



IN THE HIGH COURT OF KENYA AT NAIROBI

MILIMANI LAW COURTS

LAND AND ENVIRONMENTAL DIVISION

ELC CIVIL SUIT NO.18 OF 2014

JAY RAJ ENTERPRISES LTD... ..PLAINTIFF

VERSUS

LUCKY DISTRIBUTORS LTD..... 1ST DEFENDANT

RELIABLE ELECTRICAL ENGINEERS (NRB) LTD 2ND DEFENDANT

BRIAN OTIENO, E G BENGI AND LW MIRITI

T/A BENGI MIRITI & ASSOCIATES ADVOCATES..... 3RD DEFENDANT

GEORGE GITONGA MUCHIRI

T/A FANTASY AUCTIONEERS 4TH DEFENDANT

RULING

There are two applications by the Plaintiff for determination in this ruling. In the first application dated 17th January 2013 expressed to be made under order 51 Rule 1 and order 45 Rule 1 of the Civil Procedure Rules and section 3A of the Civil Procedure Act the plaintiff seeks the following substantive orders:-

That pursuant to the ruling delivered on 31st October 2012 and in particular order 1 thereof the court be pleased to clarify and/or give directions on the exact rent payable per month by the plaintiff/Applicant to the 1st defendant.

In bringing the application the plaintiff avers that a dispute has arisen occasioned by what the plaintiff states to be the 1st Defendant's misrepresentation of the facts regarding the exact monthly rent payable by the plaintiff to the 1st defendant. The plaintiff avers that the 1st Defendant has refused to accept rent of Kshs.137,170/- per month which the plaintiff has tendered and insists the rent payable was Kshs.580,000/- per month exclusive of VAT and thus wishes the court to clarify the monthly rent payable to the 1st Defendant.

By the 2nd application dated 8th January 2014 the plaintiff seeks an order of restraint against the 1st Defendant restraining him by way of an injunction from levying distress and/or in anyway or manner

interfering with the plaintiff's quiet possession of the suit premises, **L.R. NO.209/9792/17** pending the hearing and determination of the application dated 17th January 2013. The plaintiff seeks orders that pending the hearing and determination of the suit he be allowed to be depositing the rent payable of Kshs.137,172/- per month in court or such other place as the court may deem appropriate. The plaintiff premises this 2nd application on the grounds set out on the body of the application which can be summarized thus:-

- i. That following the order of 31st October 2012 the 1st defendant has refused to accept the rent tendered by the plaintiff insisting to be paid much higher and non-contractual rent.
- ii. That the 1st defendant's said refusal has prompted the plaintiff to file the application dated 17th January 2013 which is yet to be heard.
- iii. That the 1st defendant during the pendency of the application dated 17/1/2013 initiated out of court negotiations leading to the appointment of an independent valuer to assess the rent payable but who the plaintiff claims was manipulated by the 1st defendant to make a flawed valuation report which led to the breakup of the out of court negotiations.
- iv. That the 1st Defendant has threatened to levy distress against the plaintiff for alleged rent arrears based on arbitrary monthly rent notwithstanding that the plaintiff has not refused to pay the contractual rent of Kshs.137,170/- which he was paying to the 2nd defendant who sold the suit premises to the 1st defendant.

The plaintiff has sworn affidavits in support of the two applications which set out in sufficient detail the background to the current impasse. The plaintiff deposes that it was paying a rent of Kshs.137,170/- per month to the 2nd Defendant upto the month of June 2011 but on 1st July 2011 the 1st and 2nd Defendants threatened to levy distress against the plaintiff for allegedly rent arrears of Kshs.4,667,840/- accrued upto June 2011 on the basis that the rent that was payable was Kshs.500,000/- exclusive of VAT. The plaintiff further deposes that it was forced to pay the said sum of Kshs.4,667,840/- to save its distrained/proclaimed goods and its business but instituted this suit challenging the legality of the levy of distress on the part of the defendants. That in response by the 1st Defendant to the Notice of Motion dated 5th July 2011 the 1st Defendant specified that the sum of Kshs.500,000/- plus VAT was on account of mesne profits which the plaintiff asserts was not the same as the rent that was payable. The Plaintiff states that **Hon. Justice Odunga** in his ruling on 31st October 2012 did not make a determination of the rent payable but only directed that the plaintiff be remitting "**the due rents to the 1st Defendant in accordance with the terms of the existing tenancy**".

