



Cambridge Universal College Ltd v Hasham Lalji Properties Limited & 2 others (Environment & Land Case E017 of 2022) [2024] KEELC 13303 (KLR) (19 November 2024) (Ruling)

Neutral citation: [2024] KEELC 13303 (KLR)

**REPUBLIC OF KENYA
IN THE ENVIRONMENT AND LAND COURT AT ELDORET
ENVIRONMENT & LAND CASE E017 OF 2022
JM ONYANGO, J
NOVEMBER 19, 2024**

BETWEEN

CAMBRIDGE UNIVERSAL COLLEGE LTD PLAINTIFF

AND

HASHAM LALJI PROPERTIES LIMITED 1ST DEFENDANT

SEDCO CONSULTANTS LIMITED 2ND DEFENDANT

HEGEONS AUCTIONEERS 3RD DEFENDANT

RULING

1. By Notice of Motion dated 24th September, 2024, the Applicants sought the following orders: -
 - a. Spent.
 - b. That this honourable court do hereby stay, set aside, vary and/or vacate the orders in this matter issued on 14th November, 2022 granting temporary injunctive orders restraining the Defendants/ Applicants from attaching, offering for sale by way of public auction or private treaty and/or disposing or dealing in any manner with the Respondent's properties situated on parcel known as ELDORET MUNICIPALITY BLOCK 7/113 pending the hearing and determination of this suit.
 - c. That an Order do and be hereby issued allowing the Defendants/ Applicants to levy distress for rent arrears and other expenses charged against the Plaintiff/Respondent in respect to parcel known as Eldoret Municipality Block 7/113.
 - d. That in the alternative the Honourable Court do hereby issue an Order directing the Plaintiff/ Respondent to deposit the sum of Kenya Shillings Seventeen Million, Five Hundred and Seventy-Eight Thousand, Six Hundred and Twelve (Kshs.17,578, 612/=) being the rent and other charged expenses, that was due and owing to the Respondent for rent up to the 1st



September, 2024 or any other sum the court deems fit, into a joint account to be held by the corresponding firm of advocates within 14 days thereof pending the hearing and determination of the suit.

- e. That the costs of the Application be provided for.
 - f. Any other order that this Honourable Court deems fit and just to grant in the circumstances.
2. The application is based on the 8 grounds set out on the face of the Notice of Motion and the Supporting Affidavit sworn by Paul Rutto, a Director of the 2nd Applicant on even date. He explained that the 1st Defendant/Applicant, Hasham Lalji Properties Limited is under receivership and on 13th February, 2020, the 2nd defendant/ Applicant was appointed by the High Court in HCCC No. E148 of 2019 Hasham Lalji Properties Limited & 3 others Vs Sultan Hasham Lalji & 2 Others as the Estate Agents to manage, maintain, and collect rent accruing from all of the 1st defendant's properties including the suit premises. He averred that at all material times relevant to this suit, there has always been a lease agreement between the 1st defendant and the plaintiff over the suit premises known as ELDOROT MUNICIPALITY BLOCK 7/113 at a monthly rent of Kenya Shillings Three Hundred and Nineteen Thousand (Kshs.319,000/=). The plaintiff was under a duty and obligation to pay rent when it fell due.
 3. It was his contention that from April 2020 to date, the Plaintiff/Respondent has not been consistent in paying rent, leading to the accumulation of rent arrears amounting to Kenya Shillings Fifteen Million, Two Hundred and Ninety Seven (Kshs.15,297,000.00/=). He attached a copy of the Statement of Account for the period between 1st April, 2020 to September, 2024 in support of the said averments.
 4. He asserted that from 1st April, 2020 to 31st December, 2020, the total amount received from the Plaintiff/Respondent over the said period was Kenya Shillings Three Hundred Thousand (Kshs.300,000/=) despite the fact that the rent payable per month was Kshs.319,000/- thereby accruing an arrears of Kenya Shillings Two Million, Five Hundred and Seventy-One Thousand (Kshs.2,571,000/=).
 5. He stated that from January 2021 to December 2021, the total rental income expected over the twelve months was Kenya Shillings Three Million, Eight Hundred and Twenty-Eight Thousand (Kshs.3,828,000); however, the total amount received from the respondent between the said period was Kenya Shillings One Million, Six Hundred and Twenty-Nine Thousand (Kshs.1,629,000/=).
 6. Further, from January 2022 to date, the Plaintiff/Respondent has not made any payment in respect to rent and the accumulative arrears as at August, 2024 amounts to Kenya Shillings Ten Million, Eight Hundred and Forty-Six Thousand (Kshs.10,846,000/=)
 7. He further accused the Plaintiff/Applicant of issuing cheques to the 2nd Defendant/Applicant which bounced upon presentation to the bank, he outlined the various cheque numbers and amount in dispute thereunder.
 8. It was his assertion that the 1st and 2nd Defendants have incurred expenses in respect to auctioneers' fees for attempting to levy distress for rent, expenses which they would not have incurred had the Plaintiff honored their rent payment obligations; which he estimated amounts to Kshs.2,057,612/-
 9. He averred that temporary Orders of Injunction were issued by this court on the 14th November, 2022. It is his contention that at the time of issuance of the said injunctive orders, the Plaintiff/ Respondent had failed to inform this Court that the Court of Appeal in COA Civil Application No. E082 of 2020-Hasham Lalji Properties Limited & SEDCO Consultants Limited vs Cambridge Universal College Limited had on 31st October, 2022 issued orders requiring the respondent to pay



