



**REPUBLIC OF KENYA
IN THE HIGH COURT OF KENYA**

AT NAIROBI

COMMERCIAL DIVISION, MILIMANI

CIVIL CASE NO. 427 OF 2004

(CONSOLIDATED WITH ELDORET HCCC NO. 64 OF 2004)

MAYFAIR SERVICES AND

**INVESTMENTS LTD (In Receivership).....
PLAINTIFF**

VERSUS

**HOTEL SIRIKWA
HOTEL.....DEFENDANT**

R U L I N G

These two cases were consolidated by an order entered on 3.8.2004 for hearing and disposal together. In Eldoret HCCC No. 64 of 2004 the Plaintiff, **HOTEL SIRIKWA LIMITED (hereinafter called SIRIKWA)** sought judgment against the Defendant, **MAYFAIR SERVICES AND INVESTMENTS LIMITED (in receivership)** (hereinafter called MAYFAIR) for the following main reliefs:-

(a) an injunction to restrain Mayfair and its servants and agents from interfering with Sirikwa's business or levying distress against Sirikwa's property wherever situate and in particular at its demised premises in the parcel of land known as L.R. ELDORET MUNICIPALITY/BLOCK 4/69 commonly known as "Hotel Sirikwa"; and

(b) and order that Mayfair do honor and comply with the terms of the Deed of Assignment dated 30th January, 2004.

It was pleaded in the plaint dated 2nd June, 2004 that Sirikwa was the tenant of Mayfair in the aforesaid premises; that by the time Mayfair was placed under receivership in July, 2003 Sirikwa owed Mayfair the sum of Kshs.63,204,000/00 on account of arrears of rent; that in its turn Sirikwa was owed by the Government of Kenya through the Ministry of Foreign Affairs and International Co-operation the sum of Kshs.126,563,813/00; that by a Deed of Assignment dated 30th January, 2004 Sirikwa assigned to Mayfair a portion of these monies owed to it by the Government to pay the outstanding arrears of rent; and that it was agreed or understood between the parties that upon this assignment Mayfair was bound to refrain from taking or forbear any recourse outside the said deed of assignment to recover the arrears of rent. Sirikwa further pleaded that in breach of the deed of assignment Mayfair had threatened and

intended to levy distress against Sirikwa to recover the arrears of rent, and that such distress would be irregular, unlawful and malicious.

Mayfair filed defence. It pleaded that Sirikwa owed to it Kshs.76,084,000/00 in arrears of rent as at 28th April, 2004. It also admitted the deed of assignment but pleaded that the assigned sum was not sufficient to clear the outstanding arrears of rent. Mayfair also pleaded that the deed of assignment was neither stamped nor registered, and that therefore it could not confer upon any party rights or create binding obligations between the parties. Nor did it in any way abridge Mayfair's right to levy distress for arrears of rent. Mayfair further counterclaimed the aforesaid sum of Kshs.76,084,000/00, being arrears of rent and a further sum of Kshs.184,000/00 per month from 30th April, 2004 until payment in full. Sirikwa filed a reply to defence and defence to the counterclaim. It joined issue with Mayfair upon the question, *inter alia*, whether the monthly rent was Kshs.715,000/00 as pleaded by Mayfair or Kshs.531,000/00 as pleaded by Sirikwa. It also denied the counterclaim.

In its turn Mayfair filed suit against Sirikwa vide Nairobi HCCC No. 427 of 2004 (Milimani). It pleaded *inter alia* the Deed of Assignment dated 30th January, 2004. It also pleaded that the Government of Kenya had paid to Sirikwa part of the debt owed to it. Mayfair therefore sought a declaration that Sirikwa was holding the sum of Kshs.63,204,000/00 or any part thereof as *quasi trustee* for Mayfair.

Sirikwa filed defence. It pleaded, *inter alia*, that it had not yet received any payment of the debt owed to it by the Government. It also pleaded that no cause of action was disclosed by the plaint.

