



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

Civil Case 950 of 2002

KENYA COMMERCIAL BANK PLAINTIFF

VERSUS

JARIBU HOLDINGS LTD. DEFENDANT

R U L I N G

Two applications are before me. One is by the plaintiff. It is dated 10.11.2005 and is seeking two primary orders that the defendant be ordered to stop collecting rent from its sub-tenants on the suit property and that the plaintiff be allowed to collect the rents from the defendant's sub-tenant's in the suit premises to recover arrears of rent owed by the defendant and such further arrears as may continue to accrue pending the hearing and final determination of this suit. The application is based on the following grounds:

- (a) That the court has already entered judgment against the defendant on the admitted amount of the rent arrears in the sum of Kshs.2,040,000/= for the period upto 4.5.2005.**
- (b) That since 4.5.2005 the defendant has continued to accumulate further rent arrears which now stand at Kshs.471,000.00 for the period of May to November 2005.**
- (c) That the plaintiff has, pursuant to Section 23 of the Distress for Rent Act, notified the defendant's sub-tenants to pay rent to the plaintiff through its agents NW Realite Ltd. but the defendant, through its lawyers has told the sub-tenants to ignore the notices and intends to continue collecting rent from them.**
- (d) That it is only fairly and just that the plaintiff should be allowed to collect from the defendant's sub-tenants, the rents payable by them to the defendant, so as to be able to recover the rent arrears owing, including the Kshs.2,040,000/= on which the court has on admission by the defendant already entered judgment against the defendant.**

There is an affidavit in support of the application to which

4 exhibits have been annexed. The application is opposed and there is a Replying Affidavit sworn by one Jackline Owango, one of the defendant's directors.

The other application is also dated 10.11.2005 and is by the defendant and seeks two primary orders that there be a Stay of execution of the decree pending hearing and determination of this application and

that the defendant be allowed to settle the decretal sum of Kshs.2,040,000/= less amount received by the plaintiff's company in six installments effective 1.12.2005. The primary reasons for the application are that:-

- (1) The plaintiff's Counsel has on 1.11.2005 written to all tenants in the premises occupied by the defendant demanding that the defendant's tenants do pay their rents directly to the plaintiff's agents M/S N/W Realite Limited on grounds that the said defendant is in arrears of rent of Kshs.2,761,000/= and invoking the provisions of Section 23 of the Distress for Rent Act.**
- (2) The plaintiff has without any lawful excuse collected from the tenants during the period 1.1.2005 to November 2005 a sum of Kshs.1,012,000/=.**
- (3) The actual sum due as at November 2005 to the defendant is Kshs.1,025,000/=.**
- (4) The defendant company is able and willing to liquidate the sum due in 6 installments effective 1.12.2005.**
- (5) If the defendant is permitted to receive rent from the defendant's tenants the same will paralyze the operations of the defendant's company whose core business is to let for a fee the suit premises and apartments.**
- (6) No prejudice will be suffered by the plaintiff company if the orders prayed for are made out but the defendant is bound to lose its very business and income and its reputation affected.**

This application is also supported by an affidavit of the said Jackline Owango. To this affidavit are annexed 6 exhibits. The application is also opposed and there is a Replying Affidavit sworn by one Mary N. Mulwa, the plaintiff's Property Manager. The plaintiff's advocates have also filed Grounds of Opposition.

The parties agreed to have these two applications heard together. I accordingly heard them together. The gist of the plaintiff's application is that as there is a judgment in its favour in the sum of Kshs.2,040,000/= and the defendant has continued to accumulate rent arrears, it demanded of the defendant's sub-tenants to pay their rents directly to the plaintiff through its agents M/S NW Realite Ltd. This was pursuant to Section 23 of the Distress for Rent Act. The defendant resisted the plaintiff's demand hence the application.

