



REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA

AT MACHAKOS

Coram: D. K. Kemei - J

CIVIL SUIT NO.320 'B' OF 2011

TRANSFLEET EPZ LIMITED.....PLAINTIFF

-VERSUS-

INSTA PRODUCTS EPZ LIMITED.....DEFENDANT

JUDGEMENT

1. The Plaintiff and Defendant signed a Memorandum of Understanding on 1/4/2010 for purposes of leasing Godown No.10 situated at Athi River Export Processing Zone for a term of One (1) year commencing 15/4/2010. The Plaintiff claims that the Defendant vandalized the Godown upon vacating the premises. The Plaintiff filed this suit against the Defendant vide the Plaint dated 10/11/2011 seeking costs of repair in the sum of Kshs.14,017,550.25/= plus interest and costs of the suit. The Defendant vide the statement of defence dated 20/1/2012 denied vandalism claims by the Plaintiff and sought for dismissal of the suit with costs.

Plaintiff's case

2. PW.1 **Isaac Aoga** adopted his witness statement dated 9/2/2018. PW.1 testified that he was the Plaintiff's Administration Officer. PW.1 testified that the Defendant leased Godown No.10 from the Plaintiff for a period of one year paying a rent of 162,000 US Dollars per year starting the 15th day of April 2010. He testified that upon realizing that the Defendant had vandalized the Godown in June 2011, the Plaintiff contacted its advocates who advised the Plaintiff to conduct valuation of the building. He testified by identifying a valuation report dated 28/8/2011 as MF.2. and maintained that the author thereof was trading in the name and style of Syagga & Associate. He produced the Memorandum of Understanding as *P. exhibit 1*, Demand letter (*P. exhibit 3*), Demand letter (*P. exhibit 4*) and letter dated 16/8/2011 (*P. exhibit 5*).

At cross-examination, he stated that he was not involved the negotiations leading to the Memorandum of understanding. He confirmed that the Defendant had leased Godown No.10 for maize storage. He stated that the Defendant had requested for removal of the electrical installation at the store where maize was to be stored.

He further stated that New Wide Garments (EPZ) Ltd occupied the Godown after the Defendant had vacated the premises. According to him, the letter dated 1st July 2011 confirms that the Defendant was aware of the new tenant as at 15th June, 2011. He insisted in his testimony that Godown No.10 was solely occupied by the Defendant until 9/9/2011. He testified that the Defendant was the only tenant in occupation of Godown No.10 when inspection was conducted in June 2011 and that the defendant's employee Peter Ngeno was present during the inspection. He testified that the Defendant did not pay the monthly rent of 13,500 US Dollars for five months hence the rent arrears came up to 67,500 US Dollars. He testified that it was not possible for another tenant to lease the Godown since the Defendant was still in occupation of the premises. On re-examination, he sought for loss of rent for one month and damages for vandalism.

3. PW.2 **Paul Maurice Syagga** stated that he is a qualified property valuer and confirmed that he was instructed to conduct a valuation of the premises by the plaintiff. He confirmed that the owner of the building was present during the valuation process. He established in his report that the electrical wires, bulbs, sockets, door locks, furniture and fittings had been damaged. He estimated the total repair costs for the damages would be Kshs.9, 971,782.80/= and charged a professional fee of Kshs.1, 495,767.42. He concluded in his report that the premises were not usable hence the reason why he did not find any tenant at the premises. He produced the valuation report dated 28/8/2011 as *P. exhibit 2*.

On cross-examination, he stated that he got instructions from the Plaintiff's advocates to conduct the valuation of the premises. He testified that he did not know whether the tenants had been informed of his presence at the premises and that he could not tell if there was only one tenant. He added that he was not aware of an initial report and that he could not tell the present condition of the premises.

He finally stated that he was not aware of any extension of the lease period and further that his scope of work was to establish the costs of repairs that were to be undertaken in anticipation of a new tenant leasing the premises and that he was not aware whether the building had been used for maize storage.

Defendant's case

4. **DW.1 Stuart Allison** testified that he was the Managing Director of the Defendant and that he was involved in the negotiations of the lease for the Godown. According to him the Defendant occupied a small area of the store. He testified that a former tenant had left the premises in a mess. He added that the Plaintiff brought a new tenant to occupy the premises with the Defendant and that the occupancy was only for six months and that each tenant had its own gates.

He testified that the Defendant vacated the premises without any complaints brought to their attention by the Plaintiff. According to him, the inspection was conducted after the Defendant had left the premises. He testified that during the extension of the lease period the Defendant paid rent hence the Plaintiff's claim for lost rent is not correct. He stated that the Defendant left the premises in the same condition the Defendant found it.

