

REPUBLIC OF KENYA
IN THE HIGH COURT OF KENYA
AT NAIROBI (MILIMANI COMMERCIAL COURTS)

Civil Case 382 of 2009

LIQUID INTERNATIONAL LTD.....PLAINTIFF

VERSUS

PANARI CENTRE LTD.....DEFENDANT

RULING

The plaintiff moved this court by notice of motion pursuant to provisions of **Sections 3, 3A and 63(e)** of the **Civil Procedure Act** and **Order XXXIX Rule 1, 2 and 9** of the **Civil Procedure Rules** seeking orders of this court to restrain the defendant, by itself or its servants, by means of temporally injunction, from attaching the plaintiff's movable properties together with its tools of trade or harassing, interfering with or stopping the operations of the plaintiff's business on 2nd floor of Panari Centre, Mombasa Road situate on LR. No.12918 (*hereinafter referred to as the suit premises*) pending the hearing and determination of the suit. The plaintiff further prayed for an order of the court to compel the defendant, by mandatory injunction, to restore the electricity/power connection to the plaintiff's premises. The grounds in support of the application are on the face of the motion. The application is supported by the annexed affidavit of Raphael M. Ole Seya, the managing director of the plaintiff. The application is opposed. The defendant's general manager, Rayma Okeyo swore a replying affidavit in opposition to the application. The defendant also filed grounds in opposition to the application.

At the hearing of the application, I heard oral rival submissions made by Mr. Kurgat for the plaintiff and by Mr. Olewe for the defendant. I have carefully considered the said submissions, including the authorities cited by the said counsel in support of their respective opposing positions. I have read the pleadings filed by the parties in support of their respective cases. The issue for determination by this court is whether the plaintiff established a case to enable this court grant him the interlocutory injunction sought. The principles to be considered by this court in determining whether or not to grant the interlocutory injunction sought are well settled. In **Giella vs Cassman Brown [1973] EA 358** at page 360 Spry VP held that:

*“The conditions for the grant of an interlocutory injunction are now, I think, well settled in East Africa. First, an applicant must show a prima facie case with a probability of success. Secondly, an interlocutory injunction will not normally be granted unless the applicant might otherwise suffer irreparable injury, which would not adequately be compensated by an award of damages. Thirdly, if the court is in doubt, it will decide an application on the balance of convenience. (**E.A. Industries v. Trufoods, [1972] E.A. 420**).”*

As regards mandatory injunction, for the same to be granted, the plaintiff must establish the existence of special circumstances that may persuade the court to grant such order. The Court of Appeal in **Shariff Abdi Hassan vs Nadhif Jama Adan [2006] eKLR** quoted with approval the decision in the English case of **Locabail International Finance Ltd v Agro-Export and Another [1986] All ER 901** where it was held as follows:

“A mandatory injunction ought not to be granted on an interlocutory application in the absence of special circumstances and then only in clear cases either where the court thought that the matter ought to be decided at once or where the injunction was directed at a simple and summary act which could easily be remedied or where the defendant had attempted to steal a march on the plaintiff. Moreover, before granting a mandatory injunction the court had to feel a high sense of assurance that at the trial it would

appear that the injunction had rightly been granted, that being a different and higher standard than was required for a prohibitory injunction'

In the present application, certain facts are not in dispute. It is common ground that the plaintiff and the defendant entered into a lease agreement on 1st January 2006. Prior thereto, the plaintiff had occupied the suit premises on a month to month tenancy from 23rd April 2005. The lease that was executed by the parties herein was for a period of five (5) years and three (3) months with effect from 1st January 2006. It is not disputed that the lease is unregistered in accordance with the requirement of **Section 41** of the **Registration of Titles Act**.