In the Eldoret suit Sirikwa had obtained *ex parte* on 3.6.2004 an interim injunction to restrain Mayfair from levying distress. At Nairobi Mayfair obtained *ex parte* on 29.7.2004 an injunction restraining Sirikwa from "parting with, releasing, utilizing or in any other way interfering with the sum of Kshs.63,204,000/00 or any part thereof" pending hearing *inter partes* of the application in that behalf. Subsequently a number of applications were filed.

In the Eldoret case a consent order dated 29th July, 2004 was filed on the same date. It was signed by advocates for both parties and was in the following terms-

"1. That the parties to the suit do abide by the terms of the Deed of Assignment dated 30th January, 2004 with the following variations:-

(a) The said sum of Kshs.63,204,000/00 owing to (Sirikwa) by the Ministry of Foreign Affairs be paid to Prudential Building Society (under Central Bank of Kenya statutory management) for and on behalf of (Mayfair).

(b) (Sirikwa) be discharged from liability in respect of the said sum of Kshs.63,204,000/00 as soon as the same is paid to and received by Prudential Building Society.

(c) If the said sum of Kshs.63,204,000/00 is not paid to Prudential Building Society in terms of 1(a) above for the reason of the funds not having been released by the Ministry of Foreign Affairs within sixty (60) days from the date of this order, then the parties shall be at liberty to move the court for further orders.

2. (Sirikwa) do remain in the suit premises until the lease expires on 30th June, 2005 on condition that it pays to Mayfair the undisputed monthly rent of Kshs.531,000/00.

3. All other issues not covered by the consent do proceed to trial unless parties choose to record further consent orders.

4. The costs of the suit be agreed upon or taxed after determination of the dispute."

As it happened this consent was not formally entered as an order of the court. But the parties have all

along proceeded upon the basis that the order was indeed entered as an order of the court. I mentioned that many applications have been filed in these two suits. One such application is the chamber summons dated 26.10.2004 brought by Mayfair. It is the subject of this ruling. The application is brought under Order 38 Rules 1 and 5(1) and also under Order 39, Rule 8 of the Civil Procedure Rules (the Rules). The main orders sought are:-

(i) that there be attachment of Kshs.46,968,000/00 (being a portion of the sum of Kshs.52,598,585/00 paid to Sirikwa by the Ministry of Foreign Affairs and International Co-operation) held at Charter House Bank Limited, Kijabe Street, Account Number C.A. 01-000626, the said sum to be held in a joint interest- earning account in the names of the parties' advocates pending hearing and determination of the suits; and

(ii) in the alternative that Sirikwa be ordered to deposit the said sum of Kshs.46,968,000/00 held at the aforesaid bank in the aforesaid account in court until the hearing and determination of these suits.

The application was amended in the course of hearing thereof (amended chamber summons dated 2.2.2005) to include a prayer for leave to amend the counterclaim in the Eldoret case. The amendments sought as pleaded in the draft defence and amended counterclaim are the plea that Sirikwa has now paid to Mayfair Ksh.63,204,000/00 which was received directly from the Ministry of Foreign Affairs and International Co-operation by virtue of the Deed of Assignment dated 30th January, 2004, thus reducing the counterclaim from Kshs.76,084,000/00 to Kshs.12,880,000. A new counter claim of Kshs.34,088,000/00 is also introduced, the same said to be money advanced to Sirikwa by Mayfair at Sirikwa's request in June 1993 full particulars whereof being well-within Sirikwa's knowledge.

The grounds for the application as stated on the face thereof are:-

(a) that Sirikwa owes Mayfair a disputed sum of Kshs.12,880,000/00 on account of rent arrears;

(b) that Sirikwa owes Mayfair an undisputed sum of Kshs.34,088,000/00 on account of a loan advance;

(c) that Sirikwa is admittedly impecunious and will be unable to satisfy any decree that may be issued in favour of Mayfair; and

(d) that Sirikwa is holding Kshs.52,598,685/00 at Charter House Bank, Kijabe Street, A/C No.01-000626 paid to it by the Ministry of Foreign Affairs, and should the said sum be paid out Mayfair stands to suffer irreparable loss.