- all rents falling due with effect from the date of that order, pending hearing and determination of the Appeal (COACA/E138/2022: Hasham Lalji Properties Limited & SEDCO Consultants Limited vs Cambridge Universal College Limited. He annexed a copy of the said Order of the Court of Appeal.
10. Owing to the continued default in rent payment on the part of the Respondent; he contended that it is clear that the interim orders of injunction issued were calculated to help the Plaintiff/Respondent to avoid his contractual obligations of paying rent.
 11. He averred that the actions by the Plaintiff/Respondent for failing to pay rent thus amounts to an abuse of court orders by living on another party's premises without any consideration.
 12. He thus urged the court to balance the interest of both parties and place both parties in a fair place in the interest of justice and consider the Applicants' who stand to suffer more loss since they are not generating income and to allow the application.
 13. In the Further Affidavit he explained that there was various increment on the payable monthly rent. In May 2021, rent was increased from 350,000/- to 385,000/- in the year 2022, rent was increased to Kshs.424,589 and the final increment was in May, 2023 to Kshs.469,048.48.
 14. As a result of the rent increment thereof; the total rent that is due and owing is Kshs.20,770,621.00/=. He annexed a copy of the financial statement. He thus maintained that the respondent is not up to date on the rent payment as alleged. He admitted that the lease period has since lapsed.
 15. The application was opposed. The Plaintiff/ Respondent filed a Replying Affidavit sworn by Alex Wanjala Kango, Director of the Plaintiff, on 23rd October, 2024 in response to the Application. He dismissed the application as being misconceived, bereft of merit and an abuse of the court process. He denied the allegations raised in the Supporting Affidavit.
 16. It is his claim that the court in Nairobi HCCC No. E148 of 2019 Hasham Lalji Properties Limited & 3 Others vs Sultan Hasham Lalji & 2 Others issued orders on 8th July, 2022, whose effect was to order all tenants of Hasham Lalji Properties Limited to immediately and until determination of the arbitration, pay rent to Hasham Lalji Properties Limited's Bank Account held at Prime Bank.
 17. He averred that pursuant to the said order, the Respondent has been depositing rent to the 1st Applicant's Bank Account provided in the said court order and is up to date in payment of rent. He annexed a bundle of bank deposit slips as proof of the said averments.
 18. It was his contention that the agreed monthly rent as per the lease agreement was Kshs.300,000/- and not Kshs.319,000/- as alleged.
 19. In response to the auctioneers' charges claimed by the Applicants he asserted that the Applicants were aware of the injunctive orders dated 9th June, 2022 and 25th November, 2022, but proceeded to instruct several firms of auctioneers to attempt to levy distress for rent in total defiance of the orders. Thus, since the instructions were issued during the subsistence of a court orders, the same were unlawful and the plaintiff cannot bear the burden caused by the illegal actions.
 20. It was his claim that the orders sought in the application are untenable as the orders sought to be set aside lapsed in November, 2023 by virtue of Order 40 Rule 6.
 21. He further contended that the lease in respect of the suit premises expired 6 months ago and therefore, pursuant to section 5 of the *Distress for Rent Act*; the 1st and 2nd defendants are barred from levying distress for rent. He attached a letter dated 13th March, 2024.



