REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA NAIROBI

COMMERCIAL & TAX DIVISION – MILIMANI

CIVIL CASE NO. 508 OF 2010

RICCATTI BUSINESS COLLEGE
OF EAST AFRICA LIMITED …….....…...……
PLAINTIFF

VERSUS

KYANZAVI FARMERS COMPANY LIMITED ….....……. DEFENDANT

R U L I N G

By this application, the Plaintiff seeks an order that pending the hearing and determination of this suit, the Defendant, its agents, servants or employees be restrained from proceeding with the distress for rent levied against the Plaintiff on 14th July, 2010, in purported recovery of rent arrears of Kshs.7,003,531/=. The Plaintiff also seeks such further or other orders as this Court may deem just and expedient in the circumstances of this case.

The application is brought by a Chamber Summons dated 23rd July, 2010, and is taken out under **Order XXXIX Rules 1, 2** and **3** of the **Civil**

Procedure Rules and **Section 3A** of the **Civil Procedure Act.** It issupportedby the affidavit of Michael Ndemange Mutuku, the Managing Director of Plaintiff Company, sworn on 23rd July, 2010, and is based on the grounds that the Plaintiff does not owe the Defendant the alleged rent arrears of Kshs.7,003,531/= or at all, and that the distress levied against the Plaintiff by the Defendant's agents on 14th July, 2010 is therefore wrongful and irregular.

Opposing the application, the Defendant/Respondent filed a replying affidavit sworn by James Muema Muiya, the Chairman of the Defendant's Board of Directors, on 29th July, 2010. In that affidavit, the deponent avers that the Plaintiff's application is incompetent, bad in law, made in bad faith and that it is tainted with falsehoods and calculated to mislead the Court. He further deposes that there is a suit No 507/2008 pending in Court between the parties herein over the same subject matter, which is a duplication of cases and an abuse of the Court process. He further states that the Defendant has only leased its premises to one tenant, Robert Mutuku, who is carrying on business under Rocham and Riccatti. It is also his contention that the Plaintiff is in arrears of rent to well over Kshs.11,000,000/= which, after a meeting between the Defendant and the then Plaintiff's Advocates, Owaga & Co., the Plaintiff expressed his commitment to pay the said debt on or before 14th July, 2010, which commitment the Plaintiff never honoured.

During the oral canvassing of the application, Mr. Amuga for the Applicant argued that on 14th July, 2010, the Defendants sent auctioneers who went and levied distress against the Plaintiff to recover alleged arrears running to Kshs.7,003,351/= which rent was not owing. According to him, the Plaintiff's only outstanding rent was Kshs.581,049/= which has been duly tendered. As at the date of filing the suit, the Plaintiff did not owe the Defendant any arrears of rent and the Defendant's attempt to recover distress in excess of Kshs.7,000,000/= was wrongful. Referring to the Defendant's replying affidavit, Counsel submitted that the Defendant did not show how such arrears were arrived at.

Mr. Amuga further contended that the lease between the parties commenced on 1st February, 2010, and that the annual rent for the space occupied by the Plaintiff cannot amount even to Kshs.7 million as it is only Kshs.2.7 million and the Plaintiff has not been in the premises for even one year. He submitted that it was evident from the replying affidavit that the dispute was between the Defendant and the previous tenant, Rocham Enterprises Limited, and that whereas the former tenant might have owed the Defendant some money, the present tenant does not owe any such money. On those grounds, he urged the Court to grant the injunction as prayed.

In her response for the Defendant, Mrs. Kalinga relied on the replying affidavit and submitted that although it was alleged that the rent for this year had been paid in the sum of Kshs.581,000/=, there was no receipt issued in respect of that rent. She further submitted that Rocham and Riccatti had always held themselves out as one and the same. At no point did the Defendant deal with Rocham and Riccatti as different entities as they always held themselves out to the Defendant as one and the same entity, and the distress for rent was against Rocham and Riccatti. She also contended that the rent owed was not just for the period from February to the present but that it also included arrears, and that was how the sum of Kshs.7 million had been arrived at, and that this sum had been admitted. It was her further contention that these matters were well within the knowledge of the parties' Advocate.

