THE REPUBLIC OF UGANDA

IN THE HIGH COURT OF UGANDA; AT KAMPALA

(EXECUTION & BAILIFFS DIVISION)

MISC. APPLICATION No. 2763 OF 2014

(Arising from Misc. Cause No. 2469 of 2014)

1. MALE H. MABIRIZI K. KIWANUKA
2. MK FINANCIERS LIMITED :: APPLICANTS

VERSUS

1. OWERE FRANCO
2. N. SHAH & CO. LIMITED
3. PARIKH HETAL ::: RESPONDENTS
4. OBIRO ISAAC EKIRAPA

BEFORE: - THE HON. MR. JUSTICE ALFONSE CHIGAMOY OWINY – DOLLO

RULING

This application has been brought under the provisions of section 3 of the Distress for Rent (Bailiffs) Act, and section 98 of the Civil Procedure Act, and as well, 0.9 r.27, 0.52 r.1, 0.50 rr.1 & 6, of the Civil Procedure Rules. The Applicants seek orders of this Court that: –

1. The Distress for Rent certificate issued under Misc. Cause No. 2469 of 2014 be cancelled and the distressed properties be returned to the Applicants.

2. An order issues restraining the Respondents or their agents by whatever name from dealing with the Applicants' premises in any way.

3. An order issues for opening of of the Applicants' premises and withdrawal of security guards there from.

4. The Applicants be awarded damages for the unlawful eviction from the premises.

5. Costs of this application be provided for.

The grounds for the application, which are contained in the affidavit sworn by the1st Applicant, in support thereof, are in sum, that: –

(i) There are illegalities on the face of the record.

(ii) The certificate was applied for and granted while there was, in existence, a Commercial Court Order maintaining the status quo between the parties.

(iii) The Applicants were not served with any court process.

(iv) The said certificate was illegally obtained, since no application was made to a Chief Magistrate or Magistrate Grade 1 as required by law.

(v) The bailiff deposited no security before the issuance of the certificate.

(vi) The bailiff holds no insurance policy to cover the distressed properties.

(vii) The bailiff abused the certificate by attaching items not included in the schedule and locking up the premises.

(viii) The certificate was executed not only by the bailiff; but with the 2nd to 4th Respondents.

(ix) It is just and equitable that the application be allowed.

The 1st, 3rd and 4th Respondents swore separate affidavits in reply to the application, denying the adverse claims therein; and justifying the levying of distress. I think the application turns mainly on the first ground which, being founded on a claim of illegality, is a serious one. Indeed, this is brought out by the two issues framed for Court's determination; namely: –

(a) Whether the Respondents' distress against the Applicants and all related actions were lawful.

(b) What remedies are available to the Applicants.

1. ON THE LEGALITY OF THE DISTRESS FOR RENT

The parties hereto are on common ground that the 1st and 2nd Applicants had entered into a tenancy agreement with the 2nd Respondent in 2012; but the tenancy had expired. After the termination of the tenancy, the landlord applied to the Registrar Execution Division for, and obtained, a certificate to levy distress on the Applicants' properties. It is based on this certificate that the Applicants' properties were subjected to the levy of distress; which has resulted in this application. The common law principle is that distress for rent is only applicable where there subsists a relationship of landlord and tenant between the parties; notwithstanding that the former

tenant is still in possession. **Halsbury's Laws of England**, **Third Edition, vol. 38**, states at p. 741, paragraph 1207 as follows: –

> *"If a tenancy determines by effluxion of time or otherwise, and former tenant remains in possession against the will of the rightful owner the former tenant is, apart from statutory protection, a trespasser from the date of the determination of the tenancy."*

This principle is applied in our jurisdiction; see ***Souza Figueiredo & Co. Ltd. vs George & Others (1959] E.A. 756***, which states that for a landlord to exercise to levy for distress for rent, a landlord/tenant relationship must subsist between the two. This authority was cited by the Supreme Court of Uganda, with approval and restatement of the proposition of law therein, in ***Joy Tumushabe & Anor vs M/s Anglo African Ltd & Anor SCCA No. 7 of 1999***, wherein Kanyeihamba JSC stated as follows: –