22. In conclusion, he maintained that the issues raised in the application can be best dealt with in the main suit. He urged the court to dismiss the application with costs.
23. The application was canvassed by way of oral submissions on 28th October, 2024. Both counsels reiterated the contents in their respective Affidavits.

Applicants' Submissions

24. Learned counsel for the Applicant submitted that from the annexed a copy of the lease agreement between the landlord and the tenant, the same clearly shows that the term of the lease was for 6 years; from 1st May, 2018 to 30th April, 2024 and that the same has since expired. The said lease also provided a schedule of the rent payable, with the final amount being Kshs.469,048 inclusive of VAT.
25. He gave a brief breakdown of the money paid by the respondent and the outstanding arrears over the years; He went on to explain that from 1st April, 2020 the statement shows that the only rent payments received were of Kshs.150,000/- in November and Kshs.150,000/= made on 21st December, 2020 leaving the rent arrears of Kshs.2,826,200/=. In May, 2021, the rent increased to Kshs.385,990/-. He submitted that the Respondent made erratic payments ranging from Kshs.200,000/- to Kshs.30,000/-. By 1st January, 2022, the rent had accrued to Kshs.6,074,710 and there was no payment was recorded in the year 2022 and 2023. This trend has continued to date. That as at 1st October, 2024; the rent due was Kshs.20,770,620.64/=. That between January, 2022 and October, 2024, the rent increased from Kshs.424,582/- to Kshs.469,048.48/=
26. Counsel submitted that following the Court of Appeal Order on the payment of rent with effect from 31st October 2022, the Respondent was under a duty to pay the outstanding rent arrears but he has failed to do so to date. That the attempt to levy distress is therefore lawful and in furtherance of the Court of Appeal orders. That the Respondent has not produced any proof of payment to show that the rent was duly paid or cleared as directed in the Court of Appeal Order.
27. He further submitted that despite the fact that the lease has expired, the Respondent has neither renewed the lease nor vacated the suit premises. It is therefore prejudicial to the applicants for the Respondent to keep enjoying the tenancy without paying any rent.
28. In conclusion, he submitted that the circumstances of this case are special and they warrant the grant of the orders sought. He relied on the case of KPLC vs Benzine Holdings Ltd Trading as Wyco Paints [2016] eKLR.
29. In response to the Respondent's submissions he stated that section 5 of the *Distress for Rent Act* has a proviso allowing distress for rent if the tenant is still in possession. He confirmed that the Respondent is still in possession and they can thus levy distress. That the facts in the Aduda case are distinguishable from the facts of the instant suit since the later majorly dealt with the determination of whether the distress for rent was irregular or illegal. That the illegalities pronounced in the said case do not apply in the instant suit. He maintained that it is legal to levy distress when the rent is in arrears where the landlord owns the premises occupied by the tenant and where tenant is still in possession.
30. With regards to res judicata claims; it was submitted that the issues raised in the instant application are different from those in the Court of Appeal. He reiterated that they do not seek to vary the orders issued by the Court of Appeal. That the Court of Appeal never granted orders to levy distress but only ordered where money was to be paid and authorized the landlord to take all legal action to recover the rent arrears. He urged the court to find that the action by the Respondent warrants an order for levying distress.



Respondent's Submissions

31. Counsel for the Respondent submitted that the Respondent has duly complied with the Court of Appeal Order on the payment of rent in the company's account. That the Respondent has been paying rent to Hasham Lalji Properties Limited as per the annexed deposit slips. He however admitted that the Respondent has not been paying the monthly rent as provided in the lease agreement owing to financial challenges that it has been facing.
32. With regards to prayer No. 2 it was his submission that the same cannot be granted as the orders of injunction in question were issued on 22nd November, 2022 and pursuant to the provisions of Order 40 Rule 6, the said orders have lapsed.
33. Regarding prayer No. 3; he submitted that the applicants cannot seek to levy distress for rent yet the lease had already expired in April, 2024. The prayer is thus barred pursuant to the provisions of section 5 of the *Distress for Rent Act*. Consequently, if the court were to grant prayer no. 3, then the same would be illegal since 6 months have elapsed since the lease expired. The court would thus be aiding an illegality. In this regard, he relied on the case of CYO Owayo vs George Hannington Zephania Aduda T/A Aduda Auctioneers [2007] eKLR.
34. On the issue of the dishonored cheques, counsel submitted that there are no notices from the bank as proof that indeed some of the respondent's cheques were dishonored. That the statement annexed includes Auctioneers fees and the penalties paid for the dishonored cheques which he argued that the Respondent cannot be condemned to pay the same without proof of the dishonored cheques. Further, the auctioneers' fees were incurred in a process that was illegal since the attempts to levy distress were made during the subsistence of the injunctive orders issued by this court. He contended that the applicants have not given an explanation of how they arrived at Kshs.17,578,612/- as the outstanding rent arrears.
35. With regard to prayer 4, he stated that the same has been dealt with conclusively by the Court of Appeal in Kisumu Civil Application No. E082 of 2022 and the same therefore amounts to asking this court to review an order of the Court of Appeal.

