



REPUBLIC OF KENYA
IN THE HIGH COURT OF KENYA AT NAIROBI
CIVIL CASE NO. 1719 OF 1999

PLAZA TRUST LIMITED.....PLAINTIFF

VERSUS

HARD ROCK CAFÉ LTD.....DEFENDANT

RULING

This is the plaintiffs application for orders that:

- (1) First defendant do furnish security for plaintiffs costs of the proceedings in the counterclaim in the sum of shs 1.2 million or such sum as court finds just.
- (2) The trial of the first defendants counterclaim in this suit and interlocutory application be stayed pending compliance of the order for security for costs.

The application is based on two grounds namely

- (a) First defendant has not satisfied Decree in HCCC NO. 96 of 2000 of shs 3,413,107/20 plus costs of shs 319,189/000 in favour of plaintiff
- (b) First defendant has no known assets capable of satisfying the judgment and costs of this suit.

The application is supported by the affidavit of Simon Mugo Warui of Gimco ltd, Managing Agents of the plaintiff. That affidavit was sworn on 5.11.2002. Mr. Edwin Ochieng Yinda, 2nd defendant in the suit, and director of first defendant filed a replying affidavit sworn on 26.11.2002. Mr. Simon Mugo Warui filed a further affidavit on 16.12.2002.

Plaintiff was the first defendant's landlord. The 6 years lease expired by effluxion of time on 31.8.99 but first defendant failed to vacate the leased premises Plaintiff filed this suit to recover vacant possession and mesne profits Preliminary decree for vacant possession was given on 20.11.2000 I am informed that the preliminary decree was executed on 16.3.2000.

Plaintiff filed an amended plaint on 28.5.2002. Plaintiff is claiming a total shs 6,095,538/80 from the defendants.

The first defendant filed an Amended Defence and counterclaim. First defendants avers in the counterclaim that it invested shs 60 million on the plaintiffs premises upon a representation that a further

lease would be granted to first defendant upon expiry of the subject lease.

First defendant avers that it left in the suit premises goods worth shs 16,743,383 which plaintiff has never accounted for. The first defendant claims by way of

counterclaim shs 76,193,283 as special damages plus general damages for negligent misrepresentation.

Plaintiff disputes that first defendant left goods worth shs 16,743,283 in the premises and states that the salvaged goods were valued at shs 194,300/= which have incurred storage charges higher than their value. First defendant deposes that a Cadillac vehicle valued over shs 1.3 million was left in the premises. Mr. Simon Mugo Warui agrees but states that the vehicle was an ornamental object which was hanged from the ceiling and which according to records of the Registrar of Motor vehicles belongs to the second defendant.

There is a serious dispute between plaintiff and first defendant as to the quantity and value of the goods left in the premises and taken over by the plaintiffs. That dispute is not directly relevant to the present application. It is a dispute which is better left to the trial Judge. There is no dispute that a vintage Cadillac is still in the premises. But records show that it is still registered in the name of the second defendant.

That motor vehicle cannot be security for plaintiff's costs in defending the first defendant's counterclaim.

The grounds on which the application is based have not been challenged. Indeed, first defendant admits that it has not paid decretal sum and costs of over shs 3,800,000 in HCCC NO. 96 of 2000.

The first defendant has not explained why it has not paid the decretal sum and costs. Further, the first defendant has not denied that it has no known assets. Mr. Edwin Yinda admits in para 12 of his replying affidavit sworn on 26.11.2002 that the first defendant is not operating any business but states that first defendant is not insolvent as there is similar restaurant at Mombasa whose assets remain intact. Mr. Simon Mugo Warui states in para 7 of the further affidavit sworn 16.12.2002 that he has been informed that the Mombasa Restaurant is no longer operating. He has annexed a letter from Managing Agents of the building where the Mombasa Restaurant was located verifying that the restaurant is no longer operating there. In any case, Mr. Yinda has not disclosed what the assets are and their value. Indeed, it has not been shown that the first defendant has any assets.

The circumstances of this case do not show that the order for security for costs is being sought oppressively with the object of stifling first defendant's counterclaim. Rather, the circumstances show that first defendant is unable to pay the decretal sum of about shs 4 million in HCCC NO. 96/2000 and further that the first defendant has no assets, I am satisfied that plaintiff has shown that the first defendant will be unable to pay costs of the plaintiff if successful in the defence to the counterclaim. Considering the large sum claimed in the counterclaim, the plaintiff's costs if it successfully defends the counterclaim is not likely to be less than shs 1,000,000. It is just that first defendant be required to provide security for costs in the sum of shs 1,000,000.

Consequently ,

1. I allow the application dated 5.11.2002 to the extent that I order first defendant to furnish security in the sum of shs 1,000,000/= in terms of prayer no. 1 within 30 days and also
2. Grant orders in terms of prayer 2 of the application
3. Costs to the plaintiff in any event

E. M. Githinji

JUDGE

4.3.2003

Mr. Sumba

We would like to appeal against the ruling. I ask for 7 days stay pending filing formal application. I also apply for typed proceedings and Ruling **E. M. Githinji**

JUDGE

Mr. Gachuhi

I oppose application for stay as time for compliance is 30 days

E. M. Githinji

JUDGE

Mr. Sumba

If stay is not granted the 30 days will start running from today

E. M. Githinji

JUDGE

RULING

There is no imminent execution and the prayer for stay has not legal basis at the moment. The oral application for interim stay is rejected. Liberty to first defendant to file a formal application. Ruling to be typed and copy supplied to 1st defendants counsel as prayed

E. M. Githinji

JUDGE