IN THE COURT OF APPEAL

AT NAIROBI

(CORAM: WAKI, NAMBUYE & KIAGE, JJ.A)

CIVIL APPEAL NO. 100 OF 2015

BETWEEN

DR. RONALD NGURU GATHARA .....1ST APPELLANT

RODOKEN VENTURES (K) LTD …..... 2ND APPELLANT

RACHAEL V. MUTAHI T/A TOPLINK AUCTIONEERS....3RD APPELLANT

AND

CLIFF MBALA.....RESPONDENT

(An appeal from the Judgment and Order of the High Court of Kenya at Nairobi, (Sergon, J.) dated 13th February, 2015

in

H.C.C.C. NO. 669 OF 2011)

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JUDGMENT OF THE COURT

This is a second appeal by the appellants. Their first appeal, against the judgment of the Principle Magistrate's Court at Milimani Commercial Courts that awarded the respondent some Kshs. 400,000 in general and punitive damages for alleged unlawful distress, was dismissed by the High Court (Sergon, J) on 13th February, 2015.

That award followed a suit by the respondent against the three appellants. The first two were his landlord and the third a firm of auctioneers.

He claimed damages for the distress on 11th July 2006 for rent allegedly owing from him to the 1st and 2nd appellants over a house in New Garden Estate. The distress was effected by the 3rd appellant on 11th July 2006 on the instructions of the 1st and 2nd appellants. The respondent pleaded that the distress was wrongful, unlawful and illegal as he had paid rent up to the month of July 2006 and had no arrears to justify the distress in which his television set and refrigerator were attached. He prayed for a permanent injunction to restrain the appellant's from demanding or levying distress for alleged rent arrears and from

proclaiming, attaching, selling, auctioning or disposing of his movable property. He also sought a mandatory injunction to compel the appellants to release or surrender the two attached items to him.

By a judgment delivered on 1st December 2011 the Senior Principle Magistrate (Hon. Nditika) found that as the respondent had already issued and the 1st and 2nd appellants had accepted a notice to terminate the tenancy, the latter duo had no ***locus standi*** to demand rent or instruct the 3rd respondent to distrain for rent. Indeed, during the pendency of the suit the appellants had, in tacit acknowledgement of the unlawfulness of the distress, consented to the release of the attached goods to the respondent. Finding that the 3rd appellant did not have a certificate, though in evidence she had stated that she was a licensed auctioneer, the learned magistrate held that the distress was unlawful and awarded damages in the sum of Kshs. 200,000 each for general and punitive damages making a total of Kshs. 400,000. He also awarded costs to the respondent.

The appellants' first appeal against that judgment was dismissed as we have indicated at the beginning of this judgment. This aggrieved the appellants who charge in their memorandum of appeal that the learned Judge erred in law by;

- ***Shifting the burden of proof even after finding the respondent did not prove rent payment.***
- ***Relying on a non-existent section of the law thus misinterpreting the law on distress.***
- ***Erroneously concluding that the appellants sought possession yet they were distressing (sic) for rent.***
- ***Failing to address the issue of quantum of damages raised before him.***

Both parties filed written submissions through their respective counsel on record. For the appellant, K. Macharia & Co. Advocates in theirs, which learned counsel **Mr. Macharia** highlighted before us, pointed out that the learned Judge erroneously held that a certificate issued by the High Court was a prerequisite for the levying of distress under ***Section 18*** of the Distress for Rent Act Cap 293, ignoring that the Auctioneers Act by ***Section 34*** amended the said provision by deleting the word ***'bailiff'*** and replacing it with '***auctioneer***' for purposes of distress. Consequently, all Class 'A' and 'B' Auctioneers have a right to levy distress and the learned Judge fell into error by holding that a court order was required.

The other error the learned Judge committed stated counsel, was to hold that the appellants took possession of the suit premises without a court order, which evinced a grave misapprehension of the case that was all and only about distress for rent. The learned Judge was criticized for misapplying the case of ***GUSII MWALIMU INVESTMENT LTD & 2 OTHERS vs. MWALIMU HOTEL KISII LIMITED*** **[1996] eKLR** in that regard. He was also blamed for failing to properly address the issue of damages, the quantum of which is predetermined by ***Section 8*** of the Distress for Rent Act at double the value of the goods wrongfully sold in distress. As no goods were sold in the present case, there was no basis for any award of damages and the learned Judge erred in upholding the trial court's award of Kshs. 400,000 which was astronomical in the circumstances and went to demonstrate that he approached the case as if it was founded on an eviction, which it was not.

