Mayieko & another v Magembe & 2 others (Environment and Land Appeal E004 of 2022) [2024] KEELC 13726 (KLR) (9 December 2024) (Judgment)

Neutral citation: [2024] KEELC 13726 (KLR)

REPUBLIC OF KENYA

IN THE ENVIRONMENT AND LAND COURT AT KISII

ENVIRONMENT AND LAND APPEAL E004 OF 2022

M SILA, J

DECEMBER 9, 2024

BETWEEN

BENJAMIN GICHANA MAYIEKO ..... 1ST APPELLANT

JOHN OCHAKO ..... 2ND APPELLANT

AND

COSMAS MAGEMBE ..... 1ST RESPONDENT

VINCENT MAGEMBE ..... 2ND RESPONDENT

DAVID OENGA T/A EDY BRIGHT AUCTIONEERS ..... 3RD RESPONDENT

(Being an appeal against the judgment of Hon. S.K Onjoro, Principal Magistrate, delivered on 19 November 2021, in the suit Kisii CMCC No. 555 of 2020)

JUDGMENT

(Appellants being tenants of premises owned by the 1st and 2nd respondents; 1st and 2nd respondents proceeding to instruct the 3rd respondent to attach the goods of the appellants for non-payment of rent; 3rd respondent attaching the goods on 12 November 2020; no inventory of the goods attached presented; no notice of redemption issued; appellants filing suit on 19 November 2020 and obtaining orders for stay of sale; application subsequently dismissed; respondents however not presenting any evidence of what happened to the goods attached; on 16 November 2020, 1st and 2nd respondents leasing the premises to a third party; appellants seeking orders to be reinstated back into the premises and damages; 1st and 2nd respondents making counterclaim for unpaid rent and rent in lieu of notice; judgment entered for the 1st and 2nd respondents as prayed and suit of appellants dismissed; on appeal, court holding that the purported termination of the lease and putting in a new tenant without the requisite notice under Section 4 of Cap 301 being issued was illegal; attachment of the goods was also illegal; no evidence tendered of what happened to the goods upon attachment;

in those circumstances the 1st and 2nd respondents could not be entitled to being given judgment for unpaid rent; it was the landlord who was to issue to the tenants notice to terminate lease and none was issued thus no basis upon which to award the 1st and 2nd respondents rent in lieu of notice; on the claim for damages, court awarding the appellants damages for illegal termination of the tenancy; court also making an award for damages for the detained goods)

1. The appellants were tenants of the 1st and 2nd respondents in the premises Kisii Municipality/Block III/353. The parties had a lease agreement for two floors of the suit premises commencing 1 March 2019 for a period of 3 years at the monthly rent of Kshs. 70,000/=. It is common ground that the tenancy was a controlled tenancy under the *Landlord and Tenant (Shops, Hotels and Catering Establishments) Act*, Cap 301, Laws of Kenya (hereinafter simply referred to as Cap 301). It is not disputed that the appellants fell into arrears of rent, although none of the parties were very clear on what the arrears were, both parties giving different figures, without being specific on what months were paid and what months were not paid, an aspect that I will come to later in the judgment. For reason that the 1st and 2nd respondents were unpaid landlords, they proceeded to instruct an auctioneer, in the person of the 3rd respondent (sued as 3rd defendant in the plaint), to levy distress. The 3rd respondent filed an application in the Chief Magistrates' Court at Kisii, being Kisii CMCC Miscellaneous Civil Application No. 89 of 2020 seeking a breaking order to enter the premises and collect the goods said to have been proclaimed on 9 October 2020. The order was given on 5 November 2020. On 12 November 2020, the 3rd respondent made entry into the premises and carted away various goods and items of the appellants. This action prompted the appellants to move to court and they filed a plaint against the respondents on 19 November 2020.

2. In the plaint, they averred inter alia that on the demised premises, they were operating the business of a bar, restaurant and accommodation. They admitted being in arrears of rent and claimed that sometimes in early September 2020, the 1st appellant had agreed with the 1st respondent that the appellants would pay all accrued rent by December 2020, save for 6 months rent when the business was not functioning owing to Covid-19 and bars and hotels were closed. They pleaded that since September 2020, they had paid the sum of Kshs. 480,000/=. They complained that without any notice, the 3rd respondent came to the premises on 12 November 2020, attached goods worth over Kshs. 700,000/=, and locked the premises. It is pleaded that all that the 3rd respondent was armed with was a breaking order notwithstanding that the business had never been closed. They pleaded that as a result they have been unable to run their business and they have suffered loss. In the body of the plaint, they particularized their damages as follows: "Loss of earning and/or profits from 12 November 2020 until the release of goods and/or opening the premises - Kshs. 10,0000/= per day." In the plaint, they asked for the following orders:

    a. Mandatory injunction directing the defendants to remove the locks placed at the business premises situated on land parcel No. Kisii Municipality/Block III/253.

    b. An injunction restraining the defendants by themselves their agents, servants or otherwise howsoever wrongfully interfering with the quiet possession and enjoyment of the business premises.

    c. Return of the attached goods.

    d. Loss of earnings and/or profits.

    e. Damages.

    f. Costs and interest.

3. Together with the plaint, the appellants filed an application under certificate of urgency seeking the following orders:

    a. That the application be certified urgent and be heard ex parte in the first instance.

    b. That the sale of the plaintiffs' goods be temporarily stayed pending inter partes hearing of the application.

    c. That an injunction do issue restraining the defendants from wrongfully interfering with the quiet possession and enjoyment of the demised premises pending hearing and determination of the suit.

    d. Costs of the application be provided for.

    e. Any other orders that meets the ends of justice.

4. The application went before the trial court ex parte on 19 November 2020 and the trial court granted interim orders in terms of prayer (b) of the application, i.e. staying the sale of the goods of the appellants pending hearing and determination of the application.

5. Upon service, the 1st and 2nd respondents entered appearance through the law firm of M/s Nyangacha & Company Advocates and filed a replying affidavit to oppose the motion together with a preliminary objection. The preliminary objection was twofold; firstly, that the court did not have jurisdiction as this was a matter that fell under the jurisdiction of the Business Premises Rent Tribunal (BPRT) created under Cap 301 for reason that the tenancy was a controlled tenancy, and secondly, that the case was sub judice as the appellants had filed a similar matter before the BPRT being Kisii BPRT Case No. 120 of 2020. In the replying affidavit, which was sworn by Cosmas Magembe the 1st respondent, it was deposed inter alia that the appellants were in rent arrears of Kshs. 1, 170,000/=; that due to the default, they instructed the 3rd respondent to levy distress; that on 9 October 2020 the goods of the appellants were proclaimed and a 15 day notice to redeem given; that on expiry of the notice, the 3rd respondent sought a breaking order which was issued; that the goods were then attached and carted away; that the appellants took their office files and keys, and stated in clear terms that they were not coming back to the said premises because of embarrassment, and that they will not pay the rent arrears; that since the premises was left vacant and deserted, the 1st and 2nd respondents leased the premises to one Melchizedek Mautia Atika, who took over the premises. They annexed a lease agreement dated 16 November 2020 entered with the said Melchizedek leasing the premises for a term of 5 years from 16 November 2020 at the rent of Kshs. 76,000/= per month.

6. The application was argued and ruling delivered on 9 April 2021. Regarding the preliminary objection, the court held that the application before court was one of injunction, and in any event there no longer existed a landlord/tenant relationship, therefore the case cannot fall to the jurisdiction of the BPRT. The court observed that the appellants had been evicted and a new tenant put in place and therefore their landlord/tenant relationship ceased to exist. On the prayer for injunction, the trial court was of opinion that the same is overtaken by events. Ultimately the trial court dismissed the application for injunction. The court then directed that the case be fixed for pretrial on 31 May 2021. Importantly, the trial court did not address itself on the status of the attached goods despite having issued interim orders stopping their sale.

7. On 16 April 2021, the appellants filed an application under certificate of urgency, seeking leave to appeal the ruling of 9 April 2021 and for an order of stay of the orders issued on 9 April 2021 pending appeal. That application went before court ex parte on 16 April 2021 and the trial court ordered that status quo be maintained and the matter be mentioned on 17 April 2021. On 17 April 2021, the

trial court directed that the application be heard on 20 April 2021. On that day, Mr. Bosire Gichana appeared for the plaintiffs/applicants, and Mr. Godia was present for the 1st and 2nd respondent. Mr. Bosire stated that: "we have agreed with my colleague we proceed with the hearing of the matter as the goods are wasting. We can comply with Order 11 CPR within 3 days." Mr. Godia confirmed that this was agreeable. The court directed parties to comply with Order 11 before close of business of 4 May 2021 and fixed the case for hearing on 28 May 2021. Nothing was said about the orders of status quo issued on 16 April 2021 or the status of the goods.