> *"In any event, distress for rent is only permissible if the relationship of tenant and landlord exists between the parties; but as I have shown, that relationship had ceased to exists as a result of the appellants' acts and conduct. In the result, distress for rent in this case was effected against trespassers, and it could not have been possible for the persons who effected the alleged distress for rent to do so under the Act."*

The matter before me falls for consideration under the same circumstance. The relationship of landlord/tenant had long since ceased to exist between the parties to the Applicants and the 2nd Respondent. It is the Respondents' case, that the tenancy agreement between them and the Applicants, provided for levy of distress for rent even after the tenancy relationship had determined. The relevant part of the tenancy agreement in issue provided as follows: –

> *"... if ... the tenant ... shall commit any breach of his obligation under this agreement ... then the landlord may re–enter upon the premises and immediately terminate the tenancy ... and then it shall be lawful for the landlord at any time thereafter (after the non–payment of rent) to be free to exercise his rights of distress without a Court order."*

Counsel for the Respondents has submitted that this permitted the landlord to terminate the tenancy, take possession of the property, and still retain the right to levy distress for rent. In this, Counsel has cited and relied on the statement in **Halsbury's Laws of England, Volume 12, 4th Edition**, where at page 108, the learned authors have stated that the: *'landlord and the tenant can agree on an express power to distrain ... where the common law requisites are absent.'*

However, in England the common law right to distrain is extended by statute for six months after the tenancy has been determined. I should point out here that there is no law extending the right of the landlord to distrain after the date of cessation of the tenancy relationship; thus, the rule obtaining in England is not applicable here. Accordingly, whatever right of action the 2nd Respondent as landlord enjoyed for the recovery of any rent arrears from the Applicants after the termination of the tenancy did not include distress for rent. In the event, on this, ground the certificate to levy rent, which was acted upon to the detriment of the Applicants, was illegal.

The other leg to the issue of illegality the Applicants have raised, pertaining to the issuance of the certificate to levy distress for rent, is with regard to the role of the Registrar Execution. Section 2 of the Distress for Rent (Bailiffs) Act (Cap. 76 Laws of Uganda 2000 Edn.) provides as follows: –

*"**2. Appointment of bailiffs under certificate of certifying officer**.*

No person, other than a landlord in person, his or her attorney or the legal owner of a reversion, shall act as bailiff to levy any distress for rent unless he or she shall be authorised to act as bailiff by a certificate in writing under the hand of a certifying officer, and such certificate may be general or apply to a particular distress or distresses."

Section 1 of the Act, provides as follows: –

"1. Interpretation

In this Act –

'bailiff' means a bailiff for the purpose of distress for rent;

'certifying officer' means a Chief Magistrate or a Magistrate Grade 1."

In the instant case, the certificate to levy distress for rent was issued by a Registrar of the Execution Division of the High Court. It seems the Registrar acted so, because he is in charge of execution and bailiffs. However, in the light of the aforestated provision of the law regarding the issuance of a certificate to levy distress for rent, the Registrar Execution had no authority to do so. This being the case, his action was illegal. I should point out that it would be erroneous to seek to have recourse to the Practice Direction No. 1 of 2002, on judicial powers of the Registrars. First, and rightly so, the Circular does not purport to override any law, or create any

new powers of the Registrars; but merely clarifies on powers of the Registrar in accordance with the provisions of the Civil Procedure Rules.

Second, jurisdiction is strictly a creature of a specific law; and as such, neither can it be assumed nor be usurped by any Court. The Execution Division has no jurisdiction to sit as a Court of first instance. Its remit is consequential, and restricted, to the enforcement of decrees or orders issued by other Courts. It is unmistakably clear, from the provision of the law cited above, that the jurisdiction to issue a certificate for the levying of distress, and the appointment of the bailiff in that regard, vests solely in a Magistrate's Court; and this mandate is exclusively exercisable either by a Chief Magistrate or by a Magistrate Grade 1. Accordingly, in issuing the certificate to levy distress for rent, the Registrar Execution acted without jurisdiction; for which his act was illegal, and cannot be allowed to stand.

There is yet another ground raised by the Applicants for challenging the process that ended with the levy of distress for rent. This is that the process was undertaken in defiance to an order of Court prohibiting any such action until certain applications, pending in Court, were disposed of. The Respondents deny this; and contend that in fact it was the Applicants who had wrongfully extracted the order of the Registrar Commercial Division, which had issued an order whose lifespan had expired by the time the order for distress for rent was levied. Acting in defiance of a Court order is of course a serious matter that the Courts will not take kindly to; for it goes to very root of the authority of Courts to render justice. Society would be the worse for it, if Court orders were to be ignored with impunity.