The plaintiff interpreted this to mean he should be paying Kshs.137,170/- which he claims he was paying to the 2nd Defendant before the property was sold to the 1st Defendant. The 1st Defendant rejected the tender of monthly rent of Kshs.137,170/- claiming the rent had been increased to Kshs.500,000/- per month and required the plaintiff to pay this amount.

There followed a period of negotiations between the parties seeking to reach an out of court settlement but apparently no settlement was reached resulting in the plaintiff filing the second application dated 8th January 2014 which seeks to have the 1st Defendant restrained from levying distress against the plaintiff and to be allowed to be depositing the rent of Kshs.137,472/- per month in court or such other place as the court may direct.

The 1st Defendant through **SANJAY SHAH** filed a replying affidavit on 19th February 2013 in opposition to the plaintiff's application dated 17th January 2013 where he deposes that the 1st Defendant purchased the suit property in October 2010 from the 2nd Defendant at the consideration of Kshs.20,000,000/- and that the 1st Defendant repays a mortgage loan taken to finance the purchase at a monthly rate of over Kshs.500,000/-. The 1st Defendant states that the information given to them by the 2nd Defendant at the time of the handover was that the rent payable by the plaintiff had as at the beginning of August 2009 been increased to Kshs.500,000/- plus VAT making in all Kshs.580,000/-

payable monthly on account of rent and VAT. The 1st Defendant avers that this information as to the quantum of the rent payable was instrumental to the decision to purchase the suit property. A letter dated 25/7/2009 addressed to the plaintiff's Advocates marked "SS-2" is annexed to the replying affidavit communicating the intention to increase the rent as aforesaid.

The 1st Defendant states that the plaintiff acknowledged that the rent had been increased to Kshs.583,480/- from Kshs.137,170/- since the plaintiff had on 4/7/2011 filed a reference to the Business Premises Rent Tribunal (BPRT) stating so and requesting the BPRT to investigate to assess/reduce the rent. The reference by the plaintiff to the BPRT was prompted by the 1st Defendant's instructions to the 4th Defendant to levy distress to recover Kshs.4,667,840/- being rent arrears on the basis of the rent of Kshs.500,000/- exclusive of VAT that the plaintiff should have been paying. Pursuant to the levy of distress a sum of **Kshs.4,667,840/-** was paid to the 1st Defendant which provoked this suit with the plaintiff seeking to have the distress to be declared illegal and null and void and for the refund of the said sum by the 1st Defendant to the plaintiff. Thus in the present suit the issues relate to the legality or otherwise of the levy of distress carried out on or about 1st July 2011 and the entitlement of the plaintiff to a refund of the sum of **Kshs.4,667,840/-** paid to the 1st Defendant pursuant to the contested levy of distress by the 1st Defendant.

The 1st Defendant again through **SANJAY SHAH** has filed a replying affidavit sworn on 17th January 2014 in opposition to the plaintiff's application dated 8th January 2014. The 1st Defendant deposes that since they became owner of the suit property in October 2010 the plaintiff who has been a tenant in the premises refused to pay rent to the 1st Defendant and arising from the plaintiff's refusal to pay rent the plaintiff filed this suit and among other reliefs seeks a "**mandatory order and/or judgment**" requiring refund to them of Kshs.4,667,840 which was paid to the 1st Defendant on account of rent and simultaneously with the suit the plaintiff filed an application seeking injunction from eviction in respect of which **Hon. Justice Odunga** ruled on 31st October 2012 and issued an order barring the eviction of the plaintiff from the suit property on condition that the plaintiff paid the due rents to the 1st defendant. The 1st Defendant deposes that as at the date of the ruling the plaintiff had not paid any rent to the 1st Defendant despite having been in possession of the suit premises for the period **1st October 2010 to 31st October 2012** a total of 25 months. The 1st Defendant states that the plaintiff on 29/11/2012 inexplicably forwarded to the 1st Defendant's advocates a cheque for Kshs.137,170/- stating that the same was rent for November 2012. The 1st Defendant avers that the plaintiff did not explain how the quantum of Kshs.137,170/- was arrived at and/or when the arrears of 25 months would be paid which prompted the 1st defendant to return the cheque and advise the plaintiff that the monthly rent was Kshs.500,000/- plus VAT and thus the total arrears for 27 months was Kshs.15,660,000/- which the 1st Defendant required the plaintiff to settle. The plaintiff did not pay the rent arrears and instead filed the application dated 17th January 2013 which raised the question of what precisely was the amount of rent payable monthly by the plaintiff to the 1st Defendant. This application is the subject of this ruling along with the application dated 8th January 2014.