8. I need to mention that it was on 31 December 2020 that the 1st and 2nd respondents filed their defence which incorporated a counterclaim, while the 3rd respondent did not enter appearance nor file any defence and never in any way participated in the suit. In their defence, the 1st and 2nd respondents acknowledged that they had a lease agreement with the appellants dated 15 March 2019 for the suit premises at the rent of Kshs. 70,000/= and that it was a controlled tenancy. They pleaded that the appellants defaulted on their obligation to pay rent and that they were in arrears of Kshs. 1, 170,000/=. They pleaded that upon default they instructed their advocates to instruct an auctioneer to levy distress and the 3rd respondent was instructed. They pleaded that on 9 October 2020 the 3rd respondent proclaimed the goods of the appellants and subsequently obtained court orders for police assistance. They pleaded that the proclaimed goods were carted away and the appellants took their office files and keys in terms that they were not coming back. They pleaded that they have now leased the premises to Melchizedek and therefore the orders of reinstatement cannot be granted. They also pleaded that the court has no jurisdiction and also raised the issue of res judice which I have already mentioned were subject of the ruling of 9 April 2021. In the counterclaim, they pleaded that at the time the appellants were vacating, they were in rent arrears of Kshs. 1, 170,000/=. They pleaded further that the appellants were required to give two months notice of termination of tenancy which they did not give thus they are liable to pay the sum of Kshs. 140,000/= in lieu of notice. In the counterclaim they asked for judgment for the sum of Kshs. 1,310,000/= being the alleged rent arrears and two months notice, together with interest and costs.

9. It will be recalled that the trial court had issued directions that parties to comply with Order 11 of the Civil Procedure Rules (relating to discovery of witnesses and documents) by 4 May 2021 and had listed the case for hearing on 28 May 2021. On 25 May 2021, the appellants filed an Amended Plaint, clearly without leave having been sought nor obtained, and also filed a further list of documents being "annual report and financial statements." What was amended in the plaint was the pleading that on an unknown date the respondents locked the premises and took away all other goods in the premises. An itemized schedule of the goods was prepared and annexed to the amended plaint and it was said that their total value was Kshs. 5, 259,079/=. In the body of the amended plaint, it was added that the appellants claim return of the attached goods or their value and a mandatory injunction directing the respondents to open up the premises. The prayers however remained the same save that I observe that prayer (e) was amended to read "damages including general, exemplary, aggravated and punitive damages."

10. Together with the amended plaint, the appellants filed a reply to defence and defence to counterclaim. In that reply to defence and defence to counterclaim, the appellants reiterated that there was no proclamation whatsoever and that the respondents forcefully took possession of the suit premises with all goods, records and documents inside valued at Kshs. 5, 700,000/=. They also denied owing the 1st and 2nd respondents the sum of Kshs. 1, 170,000/= or at all.

11. The actual hearing of the case commenced on 28 June 2021 when the 1st appellant testified as PW-1. He adopted his witness statement as his evidence in chief and purportedly produced the two documents in the list of documents as exhibits i.e. the lease and bank deposit slips. I see that in the list of documents

filed by the appellants (as plaintiffs), the appellants listed two documents, respectively being payment receipts for rent and the lease agreement. However, what was attached to that list of documents was only bank deposit slips; there was no lease agreement attached. Despite the 'two documents' being purportedly marked as exhibits 1 and 2 of the plaintiffs, in reality, there was only the bank deposit slips exhibited and it cannot be said that the lease was produced as exhibit No.2 since it was neither attached to the list of documents nor does the record reflect that it was physically produced in court. In his statement, which is now his evidence in chief, PW-1 stated that they had a tenancy agreement commencing 1 March 2019 for 3 years with the 1st and 2nd respondents. He stated that they fell into arrears of rent and that sometimes in September 2020, he and the 1st respondent agreed that they can pay the outstanding rent due and payable before December 2020 "save for the 6 months period when the business was not functioning due to Covid-19 pandemic to have all the bars and hotels closed (sic)." He stated that since September 2020, they had paid more than Kshs. 480,000/= towards the rent arrears. That on 12 November 2020, the 2nd respondent (sic) without notice attached their goods valued at more than Kshs. 700,000/= and locked the premises. That he came with several people among them 8 police officers. That they referred the matter to the BPRT on 16th (sic) which matter is still pending determination. That they have been prevented from continuing their business and they have suffered loss. He added that they seek orders to have the respondents restrained from the premises, an order to return the attached goods, and loss of earning and/or profits.

12. Cross-examined, he testified that he paid Kshs. 490,000/= in 2020 and Kshs. 360,000/= in 2019 (which would be Kshs. 850,000/=). According to him, he paid rent of 12 months, i.e. Kshs. 840,000/= and had not paid rent for 8 months. He did not have a written agreement that rent is waived owing to Covid-19. He closed business from March 2020 until November 2020. He confirmed that he is no longer doing business in the premises. He did not sign any inventory when the goods were taken away and he acknowledged that he filed no invoice or receipt to show that he ordered for the items allegedly taken away from the premises. He stated that he knows "Satellite Restaurant and Caterers" which belongs to him and the 2nd appellant but did not have anything to show that it is registered. He elaborated that in case of mpesa payments (to the business) the same were paid to the bank in his name and in case of cash payments they were deposited in the joint name of himself and the 2nd appellant. He stated that he did not move out of the premises on his own but was evicted by police officers. He affirmed that he had a Manager called Erick; Erick never told him that he had been served with a proclamation notice. Re-examined, he stated that he did not pay rent from April 2020 to November 2020 when Covid-19 hit the country and he was not working at that time due to a lockdown. Regarding Satellite Restaurant and Caterers, he explained that it is a business name. On receipts for rent, he stated that they were in the office but he was evicted; that the doors were then locked with padlocks and he was not able to access the receipts. He stated that the auctioneer had no right to ask for breaking orders when the premises was open. He denied voluntarily moving out of the premises or being given notice to vacate. He wanted the premises back.

13. PW– 2 was the 2nd appellant. He also relied on his witness statement as his evidence. It was more or less a replica of the witness statement of the 1st appellant the only addition being that he itemized what he alleged was detained by the respondents when they closed the premises. In court, he added that 8 police officers and an auctioneer came to the premises to levy distress. He further testified that from September to November 2021, he paid Kshs. 480,000/=. He affirmed that the hotel was closed for about 6 months due to Covid-19 and he claimed that they had orally agreed with the landlord that he has up to December 2020 to clear the previous arrears. He stated that his workers were ordered out, the premises locked, and a new tenant brought in.

14. Cross-examined, he stated that they occupied the premises from March 2019 to November 2020 and that at the rate of Kshs. 70,000/= per month, the rent payable would be Kshs. 1,400,000/=. He claimed that they paid Kshs. 665,000/= during that period. According to him they only owe Kshs. 175,000/=. He acknowledged that the bank deposit slips that they provided do not specify what the deposits are for. On the goods, he conceded that he filed nothing to show that such goods were delivered to their premises, or that they ever existed in the premises, or anything to show that they paid for them. On the payment to waive rent he stated that it was discussed on phone. Regarding the business name, he testified that it was known as "Satellite" and that it was a partnership. He claimed that they were making Kshs. 10,000/= but also mentioned the figure of Kshs. 300,000/= and it was not clear if it was per month or per year or for what period. Re-examined, he now stated that they paid rent for 12 out of the 20 months they were in the premises. He testified that the other 6 months were affected by Covid-19 and "we agreed to negotiate with landlord but had not sat down to talk about it." The period he paid Kshs. 480,000/= was when they reopened.

15. PW – 3 was Zacharia Ongeri. He introduced himself as an accountant from Nyasae and Associates and that he is qualified to prepare an Accountant's report and that he prepared one in respect of "Satellite Restaurant and Caterers." The accounts are for the year ending June 2020. The report itself is dated 30 June 2020 and was signed on 16 June 2020. He stated that he prepared books for the last 6 years. According to him in 2021, the business made a profit of Kshs. 21, 932/-. Cross-examined, he testified that he was a partner in Nyasae & Associates. His qualifications were CPA Level 4. He however had nothing to show that he is an employee or partner at Nyasae & Associates. He acknowledged that the ICPAK website does not indicate Nyasae & Associates as having offices in Kisii. He testified that he was given a business registration certificate and that the appellants ran the business as a partnership. The report is however signed by the appellants as directors. He testified that for the year ending 30 June 2020 the rent paid was Kshs. 840,000/=.

