



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

**Civil Case 155 of 2005**

**ASIA RESOURCES (K) EPZ LIMITED.....PLAINTIFF**

**-V E R S U S**

**RAFIKI (EPZ) LIMITED.....DEFENDANT**

**R U L I N G**

The application before the court is by way of a chamber summons dated 29th March, 2005. It is expressed to be brought under O.XXXIX rules 1,2,3, and 9, O.XIX rules 1 and 2 of the Civil Procedure Rules, and S.3A of the Procedure Act, Chapter 21 of the Laws of Kenya. It was also filed during the vacation under a certificate of urgency and seeks from the court the following orders-

1. That this application be certified as urgent and be heard ex parte in the first instance due to its urgency.
2. That an injunction do issue restraining the defendants by themselves, their agents, servants or employees from interfering with, removing or disposing the plaintiffs properties, tools of trade in the factory, godowns, stores or in any other way from interfering with the plaintiff's operations in the factory until the hearing and determination of this application or further orders of this court.
3. That the defendant be ordered to render an account to the plaintiff for all monies received from the plaintiff on account of rent and or rent arrears outstanding todate.
4. That the costs of this application be provided for.

The application is supported by the annexed affidavit of SALIM SAYID, the plaintiff's general manager, and is based on the following grounds-

- (a) That the defendant is the plaintiff's landlord
- (b) That the defendant has broken into the plaintiff's factory, godown and stores and is carrying away the plaintiff's properties on account of rent which has not been ascertained and without any notice to the plaintiff.
- (c) The plaintiff's operations stand to be paralysed by the defendant's actions.

Opposing the application, the defendant has filed a replying affidavit sworn on 11th April, 2005 by one ARAFAT VAIANI, the defendant's managing director. The application was canvassed before me on 15th April, 2005 and 6th May, 2005. Mr. Owiny appeared for the plaintiff/applicant while Mr. Thangei appeared for the defendant/respondent. The two main orders sought by the applicant are an injunction and

an order to render an account.

After considering the pleadings the application and submissions of both counsel, I note that the dispute in this matter arises out of a misunderstanding on rent and arrears of rent.

It is not clear from the pleadings and the evidence on record whether the plaintiffs are still carrying on business and whether they intend to continue doing so. They have sent conflicting signals on the matter. The difficult times through which the plaintiff have been going seem to have set in early in 2004. They are expressly referred to in the plaintiff's letter dated 25th March, 2004, addressed to the defendants as follows-

**“We acknowledge receipt of your letter dated 25th March, 2004 and wish to inform you that the person who was in charge of the factory left with a large sum of money and currently we are in a tight financial situation.**

**As you know, in the past we could make commitments to the promises that we made to yourselves. In this difficult situation, we request for your support. Therefore as per our yesterday's discussion, we will be releasing US\$2,000 this week and we look forward to arranging to pay US\$2,500 every other week to ease the situation...”**

Eight months down the road, the situation seems to have worsened. In their letter dated 11th November, 2004 and addressed to the Commissioner of Customs, the plaintiffs further write as follows-

**“Dear Sir,**

**SUBJECT: ASIA RESOURCES KENYA (EPZ) LTD**

**We refer to the above company located at Rafiki EPZ Ltd Outer Ring Road, Nairobi and would like to inform you due to a unexpected (sic) death of my brother who was looking after the plant and we have now decided not to continue operations further. At present the plant is closed and we need to dispose or lease out the plant to a new investor. In this regard we hereby give permission to Mr. Viani of Rafiki EPZ to access to our premises (sic) only for the purpose of showing the plant to respective clients(sic). He will take fully responsibility (sic) of all the assets inside the plant and this authorization does not permit any kind of removal of any assets from the plant. Also this letter become null and void once we decided and inform you in writing the cancellation of authorization(sic).**

**Thanking you**

**Yours faithfully**

**ASIA RESOURCES KENYA (EPZ)LTD.**

**Sgd.**

**Managing Director/Chairmen (sic)”**

In the very first sentence of this letter the plaintiffs state that they have “decided not to continue operations further”. This contradicts paragraphs 5 and 10 of the affidavit sworn by SALIM SAYID, the plaintiff's general manager, on 29th March, 2005 in which he avers-

**“5. THAT in or about November 2004 the company temporarily closed to enabled us (sic) restructure our operations and this was brought to the notice of the defendant...”**

Whereas by November, 2004, it was clear that they did not intend to continue operations further, and that they closed the plant and needed to dispose or lease out the plant to a new investor, it would seem that by 29th March, 2005, there had been a change of heart, as well as a change of the story. It cant be both that

the plaintiffs were closing down because they wanted to discontinue operations and at the same time they closed down to facilitate restructuring. Restructuring can go on side by side with continued operations.