I have perused the certified record of the proceedings before His Worship Thadeus Opesen, the Registrar Commercial Division, in Misc. Application No. 456 of 2014. This is attached to the affidavit of Hetal Parikh (the 3rd Respondent herein) sworn in opposition to this application before me. The learned Registrar, at the end of the submissions by the Counsels, issued a short ruling, dated the 19th of June 2014, as follows: –

> *"Court: Application granted. Interim order of stay of execution against the Applicant issued and it shall remain in force till 25/08/2014 when the application No. 452 of 2024 shall be heard. Costs of this application shall abide the outcome thereof."*

However, when the order was first extracted, it read as follows: –

> *"It's hereby ordered as follows:*

1. An interim order doth issue staying the execution of the ruling and orders of the learned Chief Magistrate of Mengo Her Worship Atukwasa Justin in Mengo Civil Suit No. 849 of 2014 and Misc. Applications No. 414 and 415 of 2014, delivered on 5th June 2014 until the 25th day of August.

2. An interim order doth issue maintaining the status quo of the parties pending the hearing and determination of Misc. Application No. 452 of 2014.

3. Costs be in the cause."

A corrected version of the order, signed and sealed by the learned Registrar on the 6th day of October 2014, and attached to the aforesaid affidavit of Hetal Parikh, reads as follows: –

"IT IS HEREBY ORDERED AS FOLLOWS; –

1. This application is allowed.

2. The Interim Order of Stay of execution against the Respondent is issued and it shall remain in force till 25th August 2014 when Miscellaneous Application No. 452 of 2014 shall be heard.

3. Costs of this application shall abide the outcome of Miscellaneous Application No. 452 of 2014."

It is quite evident that the first extract of the order, imported words that are not contained in the order of the learned Registrar dated the 19th day of June 2014. This must explain why the learned Registrar had to amend the erroneous extracted order. This constrains me to reiterate my warning to the Registrars to be particularly careful to ensure that the extracts from decrees or orders, are compliant with the decrees or orders they are extracted from. Second, it is incumbent on Counsels to strictly adhere to the provision of the Civil Procedure Rules requiring that extracts of decrees or orders must first be presented to the opposite Counsels for approval, before presenting them to Court for endorsement, as this would help to stem any possible mischief or error in the extraction of the decree or order.

Be it as it may, there is no evidence before me that at the time the certificate for levy of distress for rent was applied for, and issued by the Registrar Execution, the order that had certainly lapsed on the 25th August 2014 had been extended by Court, and was still extant. I therefore find

no basis for the claim that the certificate for the levy of distress for rent, was issued in contempt of a Court order restraining such action. Similarly, with regard to the alleged presence of the Respondents, other than the bailiff, at the execution of the distress for rent, the evidence before me shows that the process was carried out by the 1st Respondent as bailiff; and, amongst others, a police officer at the rank of an ASP witnessed it.

Even then, even if the other persons complained against had fully participated in the process, I would have found no reason to fault it. Having found that the issuance, by Court, of the certificate to levy distress was wrong, the act of the persons would have been done outside of the powers of Court. However, under the provision of section 2 of the Distress for Rent (Bailiffs) Act, cited above, the landlord could have, acted by himself or herself, or through an attorney, to levy distress without recourse to Court. Further, after the expiry or termination of the tenancy relationship, the Applicants remained on the property as trespassers who the landlord could use reasonable force to evict. In the ***Joy Tumushabe & Anor vs M/s Anglo African Ltd & Anor*** (supra), Kanyeihamba JSC had this to say: –