16. With the above evidence the appellants closed their case.

17. The respondents called Cosmas Magembe, the 1st defendant/respondent as the sole witness. He relied on a witness statement as his evidence in chief. In his statement, he stated that he is brother to the 2nd respondent and they jointly own the suit premises. He acknowledged that they rented the premises to the appellants through a lease agreement dated 15 March 2019 and the rent payable was Kshs. 70,000/= per month. He stated that the appellants defaulted and were in rent arrears of Kshs. 1,170,000/=. They engaged an advocate to recover the rent owed which led to the 3rd respondent being instructed to levy distress. He stated that on 9 October 2020 the goods were proclaimed. The auctioneers then sought police assistance and the goods were carted away. He averred that the appellants took away their office files and keys and stated that they would not be coming back to the premises. Since the premises was left vacant, they let it out to Melchizedek and the premises is now leased to him. He claimed the rent arrears of Kshs. 1,170,000/= and two months notice of Kshs. 140,000/=. The respondents' list of documents, which he stated he was producing as exhibits bore four documents being (i) an authority from the 2nd respondent; (ii) copy of lease entered between themselves and Melchizedek dated 16 November 2020; (iii) pleadings in Kisii Miscellaneous Civil Application No. 89 of 2020 (the application by the auctioneer for the breaking order); (iv) pleadings in BPRT case No. 103 of 2020. I however need to make clear that the documents were actually not attached to the list of documents. I have however seen the documents attached, save for the pleadings for BPRT No. 103 of 2020, to the replying affidavit purportedly sworn on 16 November 2020 to oppose the application dated 19 November 2020.

18. Cross-examined, he testified that he and his brother live in the USA. He testified that in the 20 months that they were in the premises the appellants only paid rent for "about 2 months." He stated that the auctioneers did not break into the premises as they found the same open. According to him, the

auctioneer took everything and was not aware if any goods remained in the premises. Neither was he aware if the cost of the goods taken were more than Kshs. 5 million. He stated that the place was cleared after 15 days and that he was not served with any document to prevent eviction. He averred that the appellants left the premises empty. He stated that the appellants were given notices to catch up with their payments.

19. With the above evidence, the respondents closed their case. Counsel were invited to file submissions, which they did. In his submissions, counsel for appellants inter alia urged that the tenancy was a controlled tenancy and that the respondents were required to issue a termination notice pursuant to Section 4 of Cap 301. Counsel referred to the case of *Gusii Mwalimu Investment Company vs Mwalimu Hotel, Civil Appeal No. 160 of 1995* and Caledonia Supermarket Limited vs Kenya National Examinations Council (2000) 2 EA 351 to press this point. Counsel pointed out that the 3rd respondent never entered appearance nor testified. He submitted that the 3rd respondent never followed the provisions of the Auctioneers' Rules particularly Rule 12 thereof. He submitted that there was no proclamation served and that no notice was given to allow the appellants redeem their goods. He submitted that the attached goods should be returned to the appellants or they be paid their value.

20. On the other hand, counsel for the 1st and 2nd respondents first urged that the amended plaint should be struck out as it was filed without leave as required by Order 8 Rule 3 and further that it was not accompanied by a verifying affidavit as required by Order 4 Rule 1. He submitted that the case must be decided on the basis of the original plaint. On the prayers in the plaint for recovery of the premises, it was submitted that the premises is already rented out to Melchizedek, who is not a party to this suit and cannot be condemned unheard. Regarding failure by the auctioneer to enter appearance or testify, he submitted that he was an agent of a disclosed principal i.e. the 1st and 2nd respondents and there was even no justification to include him in the suit. On the attachment of the goods, he submitted that there was a proclamation and subsequently an application for a breaking order, and that the auctioneer prepared a certificate of service. He added that the appellants never brought any document to show that the items they claim were ever in the premises. Regarding the claim for loss of earnings, he wondered how the appellants could allege to have been making profit when they could not pay rent. He further submitted that the accounts presented were of "Satellite Restaurant and Caterers" which is not a company. He was of opinion that his clients made out a case to be paid the rent arrears of Kshs. 1, 170,000/= and two months rent in lieu of notice.

21. In his judgment, the learned trial Magistrate agreed with counsel for the 1st and 2nd respondents that the amended plaint was irregularly on record as it was filed without leave. He thus held that he would disregard it and rely on the prayers in the original plaint. On the first and second prayers in the original plaint, more or less for reinstatement into the premises, he found that the same is overtaken by events as the premises is leased to a third party. On the prayer to return attached goods, he held that it was acknowledged that the appellants were in rent arrears; that the respondents followed due process and obtained an order of court; that the original plaint had no schedule of goods and therefore the prayer was not merited. On loss of profits/earnings, he found the same not proved. On the prayer for damages he found that it was not specified what kind of damages were being sought and he dismissed it. He found no merit in the case of the appellants and dismissed it. On the counterclaim, he found that the case of the 1st and 2nd respondents was not shaken and allowed it as prayed. He condemned the appellants to pay costs of the suit and counterclaim.

22. Aggrieved, the appellants have now preferred this appeal on the following grounds (paraphrased for brevity and clarity):

1. The learned trial Magistrate erred in law and in fact in dismissing the case of the appellants against the weight of evidence;

2. That the trial Magistrate erred in law and in fact in finding that the amended plaint was irregularly filed hence arrived at a wrong conclusion;

3. That in the event that the amended plaint was irregular, the trial Magistrate should have made a decision based on the plaint;

4. The trial Magistrate erred in not finding that the prayer for return of attached goods was merited;

5. The trial Magistrate erred in allowing the counterclaim;

6. The trial Magistrate erred in failing to correctly evaluate documentary evidence tendered by the appellant thus arriving at a wrong conclusion;

7. The trial Magistrate erred in failing to adequately consider the appellant's evidence, submissions and authorities and arrived at a wrong conclusion.

The appellants seek orders for the judgment to be set aside and for this court "to make any other or further orders as may be just and expedient in the circumstances."

23. The appeal was argued through written submissions. In his submissions, Mr. Bosire Gichana, learned counsel for the appellants, submitted inter alia that the parties agreed that the rent owing be paid by December 2020 save for rent for 6 months affected by Covid-19; that between September and November 2020, the appellants paid Kshs. 480,000/=; that on 12 November 2020 the 3rd respondent without having issued notice and/or proclamation, proclaimed the goods; that goods worth Kshs. 700,000/= were attached and other goods worth Kshs. 5,259,079/= retained. Regarding the amended plaint, counsel submitted that the reply to defence and defence to counterclaim was filed on 25 May 2021, on the same date of filing of the amended plaint, and pleadings had not closed. He urged that it was not therefore necessary to seek leave to amend. He urged in any event, the court ought to have allowed the amended plaint out of time. Regarding the counterclaim, counsel urged that Section 4 of Cap 301 required notice to be issued, and that the act of renting out the premises afresh was void and of no effect to the appellant's tenancy. He submitted that allowing the prayer for two months rent in lieu of notice was erroneous. He added that the respondents had levied distress but had failed to account for the money realized from sale of the attached goods and thus the claim for rent arrears was not available. He again referred to Rule 12 of the Auctioneers' Rules which he submitted was not followed.

24. On the other hand, Mr. Nyangacha, learned counsel for the 1st and 2nd respondents more or less reiterated the submissions that he had made before the trial Magistrate.

25. I have taken all the above into account and my analysis is as follows.

26. I will start with the issue whether the amended plaint ought to have been struck out for being filed without leave.

27. The original plaint was filed on 19 November 2020. The 1st and 2nd respondents entered appearance on 1 December 2020 and filed their statement of defence and counterclaim on 31 December 2020. It is on 25 May 2021, that the appellant filed reply to defence and defence to counterclaim contemporaneously with the filing of an amended plaint. What to the Rules say on this? First, under Order 7 Rule 1, a defence is supposed to be filed within 14 days after appearance is entered. Thus, strictly speaking, the defence ought to have been filed by 15 December 2020. It was filed on 31 December 2020 which was out of time, but nobody has raised any issue on this, and it is clear that the appellants (as plaintiffs)

waived any irregularity on the delay in filing defence. Order 7 Rule 17 applies for filing of reply to defence and defence to counterclaim and it provides as follows:

> 17. Subsequent pleadings [Order 7, rule 17]
>
> (1) A plaintiff shall be entitled to file a reply within fourteen days after the defence or the last of the defences has been served on to him, unless the time is extended.
>
> (2) No pleading subsequent to the reply shall be pleaded without leave of the court, and then shall be pleaded only upon such terms as the court thinks fit.
>
> (3) Where a counterclaim is pleaded, a defence thereto shall be subject to the rules applicable to defence.