On cross examination, he stated that upon expiry of the lease agreement, they did not vacate the premises since they were allowed to remain at the premises for six months. He further confirmed that he did not have any receipts to prove payment of rent for the six months but asserted that the rent was paid.

He testified that the Defendant was not satisfied with the conditions of the premises but it was fine for storage of maize. He testified that he did not have a report at the time of entry and departure in respect of the conditions of the premises. He pointed out to the court that the bad conditions of the premises were never included in the lease agreement. He confirmed that he was not present during the handing over of the premises. He denied that damages were caused on the premises during the occupancy thereof by the defendant.

He stated that he could not tell if Peter Ngeno was present during inspection of the premises. According to him, he does not know the tenant who came into the premises after the Defendant vacated and that there was no formal agreement instructing a new tenant to occupy the premises with the Defendant. He stated that he could not recall the date when the Defendant handed over the premises. He testified that the dire need for storage facility led the Defendant to occupy the premises that was in bad condition. According to him, the premises had been vandalized by the court bailiffs who had evicted former tenants He denied having been notified of any inspection that was conducted at the premises.

5. **DW.2 Peter K. Ngeno** testified that he used to work for the Defendant and participated in leasing the premises. He testified that there were fittings fixed by the previous tenants that were removed by the Plaintiff to ensure the Defendant's storage needs had been met. He adopted his witness statement dated 20/2/2012.

He testified that the Defendant moved into the premises four days after the fittings were removed by the Plaintiff. He added that doors had not been broken save for the cracks on some doors. He stated that he did not check the state of the ceiling. According to him, Defendant's concerns were raised with the Plaintiff but he did not know if the concerns were captured in the lease agreement.

He testified that the new tenant moved into the premises on June 2011. According to him, he was not notified of any inspection that was to be carried out on the premises and that the inspection was conducted in the presence of the new tenant. He finally stated that the Defendant left the premises in the same conditions it found when occupying the premises.

On cross-examination, he informed the court that he was not present when the lease agreement was signed. He confirmed visiting the premises before the Defendant moved into the premises. According to him, the premises was proper for maize storage.

He confirmed that the Plaintiff's agents removed the fittings before the Defendant moved into the premises. He confirmed that there were no broken doors and that he did not check the state of the ceiling. He maintained that the Defendant's concerns on the state of the premises were raised with the Plaintiff but he does not know whether the concerns were captured in the lease agreement.

He confirmed that he has not read the valuation report and neither was he present during the inspection of the premises. He confirmed that for one year it was only the Defendant who had occupied the premises and if there were any damages that occurred during that period, then it should be attributed to the Defendant. He added that there were no damages on the premises save for the cracks on some doors. He confirmed that the new tenant had already occupied the premises as at the time when inspection of the premises was conducted. He asserted that the premises had not been vandalized as alleged by the Plaintiff.

6. Learned counsels for the plaintiff and the defendant filed written submissions on 16/11/2020 and 17/11/2020 respectively. I have given due consideration to the pleadings, witnesses evidence and written submissions filed herein. It is not in dispute that the Defendant had leased Plaintiff's Godown No.10 situated at Athi River on L.R No. 18474/188 for a period of one year commencing 15/4/2010 and expiring on 15/4/2011. It is not in dispute that the Defendant leased Godown No.10 for US \$ 162,000 per annum being the rent for lease period. It is also not in dispute that the Defendant continued to occupy Godown No.10 for six months upon expiry of the lease. It is not in dispute that the Defendant had requested the Plaintiff to remove certain fittings contained in the demised premises and which were duly removed by the Plaintiff. This being the position, I find the following issues necessary for determination namely:-

- a). *What was the state and conditions of the premises before the Defendant occupied the premises?*
- b). *Whether a representative of the defendant was present during the inspection of Godown No.10?*

c). *Whether the Defendant occupied the premises jointly with a new tenant namely New Wide Garment Ltd?*

d). *Whether the Plaintiff has proved its claim for direct damage of Kshs. 9,971,782.80/- and the valuer's professional fee of Kshs. 1,495,767.42/-*

e). *Whether the Plaintiff has proved its claim for rent arrears of Kshs. 2,500,000/-.*

f). *What orders may the court make?*

7. On the first issue, it was PW.1's testimony that the Plaintiff realized in June 2011 that the Defendant had vandalized Godown No.10. DW.1 testified that the premises were in a mess at the time when the Defendant was occupying the premises. The defence witness maintained that the Defendant was not satisfied with the conditions of the premises but due to the desperate need for a storage facility, it had to occupy a small space of the Godown. I note that DW.1 testified that he did not have a report on the state and condition of the premises at time of entry and at the time of vacating the leased premise. He also stated that the bad condition of the premises was not included in the lease agreement.