Paragraph 10 of the affidavit further states-

***“THAT at the moment I have received orders for some work and I was in preparation to resume our operations by this week (sic), however, the defendant has locked us out of factory” (sic)***

Even assuming that the plaintiffs had changed their minds not to continue operations any further, it is evident from this paragraph that for about 4 months, they were not in the premises. This might help to account for the arrears of rent alluded in paragraphs 6 and 7 of the said affidavit in which the deponent avers that he had agreed with the defendants’ manager that they “ were to sort out any outstanding rent arrears immediately the plaintiffs resumed operations”. The defendants’ manager is also said to have agreed to accommodate the plaintiff to pay up whatever arrears of rent once the plaintiffs restarted operations. In my view, this is clear admission that not only were the plaintiffs in arrears of rent but that they also knew it. It is hardly surprising especially considering that they were not in operation from sometime before 11th November, 2004.

The plaintiff’s case is that the defendants have gained access to the factory and have started disposing off the plaintiff’s assets on account of rent, and yet no demand notice or account of outstanding rent has been given to the plaintiffs. The bottom line in this matter is that the applicants may not know the exact amount of arrears but they know for a fact that they are in arrears. Exhibit “AV 3” annexed to the replying affidavit of ARAFAT VAIANI, the defendant’s managing director, shows that as at 28th February, 2005, the total amount due from the plaintiffs to the defendants was US\$129,017.24. The plaintiffs dispute this figure and argue that the account given in this exhibit runs from 1st January, 2002, and yet the lease agreement between the parties herein was executed on 15th October, 2003, and this date should be taken as the date when the plaintiffs moved into possession of the leased premises. They also take exception to an amount of \$ 20,000 allegedly spent on repairs and paintings, as well as a deposit refund of \$ 31,049.00 which, on the face of the record, is in their favour. Whereas there may be some truth in these observations, it is also significant from that exhibit that the plaintiff has been in breach of the terms of the lease as regards prompt quarterly payments of rent and service charges. The last time that the plaintiff ever paid any money on account of rent was on 26th August, 2004. This is not controverted in any way. No doubt, the plaintiffs know very well that they are in arrears of rent. The actual amount may be disputed. On a similar point in **MINAR RESTAURANT v. PLAZA TRUST LTD.** HCCC NO. 679 of 2001 (Milimani) the court ruled that-

***“...whether the defendants accounts be right or wrong, the plaintiff stands in some arrears and as long as there are any arrears outstanding, the landlord is entitled to levy distress.”***

This observation is as much applicable to the instant case as it was in MINAR’S case.

Counsel for the applicant argued that there were irregularities in the mode of purporting to levy distress. I don’t think that this would necessarily affect the plaintiff’s liability to have its goods distressed for rent. It would only give rise to an action for damages.

Before the plaintiffs can qualify for an order of injunction, the case of **GIELLA v. CASSMAN BROWN & CO. LTD.** [1973] E.A. 358, demands that they demonstrate, first and foremost, a prima facie case with a probability of success. Given that the plaintiffs are plainly in arrears of rent, and there is no evidence of a threat to evict them, they have not established a prima facie case which would entitle them to the grant of an injunction pending the hearing of the suit. Even if they had established such a case, the wording of the application for an injunction does not allow for the grant of an injunction pending the hearing and determination of the suit. Instead, the prayer is for an injunction-

***“...restraining the defendant....until the hearing and determination of this application...”***

The order sought by these words is one which should be in place until this application is heard and

determined. As the application is now heard and determined, there is nothing else for the court to do. There is no prayer for an injunction pending the hearing and determination of the suit. And the court cannot grant an order which is not prayed for.

The application for the injunction is now spent as the application is already heard and determined. Faced with an application which was similarly worded in SOUTHERN CREDIT BANKING CORP. LTD. v. CHARLES WACHIRA NGUNDO, HCCC No. 1780 of 2000 (Milimani), Onyango-Otieno J. had this to say-

**“It will be seen from the above that the main application is seeking injunction to be granted only until this application is heard and determined interpartes. Clearly, this prayer which is the main prayer in this application was presupposing that another prayer possibly for injunction pending the finalisation of the suit which was to be heard and determined interpartes was made in the application. No such prayer for injunction pending the determination of this suit was brought... I do not think I can draft a prayer for a party and sit to decide on that prayer. I can only decide on prayers before me. There is no prayer before me seeking injunction pending the determination of this suit. The prayer before me is injunction pending the inter partes hearing of the application. The application has been heard interpartes and I have nothing more before me to decide upon. As I cannot make decisions on a matter or prayer not before me and this application has by its very wording ceased to exist, I do dismiss it with costs to the Respondent.”**

The prayer for injunction in this application is destined to meet a similar fate. For the totality of these considerations, this application fails and it is dismissed with costs to the respondent.

Dated and delivered at Nairobi this 26th day of May 2005

**L.**  
**JUDGE**

**NJAGI**