Analysis and Determination

36. This court is of the considered opinion that the main issues for determination are as follows:-
 - a. Whether the prayer for setting aside the injunctive orders of 14/11/2022 is tenable and if so,
 - b. Whether the Applicant has made out a case for setting aside the temporary injunctive Orders issued on 14th November, 2022,
 - c. Whether the Applicant can be allowed to levy distress for rent.

Whether the orders of temporary injunction dated 14th November, 2022 should be set aside

37. The Applicant herein seeks to set aside the orders of Temporary Injunction issued by this court on the 14th November, 2022. The Respondent on the other hand contends that the said prayer for setting aside the injunctive orders is untenable pursuant to Order 40 Rule 6 and that the said orders have since lapsed.
38. It is not in contest that the orders in question in the instant Application were issued on 14th November, 2022. Order 40 on Rule 6 of the Civil Procedure Rules provides as follows: -



6. Where a suit in respect of which an interlocutory injunction has been granted is not determined within a period of twelve months from the date of the grant, the injunction shall lapse unless for any sufficient reason the court orders otherwise.” (emphasis mine)
39. In this case, there has been no demonstration by the Respondent that the said orders of temporary injunction issued have since been extended. Rather, he has directly confirmed that the said orders have since lapsed.
40. The Court of Appeal in the case of Barclays Bank of Kenya Limited Vs Henry Ndungu Kinuthia & Another (2018) eKLR, held that: -
- “A plain reading of Order 40 Rule 6 shows that the rule is couched in mandatory terms, and that the only situation in which an interlocutory injunction will not automatically lapse after 12 months by operation of the law is where the court has given a sufficient reason why the interlocutory injunction should not lapse.”
- See also Court of Appeal decision in Erick Kimingichi Wapang’ana & Another vs Equity Bank Limited & Another (2015) eKLR
41. Guided by the above section and case law, it is clear that the orders in question having been issued on the 14th November, 2022 and no steps having been taken to either extend the same or fast-track the hearing and determination of the main suit within the 12 months lapsed with effect from 15th November, 2023. No sufficient reasons have been demonstrated to warrant the extension of the said orders.
42. Consequently, it is the finding of this court that the prayer for review, setting aside and/or varying of the injunctive orders untenable and has been overtaken by events pursuant to the provisions of Order 40 Rule 6 above. One cannot seek to set aside an order that has since lapsed and is not effective.
43. Having held that the said orders of injunction issued on 14th November, 2022 have since lapsed, I find that discussing whether the threshold of setting aside the temporary orders has been met by the applicants will amount to an academic exercise. Issue 2 therefore falls by the wayside.

Whether the Applicants can be allowed to levy distress for rent.**

44. The Applicant gave a brief genesis of the dispute between the parties; particularly the orders issued by the Court of Appeal vide Court of Appeal in Kisumu Civil Application No. E082 of 2022 issued on the 31st October, 2022, directing that all the tenants pay the rent falling due with effect from the date of the order. And further, the orders issued in Nairobi HCCC No. E148/2019 where orders were issued on 8th July, 2022 directing all the tenants of the 1st defendant to effectively and immediately and until the determination of the Arbitration, to pay rent into the 1st defendant’s bank account held at Prime Bank.
45. The Applicant contends that the Respondent has been in breach of the said orders and sought the injunctive orders in this court to sanction his wrong doings. That the Respondent has not been meeting his primary obligation under the lease agreement, by paying the monthly rent as and when the same fell due even though he has been enjoying possession of the suit premises at the expense of the landlord. He thus urged the court to allow them to levy distress.
46. Even though he conceded that the lease has since expired, he maintained that section 5 of the *Distress for Rent Act* is not applicable in the circumstances of the present case since the tenant in this case is still in possession of the leased premises even though the lease has not been renewed.