28. From the foregoing it will be seen that under subrule 1, a reply to defence was to be filed within 14 days of the defence, and under subrule 3, where a counterclaim is pleaded, the rules relating to filing a defence is what is applicable and we have already seen that a defence is to be filed within 14 days. Therefore, the appellants needed to file their documents within 14 days of 31 December 2020 though they could benefit from the Christmas period under Order 50 Rule 4, i.e. the period between 21 December to 13 January of the following year. But even if you take this period into account, a reply to defence and defence to counterclaim filed on 25 May 2020 would be at least 4 months late. Whatever the case, once a reply to defence and defence to counterclaim is filed, under subrule 2, no pleading subsequent thereto is supposed to be filed without leave.

29. It was argued that the amended plaint did not need leave. Amendment of pleadings is covered under Order 8. Amendment without leave is within Order 8 Rule 1 which provides as follows:

> 1. Amendment of pleading without leave [Order 8, rule 1]
> (1)A party may, without the leave of the court, amend any of his pleadings once at any time before the pleadings are closed.
>
> (2) Where an amended plaint is served on a defendant—
>
> (a)if he has already filed a defence, the defendant may amend his defence; and
>
> (b)the defence or amended defence shall be filed either as provided by these rules for the filing of the defence or fourteen days after the service of the amended plaint whichever is later.
>
> (3) Where an amended defence is served on a plaintiff—
>
> (a)if the plaintiff has already served a reply on that defendant, he may amend his reply; and
>
> (b)the period for service of his reply or amended reply is fourteen days after the service on him of the amended defence.
>
> (4) References in subrule (2) and (3) to a defence and a reply include references to a counterclaim and a defence to counterclaim respectively.
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> (5) Where an amended counterclaim is served on a party (other than the plaintiff) against whom the counterclaim is made, subrule (2) shall apply as if the counterclaim were a statement of claim and as if the party by whom the counterclaim is made were the plaintiff and the party against whom it is made were a defendant.

(6) Where a party has pleaded to a pleading which is subsequently amended and served on him under subrule (1), then, if that party does not amend his pleading under the foregoing provisions of this rule, he shall be taken to rely on it in answer to the amended pleading, and Order 2 rule 12(2) shall have effect at the expiry of the period within which the pleading could have been amended.

30. From the foregoing, a party may without leave, amend his pleadings once before the pleadings closed. In our case, pleadings closed 14 days after the defence and counterclaim were filed. It will be observed that the appellants proceeded to file a reply to defence and defence to counterclaim way out of time. Whatever the case, they could not file reply to defence and defence to counterclaim contemporaneously with the filing of an amended plaint. The sequence of filing would either have been :-

i. File reply to defence and defence to counterclaim then apply for leave to amend plaint; or

ii. File Amended Plaint, wait for the time for filing amended defence to lapse, then file reply to defence and defence to counterclaim.

31. The appellants could not create their own rules. The rules are there for purposes of giving the other party opportunity to reply to the pleadings filed by the opposite party and they need to be followed. Where on party has difficulty, he needs to inform court and seek an extension of time. Otherwise, the opposite party can very well believe that his opponent is not going to file the pleadings contemplated to be filed and may adjust his position thereto to his detriment if pleadings are subsequently filed. In fact, it would appear that in our case, the appellants had forgotten all about filing reply to defence and defence to counterclaim, and only did so because the hearing date had reached.

32. Having said that, it is not in all cases, that pleadings filed out of time without leave must be struck out. Sometimes, by his conduct, it is clear that the opposite party has waived any late filing of pleadings, by proceeding on the basis of what has been filed albeit late, and there would be no justice served in striking out the late pleadings. Sometimes, absolutely no prejudice is caused by the opposite party by the filing of the amended pleadings and the court has discretion to allow the same, pursuant to Article 159 (2) (d) of *the Constitution*. In our case, I see no prejudice caused to the 1st and 2nd respondents by the amended plaint though filed irregularly. The 1st and 2nd respondents did not raise any issue and did not appear uncomfortable with the amended plaint. The appellants were indeed extensively cross-examined on the basis of what they had filed in the amended plaint and the hearing proceeded on the basis of the amended plaint. That being the case, in my opinion, the trial court ought to have allowed the amended plaint to stand, pursuant to Article 159 (2) (d), of *the Constitution* and not to strike it out at the stage of judgment, since parties had fully involved themselves and proceeded on the basis of it.

33. It was also urged that the amended plaint did not contain a verifying affidavit. Again, that would be a technicality, curable under Article 159 (2) (d) as the original plaint had the verifying affidavit.

34. Thus, whereas I agree with the 1st and 2nd respondents that there was irregularity in the filing of the amended plaint, I do not think that fair exercise of discretion would have meant that it be struck out at the stage of judgment. I will set aside this part of the judgment and allow the amended plaint to stand. I will therefore proceed to decide the case on the basis of the amended plaint.

35. It is not disputed that the parties had a tenancy agreement for the suit property that was entered into on 15 March 2019. Regretfully, none of the parties availed the tenancy agreement. I have perused the file and nowhere is that lease annexed even in the various applications that were filed in the suit. I therefore I do not have the benefit of the lease agreement that the parties entered into and I cannot tell of its particular terms.

36. It is however agreed that the tenancy was for three years from March 2019, that the monthly rent was Kshs. 70,000/=, and that the lease was for a period of 3 years. There is consensus that this was a controlled tenancy that was subject to the provisions of The *Landlord and Tenant (Shops, Hotels and Catering Establishments) Act*, Cap 301, Laws of Kenya. Section 4 of the said Act is particularly applicable in our case and I will set it out in full. It provides as follows:

> 4. Termination of and alteration of terms and conditions in controlled tenancy
>
> (1) Notwithstanding the provisions of any other written law or anything contained in the terms and conditions of a controlled tenancy, no such tenancy shall terminate or be terminated, and no term or condition in, or right or service enjoyed by the tenant of, any such tenancy shall be altered, otherwise than in accordance with the following provisions of this Act.
>
> (2) A landlord who wishes to terminate a controlled tenancy, or to alter, to the detriment of the tenant, any term or condition in, or right or service enjoyed by the tenant under, such a tenancy, shall give notice in that behalf to the tenant in the prescribed form.
>
> (3) A tenant who wishes to obtain a reassessment of the rent of a controlled tenancy or the alteration of any term or condition in, or of any right or service enjoyed by him under, such a tenancy, shall give notice in that behalf to the landlord in the prescribed form.
>
> (4) No tenancy notice shall take effect until such date, not being less than two months after the receipt thereof by the receiving party, as shall be specified therein:
>
> Provided that—
>
> (i) where notice is given of the termination of a controlled tenancy, the date of termination shall not be earlier than the earliest date on which, but for the provisions of this Act, the tenancy would have, or could have been, terminated;
>
> (ii) where the terms and conditions of a controlled tenancy provide for a period of notice exceeding two months, that period shall be substituted for the said period of two months after the receipt of the tenancy notice;
>
> (iii) the parties to the tenancy may agree in writing to any lesser period of notice.
>
> (5) A tenancy notice shall not be effective for any of the purposes of this Act unless it specifies the grounds upon which the requesting party seeks the termination, alteration or reassessment concerned and requires the receiving party to notify the requesting party in writing, within one month after the date of receipt of the notice, whether or not he agrees to comply with the notice.
>
> (6) A tenancy notice may be given to the receiving party by delivering it to him personally, or to an adult member of his family, or to any other servant residing within or employed in the premises concerned, or to his employer, or by sending it by prepaid registered post to his last known address, and any such notice shall be deemed to have been given on the date on which it was so

delivered, or on the date of the postal receipt given by a person receiving the letter from the postal authorities, as the case may be.