Mrs. Kalinga also accused the Plaintiff of failing to disclose the existence of **HCCC No. 507 of 2008** in which the substantive issues are the same as those before this Court. She submitted that the Plaintiff therefore acted in bad faith in coming to Court with unclean hands. She further submitted that in the existing circumstances, it would be unfair for the Plaintiffs to be allowed in the premises without paying rent, and that the only remedy was distress for rent. In any case, the total value of the goods restrained was no where near the rent arrears. She urged the Court not to grant the orders sought but instead to dismiss the application.

In his reply, Mr. Amuga submitted that Rocham and Riccatti were different legal entities and that HCCC No. 507 of 2008 had nothing to do with the Plaintiff in this case. The tenancy in question commenced on 1st February, 2010 and any other tenancy did not apply. The Defendant had never discussed any issues separately with the two entities. Paragraph 5 of the supporting affidavit spoke for itself and it was clear that the Plaintiff had been paying rent. In all circumstances, therefore, it was proper for the Court to grant the injunction sought, he submitted.

After considering the pleadings and the respective submissions of Counsel, I find that the main issue to be determined is whether the Applicant owes the Respondent any arrears of rent. In addressing that issue, the relationship between the Applicant and Rocham Enterprises Limited would take the centre stage in order to shade some light on whether the two are one and the same organization.

According to the evidence on record, this drama dates back to 2004 when Rocham Enterprises Limited started running a business known as Riccatti Business College of East Africa within Agriculture House, Nairobi, as a tenant of the Defendant herein. In the process, Rocham Enterprises Ltd. seems to have accumulated some arrears of rent, apparently running into millions of shillings. By a letter dated 11th May, 2010 and addressed to the Manager, Rocham Enterprises Ltd., by M/s J.M. Mutua, Advocates for the Landlords, the said Advocates demanded the immediate payment of Kshs.11,048,174.92 on account of unpaid rent between July 2008 and 31st March, 2010. Part of the letter thereafter read –

"Our further instructions are that your lease expired on 31st March, 2010, a fact within your

knowledge and you have refused to apply for its renewal. Our clients (sic) demands that you either renew or vacate the premises have been frustrated hence this formal note…

<u>TAKE NOTICE</u> that the Landlord reserves the right to instruct auctioneers to levy distress for the outstanding arrears unless you pay the sum of Kshs.11,048,174.92 within the next 7 days of service of this notice…"

M/s Owaga & Associates, the Advocates for the tenants, responded by a letter dated 24th May, 2010, stating that theiru instructions were that their client had been paying rent and therefore the amount in the letter of demand was incorrect. Consequently, they cautioned that any levying of distress would be misplaced. In the same letter, they requested for a meeting between the parties to help reconcile accounts and settle amicably any outstanding issues between the respective clients. This letter was followed by a subsequent one dated 10th June, 2010, addressed directly to the Respondent's Chairman by the Applicant's Advocates. The latter one referred to a meeting held between the parties on 8th June, 2010. The letter, written by Owaga & Associates, Advocates is addressed directly to the Chairman of the Defendant Company. It refers to, "Lease to our clients Robert Mutham and Riccatti at Agriculture House". In paragraph 3 of the said letter, the Advocates state –

"Our client has also undertaken to make some payment towards Rocham Limited within the next 14 days from the date hereof".