During the pendency of the application dated 17th January 2013 the parties engaged in attempts to determine the rent payable and after what appears to have been extensive consultations both parties agreed to nominate a joint valuer to carry out a valuation to determine the amount of market rent payable per month on the portion of the premises occupied by the plaintiff. The parties agreed to the nomination of **M/S Llyod Masika Limited** to carry out the assessment. The joint letter of instructions dated 29/5/2013 signed by both the lawyers for the 1st Defendant and plaintiff is exhibited and marked "SS-19" and is annexed to the 1st Defendants replying affidavit. The valuers made a valuation report dated 8th August 2013 that fixed the market rent for the portion occupied by the plaintiff at Kshs.360,000/- per month exclusive of service charge.

The plaintiff filed a further affidavit/supplementary affidavit sworn by **Kamar Kumar Patel** on 3rd April

2014 in response to the 1st Defendant's replying affidavit sworn on 17th January 2014 and filed in court on 20th January 2014 in which he protested that the negotiations that were held between the parties were on a without prejudice basis and that the aforesaid valuation report resulted from these on **without prejudice** negotiations and that the same ought not to be admitted as evidence and the same should be excluded and should not be considered by the court. While the negotiations were commenced on a without prejudice basis it is clear that in the course of the negotiations the parties agreed to submit the dispute on rent to a neutral and independent valuer to make the assessment. The nomination of the valuer was not dictated by one party but was in fact consensual. In my view there would be no basis to exclude and/or expunge the valuer's report from the record when both parties mutually agreed to refer the matter to the valuer. M/S Llyod Masika Limited is a reputable professional firm of valuers who it would be expected would execute their work in a professional manner. Paragraph 4 and 5 of the signed joint letter to **Llyod Masika Ltd** were in the following terms:-

4. The above named Landlord and Tenant wish to determine the amount of market rent payable per month on the whole of the premises occupied by the Tenant.

5. The Landlord and the Tenant have settled on you to conduct the said valuation. They believe that you are neutral and have no conflict of interest as concerns the subject matter and/or either of them.

There is thus no doubt therefore both the plaintiff and the 1st Defendant between themselves acknowledged that a professional was better and well placed to assess and advise them what the rent market value of the premises occupied by the plaintiff was. Indeed the firm of **Llyod Masika Limited** was proposed by the plaintiff's Advocates before both parties agreed to nominate them to carry out the valuation.

Hon. Justice Odunga in his ruling of 31st October 2012 accepted the view that the plaintiff had been notified that the suit premises had been sold to the 1st defendant by the 2nd defendant. In his ruling he stated thus:-

"The plaintiff's suit is premised on the ground that the distress that was carried out by the 4th defendant acting as agent for 1st defendant was unlawful. According to him there were no rent arrears in existence as he was not aware of the fact that the 1st defendant had taken over the 2nd defendant's rights as Landlord in respect of the suit premises. In the supplementary affidavit, it is however admitted that the plaintiff was notified that the property had been sold. The plaintiff's contention, if I understood it properly is that it ought to have been expressly informed that the 1st defendant was the new landlord. In my view once a tenant is notified that the property the subject of the tenancy has changed hands it is upon it to confirm whether it should continue paying the rents to the old landlord and if no information is forthcoming to take the necessary steps to invoke the jurisdiction of the Business Premises Rent Tribunal or even the High Court for appropriate orders. If the tenant insists on paying rents to the "wrong" person it can only have itself to blame if it turns out that it was paying the rents to a person not entitled to the same".

In granting the plaintiff the order of injunction to restrain the 1st Defendant from evicting the plaintiff, the judge held that the 1st Defendant clearly could not use the remedy of distress for rent to evict the plaintiff from the suit premises and further that the plaintiff could only be evicted after the 1st defendant has followed the laid down procedure for termination of the tenancy. A careful review of the Honourable Judge's ruling of 31st October 2012 indicates that the judge did not restrain the 1st Defendant from levying distress for due rent. The 1st Defendant was restrained from evicting the plaintiff from the suit premises or interfering with the plaintiff's quiet possession of the suit premises pending the hearing and determination of this suit **on condition that the plaintiff remits the due rents to the 1st defendant in accordance with the terms of the existing tenancy.**