The main grounds for opposing the plaintiff's application are that the amount due by the defendant to the plaintiff is not certain and for this reason the plaintiff cannot invoke the provisions of Section 23 of the Distress for Rent Act. Further that to grant the orders sought by the plaintiff will amount to giving the plaintiff vacant possession of the suit premises without a trial and lastly that the plaintiff has not properly moved the court and its application should be struck out.

Turning now to the defendant's application, it is clear to me that the primary reason for the same was to counter the plaintiff's demand against its sub-tenants to pay their rents directly to the plaintiff's agents. I am fortified in this finding by the grounds given in the body of the application. Of the 7 grounds given therein only one supports the prayer for payment by installments which is that the defendant company is able and willing to liquidate the sum due in 6 installments effective 1.6.2005.

The gist of the plaintiff's opposition to the defendant's application is that if the orders sought are granted, the court will have in effect quashed the plaintiff's valid notices to the sub-tenants which notices conferred on the plaintiff a Statutory right to recover and receive rent from the sub-tenants. The plaintiff further argues that the defendant has not shown sufficient cause why it should be allowed to settle the rent arrears in installments.

I have now considered both applications. The plaintiff seeks an order that the defendant be stopped from collecting rent from its sub-tenants on the suit premises and instead the plaintiff be allowed to collect the rents from the said sub-tenants. The basis of these prayers is that there are rents owed by the defendant to the plaintiff as evidenced by the judgment entered against the defendant in favour of the plaintiff on admission. On account of the admitted arrears and subsequent accumulated arrears the plaintiff invoked the provisions of Section 23 of the Distress for Rent Act and demanded direct payment of rent from the defendant's sub-tenants. There are two major hurdles in the way of the plaintiff's application. The first hurdle is that this court's jurisdiction has not be properly invoked. The notices issued by the plaintiff to the defendant's sub-tenants under the provisions of Section 23 of the Distress for Rent Act formed the basis of a different and separated cause of action which should have been commenced by a separate action and not by a Notice of Motion in the present suit. It is instructive that in response to the defendant's application aforesaid, the plaintiff states that to allow the same would amount to quashing the notices served upon the sub-tenants which notices conferred a statutory right to recover and receive rent from the sub-tenant. According to the plaintiff, to grant the orders sought by the defendant would be without jurisdiction.

The second hurdle which the Plaintiff had to pass is related to the first one. The plaintiff in its Plaintiff *inter alia* seeks delivery of possession and arrears of rent. There are also the prayers for injunction to restrain the defendant from leasing, letting or sub-letting the suit premises and further receiving rent moneys from any tenant or sub-tenant in respect of the suit premises. These prayers are captured in the present application in paragraphs 2 and 3 thereof. If the the orders sought are granted in terms of these paragraphs this suit will have been finally determined substantially on affidavit evidence without a trial. This should not be encouraged.

In the premises, the plaintiff's application is dismissed with costs.

Turning to the defendant's application I have already found there is only one reason given for the application for payment by installments. The reason is that the defendant is able and willing to liquidate the sum in 6 installments effective 1.12.2005. The supporting affidavit of Jackline Owango aforesaid, does not explain why payment by installment is sought in **A. Rajabali Alidina vs. Remtulla Alidina and Another [1961] EA 565**, the Court of Appeal held that in deciding on installments the court should consider *inter alia* the circumstance in which the debt was incurred and the financial position and bona fides of the debtor.

The uncontroverted facts in this case are that the plaintiff claims arrears of rent in respect of premises that the defendant has let out on a commercial basis. The defendant admits that the letting out of the premises creates income for it. These premises belong to the plaintiff. It would be inequitable to allow the defendant to do business with the plaintiff's premises and yet delay payments from the same premises to the plaintiff. In any event, the defendant has not been candid about its financial position. In my view the defendant has not shown sufficient reason to be allowed payment by installments. I decline to grant the prayers sought in the defendant's application dated 10.11.2005. The defendant shall pay the costs of the application.

Orders accordingly.

DATED and **DELIVERED** at **NAIROBI** this 2nd day of February 2006.

F. AZANGALALA

JUDGE

Read **in the presence of:**