47. The Respondent on the other hand maintained that the Applicants cannot levy distress for rent yet the lease had already expired in April, 2024. That the said prayer is barred pursuant to section 5 of the *Distress for Rent Act*, owing to the fact that 6 months have already elapsed since the lease expired. Further, it is their contention that they have been paying rent over the years as directed and they do not have any arrears as alleged by the Applicants.
48. In determining this question, this court must consider the provisions of section 5 of the *Distress for Rent Act* and the exemptions thereunder, if any. Section 5 of the Act provides as follows: -
- “Any person having rent in arrear and due upon a demise, lease or contract after the ending or determination of the demise, lease or contract, may distrain for the arrears after the ending or determination in the same manner as he might have done if the demise, lease or contract had not been ended or determined:
- Provided that distress under this section shall be made within the space of six months after the determination of the demise, lease or contract and during the continuance of the landlord’s title or interest, and during the possession of the tenant from whom the arrears became due.”
49. The question that therefore follows is whether the circumstances of the instant suit fall within the context of the 3-provisos stated above. It is the Applicants contention that since the tenant/ Respondent is still in possession of the suit premises despite the lease having expired, they are lawfully entitled to levy distress for rent. The Respondent on his part did not comment on the allegations that they are still in possession of the suit premises but only stated that the lease has expired.
50. In *Royal Gardens Hospital v Ebrahim Omenyi Amwere & Another* (Civil Suit Number 10/2018, the High Court Kakamega) the court reiterated the right of a landlord to distress for rent when a tenant fails to pay rent. The court stated as follows inter alia:-
10. The Kenyan statute is rather skeletal in its provisions on the subject, and therefore guidance is to be had from the English common law. The general position in law is that a landlord is given a right to seize and remove certain goods from the possession of the tenant in order to compel him to pay rent due. If thereafter the tenant fails to pay the rent due after seizure the same is sold by auction. There are two prerequisites for the right to distrain for rent. One, there must exist a landlord and tenant relationship, at the time when the rent falls due as well as when distress is levied. Secondly, the rent must be in arrears. Being in arrear means that the amount due is ascertained, due and unpaid. The rent payable by the tenant must be certain, otherwise the right to distrain would not be available.” (emphasis mine)
51. Section 5 above provides three instances when distress for rent may be levied, these are
- a. Must be levied within a space of 6 months after determination of the lease,
 - b. During the continuance of the landlord’s title or interest
 - c. During the possession of the tenant from whom the arrears became due.
52. Further, the aforementioned case law also provides for two instances when distress may be levied, to wit;
- i. There must be a landlord and tenant relationship at the time when the rent falls due and when the distress is levied,



- ii. Rent must be in arrears.
53. I have carefully considered the circumstances of the instant case; it is not in dispute that the lease has since expired as at April, 2024; that 6 months have since lapsed after the expiry of the said lease and further that there are outstanding rent arrears.
54. It is also not in dispute that the plaintiff/respondent is still in possession of the suit premises and this matter therefore falls under the proviso to section 5 of the *Distress for Rent Act*.
55. In considering this application, the court is cognizant of its core obligation of ensuring that scales of justice are balanced between the parties.
56. With regard to prayer No. 4 as sought in the alternative; I must point out that from the facts and annexures placed before the court, it is evident that the Court of Appeal gave directions on the deposit and payment of all rent arrears. This court cannot therefore order for the said arrears to be held in a joint account held in the names of the advocates as sought. The same would amount to reviewing an appeal of an order of the Court of Appeal.
57. Accordingly, I find that the Application dated 24th September, 2024 is merited and I make the following orders;
- a. The orders of injunction have lapsed pursuant to Order 40. Rule 6 of the Civil Procedure Rules but for the avoidance of doubt, they are hereby vacated.
 - b. The Plaintiff/Respondent shall pay the outstanding arrears within 15 days failing which the Defendants/Applicants shall be at liberty to levy distress.
 - c. The costs of this Application shall be borne by the Plaintiff/Respondent.

DATED, SIGNED AND DELIVERED AT ELDORET THIS 19TH DAY OF NOVEMBER, 2024.

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J. M. ONYANGO

JUDGE

In the presence of;

Mr. Kipkurui for the Plaintiff/Respondent

Mr. Otwal for the Defendants/Applicants

Court Assistant: Brian