A response to that letter dated 17th June, 2010, and addressed by J.M. Mutua & Co. Advocates to Owaga & Associates refers to "Outstanding rent arrear (sic) – Rocham Enterprises & Riccatti". It states in paragraph 2 thereof –

"Our client demands that you pay all the sum admitted as owing, per our earlier meeting of Kshs.6,043,231.00 and Kshs.192,482.00 for weiwei (sic), on or before 24th June, 2010 as undertaken. Thereafter, we shall schedule a meeting to reconcile the accounts …"

Against the above background, Rocham & Riccatti are, *prima facie,* two separate and distinct legal entities. The reference in this letter to "outstanding rent arrears – Rocham Enterprises & Riccatti" shows that the arrears claim is directed at both institutions. As late as 24th May, 2010, when Owaga & Associates wrote to the Respondent's Advocates, the arrears of rent were alleged to be due from Rocham Enterprises Ltd. alone; yet from the evidence on record, Riccatti had already been incorporated. How, then, did Riccatti come to be a party to the non-payment of these arrears which were unpaid between July, 2008 and 31st March, 2010, and which in May, 2010 were being claimed from Rocham alone? Secondly, Rocham is not a party to these proceedings and it is not clear when exactly Riccatti was incorporated. Consequently, it is not clear whether it was in existence when the arrears started accumulating in 2008. As the claim is now directed at both Companies, is each of the Companies an alias for the other.

The evidence on the record demonstrates that Riccatti entered into two lease agreements with the Respondent on 1st January, 2010. Rent was payable quarterly on the 1st day of each quarter. That evidence further discloses that by 21st July, 2010, Riccatti had paid in full its rent for the fist two quarters. How, then, did Riccatti get involved in the affairs of Rocham, which had rent arrears dating back to 2008?

Prima facie, every Company is a separate and distinct legal entity from another Company. However, on the facts of this case, it seems that there was some affinity between the two Companies which prompted Riccatti to extend some filial sympathy to Rocham. For instance, in **HCCC No. 507 of 2008**, **<u>Rocham Enterprises Ltd</u>**. v. **<u>Kyanzavi Farmers' Company Ltd</u>.,** the Plaintiff sought a temporary injunction restraining the Defendant from levying distress against the Plaintiff's goods in the same premises that are the subject of the present suit. In paragraphs 2 and 3 of the application, the Plaintiff said that the business known as Riccatti Business College of East Africa belonged to Rocham Enterprises Ltd. At that point in time, it would appear that Riccatti had not been incorporated. Now that it

is incorporated, it ought to be responsible for paying its own rents from 1st February, 2010, which was the date of commencement of the leases between Riccatti and Kyanzavi Farmers' Company Limited. In that set up, Riccatti may not be liable for debts and liabilities of Rocham in the absence of some agreement to that effect between the two Companies.

However, as observed above, in their letter of 10th June, 2010, M/s Owaga & Associates, the Advocates for Riccatti, who had also been acting for Rocham, wrote to the Defendants saying "Our client has also undertaken to make some payment towards Rocham Limited within the next 14 days from the date hereof." From this statement, it is quite clear that would seem that there was some understanding between the two Companies whereby Riccatti would offset the liabilities of Rocham. The next sentence in that letter is even more revealing. It states "**Kindly let us know if the accounts can be reconciled to enable us have the next figures to deal with**." This demonstrates beyond peradventure that the two Companies were intertwined and they were operating as one business entity. In such circumstances, the Court will readily disregard the legal façade surrounding the corporate entity. Failure to do so would result in some unscrupulous business people hurrying to form separate Companies in order to facilitate the evasion of legally binding obligations. No doubt the eye of equity would never countenance such a practice, and whenever the latter rears its head, the courts must frown upon and discourage it.

Although each Company is, *prima faci,e* a separate legal entity, in the circumstances of this case, I find that Riccatti is nothing more than an alias for Rocham and that in practical reality the two are but one and the same organization. For these reasons, either of them is liable for the unpaid rents of the other.

The application for injunction accordingly fails and it is hereby dismissed with costs.

It is so ordered.

DATED and **DELIVERED** at **NAIROBI** this 14th day of October, 2010.

L. NJAGI
JUDGE