



REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA

AT NAIROBI

CIVIL SUIT NO. 841 OF 2003

OWINO OKEYO & CO. ADVOCATES.....PLAINTIFF

VERSUS

KENYA NATIONAL ASSURANCE (2001) LIMITED.....1ST DEFENDANT

CHAKA AGENCIES.....2ND DEFENDANT

JUDGEMENT

1. The plaintiff herein filed a suit by way of the plaint dated 13th August, 2003 and sought for judgment against the 1st and 2nd defendants jointly and severally in the following manner:

a) An order restraining the defendants from removing and carting away the plaintiff's goods or any goods belonging to the plaintiff.

b) Costs of the suit.

2. The plaintiff pleaded in its plaint that it was at all material times a tenant of the office premises on 7th floor of the property known as Town House situated on L.R. No. 209/2362 Kaunda Street in Nairobi ("the suit property") and that the reversion on determination of the tenancy was vested in the 1st defendant who was in liquidation at all material times.

3. The plaintiff pleaded in its plaint that on 17th July, 2003 the 2nd defendant acting on behalf of the 1st defendant wrongly entered the suit property and proclaimed part of the plaintiff's goods under the guise of distress for rent.

4. It was pleaded by the plaintiff that the alleged distress for rent was illegal since it did not have any outstanding arrears in rent and further, the 1st defendant did not show that it was the landlord of the suit property.

5. The 1st and 2nd defendants entered appearance upon service of summons and put in a joint statement of defence and counterclaim dated 14th January, 2004 and amended on 5th September, 2013 to deny the plaintiff's claim.

6. In their amended defence, the defendants pleaded that while there truly existed an agreement between the plaintiff and the 1st defendant and which agreement provided for *inter alia*, for the quiet enjoyment of the suit property, it was also a covenant that the plaintiff would pay rent in the manner agreed upon.

7. The defendants pleaded in their amended defence that in breach of the covenant, the plaintiff defaulted on rent payments and was in arrears of rent in the sum of Kshs.131,505/ and hence the proclamation of its goods was lawfully made.

8. In the amended counterclaim, the 1st defendant pleaded that it was at all material times the registered proprietor of the suit property.

9. The 1st defendant further pleaded in its amended counterclaim that as at 30th June, 2007 when it disposed of the suit property, the plaintiff was indebted to it in the sum of Kshs.2,175,432.93 in rent arrears and service charge.

10. Consequently, the 1st defendant (being the plaintiff in the amended counterclaim) sought for the sum of Kshs.2,175,432.93 together with costs of the suit and interest thereon against the plaintiff (being the defendant in the amended defence and counterclaim).