8. DW.2 testified that he inspected the premises before the Defendant occupied the same and stated that the premises were proper for storage of maize even though it was in bad condition. However, I note that DW.2 testified that there were no broken doors save for cracks on the door and he did not check the condition of the ceiling. DW.2 testified that the Defendant's concerns were raised with the Plaintiff but he was not in a position to confirm whether the concerns were captured in the lease agreement. DW.1 and DW.2 stated that they left the premises on 9/9/2011 in the same condition as at the time of leasing.

9. The Defendant has submitted that no inventory was taken before the Defendant occupied the premises and neither did the Plaintiff produce any evidence on the initial state of the premises prior to the Defendant's occupation hence the alleged damage cannot be pinned onto the Defendant. The Plaintiff has placed much reliance on DW.2's oral evidence that there were no damages at the time of entry into the premises by the Defendant save for cracks on the door.

10. I note that PW.1 and PW.2 did not testify on the state of the premises prior to the Defendant's occupation yet DW.1 testified that the premises was in a mess and that DW.2 stated that there were cracks on some doors. PW.1 testified that it was in June 2011 that the Plaintiff realized that the Defendant had vandalized Godown No.10 upon inspection. Valuation of the premises was conducted later after the expiry of the lease period and after the defendant had left the premises.

11. I note DW.1 and DW.2 slight variance in their evidence whereby DW.1 asserts that the Godown was in a mess before the Defendant occupied while DW.2 asserted that there were no damages save for the cracks on the door. However, I note that DW.1 and DW.2 denied vandalism claims against the Defendant.

In *Anne Wambui Ndiritu –vs- Joseph Kiprono Ropkoi & Another [2005] 1 EA 334*, in which the Court of Appeal held that:-

“As a general proposition under section 107 (1) of the Evidence Act, Cap 80, the legal burden of proof lies upon the party who invokes the aid of the law and substantially asserts the affirmative of the issue. There is however the evidential burden that is upon any party the burden of proving any particular fact which he desires the court to believe in its existence which is captured in sections 109 and 112 of the Act.”

In *Palace Investment Ltd –vs- Geoffrey Kariuki Mwenda & Another [2015] eKLR*, the Judges of Appeal held that:-

“Denning J, in Miller –vs- Minister of Pensions [1947] 2 All ER 372 discussing the burden of proof had this to say;-

“That degree is well settled. It must carry a reasonable degree of probability, but not so high as is required in a criminal case. If the evidence is such that a tribunal can say: we think it more probable than not; the burden is discharged, but, if the probabilities are equal it is not.

This, burden on a balance or preponderance of probabilities means a win however narrow. A draw is not enough. So, in any case in which the tribunal cannot decide one way or the other which evidence to accept where both parties...are equally (un) convincing, the party bearing the burden of proof will loose because the requisite standard will not have been attained.”

12. The burden of proof was on the Plaintiff to prove that the Defendant vandalized the premises. I note that PW.1 and P.W2 did not adduce any evidence as to state and conditions of the premises before the Defendant occupied the same. PW.1 chose to rely on PW.2's valuation report that establishes that inspection of the premises was conducted on 19/8/2011. Although DW.1 and DW.2's evidence vary slightly as to the state and condition of the premises, they have both stated that the Defendant left the premises in the condition it was when the Defendant occupied the same. On re-examination, DW.2 denied that the premises was vandalized as alleged by the Plaintiff.

13. A report on the state of the premises before the Defendant occupied the premises would have been of great assistance to the court in determining this issue but none was produced by the Plaintiff or Defendant. It is therefore not possible for the court to know with certainty the state and conditions of the premises as at 15/4/2010 when the term of the lease was to commence. DW.1's evidence on the state and conditions of the premises was not controverted and having stated that the premises was in bad condition but because the Defendant was desperate for storage facility, it occupied the same. DW.1 and DW.2 testified that despite the bad conditions of the premises, the space was fine to store maize. I find the only conclusion is that the premises had been vandalized even before the Defendant occupied the premises because the version of events by the defence witnesses seems plausible as compared to that by the plaintiff in the absence of documentary evidence. I find it rather curious that the plaintiff could find it appropriate not to prepare an inventory of the premises before tenants move

into the premises but go ahead to prepare one upon the vacation by a tenant as it happened herein.