The respondent's submissions filed by his Advocates on record, Achola Jaoko & Co., but not highlighted, were that the distress was unlawful because; first, no rent was owing and; second, the 3rd appellant did not hold a certificate issued by the Registrar of the High Court authorizing her to levy distress for rent as stipulated by ***Section 18*** of the Distress for Rent Act. He cited in aid the definition of unlawful distress in Halsbury's Laws of England 4th Edn. P 543 and 551 and the High Court (Simpson J, as he then was) case of ***NTHENGE vs. WAMBUA*** **[1984] KLR 799** which asserted the need for a High Court-issued certificate for a bailiff to distrain for rent.

Counsel challenged as unfounded the appellant's contention that the Distress for Rent Act was expressly or impliedly amended by the Auctioneers Act. We were urged to dismiss the appeal.

We have given due consideration to the record and taken into account the submissions made and

authorities cited by the opposing parties before us. We think that there is no doubt there was no rent owing from the respondent to the 1st and 2nd appellants as at the date the respondent's television set and fridge were attached by the 3rd appellant on instructions of the two appellants. There are two concurrent factual findings on this and we have no basis for departing therefrom. To that extent, and bearing in mind the definition cited, the distress was unlawful. The second basis for unlawfulness of the distress relied on by the two courts below, namely that there was no certificate issued by the High Court under ***Section 18*** of the distress for Rent Act permitting the levying of distress did not however lie. This is because that provision was repealed by ***Section 21*** of Act No. 17 of 2006. Consequently, there is no longer a requirement that an auctioneer first obtain that court's permission before levying distress. A holding to the contrary was clearly misplaced, misadvised, erroneous and quite ***per incuriam*** in light of that repeal.

Having found that the distress was unlawful on account of the first score, what remedy was available to the respondent? We think, with respect, that whereas the issue of damages lies in the discretion of the trial court and an appellate court should interfere only sparingly, a basis did exist that would have entitled, indeed compelled, the High Court to interfere with the award of Kshs. 400,000. In the case of ***KITAVI vs. COASTAL BOTTLERS LTD*** **[1985] KLR 470** cited by the appellants, this Court held, and we reiterate, that an appellate court ought to be slow to disturb an award of damage made by the trial court but will do so when the trial court has taken into account a factor that it ought not to have or failed to take into account what it ought to have, or if the award is so high or so low as to amount to an erroneous estimate.

It seems plain to us that there was neither factual nor legal basis for the award of Kshs. 400,000 as general damages that was made by the subordinate court and affirmed by the learned Judge. There were no authorities cited and no reasoned justification for the figure which seems to have been literally plucked from the air. Considering that all that occurred herein was the attachment and restoration shortly thereafter of the respondent's television set and refrigerator, the award given and confirmed was inordinately high and amounted to a wholly erroneous estimate and must be set aside.

We note with some perplexity that the learned Judge treated the matter before him as a case involving unlawful eviction of the respondent from the suit premises. It certainly was nothing of the sort and the learned Judge was clearly wrong to treat it as such. His reliance on the **MWALIMU HOTEL** case (supra) was doubtless informed by that misapprehension of the character of the dispute before him, as was the confirmation of the findings and award of the trial court. That error of law is likewise reversible.

Having said that, it cannot be gainsaid that the intrusion into the premises of the respondent, however brief and harmless, was a wrong done to him. As always equity does not suffer a wrong to be done without a remedy and we think the respondent was entitled to nominal damages in the circumstances. We assess them at Kshs. 50,000 (Fifty Thousand Shillings).

The upshot of our consideration of this appeal is that it is merited and we allow it save to the extent stated above. The judgment and decree of the High Court is accordingly set aside and substituted with an order reducing the damages payable to the respondent to Kshs. 50,000, payable with interest thereon from the date of judgment of the Principal Magistrate.

Each party shall bear its own costs of this appeal.

Dated and delivered at Nairobi this 16th day of June, 2017.

P. N. WAKI

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JUDGE OF APPEAL

R. N. NAMBUYE

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JUDGE OF APPEAL

P. O. KIAGE

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JUDGE OF APPEAL

I certify that this is a true copy of the original.

DEPUTY REGISTRAR