



REPUBLIC OF KENYA

IN THE HIGH COURT AT MOMBASA

CIVIL CASE NO 842 OF 1983

FATEMI INVESTMENTS LTD..... PLAINTIFF

VERSUS

BAYUSUF.....DEFENDANT

JUDGMENT

The plaintiff in this case claims by plaint a sum of shs 900,000/-. The facts alleged briefly are: that the plaintiff had a tenant Sheikha Ventures which operates a video library in the plaintiff's premises called Fatemi House; Sheikha Ventures Limited did not pay their rent regularly and fell into arrears respecting the same. A bailiff, a Mr Hassanali Dato, now deceased, acting on instructions of the plaintiff levied distress on the tenant premises and seized the goods therein. The goods were retained in the said premises; that they remained in the possession of the plaintiffs by virtue of the doctrine of walking possession. Part of the goods in the said premises were 1,000 video cassettes which had been hired or sold to the defendants and were rent out for profit. The payment of the purchase price was by instalments. Ownership of the property cassettes remained in the owners, the defendants, until all the purchase price had been paid. It is said that after the levy of the said distress the defendant with the assistance of the tenant removed from the said premises the 1,000 video cassettes and at that time the defendant knew or ought to have known that the plaintiff had levied distress on the said cassettes.

The plaintiff says by virtue of section 7 of the Distress for Rent Act, he is entitled to claim three times the value of the goods from the defendant.

Section 7 provides:

"7. If any person in any unauthorised manner removes or causes to be removed goods, chattels, stock or crops distrained upon for rent from any place where they or any of them are lawfully stored or detained, he shall be guilty of an offence and liable to pay to the person or persons aggrieved by the removal three times the value of the goods, chattels, stock or crops so removed, in addition to any costs incurred by the person or persons so aggrieved in the prosecution of the offender, and the tenant or owner of the goods, chattels, stock or crops or any of them so removed shall be liable to the same penalties as are imposed upon the person removing or causing to be removed the goods, chattels, stock or crops, where they or any of them are afterwards found to have come into his use or possession."

Mr Satchu who appears for the defence says that the defendant never rescued the said cassettes. I have

therefore, to consider which evidence I should believe. There is evidence from Mr Dato that the property he seized included 1,000 cassettes. PW3 says that he saw the defendants and the two women who owns Sheikha's Ventures Ltd, taking cartons containing cassettes into a car owned by the manager of Sheikha Ventures. The defendants deny this and says that on the day prior to the distress Sheika, the proprietor of the video shop came to him and asked him to take away 461 cassettes as she could not afford to pay him. He sent his son with her to collect the cassettes. The son collected 461 cassettes. This conflict of evidence I must solve. It is anything but easy to do so. I am however satisfied on the balance of probabilities that I should believe the story told by the plaintiff. It would have been quite easy for the defendant to have denied the rescue all those 1000 cassettes as is his present story. He however, said in a letter dated 28th May 1983 that the cassettes belonged to and they always belonged to him by virtue of an agreement dated 5th December, 1982. This makes me believe that what the plaintiff said is true. I must state clearly at this stage that in view of what come hereinafter, this is a finding on the balance of probabilities. It is the proper standard of proof required in civil cases.

However, during the course of the hearing it occurred to me that the claim to recover, treble the value of the goods sold was a liability imposed purely by statute and that on the authority of *Barraclough v Brown & others*, [1897] AC p 615, where a right is given by statute and means to enforce are or redress are given by statute one must use this means to get the relief one seeks. There is no doubt that in England one who is entitled on similar provisions of the statute to bring an action to recover, treble the damages where rescue has been effected, as in this case. The English statutes however, which so provides are significantly different on section 7 of the Kenya Act which I have already set out. The English sections are conveniently set out in King's Bench Division Report [1933] p 205 in *Lavell & Co Ltd v AE O'Leary*. These sections are:

“(1) Distress for Rent Act 1737 (11 Geo 2, c 19), s 10:

“It shall ... be lawful to and for any person or persons lawfully taking any distress for any kind of rent, to impound or otherwise secure the distress so made, of what nature or kind soever it may be, in such place or on such part of the premises chargeable with the rent as shall be most fit and convenient for the impounding and securing such distress ... and that if any poundbreach or rescous shall be made of any goods and chattels, or stock detained for rent and impounded or otherwise secure by virtue of this Act, the person or persons aggrieved thereby shall have the like remedy as in cases of pound-breach or rescous is given and provided by the said statute” – that is, the Sale of Distress Act, 1689.

(1) Sale of Distress Act, 1689 (2W & M c 5), s 3, sub-s 1: “And be it further enacted by the authority aforesaid, that upon any pound-breach or rescous of goods or chattels detained for rent, the person or persons grieved thereby shall, in a special action upon the case for the wrong thereby sustained, recover his and their treble damages and costs of suit against the offender or offenders in any such rescous or poundbreach, any other either of them or against the owners of the goods distrained in case the same be afterwards found to have come to his use or possession.”

The means provided by these statutes is a special action on the case which means nowadays in Kenya an action brought by plaint under the Civil Procedure Act.

Section 7 of the Distress for Rent Act creates an offence and imposes a penalty. Offence is defined thus in the Interpretation and General Provision Act cap 2 which is as follows:

“Offence” means a crime, felony, misdemeanor contravention or other breach of, or failure to comply with, any written law, for which a penalty is provided:”

Section 7 accordingly, in my view creates a criminal offence and must if a person is charged with it be prosecuted in accordance with the safe guards contained in section 77 sub-section 1-9 of the Constitution and the Crimes Procedure Code. I am strengthened in this view by the clear distinction between the liability imposed by section 7 and the right to recover bestowed by section 8 and 10 of the said Act. I accordingly hold that I have no jurisdiction to entertain the plaintiff's claim and I dismiss it. As the amendment to the defence raising the *Barraclough v Brown* issue was raised by the Court at a very later stage, I award the defendants 1/3 of his costs.

I should further state that the principle of *Barraclough v Brown* is no stranger to the Laws of Kenya, it has frequently been cited in election petitions where it is sought to raise the lawfulness of the registration of voters.

Dated and Delivered at Mombasa this 14th Day of May, 1990

J.F. SHIELDS

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JUDGE



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