



REPUBLIC OF KENYA
IN THE HIGH COURT OF KENYA AT KAKAMEGA
CIVIL CASE 124 OF 2012

REBECCA BRENDA JUMA PLAINTIFF

VERSUS

DONCOM LTD. 1ST DEFENDANT

HOLDEN INVESTMENT LTD. 2ND DEFENDANT

R U L I N G

The application dated 29.5.12 principally seeks orders for a temporary injunction restraining the 2nd defendant, its agents, heirs and/or assigns more specifically Nyaluoyo Auctioneers from selling and/or in any manner interfering with the plaintiff's goods and/or assets and equipment at Kula Korner restaurant or at Holden mall pending the hearing of the suit.

It also seeks a mandatory order of injunction to issue directed at the 2nd defendant to open the premises known as Kula Korner restaurant to enable the applicant access her tools of trade and/or operate her business.

The application is supported by the affidavit of the plaintiff/applicant, REBECCA BRENDA JUMA.

According to the said affidavit, on 1.1.2010, the applicant executed a franchise agreement with the 1st defendant/respondent for a period of six years to run a restaurant known as Kula Corner at the Holden mall owned by the 2nd defendant. The 1st defendant was to provide the premises and the kitchen equipment while the Plaintiff equipped the premises with equipment and tools for running the restaurant. That on 15.4.12 the 2nd defendant forced the Plaintiff to close the restaurant alleging non payment of Kshs.1,371,164.50 rent. According to the plaintiff, the 1st defendant had given her a statement that indicated a balance of Kshs.936,139/= while according to the Plaintiff the balance was Kshs.684,973.93. The Plaintiff further stated that she had paid a rent deposit of Kshs.474,106.50 and spent Kshs.846,097/= on the internal construction at the restaurant.

That the plaintiff issued the 1st defendant with 3 post-dated cheques for Kshs.410,699, Kshs.402,223 and Kshs.402,223 but one cheque bounced because the 1st defendant presented it to the bank before the agreed date. The plaintiff deponed that the attached goods are her tools of trade and that her business was closed unlawfully under the guise of distress for rent. The plaintiff further stated that no notice for vacant possession was given by the 2nd defendant.

The 1st defendant through a replying affidavit by a Director, DOMINIC KOSEN sworn on 28.6.12

contended that the plaintiff was in rent arrears, hence the distress for rent by the 2nd defendant. The 1st defendant's prayer is that the plaintiff should deposit the admitted amount of Kshs.684,973.93 rent owed.

In opposition to the application, the 2nd defendant through a director, RAJINDER SINGH SEMBI swore an affidavit on 3.6.12. According to the 2nd defendant, the rent was to be paid quarterly in advance. That the Lease Agreement provided for re-entry and repossession for non payment of rent. The agreement also provided that the Lessee did not have any right to notice of re-entry if rent was not paid and therefore the distress for rent was lawful.

The 2nd defendant further deposed that the plaintiff had come to court with unclean hands, having admitted owing Kshs.684,973.93 and did not therefore deserve any equitable remedy. According to the 2nd defendant, it does not matter whether the distrained goods belong to the plaintiff or for 1st defendant. In any event, the 2nd defendant contended that the plaintiff removed numerous items from the restaurant once she got wind of the impending distress for rent.

The restaurant purchase agreement between the 1st defendant and the plaintiff (annexure RB "J-1") is not disputed by any of the parties. The Lease agreement between the 1st and 2nd defendants (RS S-1) is not contested.

The bone of contention is whether rent has been paid by the plaintiff. Although there is a dispute on the exact amount owing, the plaintiff in paragraph No. 12 of her affidavit has admitted that Kshs.684,973.93 was due and owing. The explanation that the plaintiff has given in respect of the amount owing is that the post-dated cheque she issued was presented to the bank before Easter contrary to her advice. There is no explanation why the plaintiff had not paid the said amount between the time she filed suit on 29th May 2012 which was long after Easter. With the rent owing, the plaintiff was in breach of the Lease Agreement. The 2nd defendant was entitled to re-entry under the lease agreement.

The plaintiff in her supporting affidavit sworn on 2.7.12 has exhibited documents that show that some of her goods in the restaurant belong to her. From the nature of the goods described, the same are no doubt tools of trade and ought to be released.

The plaintiff can however not admit non payment of rent and at the same time seek equitable remedies. The non payment of rent by the plaintiff is the cause of the problems that led to the filing of the application herein. The plaintiff is in breach of clause No. 5 of the Lease agreement (annexure RSS-1). The 2nd defendant was therefore entitled to a repossession of the premises.

With the foregoing, I allow the temporary injunction prayed. The prayer for access to the plaintiff's goods is allowed on condition that the plaintiff pays the admitted rent of Kshs.684,973.93 plus the auctioneers charges. Costs in the cause.

Delivered, dated and signed in open court this 31st day of July, 2012

B. THURANIRA JADEN
J U D G E