

REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA AT NAIROBI
CIVIL CASE NO.1226 OF 2001

MINA RESTAURANT LLTD PLAINTIFF

VERSUS

YAYA TOWERS LTD DEFENDANT

R U L I N G

By its chamber summons of the 24th July, 2001 the Plaintiff sought to restrain the Defendant from interfering or disconnecting or withholding electricity supply to the Plaintiff's premises, and also from evicting the Plaintiff from the Plaintiff's premises. It also asked for the Defendant to furnish the Plaintiff with accounts.

In para.9 of the affidavit support in of the application sworn by Jugal Kishore Bhalla for the Plaintiff he states that the Defendant's advocate instructed a firm of auctioneers to levy distress for outstanding rent and service charges. Annexed to the affidavit is a letter from the Defendant to the Plaintiff dated the 18th July, 2001 demanding a sum of Shs.1,751,473=89 due after accounts had been reconciled.

I would observe that the Plaintiff does not seek to restrain the Plaintiff from levying distress for rent in its application. In para.14 of the Plaintiff's supporting affidavit he complains that the Defendant has been inflating its electricity bills in so far as the same is passed on to the Plaintiff. In the letter of the 8th July, 2001 Plaintiff threatened to cut off the Plaintiff's electricity supply if the sum claimed was not paid. Whether or not the Defendant has this right is not an issue at present as the parties agreed to appoint an auditor to produce a final account. Although the consent order does not say for what purpose the final account was being prepared it would seem that it was to determine what if anything was due from the Defendant to the Plaintiff.

At the hearing of the application the parties handed in by consent an audit report prepared by Kassim-Lakha Samvir Abdulla , which shows that as at the 18th July, 2001 the sum due from the Plaintiff to the Defendant is Shs.1,467,386=99.

In the notes to the report is an observation relating to two sums of Shs.511,495=90 and Shs.244,420 which the Plaintiff claims credit for. The parties have asked me to make a finding with regard to these two sums. The first sum of Shs.511,495=90 was the subject matters of an agreement referred to in a letter of the 23rd May, 2000 between the parties whereby this sum would be written off from the Plaintiff's account conditional upon payment of all outstanding invoices and the same be being brought to zero. In the supporting affidavit Mr. Bhalla seeks a credit for this sum but does not allege or demonstrate that the condition of the credit had been fulfilled.

In paragraph 6 of replying affidavit sworn by Lisa Pegg for the Defendant on the 18th July, 2001. Miss Pegg agrees that the Plaintiff would be given a credit for shs.511,495=90, but that the same was conditional upon the account having brought to zero which was not done. In his further affidavit of the 10th August, 2001 Mr. Bhalla does not deal with the claim by Miss Pegg that the account had not been brought to zero. The Plaintiff seems so incensed by the alleged overcharge in respect of electricity and other extraneous matter that he does not properly address the liabilities of the Defendant. With regard to the sum of Shs.234,420 Mr. Bhalla in the supporting affidavit states in para.5 that this sum was in respect of monies paid to the Defendant and acknowledged. He refers to receipt No.3454 of 15th December, 1991 in this sum which is set out as a letter to the Defendant's advocate of the 15/6/2001, but the receipt is not attached.

In her replying affidavit Miss Lisa Pegg states it is her belief that the receipt which Mr. Bhalla refer to is dated the 15/2/1991 and not 15/12/1991 in Exh.LIP4 annexed to her affidavit is an extract from the Defendant's ledger showing a credit in the sum of Shs.234,420=00. In his further affidavit Mr. Bhalla in para.4 annexes at exhibit JKB2 a copy of a statement showing the sum of Shs.234,420 credited as a payment on the 16/8/1999 and in para.5 of his affidavit he says this sum was not credited. It is not possible for me to say whether this is correct or not and I would suggest that this matter be referred back to the auditor for further opinion.

The lease in respect of the premises provides in clause 1(e) that the Plaintiff will pay a service charge to the Defendant. This service charge includes in sub clause (111) all charges for electricity consumed on the common parts of the Yaya Towers. In clause 1 (b) the Plaintiff agrees to pay inter alia all charges for electricity in respect of the premises. It appears that the Plaintiff is charged in accordance with a metre in its premises see Para.3(a) of the Defence and counterclaim. So far as the allegation with regard to the service charge the lease provides for the calculation of the charges.

In so far as the evidence before me shows, it would appear that so far as the sum of Shs.511,495=90 is concerned that was conditional upon the account with the Defendant having brought to zero which did not happen. I am not able to say whether or not the credit of Shs.234,420 is due.

However even if these two accounts are credited to the Plaintiff it still owes an outstanding amount. Under the lease further amounts are now due and which arose after the filing of this suit. In my view it is not a proper remedy for the Defendant to cut off the Plaintiff's electricity supply but there is nothing to restrain the defendant from levying distress for rent. Rents include any outstanding service charge. I therefore restrain the cutting off of the Plaintiff's electricity. There is no evidence that the Defendant is evicting the Plaintiff from the premises. To this limited extent I allow the application. The costs of the application will be costs in the cause.

Dated and delivered at Nairobi this 11th day of October, 2001

PHILIP J. RANSLEY

COMMISSIONER OF ASSIZE