



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

Civil Case 215 of 2006

HORNBILL PUB LIMITEDPLAINTIFF

VERSUS

AMBASSADEUR (INVESTMENTS) KENYA LIMITED.....DEFENDANT

RULING

The relationship between the Plaintiff and the Defendant is one of the landlord and tenant. The Plaintiff who is the tenant filed this action seeking prayers to restrain the Defendant from interfering or evicting it from a shop known as No.7 and No.3 occupied by the Plaintiff on the Defendant's premises. At the time of filing the Plaintiff filed a Chamber Summons dated 24th April, 2006. The Plaintiff's main prayer was in the following terms:-

“THAT the Defendant/Respondents herein be restrained whether by themselves and/or servants and/or agents or in any way whatsoever from interfering and/or evicting and/or interrupting with the Plaintiff/applicant/tenancy and/or further leasing and/or reassigning and/or sub-letting of that premises known as shop Number 7 and Shop Number 3 occupies by the Plaintiff/Applicants and operated as **HORNBILL PUB AND HORNBILL EATING HOUSE/HORNBILL FAST FOOD** respectively located on the ground floor of the building known as **AMBASSADEUR HOTEL AND CAPITAL HOUSE** pending inter-parties hearing of this application.”

That application was fully heard by the Honourable Justice Azangalala and the ruling was delivered by the judge on 5th July, 2006 whereby the Judge dismissed the said application. It does seem that thereafter the Defendant instructed auctioneers to levy distress on the Plaintiff. That action provoked the Plaintiff to file a Chamber Summons application dated 9th June, 2006. In that Chamber Summons the Plaintiff prays for the following order.

“THAT the Defendants/Respondents herein be restrained whether by themselves and or their servants and/or agents namely **EXPEDITIOUS GENERAL MERCHANTS** from acting and/or executing on their Proclamation dated 31st May 2006 and/or proceeding to attach the moveable property of the Plaintiff/Applicants located at Ambassadeur Hotel, shop No.7, or at all, and/or from further interfering in any manner whatsoever, with the plaintiff/applicant's tenancy of that premises known as shop Number 7 located on the ground floor of the Defendants/Respondents property: **AMBASSADEUR HOTEL AND CAPITAL HOUSE** pending inter-partes hearing of this application”.

It does seem from the outset that the latter part of that prayer is res judicata for it seeks for an order in terms of the former application which had been ruled upon by this court. For that reason in considering

the arguments presented before this court this court will not take recognition of the arguments relating to Order stopping the Defendant from evicting or interfering with the Plaintiff's occupation or tenancy of shop No. 7. The Plaintiff's affidavit in support was sworn by a director of the Plaintiff. He deponed that the Plaintiff has continued to pay rent to the Defendant. In that regard he annexed copies of details of such payment. That the details he had been able to put together for this application in regard of the rental payments was from May 2003 to March, 2006. That at 31st May 2006 the Defendant instructed auctioneers known as Expeditious General Merchants to proclaim the Plaintiff's moveable goods claiming rent arrears of Kshs.2,894,019/= plus auctioneers fees of Kshs.200,000/=. The Plaintiff stated that the Defendant in making the allegation about rent arrears was in bad faith since they had hived at least 308 sq. ft of the rented premises and also because they had directly negotiated a new lease with the Plaintiff's sub-tenant from the last quarter of the year 2001. Further because they had refused or neglected to put the Plaintiff in the same position as per the lease and finally because the subtenant continued to enjoy facilities and/or utilities that were incorporated to accommodate a sub tenancy including water and electricity.

The Defendant opposed the application by a replying affidavit sworn by a director of the Defendant. He deponed that the Plaintiff had been granted a six year lease from 1st May 200 at variable monthly rent of Kshs.180,000/=. That the six year lease expired on 30th April, 2006 now past. That that lease contained an entire understanding or agreement between the parties relating to the said premises. That lease prohibited the Plaintiff from subletting or parting with possession of the premises or any part thereof without the Defendant's written consent. The Defendant under the lease had a right to re-enter the premises without notice upon the term of the lease determining or upon the Plaintiff subletting the premises without written consent. The Defendant had a right to withhold consent in order to ensure that there was no creation of controlled tenancy. On the present directors purchasing the Defendant's business they discovered that the Plaintiff had sublet the premises to an entity called Simba Telecom Limited for a term of one year renewable at a monthly rent of Kshs.30,000/=. That the Defendant wanted to eliminate that controlled tenancy and proceeded to regularize the occupation by Simba Telecom Limited by entering into a tenancy agreement directly with them. The Plaintiff and the Defendant thereafter had several meeting and it was then agreed that the rent payable by the Plaintiff would be adjusted to exclude the area formerly sublet. The area which the Plaintiff entered into a tenancy agreement with Simba Telecom Limited was 308 sq. ft. out of a total area which had been let to the Plaintiff of 2872 sq. ft. Subsequent to those meetings the Plaintiff was informed that the area which had been let to Simba Telecom limited had been excluded from the Plaintiff's lease. The Plaintiff it was deponed thereafter decided unilaterally to deduct from the rental payable by it Kshs.90,000/= per month. The Defendant denied that the subtenant was paying to the Plaintiff that same amount of Kshs.90,000/=. The Defendant thereafter deponed that the Plaintiff is not deserving of the equitable remedies which it seeks from the court in view of the breach of the express terms of the lease. That the Defendants instructions to the auctioneer to distress for rent was due to the Plaintiff's failure to pay rent as per the lease agreement.