"... where tenants defy the landlord's terms and conditions of tenancy agreed between the parties, and the landlord gives notice to repossess or effect a lawful act which the tenants continue to disregard, they become trespassers on the property concerned. In that event, the owner may resort to any legal means to achieve the desired objective, namely of evicting the defiant trespassers as well as removing their property from the premises so as to leave those premises vacant. Thus in a series of cases, including ***Jackson vs Courteneou (1857) 8 E&B 8, Ex. Ch. Scott vs Matthew Brown & Co. Ltd. (1884)51 LT. 746, Shaw vs Chairitle (1850)3 Car. & Kir. 21****, and* ***Hemmings vs Stoke Pages Golf Club Limited & Anor [1920]1K.B. 720 (C.A.)****, it has been the principle that if a trespasser peacefully enters or is on a land, the person who is in, or entitled to, possession may request him to leave, and if he refuses to leave, that person may remove him from the land, using no more force than is reasonably necessary. In the case of* ***Hemmings & Wife vs The Stoke Pages Golf Club Limited & Anor*** *(supra), Scrutton L.J. said:*

"This case raises a legal question of great interest and the general importance, shortly stated the question is whether an owner of landed property finds a trespasser on his premises, he may enter the premises and turn the trespasser out, using no more force than is necessary to expel him, without having to pay damages for the force used. So stated, common honesty and common sense would answer, "of course he may."

After citing the authorities above, the learned Kanyeihamba JSC then concluded by stating that: –

"Under the circumstances of this case, I am satisfied that the respondents had the power to evict the appellants from the suit premises in accordance with the provisions of the law. It is trite law that the owner of property has the right to evict a trespasser who has refused to vacate the property as was held in ***Harvey vs Brudges 14M & W437****. Moreover where such eviction is effected, the owner may also remove the property and goods of the person evicted to leave the premises empty".*

2. REMEDIES AVAILABLE

The Applicants have urged Court to find for them and order for the return of the items wrongfully distrained for rent. Furthermore, they have sought an order of damages for the loss they have suffered due to the illegal distress for rent. In the same case of ***Joy Tumushabe & Anor vs M/s Anglo African Ltd & Anor*** (supra), Kanyeihamba JSC stated as follows: –

"... although I have held that the seizure of the 1st Appellant's property from the flat for purposes of distressing for rent was illegal, I have also held that her eviction from the flat as a trespasser was lawful and justified. ... Taking into account all the facts and circumstance of this case, I would order that such property as was proved to have been removed and listed in accordance with the findings of the trial Court should be returned to the appellants or its value paid to them by way of compensation."

For his part, Wambuzi C.J. who concurred with Kanyeihamba JSC, on the illegality of distress for rent, but lawful eviction under trespass, stated in his judgment that: –

"It appears that a trespasser who refuses to leave may be removed from the land using no more force than is reasonably necessary (Halsbury's Laws of England, 3rd Edition, Vol. 38, p.747). In this case, I do not think it matters who carried out the actual eviction as long as they are acting for and on behalf of the landlord. It was open for the respondent to remove the property from this land. It appears that the property was actually carried away and kept by the respondent, ostensibly for purposes of levying distress for rent. As the respondents were not entitled to levy distress for rent on the appellant's goods, they were under a duty to make the goods carried away available to the appellants or pay the value of such goods as were

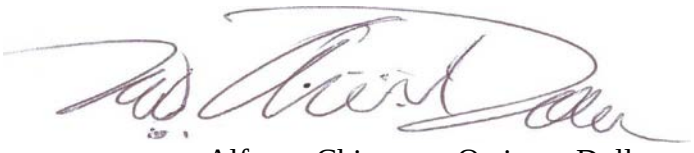
proved to have been carried away for which the respondents failed to account to the appellants."

On the authority of ***Joy Tumushabe & Anor vs M/s Anglo African Ltd & Anor*** (supra), I find that the levy of distress for rent by Court order was unlawful; and so I set it aside. The 1st Respondent shall return to the Applicants the properties so wrongfully distrained for rent. In the event that the distressed properties are no longer available, the Applicants are advised to file a separate suit for the determination of any loss they have suffered thereby; and also to determine any other loss they have suffered by reason of the wrongful distress for rent. However, since the Applicants' tenancy relationship with the 2nd Respondent had expired, they were trespassers on the premises; for which, their eviction was lawful. Accordingly, they are not entitled to return to the premises. In the event, I make the following orders: –

(i) I award the Applicants damages in the sum of U. shs. 1,000/= (One thousand only) as damages for wrongful distress for rent.

(ii) The 1st Respondent shall immediately return to the Applicants all the Applicants' properties that were taken from the premises under distress for rent.

(iii) The Applicants are awarded costs of the application.



Alfonse Chigamoy Owiny – Dollo
JUDGE

25 – 05 – 2015