37. It is apparent from the above, that in a controlled tenancy, the landlord cannot simply kick out a tenant. And without a tenant having given him notice that he has vacated, or from the facts and circumstances there is no other deduction that any reasonable person can make other than the conclusion that the tenant has vacated for good, a landlord cannot assume that a tenant has vacated the premises and proceed to put in a new tenant. The landlord needs to give the requisite two months notice of termination unless the parties have agreed to a lesser period.

38. In our case, the 1st and 2nd respondents allege that after the attachment of the goods of the appellants, the appellants told them that they have left the premises and they therefore entered into a new lease with a third party. That, I am afraid, is not good enough. First, it is denied by the appellants that this is what happened. In the face of that denial, the 1st and 2nd respondents bore the burden of proving that the appellants actually vacated the premises for good, and they have not discharged that burden by providing any sufficient evidence. Secondly, from the facts of the matter, it is apparent that the issue was rent arrears and attachment of the goods of the appellant. The appellants came to court within 7 days of that attachment. As I will demonstrate later, the appellants had to be given opportunity to redeem their goods pursuant to a seven (7) day redemption notice. That period had not lapsed by the time a new tenant was being put in the premises purportedly on 16 November 2021, which was just 4 days after the attachment of the goods of the appellants. The purported termination of the lease of the appellants and the purported entering into a new lease with a new tenant, just 4 days after attaching the goods of the appellants, was for all intents and purposes an illegal taking of possession by the 1st and 2nd respondents as landlords. Either the landlord would have obtained something in writing that the tenant has vacated or the landlord ought to have issued the termination notice in line with the provisions of Section 4 above. To simply put in a new tenant without first going through the provisions of Section 4 of the Act was wrong. They could not take the path of the law of the jungle and they are liable to pay damages. I will come to the aspect of damages later in this judgment but suffice it to state that this court finds and holds that there was an illegal eviction of the appellants from the demised premises.

39. The cause of friction between the parties appears to have been the rent owing. It is not disputed that at some point the appellants fell into rent arrears. However, what the rent arrears were is not clear. When PW-1 testified, he stated during cross-examination that they paid Kshs. 490,000/= in the year 2019, and Kshs. 360,000/= in the year 2020, thus a total of Kshs. 850,000/=. He further testified that they had not paid rent for 8 months. PW-2 on his part testified that they were in the premises for 20 months and paid for 12 months although he did contend that what is owing is only Kshs. 175,000/=. The 1st respondent on the other hand alleged that they were only paid for two months and it will be recalled that the 1st and 2nd respondents counterclaimed for unpaid rent of Kshs. 1,170,000/=. You would imagine that in a case such as this, the parties would be very elaborate in their evidence regarding what exactly they paid and what they owed, or what they were paid and were still owed, and support the same with documentary evidence. I am afraid that the evidence was rather sketchy. Starting with the 1st and 2nd respondents, they never presented their bank statements to demonstrate that indeed only two months rent was paid. That being the case I even do not see how they can allege to have been owed Kshs. 1,170,000=. Moreover, under Section 3 (3) and (5) of Cap 301, they were supposed to have keep and maintain a rent book. The sections provide as follows:

(3) The landlord of a controlled tenancy shall keep a rent book in the prescribed form, of which he shall provide a copy for the tenant and in which shall be maintained a record, authenticated in the prescribed manner, of the particulars of the parties to the tenancy and the premises

comprised therein, and the details of all payments of rent and of all repairs carried out to the premises.

(5) Any person who—

(a) being a landlord, fails to keep a rent book or to provide a copy thereof as required by subsection (3) of this section; or

(b) fails to make any prescribed entry in a rent book, or to authenticate any such entry in the prescribed manner; or

(c) makes any entry in a rent book which he knows to be false or which he has no reasonable cause to be true; or

(d) makes any alteration or erasure of an entry in a rent book which may be to the prejudice of the landlord or the tenant, shall be guilty of an offence and liable to a fine not exceeding two thousand shillings or to imprisonment for a period not exceeding two months, or to both such fine and imprisonment.

40. From the above, the landlord is supposed to maintain a rent book and it is in fact an offence not to keep one. If the 1st and 2nd respondents had provided the rent book, as they were required to do, then it would have been clear what rent was owing, but they never produced any.

41. For the appellants, what they did was simply throw to court some bank deposit slips, without any elaboration of the particular months the payments were for and no tabulation of the same to find out the totals paid. I wonder how the appellants expect the court to match what deposit to which month's rent. Some of those deposits are for Kshs. 10,000/=, some for Kshs. 20,000/=, and I have even seen one for Kshs. 120,000/=. Without explanation no one can tell which payment is for which month and no one can tell what the rent arrears are.

42. However, there is admission by the appellants in their evidence that they had not paid for 8 months, and given that the 1st and 2nd respondents presented nothing to support their claim for unpaid rent, and had no rent book, I will use that admission in favour of the 1st and 2nd respondents and take it that the unpaid rent was for 8 months.

43. While I am on this point of unpaid rent, it was urged by the appellants that there was an agreement to waive 6 months rent because they did not do business owing to closure orders due to Covid-19. The appellants alleged that this was agreed through a telephone conversation, while the 1st and 2nd respondents deny this. I think given the denial something more tangible needed to come from the appellants to support that contention that there was an agreement to waive rent. Without anything tangible, I cannot hold that there was any agreement to waive rent as alleged. Thus, my position will be that the rent owing was only for 8 months, and that, as I have explained, is from the admission of the appellants, not because of any proof tendered by the 1st and 2nd respondents. If the 1st and 2nd respondents wished to refute this admission, they should have presented their own account of what was unpaid, or present the rent book, which they did not.

44. Being unpaid landlords, the 1st and 2nd respondents had the right to levy distress. That right to levy distress is contained in the *Distress for Rent Act*, Cap 293, Laws of Kenya. The right to distress is given in Section 3 of the said Act which provides as follows:

3. Right of distress

(1) Subject to the provisions of this Act and any other written law, any person having any rent or rent service in arrear and due upon a grant, lease, demise or contract shall have

the same remedy by distress for the recovery of that rent or rent service as is given by the common law of England in a similar case.

(2) No distress shall be levied between sunset and sunrise or on any Sunday.

45. The manner of distress is elaborated in the Auctioneers' Rules, 1996, made under the Auctioneers' Act, Cap 526, Laws of Kenya. Part III of the Rules is titled "Attachment and Sale of Property" and as it is titled it provides for the manner of attachment and sale of attached property. Part III comprise of Rules 5 – 18. I feel the need to copy part III of the Rules so that there is no doubt regarding its content. It provides as follows :-

Part III – Attachment And Sale Of Property

5. Application of Part III

(1) This Part shall apply to the attachment and sale of movable and immovable property under warrants of court and letters of instruction from third parties, including distress for rent and repossession, unless—

(a) otherwise provided by any other written law; or

(b) the court otherwise directs under the Civil Procedure Rules (Cap. 21), Sub. Leg.).

(2) A letter of instruction under subrule (1) shall be in Sale Form 1 set out in the Schedule.

6. Register of warrants and letters of instruction

An auctioneer shall keep a register of all warrants and letters of instruction passed to him by a client, and shall record in it—

(a) the number of the case under which the warrant was issued and the name of the court that issued it;

(b) the name and address of the creditor and the advocate (if any) who issued the letter of instruction;

(c) the date he received each warrant or letter of instruction;

(d) the amount he is required by the warrant or letter of instruction to recover;

(e) the date of return endorsed upon the warrant;

(f) an itemised inventory of the property to be sold showing the value to be placed on each lot;

(g) the amount realised in respect of each item sold;

(h) the date the warrant was returned to the court;

(i) the date and amount of the proceeds of any sale forwarded to the court, or to the creditor, or his advocate; and

(j) the charges levied by the auctioneer.

7. Payment of auctioneer's charges

A debtor shall pay the charges of the auctioneer unless—

(a) that debtor cannot be found; or

(b) he has no goods upon which execution can be levied; or

(c) the sale proceeds are insufficient to cover the charges, in which cases the creditor shall pay the charges or the deficiency thereof.

8. Insurance

(1) Subject to these Rules, the auctioneer seizing or repossessing goods under a court warrant or letter of instruction shall be responsible for the safe custody and insurance of any movable property seized or repossessed by him until it has been sold or the seizure or repossession is withdrawn.

(2) In case of a stay of the seizure or repossession of any property or objection proceedings to the seizure the auctioneer shall immediately notify the creditor and the debtor, and the court (if any) of the arrangements he considers desirable or necessary for the safe custody, repair, maintenance, storage, transport and insurance of the goods seized or repossessed and the cost thereof pending determination of the stay or objection and may request the court to fix such fees and costs and payment in advance or as the court may think just, such fees and costs being in addition to those provided for in these Rules.

