



REPUBLIC OF KENYA
IN THE HIGH COURT OF KENYA
AT MOMBASA

Civil Suit 42 of 2009

HUSSEINS LIMITED.....PLAINTIFF

VERSUS

HAROONANI BADRUDIN.....DEFENDANT

RULING

The applicant, by its Chamber Summons dated 17th February 2009, primarily seeks a temporary injunction restraining the respondent from proceeding with the distress for rent dated 6th February 2009 pending the hearing and determination of this suit. The application is expressed to be brought under Order XXXIX Rules 2, 3 and 9 of the Civil Procedure Rules. The application is supported by an affidavit sworn by one Rajabali Dungawalla, the applicant's Managing Director and the main grounds for the application are that the applicant is a tenant of the respondent in the respondent's premises at the monthly rent of Kshs. 33,000/= which rent was negotiated upwards to Kshs. 37,950/= after the respondent had served a notice to increase rent to Kshs. 70,000/=. The respondent then changed his position and after some time claimed the rent in the said notice prompting the applicant to apply to the Business Premises Rent Tribunal for leave to file a reference out of time. The respondent on his part sought to distrain for rent in the basis of the new rent. The distress triggered this application.

The application is opposed and there is a replying affidavit sworn by one Badrudin Abdulshakur, the defendant's proprietor. In the affidavit the respondent admits the tenancy and issuing the Notice to increase rent but denies engaging in any negotiations to settle the matter. The respondent therefore contends that as no reference to the Tribunal was filed after the notice to increase rent was served, the applicant is bound to pay the new rent and the distress for rent was in the premises properly levied.

When the application came up before me for hearing on 29th April 2009, counsel agreed to file written submissions which were in place by 6th May 2009.

I have anxiously considered the application and the rival arguments made by counsel. Having done so, I take the following of the matter. This being an application for an interim injunction, the applicant had to establish the conditions set in **Giella – v – Cassman Brown & Company Limited [1973] EA 358.** Those conditions are as follows:-

- 1) An applicant must show a prima facie case with a probability of success.**
- 2) An applicant should also show that unless the injunction is granted he may suffer irreparable**

injury.

3) If the court is in doubt, it will decide the application on the balance of convenience.

The applicant wishes to challenge the respondent's Notice to increase the monthly rent from Kshs. 33,000/= to 70,000/=. In that regard, it has applied to the Business Premises Tribunal for leave to file a reference out of time. That application may or may not succeed. If it succeeds, the said Tribunal will determine the rent payable. The issue as to how much the applicant will pay by way of rent is therefore before a competent tribunal and it is only a matter of time before the matter is resolved.

I also note that the respondent served his notice in May 2008. Yet the demand for the arrears of rent was not made until January 2009, more than seven (7) months later. It may be possible that the parties in the interim engaged in negotiations which may have collapsed before the said demand.

In the premises, I am tentatively persuaded that the applicant will probably succeed in challenging the said notice to increase the rent. I therefore do find that the applicant has shown a prima facie case with a probability of success at the trial. That being my view of the matter, I need not consider the balance of convenience.

As regards the second condition for the grant of an interlocutory injunction, I note that the Court of Appeal in **Giella – v – Cassman Brown & Company Limited (supra)** did not set an inflexible rule that an interlocutory injunction can never be granted unless the applicant can show that he will suffer irreparable damage which cannot be compensated in damages. The use of the phrase “**will not normally be granted**”, leaves the court with the discretion dependent on the justice of the case. It is possible therefore for an applicant to demonstrate that even though damages would furnish adequate compensation yet his circumstances are such that it should be granted. The applicant has demonstrated a desire to challenge the notice to increase rent. The Law makes provision for that. Refusal of an injunction at this stage may very well operate oppressively against the applicant who wishes to exercise his undoubted rights in accordance with the Law. There is no allegation that the applicant defaulted in payment of its rent before the increase and that it will not be able to pay any increase should his application at the Tribunal be declined. In those premises, I am inclined to exercise my discretion in favour of the applicant.

If I were to consider this application on the balance of convenience, I would hold that the same tilts in favour of granting the interim injunction in view of the proceedings pending before the Tribunal which is the proper forum for determining issues regarding the core dispute between the applicant and the respondent.

The upshot of my consideration of the plaintiff's application dated 17th February 2009 and filed on the 18th February 2009 is that I accede to the same and grant an order in terms of prayer (3) thereof. The injunction will be conditional on the applicant filing in court an undertaking under its seal as to damages. Such undertaking to be fortified by another undertaking as to damages under oath by Rajabali Dungawalla the applicant's Managing Director. Both undertakings to be filed within the next seven (7) days of today. The applicant shall continue paying the old rent in the interim.

Costs shall be in the cause.

In view of the proceedings pending before the Tribunal, I grant each party liberty to apply.

Orders accordingly.

DATED AND DELIVERED AT MOMBASA THIS 27TH DAY OF MAY 2009.

F. AZANGALALA

JUDGE

Red in the presence of:-

Khaemba holding brief for Hamza for the plaintiff.

F. AZANGALALA

JUDGE

27TH MAY 2009