



**REPUBLIC OF KENYA**

**IN THE HIGH COURT OF KENYA AT NAIROBI**

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

**MILIMANI LAW COURTS**

**ELC NO. 1047 OF 2014**

**TROUVAY & CAUVIN LIMITED .....PLAINTIFF**

**VERSUS**

**AGGREY LUSENO ..... 1ST DEFENDANT**

**L.N. WAWERU t/a PURPLE ROYAL AUCTIONEERS.....2<sup>ND</sup> DEFENDANT**

**JUDGMENT**

The dispute herein concerns operations of a commercial block, the premises known as L.R. No. 2/704 Morningside Office Park. In its pleadings, plaintiff states that it entered into a sub-lease agreement with defendant on 1/8/13 in respect of the suit premises for a term of 5 years and 3 months. The sub-lease agreement provided that the rent would be exclusive of service charge but inclusive of V.A.T.

However, defendant has apparently been invoicing plaintiff in respect of V.A.T. , prompting the plaintiff to file this suit on 5<sup>th</sup> August 2014. The prayers there in are;

a) A permanent injunction to restrain the defendants whether by themselves, their employees, servants, and/or agents from levying distress, attaching or in any other way howsoever recovering the amount of Ksh.806, 812.48 or any other amount relating to alleged rent arrears by the plaintiff or any claim of V.A.T in respect of the leased premises occupied by the plaintiff known as L.R. No. 2/704, Morningside Office Park.

b) Costs of the suit.

Service of Summons to enter appearance were served, but defendant did not enter appearance or file a defence. The matter proceeded ex-parte.

PW1, Margaret Wakonyo Mungai testified as an administrative executive of the plaintiff. She adopted her statement recorded on 5/8/14 as her evidence in chief. She also urged the court to rely on the affidavit of 4/8/14, and the annexures there in. She produced the documents in the list filed on 5/8/14 as P Exhibits 1-5.

Plaintiff contends that part of the sub lease agreement contained the following;

1) It was provided that the annual rent would be Ksh. One Million Eight Hundred Twenty Six Thousand and Four Only (Kshs. 1,826,304.00) calculated using the monthly rent of Kshs. One Hundred Fifty Two Thousand One Hundred Ninety Two Only (Kshs. 152,192.00).

2) It was also expressly provided that the annual rent payable would be exclusive of service charge but inclusive of V.A.T.

3) The monthly rent has been determined to be Kshs.152, 192 while the service charge is determined as Kshs.39, 360 per month. The monthly rent includes V.A.T as per the agreement.

Plaintiff contends that the 1<sup>st</sup> defendant has been sending invoices regarding the rent and the service charge and the plaintiff has been paying rent. The invoices together with Schedules showing the payments made by the plaintiff are at pages 30-39 in the list of documents.

Before filing this suit, in August 2014, plaintiff had paid the rent due for the period 1<sup>st</sup> June 2014 to 1<sup>st</sup> August 2014 f on 18<sup>th</sup> July 2014 and the supporting document is the Standard Chartered Bank Payee Advice found on page 46 of plaintiff's documents.

Plaintiff avers that on 24<sup>th</sup> July, the 2<sup>nd</sup> defendant acting on instructions of the 1<sup>st</sup> defendant proclaimed the plaintiff's goods purporting to levy distress for rent arrears. The proclamation and the instructions are on pages 39 to 41. The 2<sup>nd</sup> defendant apparently gave the plaintiff 14 days from the 24<sup>th</sup> July 2014 within which to pay the alleged rent arrears of Kshs. 806,812.48 together with the auctioneer's fees of Kshs. 80,000 and advocate's fees of Kshs.50, 000.

The plaintiff wrote to the 1<sup>st</sup> defendant on several occasions seeking to confirm that under the existing sub-lease the plaintiff was not to pay the V.A.T separately from the rent payable, but the 1<sup>st</sup> defendant's advocates insisted that their instructions were that the V.A.T was to be paid on top of the rent payable.

### **DETERMINATION**

I find that the invoices given to plaintiff by the management of the property contain a figure of Kshs. 73,052.16 charged as V.A.T monthly. The document giving plaintiff the right to occupy and use the premises is the sub-lease document where in clause 4(1), it is stated that;

**“The annual rent payable in 4 above is exclusive of service charge and inclusive of V.A.T”**

It follows that plaintiff was not to be charged for V.A.T. It is only service charge that was to be paid in addition to the rent.

### **Conclusion;**

I find that plaintiff has proved its case and I therefore proceed to give orders as follows:

**a) A permanent injunction is hereby issued restraining the defendants, their employees, servants, and/or agents from levying distress, attaching or in any other way howsoever recovering the amount of Ksh.806, 812.48 or any other amount relating to alleged rent arrears by the plaintiff or any claim of V.A.T in respect of the leased premises occupied by the plaintiff known as L.R. No. 2/704, Morningside Office Park.**

**b) Defendants are condemned to pay costs of the suit.**

**DATED SIGNED AND DELIVERED AT NAIROBI THIS 3<sup>RD</sup> DAY OF NOVEMBER, 2017**

**HON. L.N. MBUGUA**

**ELC JUDGE**

**IN THE PRESENCE OF:-**

1. Tugee for Plaintiff
2. Nyambiri H/B for Midwa for Defendant