REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA
AT NAIROBI
CIVIL CASE NO. 607 OF 2001

REFCOLD REFRIGERATION LTD. ………………. PLAINTIFF

VERSUS

SUKUMA WIKI LTD & ANOTHER ………………. DEFENDANT

RULING

What is in court is a dispute between a landlord and a tenant. The dispute is principally over rent which culminated in a distress for rent. This issue has been temporarily put on hold by this court (Mulwa J.). but the landlord in its counter-claim has introduced another angle to the dispute.

The landlord complains that the tenant has stored scrap metals and waste material on top of the roof. As a result the roof is caving in and posing danger to the suit premises and the other tenants.

The City Council has entered the fray and demanded the removal of the said scrap metal and materials from the top of the roof. This is what it would appear, provoked the application before me.

The application before me is dated 3rd December, 2001. It has three substantive prayers. The first prayer seeks a mandatory injunction to issue compelling the tenants (who are the plaintiffs) to remove the scrap metal and waste materials on top of the suit premises. The landlord (first defendant) also seeks a further prayer that it be allowed to remove the said material at the tenant's cost.

The second prayer is that this suit be certified as urgent and be heard on priority basis. The third prayer seeks for an order that plaintiffs be ordered to give security for costs.

The application is supported by seven grounds on the body of the application and an affidavit sworn by Joseph Mwangi Mwaniki the secretary of the first defendant company. I have perused and considered the same.

There are annexutures to the affidavit.

The application is opposed and a replying affidavit filed, there are annexutures to the affidavit. I have perused and considered the same.

In general, the principals regulating the grant of mandatory injunctions are the same as those regulating prohibitory injunctions; for otherwise a defendant who had committed a breach of his obligations would be better off that one who merely threatened to commit a breach. The mere fact that the injury has been completed before the action is commenced is no bar to the grant of a mandatory injunction.

However, the court will not interfere by way of mandatory injunction, except in cases on which extreme, or at all events very serious, damage will ensure from its interference being withheld. See the old case of Durell V. Pritchard (1865) 1 CH. APP. 244.

In its replying affidavit the plaintiffs admit that some scrap metal are on the top of the roof but state that the same were placed there by the first defendant.

I have perused the annexutures to both the affidavits filed by the parties in support and against the application. The roof top is not the right place to store scrap metal. No wonder the City Council has entered the fray. It would appear that there is a risk of the roof collapsing. Other tenants are being inconvenienced. The plaintiffs could care less because of the strained relationship existing between them and the Landlord. Although I would be reluctant to issue the orders sought in the circumstances of this case, and in view of the fact that the defendant only objected after it received notice from the City Council, I think to avoid the risk of serious consequences I would give orders in terms of prayer 2 of the application.

There is no doubt that this dispute and other disputes need to be heard and resolved expeditiously. But the Courts do not have enough manpower and facilities. For these reasons, I am unable to certify this suit as urgent.

Prayer 3 of the application is rejected. The prayer for security for costs is based on what is alleged in paragraphs (d) (e) (f) and (g) of the grounds in support of the application.

Under order XXV of the Civil Procedure Rules, the court may on certain cases make an order to compel the plaintiff to give security for costs of the action. The example is where the plaintiff is ordinarily resident abroad, and has no substantial property, real or personal in Kenya Or is merely nominal and impecunious plaintiff suing for the benefit of some other person; or is an insolvent company; or has deliberately omitted or misstated address in the writ; or has changed his address with a view to evading the consequences of litigation. But the mere fact that an individual is insolvent is not sufficient ground for such an order. See Findlay V. Wickman (1920) W. N. 317.

The court has not been shown to its satisfaction that it ought to make an order for security for costs.

The issue of storage charges goes to the root of the earlier decision by Mulwa J. If the matter is not heard and determined soon, the parties have other options on the issue of storage charges. But I do not think it is right for me to provide for it by ordering the plaintiffs to give security for costs.

The 4th prayer is also ejected.

As I said above prayer 2 of the application dated 3rd December, 2001 is allowed with half taxed costs to the first defendant.

Dated and delivered at Nairobi this 24th day of January, 2002.

D. M. RIMITA

JUDGE