(3) Where the property seized is livestock the auctioneer receiving the warrant or letter of instruction shall forthwith notify the creditor and the debtor and the court (if any) of the arrangements he considers desirable or necessary for the safe custody, health, feeding, watering or transport of the livestock seized, the costs thereof and their payment in advance, or as the court may think just, such fees and costs being in addition to those provided for in these Rules.

9. Police assistance

(1) Where an auctioneer has reasonable cause to believe that—

(a) he may have to break the door of any premises where goods may be seized or repossessed; or

(b) he may be subject to resistance or intimidation by the debtor or other person; or

(c) a breach of the peace is likely as a result of seizure, repossession or attempted seizure or repossession of any property, the auctioneer shall request for police escort from the nearest police station in order to carry out his duties peacefully.

(2) An application under this rule shall be by motion by way of a miscellaneous application support by an affidavit and may be heard ex parte. [L.N. 144/2009, r. 3.]

10. Independent valuation of goods attached

A debtor may, at any time before the property seized or repossessed is sold, apply to a court for an order that the property be valued by an independent valuer.

11. Contents of court warrant or letter of instruction

(1) A court warrant or letter of instruction shall include, in the case of—

(a) movable property—

(i) the decretal amount, date of decree, date of return to court or where there is no decree, the exact amount to be recovered as at a date not later than the date of the letter of instruction plus the estimated daily or monthly interest or rent to accrue thereafter;

(ii) the person amongst whom the decree is to be executed;

(iii) the exact location of goods;

(iv) the person to point out the goods;

(v) where ascertainable, a list of the goods to be attached or repossessed;

(vi) where appropriate, reserve prices or where there are to be no reserves prices, a record of the reasons for not selling subject to such reserve prices;

(b) immovable property—

(i) as in (i) to (v) in paragraph *(a)*;

(ii) the land reference number, file number, plot number, or flat number, as the case may be;

(iii) the area in hectares or in square metres;

(iv) the user and any restrictions by statute or otherwise on the disposition of the property or any interest in it;

(v) the tenure and in the case of leasehold, particulars of the landlord and the annual land rent;

(vi) the location, and in the case of land situated within a township or municipality, the amount of the most recently available annual site value tax;

(vii) on accurate description of improvements and developments;

(viii) the names, and addresses of encumbrancers on the title together with—

(aa) the estimated amount due to any encumbrancer; and

(bb) the estimated amount of arrears of land rent rates and taxes;

(ix) the names addresses and titles of any persons in possession of the property to be sold or any part of it;

(x) the reserve price for each separate piece of land based on a professional valuation carried out not more than 12 months prior to the proposed sale.

(2) The letter of instruction shall be in the Sale Form 1 out in the Appendix.

12. Movable other than perishable goods and livestock

(1) Upon receipt of a court warrant or letter of instruction the auctioneer shall in case of movables other than goods of a perishable nature and livestock—

(a) record the court warrant or letter of instruction in the register;

(b) prepare a proclamation in Sale Form 2 of the Schedule indicating the value of specific items and the condition of each item, such inventory to be signed by the owner of the goods or an adult person residing or working at the premises where the goods are attached or repossessed, and where any person refuses to sign such inventory, the auctioneer shall sign a certificate to that effect;

(c) in writing, give to the owner of the goods seven days notice in Sale Form 3 of the Schedule within which the owner may redeem the goods by payment of the amount set forth in the court warrant or letter of instruction;

(d) on expiry of the period of notice without payment and if the goods are not to be sold in situ, remove the goods to safe premises for auction;

(e) ensure safe storage of the goods pending their auction;

(f) arrange advertisement within seven days from the date of removal of the goods and arrange sale not earlier than seven days after the first newspaper advertisement and not later than fourteen days thereafter;

(g) not remove any goods under the proclamation until the expiry of the grace period.

(2) If on the expiry of the period of notice, the auctioneer finds that there are other goods belonging to the judgement debtor—

(a) which were not pointed out by the decree holder and proclaimed earlier in his proclamation; or

(b) which have been removed by the judgment debtor, or cannot be found, the auctioneer shall file an application in court seeking leave of the court to be allowed to attach any other movable properties of the judgement debtor pointed out by the decree holder.

(3) An application under paragraph *(2)* shall be by motion by way of a miscellaneous application supported by an affidavit in a competent court, and in the case of distress for rent, repossession and attachment, may be heard ex parte.

(4) Where orders obtained by a judgement debtor staying execution and served on an auctioneer are subsequently vacated, the auctioneer shall—

(a) where the warrants of attachment and sale, or letter of instruction, are still valid, proceed with execution in compliance with these Rules;

(b) where the warrants of attachment and sale have expired, apply for extension of the warrants for a period not exceeding forty-five days, within which he shall finalize execution;

(c) where fresh warrants of attachment and sale or letter of instructions are issued with new figures, proceed in the manner provided in these Rules in respect of a fresh warrant.

13. Perishable goods and livestock

Upon receipt of a court warrant or letter of instruction the auctioneer shall in the case of goods of a perishable nature or livestock—

(a) record the court warrant or letter of instruction in the register;

(b) prepare a proclamation in Sale Form 2 of the Schedule indicating the value of specific items and the condition of each item which inventory shall be signed by the owner of the goods or an adult person residing or working at the premises where the goods are attached, and where a person refuses to sign such inventory, the auctioneer shall sign a certificate to that effect;

(c) give in Sale Form 3 to the owner of the goods seventy-two hours notice within which the owner may redeem the goods by payment of the amount set forth in the court warrant or letter of instruction: Provided that in the case of perishable goods, no such grace period shall be necessary;

(d) on expiry of the period of notice without payment remove the goods;

(e) ensure safe storage of the goods pending their auction;

(f) arrange immediate advertisement and sale.

14. Non-removal or alteration of attached goods

A person who removes, alters, damages, substitutes or alienates any goods comprised in the proclamation, before they are redeemed by payment in full of the amount in the court warrant, or letter of instruction, or in such lesser amount as the creditor or his advocate may agree in writing, commits an offence.

15. Immovable property

Upon receipt of a court warrant or letter of instruction the auctioneer shall in the case of immovable property—

(a) record the court warrant or letter of instruction in the register;

(b) prepare a notification of sale in the form prescribed in Sale Form 4 set out in the Second Schedule indicating the value of each property to be sold;

(c) locate the property and serve the notification of sale of the property on the registered owner or an adult member of his family residing or working with him or where a person refuses

to sign such notification, the auctioneer shall sign a certificate to that effect;

(d) give in writing to the owner of the property a notice of not less than forty-five days within which the owner may redeem the property by payment of the amount set forth in the court warrant or letter of instruction;

(e) on expiry of the period of notice without payment arrange sale of the property not earlier than fourteen days after the first newspaper advertisement.

16. Advertisement

(1) An advertisement by an auctioneer shall, in addition to any other matter required by the court, contain—

(a) the date, time and place of the proposed sale;

(b) the conditions of sale or where they may be obtained;

(c) the time for viewing the property to be sold;

(d) in respect of movable property other than perishable goods and livestock, an accurate description of the goods to be sold and a statement as to whether or not they are to be sold subject to a reserve price;

(e) in respect of goods of a perishable nature or livestock an accurate description of the goods to be sold and of their condition and a statement as to whether or not they are to be sold subject to a reserve price;

(f) in case of immovable property all the information required to be contained in the court warrant or letter of instruction except the amount to be recovered and the exact amount of any reserve price.

(2) Except as may be ordered by a court, advertisement by an auctioneer of a sale by auction of any property, movable or immovable, shall be by way of an advertisement in a newspaper, provided that in the case of perishable goods and livestock advertisement in a newspaper may be dispensed with if adequate notice to prospective bidders in all the circumstances can be achieved by radio or television announcement, or handbills or posters, or other means of communication.

17. Auction

(1) Subject to Order 21, rules 62, 63, 65, 66, 68 and 69 of the Civil Procedure Rules (Cap. 21, Sub. Leg.) a public auction shall take place—

(a) of goods seized or repossessed under any contract or any written law between the hours of 10.00 a.m. and 6.00 p.m.; or

(b) in other sales between the hours of 10.00. a.m. and 10.00 p.m., and in either event—

(c) in a venue open to and accessible to the public, provided that it shall be lawful for an auctioneer to charge prospective bidders a reasonable sum for a sale catalogue or other list of lots for sale as a condition precedent to entry to the auction premises.