14. On the second issue, PW.1 testified that DW.2 was present during the inspection of the premises while PW.2 stated that he was accompanied by the owner of the premises. PW.2 further stated that he could not confirm if tenants had been alerted of his presence at the premises. DW.1 and DW.2 testified that they were not notified of any inspection on the premises.

15. The Plaintiff submits that DW.2's denial of his presence during inspection is mere denial since the Defendant was still in occupation noting the date of PW.2's valuation report dated 28/8/2011. Upon perusal of page 4 of the Valuation report I note that DW.2 indicated that inspection was conducted on 19/8/2011. It means therefore there were two inspections. PW.1 stated that the inspection was conducted in June 2011 while PW.2 stated that inspection was conducted on 19/8/2011. DW.2's presence has further been denied in his witness statement dated 20/2/2012. If indeed DW.2 was present during the inspection as claimed by PW.1 no document has been produced in court to confirm his presence so that it may be concluded that there was a joint inspection. DW.2 denied his presence during the alleged inspection as well as in the witness statement. In *Kenya Akiba Micro Financing Limited vs. Ezekiel Chebii & 14 others [2012] eKLR* the court stated as follows:-

“In my view, a statement made on oath should as a matter of fact be expressly denied on oath. If not challenged, it remains a fact and the truth for that matter.”

On the question of what are the consequences of a party failing to adduce evidence? **Odunga J** in *Mohamed Dagane Falir vs Alfonso Mutuku Muli & another [2020] eKLR* relied on the case of **Janet Kaphiphe Ouma & Another vs. Marie Stopes International (Kenya) Kisumu HCCC No. 68 of 2007** where **Ali-Aroni J.** citing the decision in **Edward Muriga Through Stanley Muriga vs. Nathaniel D. Schulter Civil Appeal No. 23 of 1997** held that:-

“In this matter, apart from filing its statement of defence the defendant did not adduce any evidence in support of assertions made therein. The evidence of the 1st plaintiff and that of the witness remain uncontroverted and the statement in the defence therefore remains mere allegations...Section 107 and 108 of the Evidence Act are clear that he who asserts or pleads must support the same by way of evidence.”

I find PW.1's evidence not sufficient to conclude that DW.2 was present during the two inspections that led to the drafting of the valuation report.

16. As regards the third issue, it was PW.1's testimony that New Wide Garments Ltd occupied the premises after the Defendant had vacated the premises. Going by PW.1's testimony, it means that New Wide Garment Ltd occupied the premises on 9/9/2011 when the Defendant vacated the premises. I note that PW.2 testified that it was not possible to confirm whether the premises had been occupied by one tenant.

17. DW.1 testified that there was no formal agreement introducing a new tenant to occupy the premises with the Defendant. DW.1 and DW.2 testified that the Defendant was the sole occupant of the premises for only one year. Further DW.2 testified that the new tenant had already occupied the premises as at June 2011 hence the inspection was conducted when the new tenant had occupied the premises.

18. However, I note that the Defendant filed the list of documents dated 20/1/2012 on 20/1/2012 containing a letter dated 1/7/2011 among other documents from the aforesaid new tenant, New Wide Garment Ltd stating that the new tenant had leased the premises in June 2011 and had agreed with DW.2 to vacate the premises by 15/6/2011 but an extension was sought by DW.2 to 21/6/2011. PW.1 confirmed to have seen the letter but maintained that the premises had been occupied by the Defendant only. I note that the letter was not produced as an exhibit hence it does not form part of the court record and the court is now left to place reliance on witnesses' evidence.

19. It is not in dispute that the Defendant was still in occupation of the premises up to 9/9/2011. I note that PW.1 testified that the new tenant occupied the premises after the Defendant had vacated. However, PW.1 did not state the date when the new tenant occupied the premises after Defendant vacated. If indeed the premises had been vandalized as claimed by the Plaintiff, then the premises were to be repaired first to enable the new tenant occupy the same but no evidence was adduced whether the damages in the godown were occasioned. I find the Plaintiff did not sufficiently prove that the New Wide Garment Ltd did not occupy the premises with the Defendant.

20. In view of the forgoing, I find it needles to render myself on the fourth issue in view of my findings above that no sufficient evidence has been placed before this court to find that the Defendant vandalized the premises. Furthermore, noting that this is a claim for costs that are in the nature of special damages, receipts ought to have been produced by the Plaintiff to show expenses incurred to repair the premises. The valuation report was an assessment of damages which were to be repaired. The plaintiff has not availed evidence that it had carried out repairs on the premises and thereby incurred the sums now claimed. It seems the plaintiff seeks to be paid for expenses not incurred yet and it would be unconscionable to saddle the defendant with the same yet the defendant has vehemently disputed the allegations of vandalism of the premises and further maintained that the alleged valuation had been conducted in its absence.