There is a supporting affidavit sworn by one **LAWRENCE NGAMAU**, one of the joint Receiver/Managers of Mayfair, in which the grounds for the application are expounded. A replying affidavit sworn by one **WILSON KIPKEMBOI KIPKOTI** was filed on 8.11.2004. He says he is a director and executive chairman of Sirikwa. He points out in the affidavit that the question whether the rent payable by Sirkwa is Kshs.513,000/00 or Kshs.715,000/00 per month has already been agreed to be an issue to be determined at trial vide the consent filed in court on 29th July, 2004. He also denies the alleged impecuniousness of Sirikwa. More specifically the alleged debt on account of a loan advancement is denied. Mr. Kipkoti has also deponed that the funds sought to be attached are in any case not available, the same having been committed and applied by Sirikwa to meet urgent and pressing commitments to its other creditors.

I have considered the submissions of the learned counsels appearing, including the authorities cited. What Mayfair seeks is attachment before judgment. Rule 5 of Order 38 of the Rules lays down the conditions that must be met before the court will exercise its very coercive power of ordering attachment before judgment. The court must be satisfied, by affidavit, or otherwise, that the defendant, with intent to obstruct or delay the execution of any decree that may be passed against him:-

(a) is about to dispose of the whole or any part of his property; or

(b) is about to remove the whole or any part of his property from the local limits of the jurisdiction of the court.

No such intent on the part of Sirikwa has been alleged by Mayfair and none is evident from the material placed before the court. On the contrary the material before court shows that Sirikwa has paid the admitted arrears of rent, all amounting to over Kshs.63 million, following the consent order filed in court on 29th July, 2004. It continues to pay accruing rent at the old monthly rate of Kshs.531,000/00. The disputed arrears which Mayfair calculated upon the disputed revised monthly rent has already been agreed by the parties to be an issue that should go to trial.

What Mayfair now pleads is that Sirikwa is impecunious. There is a contradiction here. If Sirikwa was able to pay arrears of rent amounting to over Kshs.63 million, is able to pay accruing rent at the rate of Kshs.531,000/00 per month, and both these facts are not in dispute, and if it has in its account over Kshs.50 million as stated by Mayfair, how can it then be impecunious? In any event, impecuniousness is not one of the grounds upon which the court can order attachment before judgment under Rule 5 aforesaid. This portion of the application must fail.

Regarding leave to amend the counterclaim in the Eldoret case, it is evident that the suit was largely compromised by the consent order of 29th July, 2004. Following that compromise Sirikwa has paid to Mayfair the very large sum of over Kshs.63 million in arrears of rent. The subject matter in that suit, as indeed it is in the Nairobi case, revolved around rent, both arrears and accruing, and nothing else. The amendment sought to revise the sum of arrears of rent claimed in light of the payment now made cannot occasion Sirikwa any prejudice, and I will permit that amendment to be made. However, the amendment sought to introduce a second counterclaim for money lent and advanced will introduce a completely new and distinct cause of action in a suit that has already been largely compromised by consent of the parties. This will no doubt occasion prejudice to Sirikwa and unnecessarily embarrass or delay trial of the outstanding issue in the suit. I will not permit it. Mayfair can file a separate suit for that claim if it is so minded.

In conclusion therefore, except for leave to amend the counterclaim in order to revise the amount of arrears of rent claimed, the application is dismissed with threequarters of costs to Sirikwa. Mayfair may file an amended counterclaim within fourteen (14) days of delivery of this ruling. Sirikwa shall have liberty to file an amended defence to the amended counterclaim within fourteen (14) days of service upon it of the amended counterclaim. Orders accordingly.

DATED AND SIGNED AT NAIROBI THIS 28TH DAY OF APRIL. 2005.

H. P. G. WAWERU

JUDGE

DELIVERED THIS.....DAY OF APRIL, 2005.