Thus if the plaintiff failed to remit the due rents to the 1st defendant in accordance with the terms of the

existing tenancy the 1st defendant in my view could properly levy distress for the same. The question however that does not appear to have been answered by the Honourable judge was what the terms of the tenancy between the plaintiff and the 1st defendant were and what the quantum of the due rent was. The plaintiff maintains it was paying a monthly rental of Kshs.137,170/- to the 2nd Defendant at the time the property changed hands to the 1st Defendant. This assertion does not appear to have been rebutted. The 1st defendant for his part appears to rely on a letter dated 25th July 2009 to assert its claim for rent of Kshs.500,000/- plus VAT sent to the plaintiff's Advocates presumably by the Advocates for the 2nd defendant that there was intention to raise the rent to Kshs.500,000/- plus VAT beginning August, 2009 to assert its claim for rent of Kshs.500,000/- plus VAT. There is no evidence that the plaintiff accepted this intended increase. To the contrary the plaintiff through a reference BPRT NO. 442 of 2011 filed on 4/7/2011 challenges what it states to have been an unlawful rent increase resulting to an unlawful distress for rent for Kshs.4,667,840/-.

The rent demand per month of Kshs.500,000/- was thus neither agreed and/or determined by the Business Premises Rent Tribunal and the 1st Defendant would not have had any basis to levy distress on the basis that this was the rent payable by the plaintiff for the suit premises on a monthly basis to the 1st defendant. As the tenancy between the plaintiff and the 2nd Defendant appears to have been a controlled tenancy the provisions of the Landlord and Tenant (shops, Hotels and Catering Establishments) Act Cap 301 Laws of Kenya would be applicable and thus the 1st Defendant would have required the sanction of the Business Premises Rent Tribunal to increase the rent if the same was not agreed as between the parties.

To the extent that the plaintiff was a controlled tenant in the suit premises at the time the same was transferred to the 1st Defendant such transfer to the 1st Defendant was subject to the existing tenancy of the plaintiff. The 1st Defendant could only alter the terms of the tenancy by following due process as prescribed under Cap 361 Laws of Kenya. In the premises therefore the plaintiff was until such time as the terms of the tenancy were lawfully altered entitled to pay a monthly rent of Kshs.137,170/- plus VAT since VAT is payable on rents.

Thus the rent due as at 31st October 2012 when the Honourable Judge delivered his ruling would have been the monthly rent of Kshs.137,170/- payable from October 2010 when the 1st Defendant became entitled to receive the rent. In my view this rent would continue to be payable upto July 2013 and from August 2013 the market rent of Kshs.360,000/- per month plus VAT would be payable to the 1st Defendant. I am aware that the 1st Defendant argues that the assessed rent should be backdated to October 2010 when the 1st Defendant became entitled to receive the rent. I do not consider that it would be acceptable to apply the assessed rent retrospectively on the basis that the valuers were not instructed to assess the market rent as at October 2010. It is clear the assessment of the rent was as at 7th August 2013 when they inspected the premises. The comparable applied by the valuer was on the basis of the rent being paid at the time of the inspection and thus it would be unfair to give effect to the rent assessment retrospectively. I therefore hold that the assessed rent would be applicable from the month of August 2013 when the assessment was done.

In the premises I make the determination that the rent due and payable by the plaintiff to the 1st Defendant is as follows:-

- i. **From October 2010 to July 2013 being (34 months) Kshs.137,170/- plus VAT per month.**
- ii. **From August 2013 to June 2014 being (11 months) Kshs.360,000 plus VAT per month.**
- iii. **I Further direct that the sum of Kshs.4,667,840/- stated to have been paid to the 1st Defendant following the contested levy of distress of 1st July 2011 be applied to offset the rent due by the plaintiff to the 1st Defendant and henceforth the plaintiff to continue to remit the monthly rent of Kshs.360,000 plus VAT to the 1st Defendant.**
- iv. **The plaintiff to pay all the rent and VAT due to the 1st Defendant as above within the next fifteen (15) days from the date of this ruling failing which the 1st defendant to be at liberty to**

- levy distress to recover the same.**
v. **Each party to bear their own costs for the applications.**

Orders accordingly.

Ruling dated signed and delivered at Nairobi this...26THday of.....JUNE2014.

J. M. MUTUNGI

JUDGE

In presence of:

..... For the Plaintiff

..... For the Defendants.