

REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA AT NAIROBI
MILIMANI COMMERCIAL COURTS
CIVIL CASE NO. 1736 OF 2000

BLUEBELLS FOODS LIMITED PLAINTIFF

VERSUS

A H ADAM INVESTMENTS LIMITED DEFENDANT

R U L I N G

This application is seeking only one order and that is an order that the Respondent whether by its servants and/or agents be restrained from attaching and selling the Plaintiff's property until the hearing and determination of this suit on grounds that the Applicant is upto date with its rent and that the distress for rent and the attachment of the Plaintiff's property is without foundation and therefore it is only fair and just that injunction orders be issued pending the hearing and determination of this suit. In the supporting affidavit sworn by Hellen Maeda, the Plaintiff's Director, she says that rent due to the Defendant has been paid upto and including October 2001 through the Defendant's lawyer. She also says that rent has been levied against the Plaintiff's assets and the same goods were taken to unknown destination and that if the Respondent is not restrained from selling the Applicant's properties, the Applicant stands to suffer irreparable loss.

The Respondent opposed the application maintaining that rent was not paid from 1st August to 1st September 2001, that as on 14th September 2001 the Applicant was in arrears of admitted rent from the period 18th February 2000 to 1st September 2001 in the sum of K.shs 520,000/- plus service charge of K.shs 34,640/-, all totalling to K.shs 554,640/-, that the Applicant had no business paying rent to Wangari & Company Advocates as she knew only too well having had four meetings with the present counsel for the Respondent that Wangari & Company, advocates were no longer acting for the Respondent. That in this case the Applicant had been ordered to pay the admitted rent and the rest was to go for trial.

This application cannot be granted. First it cannot be granted because the Applicant maintains that it is upto date with rent upto the month of October 2001 whereas vide its one annexure HM2, a copy of the proclamation, it is clear that the same proclamation was dated 14th September 2001 and as on that date the amount outstanding was K.shs 554,670. Even if I were to go by the letter of 14th September 2001, the rent that was due then that necessitated distress was K.shs 520,000/-. I have ignored service charge as the law is not yet settled in Kenya as to whether service charge should be claimable under the Distress for rent Act. The Applicant has not disputed this allegation that as on 14.9.2001 the rent due from it to the Respondent was K.shs 520,000/-. Assuming for the moment that I accept payment to Wangari & Company advocates two things still arise. These are first that payment to Wangari was received on 15th October 2001 (see Applicants Exh. HMI) one month after the proclamation. That in effect means the proclamation was (even by the Applicant's act of paying to Wangari on 15th October 2001) properly carried out as at that time 14.9.2001 there was indeed rent due and payable to the Respondent which was then K.shs 520,000/- which was not paid. That being the position, on what basis can the Respondent be faulted?

Secondly, even when the payment was made, all that the Applicant can vouch for is that it paid K.shs 411,000/- short of the arrears then due of K.shs 520,000 by K.shs 109,000. On what grounds then can the attachment which is already carried out be lifted and upon what reasons can the Respondent be stopped from selling the property when it is clear even by the Applicants stand that some rent arrears is still due and not yet paid.

Second reason why this application cannot succeed is that it is clearly not brought into the court with

clean hands. In her affidavit, a Director with the Plaintiff/Applicant company say that the company has paid rent due to the Defendant upto and including October 2001 and that to the utter shock and horror of the Applicant, the Respondent instructed the auctioneers to levy distress on the Applicant for rent arrears whilst in reality none is due and owing. This cannot be true because it gave wrong impression that by the time the distress was levied there was no rent due. Yet as I have stated above when distress was levied on 14.9.2001 the amount due was K.shs 520,000 and an attempt to pay this was made in October when on 15.10.2001 Wangari & Company acknowledged receipt of K.shs 411,000 which still left some money unpaid. This telling of untruths cannot qualify the Applicant to enjoy any equitable remedy like injunction from a court of law and I am not prepared to be the exception on this.

Lastly, the Applicant knew only too well that on 13.3.2001, it had been ordered to pay the amount that was due in respect of the admitted monthly rent in a certain way. It did not comply with that order and now comes to court for injunction notwithstanding its non compliance with the court order and even worse, it makes it appear as if it had dutifully complied with the same order. Again that is not coming to court with clean hands.

I have no alternative but to decline this application. It is dismissed with costs to the Respondent.

Orders accordingly.

Dated and delivered at Nairobi this 1st day of November 2001.

ONYANGO OTIENO

JUDGE