In *Haha Vs Sighn (1985) KLR* the Court to Appeal **Kneller, Nyarangi JJA** and **Chesoni Ag JA** stated: -

“Special damages must not only be claimed but must also be strictly proved as they are not the direct natural or probable consequences of the act complained of and may not be inferred from the act. The degree of certainty and particulars of proof required depends on the circumstances and nature of the act themselves.”

21. The damages at the Godown cannot be attributed to the Defendant when the Plaintiff has not sufficiently proved its case against the Defendant. Further, the presence of a new tenant complicated matters for the plaintiff as it did not see it fit to rope the said new tenant into these proceedings so as to confirm that the premises had been vandalized before they entered into the same. This was crucial in that the new tenant could then shed light about the state of the premises when they entered them. It was not the duty of the defendant to do so since the

burden of proof lay with the plaintiff to discharge.

22. As regards the fifth issue, it is noted that during the cross-examination PW.1, he stated that the Defendant was in rent arrears of five months amounting to US \$ 67,500 noting that the monthly rent was US \$ 13,500. DW.1 denied that the Defendant did not pay rent but failed to produce receipts as proof of payment.

23. On re-examination, PW.1 testified that the Plaintiff is suing for loss of rent for one month in the sum of Kshs.2, 500,000/-. At paragraph 6 of the Plaint, the Plaintiff pleaded for loss of rent of Kshs.2, 500, 000/- for the period that the premises had been closed down for repairs. Upon perusal of the valuation report, I note that there are no particular dates indicated to confirm the closure of the premises for re-installation purposes. In fact, PW.1 stated that the new tenant occupied the premises after the Defendant vacated without stating whether repairs were carried out on the premises. Again, this is a claim in the nature of special damage which must be specifically pleaded and proved with certainty.

24. I note that PW.2 did not explain while testifying how he arrived at Kshs.2, 500,000/- as loss of rent for one month. In fact, PW.2 stated that his scope of work was to assess the costs of repairs in anticipation of a new tenant. PW.2 only produced the report as P. exhibit 2.

Section 107(1) of the Evidence Act on the burden of proof provides as follows;

“Whoever desires any court to give judgment as to any legal right or liability dependent on the existence of facts which he asserts, must prove that those facts exist.”

Section 108 on incidence of burden of proof provides thus;

“The burden of proof in a suit or proceedings lies on that person who would fail if no evidence at all were given on either side.”

Section 109 on proof of a particular fact provides thus;

“The burden of proof as to any particular fact lies on the person who wishes the court to believe in its existence, unless it is provided by any law that the proof of that fact shall lie on any particular person”.

25. I note that PW.1’s claim is different from PW.2’s findings in that PW.1 is claiming for five months outstanding rent while PW.2’s findings was on loss of rent for one month. PW.1’s claim has not been pleaded. It is trite that parties are bound by their pleadings. In **Independent Electoral and Boundaries Commission & Ano. vs. Stephen Mutinda Mule & 3 Others (2014) eKLR** which cited with approval the decision of the Supreme Court of Nigeria in **Adetoun Oladeji (NIG) vs. Nigeria Breweries PLC SC 91/2002** where **Adereji, JSC** expressed himself thus on the importance and place of pleadings: -

“...it is now trite principle in law that parties are bound by their pleadings and that any evidence led by any of the parties which does not support the averments in the pleadings, or put in another way, which is at variance with the averments of the pleadings goes to no issue and must be disregarded...In fact, that parties are not allowed to depart from their pleadings is on the authorities basic as this enables parties to prepare their evidence on the issues as joined and avoid any surprises by which no opportunity is given to the other party to meet the new situation.”

The claim for Kshs.2, 500,000/- has not been proved with certainty even though pleaded in the Plaint hence the Plaintiff is not entitled to Kshs.2, 500,000/-.

26. As regards the last issue and in view of the forgoing observations, I find that the Plaintiff’s claim for Kshs. 14,017,550.25/- has not been sufficiently proved against the Defendant.

27. In the upshot, it is my finding that the plaintiff has not established its case against the defendant on balance of probabilities. The Plaintiff’s suit is ordered dismissed with costs.

It so ordered.

Dated and delivered at **Machakos** this 25th day of **February, 2021**.

D. K. Kemei

Judge