



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

Civil Case 1300 of 2005

PASARA CAFÉ & BAR LIMITED.....PLAINTIFF

VERSUS

KENYA COMMERCIAL BANK STAFF.....DEFENDANT

RULING

By a Notice of Motion dated 20th February 2006 brought under Order XXXV Rule 1(1)(b) of the Civil Procedure Rules, Section 3A of the Civil Procedure Act and all other enabling provisions of the law, the Applicants pray that summary judgment be entered against the Plaintiff in terms of the Applicants' counterclaim dated 15th September 2005. They also seek an order compelling the Plaintiff to deliver vacant possession of the suit premises with immediate effect and an award of costs of this application.

The application is founded on the grounds that the Plaintiff has forfeited its right to the lease over the suit premises situate in L.R No 209/7155 Lonrho House Nairobi for failure to pay rent and service charge as and when the same fell due. The applicants emphasize that the Plaintiff/Respondents have admitted that they are guilty of persistent delays in the remittance of rent and other outgoings in its Supplementary Supporting Affidavit sworn by Mr. Moez Charania on 29th November 2006 and the Defence to counter claim dated 13th February 2006. I have perused the said affidavit as well as the Defence to counterclaim and have ascertained that indeed the Respondents have admitted their persistent delays in paying rent.

The relationship between the parties is governed by the Lease dated 1st August 2000 which both parties agree to be binding. Clause 4(a) of the said

Lease provides as follows:

“If the rent hereby reserved or any part thereof shall at any time be unpaid for Fourteen (14) days after becoming payable (*whether lawfully demanded or not*) or if any of the other covenants on the part of the Lessee herein contained shall not be performed and observed then and in any of the said cases it shall be lawful for the Lessor to re-enter upon the premises or any part thereof in the name of the whole and thereupon this lease shall determine absolutely but without prejudice to the right of action of the Lessor in respect of any antecedent breach of any of the Covenants on the part of the lessee herein contained.”

The Respondent's suit seeks the following orders as prayed in the plaint filed on 27th October 2005:

- (a) That a declaration do issue, that the Parties are contractually bound to submit to Arbitration in the event of any real or perceived dispute

- (b) That a declaration do issue that the Defendant do admit to arbitration any real or perceived dispute it harbours.
- (c) That a declaration do issue that the Defendant's notice is unlawful and illegal
- (d) That without prejudice to any other prayer a declaration do issue that the Defendant's eviction notice is premature for not having preceded by Arbitration and the same is of no effect and is null and void.
- (e) That a permanent injunction do issue restraining the Defendants whether by themselves or assigns or agents or anybody whosoever from evicting inhibiting, threatening, harassing, haranguing or in any manner whatsoever interfering with the Plaintiff's quiet peaceful enjoyment of the leased and licensed area including free and unhindered use and access to the leased and licensed area, save as provided and prescribed and for the period secured in the lease and license agreements upon which the plaintiff is occupying the premises.
- (f) A declaration do issue that the Plaintiff is not in breach of any lease or license terms to warrant eviction and/or termination of the lease and license agreements
- (g) Any other or further orders the court may deem fair and just to grant
- (h) Costs
- (i) Interest

I have not been asked, in the present application to make any findings in relation to the above prayers. By stating in ground (d) of the application that

“in view of the Courts’ Ruling aforesaid (Ruling of 27th October 2005), the Plaintiff’s “Defence to Counterclaim” does not raise any triable issues that

would merit the full hearing of the case”,

the applicant does give an indication of his desire that the entire suit be determined at this stage. I have a difficulty in considering the Defendant's request for summary judgment in the manner sought when the application does not in any way address itself to the Plaintiff as filed. I am of the view that by providing in Order VIII Rule 2 that a counterclaim shall have the same effect as a cross suit

“So as to enable a court to pronounce Judgment in the same suit both on the original and the counterclaim”

the law intended that where a counterclaim is allowed then a determination be made in the original suit as well. It is for this reason that even where summary judgment is allowed in a suit where a **“plausible, though not necessarily a bona fide counterclaim”** exists, execution of such judgment will be stayed until the trial of the counterclaim.

In the present case, I am of the considered view that the Plaintiff ought to be struck out first before summary judgment on the counterclaim can be considered. I have not been asked to do so and counsel for the applicant did not address himself to that fact. I have no alternative in the circumstances but to disallow the application and hereby dismiss the same.

I make no orders as to costs.

Dated and delivered at Nairobi this 7th day of June 2006.

M. G. Mugo

JUDGE

Delivered in the presence of

Mr. Chahenza holding brief for Kangatta the Applicant

Mr. Muma holding brief for Kemboy for the Respondent