In a supplementary affidavit sworn on behalf of the Plaintiff the Plaintiff deponed that it had a varied sub tenancy with Simba Telecom Limited. The Plaintiff further deponed that the said Simba Telecom Limited paid the amount of Kshs.1,080,000/= and further made other payments to the Plaintiff in respect of the rent.

The counsel for the parties in oral submissions repeated the averments in the affidavits in support and in reply. The Plaintiff's counsel further argued that the auctioneers sent to its premises had breached Rule 12 of the Auctioneers Rules. I have looked at that rule and have found that it relates to situation where the could would issue warrants of attachment. In this case the defendant in instructing the auctioneer moved under the Distress of rent Act. As stated before the court will not consider the issue relating to the right of the Plaintiff continuing to remain in possession of the premises. That was ruled upon and therefore the court will not entertain it. However, it does seem that the Defendant in entering into the tenancy agreement with Simba Telecom Limited reduced the space that had been rent to the Plaintiff and that stated in the lease agreement. The Plaintiff in bringing the present action has stated categorically that it is not indebted to the Defendant in rent arrears. Faced with that assertion it was incumbent upon the Defendant to rebut that assertion. In other words it was important for the Defendant to show to this court how it arrived into alleged rent arrears. What however, the Defendant did provide was the rent payable

taking into account the lesser area rent to the Plaintiff. That being so the Plaintiff's statement that it does not owe rent stands unchallenged and that in itself is sufficient to move this court to grant the order sought by the Plaintiff stopping the distress of the rent over its moveable property. I am aware of the Defendant's submissions with regards to Section 8 of the Distress for Rent Act Cap 293 which according to the authorities relied on by the Defendant namely **HCCC No.679 of 2001 Minar Restaurant v Plaza Trust Limited & 2 others** the court stated in regard to Section 8 as follows:-

“Thus not only is the tenants’ remedy expressed by the statute itself to be in damages but the measure of the damages thereof is prescribed. In these circumstances an injunction cannot be issued to prohibit the demand or the enforcement by way of distress of payment of the rent disputed by the tenants”.

This court however, is of the view that even if Section 8 provides that a party would be able to recover double the value of the goods distrained if the distress was wrongful that may not always be satisfactory for there may be instances when items of property cannot be properly valued or the proof of their value is not readily available and of course items of property can sometime have sentimental value. In that case the party who suffers wrongful distress may suffer loss which cannot be compensated for lack of proper proof. For that reason Section 8 is not a total bar from a party seeking an injunction to stop an alleged wrongful distress of rent. As I stated hereinbefore the crux of the matter is that the Plaintiff has alleged that it is not indebted to the Defendant in rent arrears. The Defendant has failed on a balance of probability to prove to this court that it is owed rent by the Plaintiff. In that case the court is satisfied that the Plaintiff has proved a prima facie case with a probability of success in respect of the alleged wrongful distress for rent. As stated before it is not possible for this court to say categorically that the loss that the Plaintiff may suffer can be compensated in damages. For that reason since the court is not in doubt of the first two principles of injunctions, the Plaintiff will be granted an order to stop distress of rent until the final determination of this case. The orders of this court is as follows:-

1. THAT the Defendants/Respondents herein be restrained whether by themselves and or their servants and/or agents namely EXPEDITIOUS GENERAL MERCHANTS from acting and/or executing on their Proclamation dated 31st May 2006 and/or proceeding to attach the moveable property of the Plaintiff/Applicants located at Ambassadeur Hotel, shop No.7.

2. Half of the costs of Chamber Summons dated 9th June, 2006 are awarded to the Plaintiff.

MARY KASANGO

JUDGE

Dated and delivered this 16th day of November, 2006

MARY KASANGO

JUDGE