Although the plaintiff made a big issue regarding whether the terms of said lease was legally enforceable in view of the fact that the same was not registered, having evaluated the rival arguments made in this regard, I was not persuaded by the position taken by the plaintiff. The legal position regarding the effect of unregistered leases was settled as far back as 1982 when the Court of Appeal held in **Bachelor's Bakery Ltd vs Westlands Securities Ltd [1982] KLR 366** that the parties who had entered into an agreement exceeding five (5) years made it a contract falling under **Section 106** of the **Transfer of Property Act**, made such agreement valid between the parties even in the absence of registration. The court held that the agreement between the parties was an unexecuted lease and not an agreement for lease. In such circumstances, the parties to the agreement were bound by the terms that they negotiated and agreed to. The arguments advanced by the plaintiff was that in view of the provisions of clause 7.1 of the agreement (*that allowed the lease to be terminated by the landlord upon the landlord re-entering the suit premises in default of paying the rent*) and thus rendering its tenancy to be a control tenancy under the **Landlord and Tenants (shops, hotels and catering establishments) Act**, is untenable in light of this court holding that the plaintiff was bound by the terms of the lease agreement.

It was apparent from the affidavit on record evidence that since the plaintiff took possession of the suit premises pursuant to the lease agreement, it has been in persistent default in paying the periodic rent due. The plaintiff has irregularly paid the rent due to an extent that it has accumulated arrears to the tune of Kshs.5 million. The plaintiff has further accumulated a sum of Kshs.359,297/=, being the cost of electricity that it had consumed in the suit premises. Although the plaintiff argued that it was not entitled to pay for the electricity in view of the fact that the same was part of the service charge, upon perusal of correspondence exchanged between the plaintiff and the defendant, it was clear that the plaintiff was aware that it was required to pay for the consumption of electricity. Although the plaintiff in its pleadings purported to make representations that the defendant had acted unlawfully in disconnecting electricity or frustrating the tenancy, it was evident that the defendant had indulged the plaintiff whenever the plaintiff fell in rent arrears. The last indulgence became one too many.

The plaintiff has not at any time during the subsistence of the tenancy disputed that it owed outstanding rent to the defendant in respect to the demised premises. The defendant at one time even reduced the rent that the plaintiff was required to pay pursuant to the lease agreement. In fact, the letter written by the plaintiff's advocate dated 30th April 2009 establishes this fact. In the said letter, the advocate pleads on behalf of the plaintiff to be given time to pay the outstanding rent arrears. The plaintiff informed the defendant that it was in the process of obtaining a loan from Kenya Tourist Development Corporation to enable it pay off the outstanding rent. The plaintiff admitted owing a bill for the electricity that had been utilized. From the annexures to the affidavit, it was apparent that the plaintiff was in the habit of issuing cheques to the defendant which upon presentation to the bank were returned unpaid. My evaluation of the facts in support of this application is that it is unlikely that the plaintiff would be able to clear the outstanding rent arrears, if the trend of the past three (3) years is anything to go by.

Was the defendant justified to distress for rent in terms with the lease agreement? As stated earlier in this ruling, it was clear that the outstanding rent that is in arrears is not disputed. It is further evident that the plaintiff made proposals in the past which it was unable to honour. The plaintiff, in the correspondence exchanged with the defendant, admits that the business environment has increasingly become tough that the plaintiff would be unable to conduct profitable business in the suit premises. Faced with this reality, the defendant was justified to distress for rent.

I find no merit with the plaintiff's application. The pleadings filed by the plaintiff in this suit contradict the previous position taken by the plaintiff when it corresponded with the defendant in regard to how it intended to settle the rent arrears. This court is of the view that the issues raised by the plaintiff in this application are red herring meant to divert the attention of this court from the real issue in controversy between itself and the defendant; that is, that the plaintiff has been hopelessly in rent arrears with no prospect of repaying the same. The plaintiff has therefore failed to establish a prima facie case to justify this court to grant it both the interlocutory and mandatory injunction sought. The application is dismissed with costs to the defendant.

DATED AT NAIROBI THIS 24TH DAY OF JULY 2009

L. KIMARU

JUDGE