord's Advocates.

The main dispute is what the "stay" comprised of. The Appellant/Applicant insist that the stay issued was in respect of the Respondents levying distress upon her. However, the Respondents contend that this is

not so and that the stay issued is ambiguous as it does not state what in particular was being stayed. I have perused the entire court file and cannot find a copy of the Ruling of Hon. D.S. Mboroki at the Business Premises Rent Tribunal which I believe was “stayed” by the order of Justice Onyancha. That being the position, this court is not able to decipher the import of that order of stay. The Appellant/Applicant has therefore not successfully demonstrated to this court that the order of stay issued by Hon. Justice Onyancha specifically prohibited the levying of distress upon her. That being the position, this court cannot find that the Respondents disobeyed this court’s order and cannot therefore find them to be in contempt of court.

In light of the foregoing, this Application is hereby dismissed. Costs in the cause.

DELIVERED, DATED AND SIGNED AT NAIROBI THIS 1ST DAY OF SEPTEMBER 2017.

MARY M. GITUMBI

JUDGE