



REPUBLIC OF KENYA
IN THE HIGH COURT OF KENYA AT NAIROBI
COMMERCIAL & TAX DIVISION – MILIMANI

CIVIL CASE NO. 167 OF 2009

MA CUISINE LIMITED
..... PLAINTIFF

VERSUS

CONTEA LIMITED
..... DEFENDANT

R U L I N G

By this application, the Plaintiff/Applicant seeks an order that the sum of Kshs.296,122.60 (together with interest accrued) that was deposited by the Applicant into a joint interest earning account in the names of the parties' Advocates with Chase Bank, Hurlingham Branch, pursuant to this Court's order of 9th April, 2009 be released to the Applicant and that the costs of this application be borne by the Respondent. The application is brought by Notice of Motion under **Sections 3A and 63 (e)** of the **Civil Procedure Act; Order L Rule 1** of the **Civil Procedure Rules**, and all other enabling provisions of the law.

The application is supported by the annexed affidavit sworn on 14th May, 2010, by Nicole Frances Susan Church, one of the Directors of the Applicant. It is based on the grounds –

- 1. That the dispute between the Applicant and the Respondent was heard and determined by the Business Premises Rent Tribunal which on 10th February, 2010, recorded and adopted a Consent entered into by the parties whereby the Respondent conceded to the Applicant's complaint dated 27th February, 2010, which was in favour of the Applicant who enjoys a protected tenancy under the provisions of Cap. 301 of the Laws of Kenya.***
- 2. That in view of the filed Consent and the Tribunal's order, there are no arrears payable to the Respondent.***
- 3. That consequent on 2 above, it would be in the interests of justice that the sum of Kshs.296,122.60 deposited by the Applicant in a joint interest earning account in Chase Bank be released to the Applicant together with the interest accrued.***

Opposing the application, the Respondents filed a replying affidavit sworn on 17th June, 2010, by John F. Unsworth, a Director of the Respondent herein. In that affidavit, he deposes that the Respondent has issued a Notice of its intention to increase rent by a letter dated 8th March, 2010 to the Applicant and that

the Applicant has responded and indicated that it opposes the increase. In view of the issues raised in the said notice, he deposes that the matter of rent has not been determined by the Tribunal, and therefore the deposited amount should not be released.

I have considered the pleadings and the submissions of both Counsel. In a nutshell, by an application by Chamber Summons dated 12th March, 2009, the Applicant herein applied for an injunction restraining the Respondent from removing or disposing of the Applicant's property in any way pending the hearing and determination of this suit. By its ruling dated 9th April, 2009, this Court granted the application for injunction on terms as follows –

(a) That an interim injunction be and is hereby issued restraining the Respondent from removing or disposing the Applicant's property from the suit premises pending the hearing and determination of this suit and/or pending the determination of the case pending before the Business Premises Rent Tribunal.

(b) The Applicant should pay the rent disputed, in the sum of Kshs.296,122.60, into an interest earning account in the joint names of the Plaintiff's Advocates and the Defendant's Advocate within 30 days with either party having leave to apply.

It will be observed from **Order (a)** above that the injunction restraining the removal of the Applicant's property from the suit premises was granted **“pending the hearing and determination of this suit and or pending the determination of the case pending before the Business Premises Rent Tribunal.”** It is implicit from the wording of this order that the injunction was to come to an end either upon the hearing and determination of this suit or of the case pending before the Business Premises Rent Tribunal, whichever was the earlier. As for the 2nd order, the money was duly deposited in Chase Bank, Hurlingham Branch.

As fate would have it, the case pending before the Tribunal came to a close by way of a Consent order made on 10th February, 2010, in favour of the Applicant herein, who was also awarded the costs. It is for this reason that the Applicant now seeks a release of the monies which were deposited pursuant to the Court order.

In my considered view, upon the parties filing the Consent order which was duly adopted by the Business Premises Rent Tribunal, the case pending before the Tribunal came to an end and was thereby determined as envisaged in **Order (a)** hereinabove. Thereafter, there was no longer any justification for the account in the joint names of the parties' Advocates.

The Respondent now contends that it issued to the Applicant a Notice of intention to increase rent by a letter dated 8th March, 2010, and that the Applicant has opposed the increase. In paragraph 6 of the replying affidavit sworn by John F. Unsworth, the Respondent's Director, on 17th June, 2010, the deponent avers that in view of the issues raised in the Notice, the matter of rent has not been determined by the Tribunal, therefore the deposit amount should not be released. With respect, the amount deposited in the account was conditional upon the determination of the case pending before the Tribunal. Upon the determination of the matter before the Tribunal on 10th February, 2010, that condition was satisfied whereupon there was no longer any basis or authority for maintaining that account. Subsequent events cannot justify the continued retention of that account. The argument that the matter of rent has not yet been determined by the Tribunal is attractive. However, it should be remembered that the Tribunal may or may not increase the rent. To retain that account at this juncture would be speculative, presumptuous, and devoid of any legal justification.

For the above reasons, I am satisfied that the Applicant is entitled to the money deposited with Chase Bank, Hurlingham Branch, in the names of the parties' Advocates, and I so hold. I accordingly make the following orders –

(i) Prayer 1 of the application by Notice of Motion dated 25th May, 2010 is hereby granted as prayed.

(ii) Costs to the Applicant.

Orders accordingly.

DATED and DELIVERED at NAIROBI this 7th day of October, 2010.

L. NJAGI
JUDGE