(2) The auctioneer shall make reasonable arrangements for the identification of the items for sale by list or catalogue and by the allocation of lot numbers which shall so far as possible be indicated on the goods at the time of sale.

(3) The auctioneer shall call out each lot for auction identifying the lot number and showing to bidders the lot for sale or in the case of immovable property identifying the lot for sale by reference to a map or sketch and shall invite bids on it.

(4) The highest bidder shall be the purchaser subject to compliance with the conditions of sale.

(5) The auctioneer shall, after selling the movable property, attaching goods or goods lawfully held under this custody, and for purposes of effecting transfer in favour of the purchase, file an application to the court which issued the decree or to any other competent court which is applicable.

(6) An application under this rule shall be by motion by way of miscellaneous application, supported by an affidavit and may be heard ex parte.

18. Proceeds of sale

(1) Payment by a purchaser at a sale of seized goods shall be in form of cash, banker's cheque or electronic funds transfer.

(2) Payment by a purchaser in all other cases shall be in such forms as the auctioneer shall think fit.

(3) On receipt of the proceeds of sale the auctioneer shall issue a receipt for it and in the case of immovable property sign a memorandum of sale.

(4) The auctioneer shall remit the proceeds of sale less his charges to the court or the instructing party, as the case may be, accompanied by an itemised account in the case of movable property within fifteen days of the sale and in the case of immovable property as provided under Order 22, rule 70 of Civil Procedure Rules (Cap. 21, Sub. Leg.).

46. From the foregoing, it will be seen that the Auctioneers Rules, apply to attachment of property, including distress for rent as provided in Rule 5 (1) above. An auctioneer ought to proceed after receiving a warrant from court or a letter of instruction. In our case, there was no warrant and therefore the auctioneer could only proceed on the basis of a Letter of Instruction. The form of a letter of instruction is to be in line with Form 1 of the Schedule. Rule 11 provides for what should be in the letter of instruction. It should have the amount sought to be recovered, the person against to whom the execution refers to, the exact location of the goods, the person to point out the goods, where ascertainable a list of the goods to be attached, where appropriate the reserve prices. On receipt of the warrant or Letter of Instruction, pursuant to Rule 6, the auctioneer is required to record the name of the creditor and advocate (if any) who issued the letter of instructions, the date he received the warrant or letter of instructions, and the amount he is supposed to recover. Ultimately, he is supposed to show the inventory of property sold, the date and amount the proceeds of sale are forwarded, and his charges. Under Rule 7, the Auctioneers' charges are to be paid by the debtor unless he cannot be found, or has no goods, or the sale is insufficient to cover the same, in which case, the creditor shall pay the charges. Under Rule 8, the Auctioneer is responsible for safe custody of the goods seized and of their insurance until they are sold or the seizure is withdrawn. Under Rule 9, an auctioneer can apply to court for police escort if he believes that he may need to break into the premises, or he may face resistance, or a breach of peace may ensue. Under Rule 12, once the Auctioneer receives the letter of instruction, in case of movable property other than livestock or perishables, he is to record the letter of instruction in a register, prepare a proclamation indicating the value of the items and their condition, and such inventory is to be signed by the owner or adult person residing or working at the premises and if the person/s refuse to sign the auctioneer is to sign a certificate to that effect. Upon proclamation, the Auctioneer is required to give the owner a seven (7) day notice of sale pursuant to Rule 12(1) (c) within which period the owner may redeem the goods by paying the amount in the letter of instruction. On expiry of the seven days period, the auctioneer may collect the goods proclaimed if they are not to be sold in situ. He is thereafter required to arrange for advertisement within 7 days of removal of the goods and arrange for a sale not earlier than 7 days after the first newspaper advertisement and no later than 14 days thereafter. The manner of advertising is covered in Rule 16 which provides that the advertisement is to indicate the time and place of the proposed sale, the conditions of sale, the time for viewing the properties to be sold, an accurate description of the goods, a statement whether they are being sold subject to a reserve price. Such advertisement as provided in Rule 16 (2) is supposed to be in a newspaper though exception may be made for perishable goods. Rule 17 provides for the auction i.e. sale of the goods. The sale is supposed to be done between 10.00am and 6.00pm in a venue that is accessible to the public. After the sale, the Auctioneer is supposed to issue a receipt to the purchaser, and remit the proceeds of sale to the instructing party. This must be accompanied by an itemized account within 15 days of sale in case of movable property.

47. The appellants contend that all this was not followed. On the other hand, the 1st and 2nd respondents assert that the rules were followed. They say that there was a proclamation, that the auctioneer applied for a breaking order, and that he properly attached the goods. The appellants refute that there was any proclamation and assert that they were ambushed on 12 November 2021, when the auctioneer came and attached the goods.

48. I have seen and gone through the documents provided by the 1st and 2nd respondents relating to the attachment which were contained in the case Kisii Chief Magistrates' Court Miscellaneous Application No. 89 of 2020. There is a letter therein from M/s Nyangacha & Company Advocates dated 9 October 2021 which purports to be the letter of instruction. It is a letter which is not drawn in the manner prescribed by the Rules. Anyway, let us assume that the technicality relating to the Form may be waived. The content of the letter to the 3rd respondent is that it instructs the 3rd respondent to recover from the appellants rent arrears to the tune of Kshs. 1,235,000/= and further directs the Auctioneer to comply with the law including the *Distress for Rent Act* and the Auctioneers' Act. The next document I have seen is a Proclamation from the 3rd respondent again dated 9 October 2020. It purports that the 3rd respondent has proclaimed about 11 items and their estimate value being:

    1. 14 assorted wooden/metal tables (old) – Kshs. 10,000/=
    2. 25 assorted plastic/metal chairs (old) – Kshs. 12,500/=
    3. Water top tank 2300 litres (fair) – Kshs. 2,000/=
    4. Assorted brands of liquor – value to be ascertained.
    5. Two big speakers (old) – Kshs. 3,000/=
    6. Assorted empty crates of beer (15) – Kshs. 1,500/=
    7. (skipped i.e. no No.7)
    8. One sony 42 LCD TV 14 inch (sic) (old) – 10,000/=
    9. One sony 32 inch LCD TV (old) – Kshs. 5,000/=
    10. 34 assorted beds and mattresses (used) – TBA
    11. One gas meko/metal jiko (used) – TBA

    Or any other movable property within the premises.

49. It is purported that the proclamation was done in presence of one Erick "manager" who refused to sign. There is a certificate said to be prepared by the auctioneer on the same day stating that the tenant's agent, Mr. Erick, "the manager" refused to sign the inventory. The next documents availed are the pleadings and order issued in the said Miscellaneous Case No.89 of 2020 which show that the auctioneer was given a breaking order on 4 November 2020. These are the only documents related to the attachment. Notably, there is not exhibited the register of letters of instruction as required by Rule 6 of the Auctioneers' Rules, which is supposed to inter alia show the date of receipt of the letter of instruction; there is not exhibited any notice of redemption in compliance with Rule 12 (c); there is not exhibited any evidence of what goods were actually collected and when; there is not exhibited any advertisement of the goods; there is not exhibited any return indicating when the goods were sold, what goods were sold and for how much; there is not shown whether there was any shortfall after the goods were sold nor the auctioneers' charges. In other words what we have starts and stops at the proclamation.

50. The respondents do not say what happened to the goods taken and have maintained a loud silence on the same. It is even not clear what was taken from the premises as no inventory of the goods taken was ever presented. However, it would appear to me that everything that was inside was either taken by the auctioneer or retained by the 1st and 2nd respondents as there is consensus that the appellants never went back to the premises after the attachment, and never got any of their goods back.

51. In my assessment, the attachment by the auctioneer was illegal. Let me first start with the proclamation which is disputed. All that the proclamation says is that the goods were proclaimed on 9 October 2020 in presence of one Erick who is described as a manager and who refused to sign. I am not persuaded that this is good enough from the 3rd respondent. The instruction to the 3rd respondent informed him of who the debtors were and they were named as the appellants. As an auctioneer, the 3rd respondent ought to have been very keen to direct his proclamation to the persons named as debtors. For example, did he call them when he was at the premises? I would think that an auctioneer ought to make effort to inform the debtor when he goes to proclaim his goods. If the debtor is not reachable the auctioneer should give a certificate to that effect and give an elaborate account of the person present when the goods are proclaimed. I am not persuaded that it is enough for an auctioneer to simply walk into premises, list some goods, and claim that the people there refused to sign as this is prone to abuse. More elaboration as I have explained is needed. It is also advisable that when an auctioneer is actually taking away the goods, an inventory of what is taken be made, so that there is no question regarding what was taken and what was not. In our case we have none.

