REPUBLIC OF KENYA

IN THE HIGH COURT

AT MALINDI

CIVIL SUIT NO. 35 OF 2010

ARN HOLDING COMPANY LIMITED ……..……PLAINTIFF

VERSUS

GESTIONE RESTORANTI AFFINI LIMITED……..……..DEFENDANT

RULING

This chamber summons application dated 3rd March 2010 is brought pursuant to the previous Order XXXVIII Rule 1 (b), 2(1) and 5(1) (a) (b) and 2(12) of the C.P.A.

It seeks that

1 The Defendant do appear and show cause why he should not furnish security by way of depositing into a joint interest earning Account in the names of the Advocates for the parties, within a period fixed by this court, the amount of 22,000 Euro (Kshs.2,486,000=) being outstanding rent arrears under the lease dated 23rd January 2009, for the period between January 2010 to November 2010 as security for its appearance on its application dated 26th April 2010.

2 The Defendant does appear and show cause why it should not furnish by way of deposit into a joint interest earning bank account in the names of the Advocates for the parties, the amount of Euros 2000, being the applicable monthly rent under lease dated 23.01.09 for each and every consecutive month beginning and following December 2010 as security for its appearance in the suit until the suit is heard and delivered.

The grounds are that the Plaintiff and Defendant entered into two leases, one signed in Italy citing the applicable rent at Euros 4000, and another one signed in Kenya, setting the applicable rent at Euros 2000. The contention in the suit is which of the two leases the operating one is whose terms govern the relationship between the parties.

The Defendant occupies the plaintiff's premises and is conducting business therein. The defendant has now obtained an order of injunction restricting the plaintiff from exercising the right to distrain for rent arrears amounting to 22 Euros. The Defendant Company has no known assets within the jurisdiction of this court nor are its directors within Kenya. In the event that the Defendant Company winds up operations in Kenya or cease to operate and leave the jurisdiction of this court, then in the event of successful litigation by the plaintiff in this suit, execution of decree may be delayed or defeated. The plaintiff/applicant is apprehensive that the rent continues to accumulate as the suit progresses month to

month without adequate safeguards for the derivative income it could have engaged or invested from its property - investment including depositing the said monies into interest earning accounts. It is stated that the order sought will not be prejudicial to the defendant/respondent because if defendants' suit succeeds, then monies deposited will be recoverable by it, going by its counterclaim of set off against rent.

As it is, defend continues to enjoy occupation, protection from distress for rent and income from running is business on the plaintiffs premises and plaintiff is prejudiced by this.

In the supporting affidavit sworn by LISTON THOYA MRAMBA, a director of the plaintiff company, he depones that the defendant's main ground of defence is that, it is justified in not paying any rent in line with terms allegedly contained in an earlier agreement entered into between the parties in Italy on 1st December 2008 where the rent was set at 4000 Euro per month. Defendant claims there are renovations it undertook on the premises, which entitles it to breach its obligation contained under either of the leases, to pay the applicable rent with the result that no rent has been paid at all.

The applicant refers to the two leases saying there is no waiver of rent included in those leases.

Further that the rent plaintiff seeks is at the rate of 2000 Euros and not even the 4000 Euro rate which defendant claims to recognize as stipulated under the lease.

I have not seen any replies by the respondent/defendant.

The court directed that this matter be disposed of by way of written submissions but at the date of writing his ruling, I only had written submissions filed by Dr. Khaminwa.

Dr. Khaminwa's submissions is that it is imperative that the plaintiffs'' interest to be protected, and that it is unfair to let the defendant carry on business on the plaintiff's property without paying rent at all. He urges this court to consider the fact that since there are two lease agreements, and each at least stipulates a certain amount of rent, then it is improper for the defendant to remain in occupation rent free, and to be fair to both, he has elected to be guided by the lower figure of 2000 Euro.

The genesis for this application is the temporary restraining orders which were issued to last for 14 days, to restrain the action for distress for rent by the plaintiff. Although Dr. Khaminwa submits that the contest between the two parties is which agreement/lease should be guiding their relationship, I think it is more than that – because for the defendant, from the pleadings, it's not a question of just which lease, agreement – it is that defendant should not pay rent because it has carried out major renovations on the plaintiff's property which entitles it not to pay the rent – it should be a set off. The orders of 26th April 2010 were issued on a temporary basis pending interpartes hearing of the application for injunction. It is the parties who have prolonged the hearing of that matter by either agreeing to an adjournment, entering into a consent to maintain status quo or as is now, filing another application. My view is that the prayers sought here would have best been considered along with the application dated 26th April 2010, - to my mind it is almost akin to seeking an undertaking for due performance, even before the orders had been confirmed. I needed to hear and determine the application dated 26th April 2010 so as to put in perspective whether applicant is deserving of the injunctive orders, since they were initially issued exparte. It would only have been after hearing that applicant, and if this court ordered for injunction to issue that it would have been appropriate to give directions such as the ones sought here.

However before the application dated 26th April 2010 could be heard inter parties, the parties filed a letter of consent dated 24th September 2010 which inter alia, they agreed to maintain the status quo obtaining until the hearing and determination of this suit. That consent orders has not been set aside and did not include any conditionalities. To now require the defendant/respondent to make certain payments so as to accommodate the plaintiff's interest, is in my view interfering with the status quo obtaining as at 24th September 2010 when the order of consent was entered into, there are well set out conditions to be taken

into account when setting aside or varying a consent, which is well discussed in the case of **Flora Wasike v Desterio Wamboko** to the extent that setting aside a consent meets the same conditions required in setting aside or vitiating a contract i.e,

(1) Fraud

(2) Mistake

(3) Misrepresentation – none of these has been demonstrated here. It would almost appear as though the applicant plaintiff suddenly realized that it ought to have pegged some conditions to the consent entered into rather late, I think it is not the exparte order which failed to provide security, is the consent order.

The upshot is that under the prevailing circumstances, I disallow the prayers sought.

Delivered and dated this 23rd day of March 2011 at Malindi.

H. A. Omondi
JUDGE

NOTE:

On 16th March 2011 after I had written this ruling, and while writing judgment in HCCC Appeal No. 35 of 2010, I stumbled upon the replying affidavit and written submissions by the defence.

The date stamp showed they were received on 8th November 2010. Initially I thought there was a genuine mistake in misfiling because of the similarity in number and as in fact prepared to consider the documents and take into account the contents so as to include the same in my ruling. However, I did not. All I did was to direct my clerk Mr. D. Randu, to ensure proper filing of the documents, by removing them from the HCCC Appeal No. 35 of 2010. The reason why I did not take into account the contents of the documents is that – they are date stamped as having been received on 8th November 2010, YET, from the court record by 12th November 2010, Mr. Otara or the defendant had not filed written submission or even the replying affidavit and was granted 15 days thereof to do so.

On 8th December 2010, Miss Otieno held Mr. Otara's brief, where she was still asking for ten more days to file the written submissions, so how then could the same documents have been received on 8th November 2010 – even if they were placed in the wrong file?

This is confirmed by the fact that even Dr. Khaminwa, the plaintiff's counsel had not been served with replying affidavit or submissions as at 8th December 2010 – so that even if good faith was to be given that the documents were genuinely received in the registry on 8th November 2010 but misfiled, then what about the non service on counsel for the adverse party. It is due to these observations that the contents of these documents are not considered and taken action of in this ruling.

H. A. Omondi
JUDGE
16th March 2011