



REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA AT NAIROBI (MILIMANI COMMERCIAL

COURTS)

CIVIL CASE NO. 133 of 2005

UNITED ARYAN (EDZ) LIMITEDPLAINTIFF

VERSUS

INDIGO (EPZ) LIMITED

(IN RECEIVERSHIP).....1ST DEFENDANT

KIERAN DAY

(IN RECEIVERSHIP).....2ND DEFENDANT

RULING

The plaintiff is seeking an injunction to restrain the defendant from demanding any rents, or proclaiming, distraining, removing, carrying away, selling or disposing the plaintiff's goods, until further orders of the court. The plaintiff also asks that the defendants be ordered to provide accounts for all the monies which they received from the plaintiff pursuant to the tenancy or rent agreement between the parties herein.

In support of its application the plaintiff has made available receipts, showing that rent had been paid upto June 2006.

However, the defendants have asserted that the receipts which the plaintiff has exhibited, were forgeries, which did not emanate from the defendants.

In effect, at this point in time, the court is faced with affidavits which are diametrically opposed. The question that therefore arises is what the court should make of the two affidavits.

To my mind, the answer lies in the fact that the defendants replying affidavit was sworn by the Receiver Manager of the 1st Defendant.

By so saying, I am in no way imputing any ill motives on the said Receiver Manager, Mr. Kieran Day. I am only taking note of the fact that as at the date when the plaintiff was allegedly issued with the contentious receipts, the Receiver Manager was not in place. In other words, the 1st defendant was still

being run by the directors of that company. Therefore, the least that the Receiver Manager could have done, so as to give more weight to his assertion that the receipts did not emanate from the 1st defendant would have been to procure one of the directors of the company to swear an affidavit. Such a director would, if he was the person who had handled rental matters with the plaintiff, been able to say, with authority that the receipts did not emanate from the company.

It might also have helped if the defendants had provided copies of the authentic receipts which were ordinarily issued by the 1st defendant.

But even more importantly the defendants ought to have considered obtaining expert evidence, with a view to ascertaining that the receipts were forgeries. Without the benefit of expert evidence or that of a director who had allegedly signed the contentious receipts, I find it hard to accept the deposition in the replying affidavit.

Therefore, on the face of the evidence before the court, I hold that it appears more probable than not, that the plaintiff had paid rents upto June 2006, save only for the first quarter of 2006 (between January and March) for which no receipt was exhibited.

In the circumstances, there would be no justification for the defendants demanding rents from the plaintiff for the period upto June 2006. The defendants would also not be entitled to take any steps towards the recovery of the rents upto June 2006.

Accordingly, an injunction shall issue forthwith, to restrain the defendant from demanding rents for the period upto June 2006, and also from taking any steps aimed at recovering rents for that period. This order shall however not cover the three months of January, February and March 2006.

In accordance with the plaintiff's prayers in the application dated 9th March 2006, this injunction order shall remain in force until further orders of this court. And, for the avoidance of any doubt, this order does not relate to any rents that may have become payable subsequent to June 2006.

The costs of the application dated 9th March 2006 are awarded to the plaintiff.

Dated and Delivered at Nairobi, this 19th day of January 2007.

FRED A. OCHIENG

JUDGE