52. But what happened to the goods of the appellants? It will be observed that the appellants filed this suit on 19 November 2020 which was exactly 7 days after the attachment and the court issued a stay of sale of the properties attached. No sale could have taken place within the 7 days or until the application for injunction was decided, which was on 19 April 2021. At the hearing of the case, the respondents offered no evidence of what happened to the goods. The question still remains whether the goods were sold or were converted, or were stored. Whatever happened to the goods is a fact squarely within the knowledge of the respondents and the respondents have taken the option of remaining quiet and not disclosing anything relating to the same.

53. The *Evidence Act*, Cap 80, at Section 112, makes provision for proof of special knowledge in civil proceedings. It provides as follows:

> 112. Proof of special knowledge in civil proceedings.
>
> In civil proceedings, when any fact is especially within the knowledge of any party to those proceedings, the burden of proving or disproving that fact is upon him.

54. It follows that the burden of proving whether the goods were sold, stored, or if sold the amount recovered is squarely on the respondents but they provided no evidence.

55. The other thing that is not clear to me is what exactly was taken. As I have said the respondents offered no inventory of what was taken. The appellants on the other hand outlined in the schedule to the amended plaint various goods that they alleged were taken.

56. Despite the items being listed, there is no evidence of these particular itemized goods ever being in the premises. Not a single invoice, receipt, photograph, or any document, was presented to inform court of what goods were there in the premises. There was no independent evidence from a third party, or a balance sheet, or anything. I am not persuaded that without presenting anything tangible then it can be contended that the appellants proved that the goods they listed in the schedule were the actual goods taken or retained. I am therefore unable to hold that the appellants proved that the goods taken are the goods alleged in the schedule of goods.

57. What we cannot however run away from is that the 1st and 2nd respondents never issued any notice to terminate tenancy as required by Section 4 of Cap 301. They therefore illegally terminated the tenancy of the appellants. The other thing we cannot run away from is that the attachment was illegal. I have already pointed out the illegalities and also pointed out that the respondents chose to be silent in disclosing the actual goods taken and the whereabout of the goods.

58. Since the respondents have not given any whereabouts of the goods, they cannot be entitled to judgment in the sum of the 8 months that they remained unpaid. They cannot take the goods of the tenant, retain them, not give any account, and still be entitled to be paid rent arrears. I therefore proceed to set aside this award for rent arrears that was made in their favour by the trial court. The other thing that the 1st and 2nd respondents cannot be entitled to is two months rent in lieu of notice. It was them, as landlords, who were required to give two months notice to terminate tenancy pursuant to Section 4 of Cap 301 which they never did. How then can it be alleged that they are entitled to two months rent in lieu of notice? On the contrary, if there was anybody to pay the other, it would be them (landlords) to pay two months rent for failure to give their tenants notice. That being the case I also set aside the judgment of the trial Magistrate awarding the 1st and 2nd respondents two months rent in lieu of notice. In essence there is no substance in the counterclaim and it is hereby dismissed.

59. What about the claim of the appellants? They claimed return to the premises but I regret that I cannot give this order, as the premises is let out to a third party who has not been joined to this case. I agree with counsel for the 1st and 2nd respondents that it will be condemning him unheard if this court orders that he be evicted so that the appellants can take possession of the premises. I also cannot order return of goods whose particulars are not clear.

60. However, I have held that there was an illegal termination of the controlled lease and illegal attachment of the goods of the tenant. The respondents cannot get away with it and they are liable to pay general damages for illegal termination of the lease. General damages are of course in the discretion of the court and I have mulled over what to give in this case. I do observe that in the case of Munaver N Alibhai t/a Diani Gallery v South Coast Holdings Limited [2020] eKLR, P.J Otieno J, awarded Kshs. 2,000,000/= as general damages for illegal termination of lease and in his judgment he stated that he was guided by a similar award made in the case of "Mattarella Limited – Versus -Michael Bell & another [2018] eKLR"; the monthly rent payable was Kshs. 41, 508/=. In the case of J.M Kimani t/a Renco Car Identity v Parliamentary Service Commission (Environment & Land Case 258 of 2016) [2022] KEELC 2843 (KLR) (6 June 2022) (Judgment) Mogeni J, also made an award of Kshs. 2,000,000/= again being guided by the said case of Matarella Limited vs Michael Bell & Another (2018) eKLR in a case where rent was Kshs. 40,000/= per month. I have not had the benefit of finding this decision in Matarella vs Michael Bell and I am not sure on what basis the award of Kshs. 2,000,000/= was made.

61. On my part, I would think that before arriving at a decision on the amount of general damages to be awarded, the court needs to consider the rent payable, the chances of getting alternative premises for conducting business, the term left in the lease, the conduct of both landlord and tenant, other damages awarded to the tenant such as loss of business, and any other important surrounding circumstances. I am further of the opinion, that the award ought not to be so high compared to the rent payable, so as to constitute an unjust windfall on the part of the tenant, but it should also not be too low so that landlords do not have an incentive to illegally evict tenants. It should be sufficient to be both compensatory and a deterrence at the same time. In our case, I have considered the rent payable and the term left in the lease which was about one year and 3 months. I have also considered the conduct of the parties and that includes the fact that the appellant was not a tenant that was up to date with his payments of rent. I have taken into account the manner in which the landlord took over the premises and indeed all other surrounding circumstances related to the eviction. If the tenant was a fully paid tenant, I may have been moved to make an award equivalent to the rent receivable by the landlord for the remainder of the term which would have been Kshs. 1,050,000/-. But the fact that the appellants were defaulters needs to be taken into account. In my discretion I will give an award equivalent to one year's receivable rent as general damages, which will be Kshs. 840,000/=. This award is payable jointly and/or severally by the 1st and 2nd respondents and for the avoidance of doubt, it constitutes

general damages for illegal termination of the lease of the appellants. The attachment was done by the 3rd respondent on instructions of the 1st and 2nd respondents, and the 1st and 2nd respondents gladly accepted that they are liable in respect of the acts of the 3rd respondent and even wondered why he was being sued. Given that position, all respondents are all jointly and/or severally liable for the loss of the goods of the appellants. That loss, as I have repeatedly stated is not clear. However, the fact of the matter is that the appellants were operating a hotel in the premises which had at least a 34 bed capacity. That was not a small operation. There must have been facilities in the hotel that would support an operation of this magnitude. Doing the best that I can, I will make an award in the sum of Kshs. 1,000,000/= for loss of goods. The judgment for this amount of loss of goods is joint and/or several against all respondents.

62. There was a claim for loss of profits but I cannot take seriously this claim. There was too much gaps in the purported accounts presented. First, it was not even clear whether the person who prepared the books was duly qualified. Those books related to a business name that is strange as the appellants did not present any Certificate of Registration of a Business name for operation in the premises. The appellants did not present any Kenya Revenue Authority (KRA) returns to show what sort of returns they were making which would reflect their profits. There is no need of me wasting time on this claim. It was not proved. I will make no award for loss of profits.

63. The only award made is therefore Kshs. 840,000/= for illegal termination of the lease against the 1st and 2nd respondents, and Kshs. 1,000,000/= for illegal attachment and detention of goods jointly and/or severally against the 1st, 2nd and 3rd respondents. These sums will attract interest from the date that this suit was filed, which is 19 November 2020, at court rates till satisfaction in full. The appellants will also have the costs of the suit and of the costs of this appeal jointly and/or severally against all the respondents.

64. One last issue, the 1st and 2nd respondents urged that the nature of damages was not outlined in the pleadings. That may be so, but it does not mean that the court could not award damages in the nature that it thought fit. The fact that the damages may not have been elaborated in the prayers does not mean that no damages can be awarded.

65. Judgment accordingly.

DATED AND DELIVERED THIS 9 DAY OF DECEMBER 2024

JUSTICE MUNYAO SILA JUDGE, ENVIRONMENT AND LAND COURT

AT KISII.

Delivered in presence of: -

Ms. Nyaenya present for the appellant;

Ms. Omondi h/b for Mr. Nyangacha for the 1st and 2nd respondents;

N/A for 3rd respondent

Court Assistant – David Ochieng'