11. The plaintiff in the original claim rejoined with the reply to defence and defence to counterclaim dated 24th October, 2013 to deny the averments made in the statement of defence and the counterclaim, and sought for the dismissal of the amended counterclaim, to which the defendants rejoined with a reply to the defence to counterclaim.
12. When the parties attended court on 20th July, 2015 it is clear from the record that the plaintiff had not complied with Order 11 despite having been given various opportunities to do so in the past. For that reason, the court declared the plaintiff's suit as dismissed with costs.
13. There is nothing to show that the plaintiff made any attempts at having the suit reinstated.
14. The record shows that the plaintiff put in the notice of preliminary objection dated 18th January, 2016 to challenge the validity of the amended counterclaim by dint of Section 4 of the Limitation of Actions Act, Cap. 22 Laws of Kenya ("the Act").
15. The court directed that the issue raised in the preliminary objection be an issue for determination at the trial.
16. The matter proceeded on the amended counterclaim, with the defendants calling one (1) witness while the plaintiff did not call any evidence.
17. Tabitha Mumbi Mwaniki (DW1) adopted her signed witness statement as evidence and produced the defendants' list and bundle of documents as D. Exhibits 1 to 21.
18. In cross-examination, the witness testified that as at 31st July, 2003 the amount being claimed against the plaintiff was in the sum of Kshs.131,505/ and which amount was amended in the counterclaim to become the sum of Kshs.2,175,532.93 as at 30th June, 2007.
19. The witness further testified that the plaintiff and the 1st defendant enjoined a contractual relationship which ended in the year 2007 when the suit property was sold by the 1st defendant to a third party.
20. It is the evidence of the witness that the parties did not enter into a lease agreement but signed a letter of offer, and that prior to the 1st defendant going into liquidation, it was the owner of the suit property between the years 1992 and 2006.
21. In re-examination, DW1 stated *inter alia*, that the sum of Kshs.131,505/ was owing to the 1st defendant as at the time of filing the original statement of defence and counterclaim but that the said amount accrued as a result of the outstanding rent.
22. At the close of the hearing, this court called upon the parties to file and exchange written submissions on the amended counterclaim.
23. In their submissions, the defendants argue that upon obtaining interim injunctive orders, the plaintiff continued to enjoy occupation of the suit property while failing to pay rent and service charges, and that the injunctive orders continued to be extended until the year 2007 when the 1st defendant sold the suit property to a third party, by which time the arrears in rent had accumulated to the sum of Kshs.2,175,432/.
24. The defendants argue that the plaintiff did not call any evidence to challenge their counterclaim and hence the 1st defendant is entitled to the reliefs sought in the amended counterclaim, citing the case of **Susan Kanini Mwangangi & another v Patrick Mbithi Kavita [2019] eKLR** in which the court considered the argument that it is not enough for a party to deny the allegations made in a claim; but that such party ought to bring evidence to support its position.
25. On the preliminary objection, it is the submission of the defendants that the same is baseless for the reason that in the present instance, the rent became due every proceeding month from the date on which the plaintiff first defaulted in payment of rent, while continuing to utilize the suit property.
26. The defendants equally contend that a preliminary objection ought to be based purely on points of law and should be raised at the earliest opportunity possible.
27. In retort, the plaintiff submits that it does not owe the 1st defendant any monies in outstanding rent arrears as at 31st July, 2003.
28. In respect to the preliminary objection, the plaintiff contends that there was an agreement between the parties that the rent in respect to the suit property be paid quarterly and hence the rent in question accrued on 31st March, 2003 which is to say that the 1st defendant had a window period of up to 30th March, 2009 to claim any outstanding sums in rent arrears from the plaintiff but did not.
29. The plaintiff submits that the amended counterclaim was brought outside the statutory timelines and is therefore defective. Consequently, the plaintiff urged this court to dismiss the amended counterclaim.
30. I have considered the evidence tendered alongside the contending submissions and authorities relied upon. I note that whereas the amended defence and counterclaim was filed by the 1st and 2nd defendants jointly, it is apparent from the record and proceedings that the amended counterclaim was essentially brought by the 1st defendant.
31. Therefore, the following are the issues arising for determination:

i. Whether the 1st defendant's claim for rent and service charge made against the plaintiff from 1st February, 2004 is valid;

ii. Whether there was a breach of the agreement by the plaintiff; and

iii. Whether the 1st defendant is entitled to the reliefs sought.

32. The **first** issue was raised in the preliminary objection, with the plaintiff arguing that the claim for rent and service charge from 1st February, 2004 onwards is time barred by virtue of the provisions of Section 4 of the Limitation of Actions Act ("the Act") and hence this court has no jurisdiction to determine the claims arising from the aforementioned date.

33. In the case of **Mukisa Biscuit Company v West End Distributors Limited (1969) EA 696** cited in the parties' respective submissions, the court analyzed the definition of a preliminary objection as follows:

"A Preliminary Objection is in the nature of what used to be a demurrer. It raises a pure point of law which is argued on the assumption that all the facts pleaded by the other side are correct. It cannot be raised in any fact that has to be ascertained or if what is sought is the exercise of judicial discretion."

34. The above definition was advanced by the Supreme Court in the case of **Independent Electoral & Boundaries Commission v Jane Cheperenger & 2 others [2015] eKLR** thus:

"It is quite clear that a preliminary objection should be founded upon a settled and crisp point of law, to the intent that its application to undisputed facts, leads to but one conclusion: that the facts are incompatible with that point of law."

35. Going by the pleadings and material tendered, it is clear that the claim in question arose out of contract and more specifically, the subject of rent. Consequently, the relevant provisions would be Sections 4(1) and 8 of the Act. Section 4(1) stipulates that:

"The following actions may not be brought after the end of six years from the date on which the cause of action accrued—

(a) actions founded on contract

....."

36. Furthermore, Section 8 provides that:

"An action may not be brought, and distress may not be made, to recover arrears of rent, or damages in respect thereof, after the end of six years from the date on which the arrears became due."

37. In the present instance, it is apparent that the outstanding rent sums claimed by the 1st defendant against the plaintiff are alleged to have accrued over time.

38. Upon my perusal of the pleadings and evidence, I note that the amended counterclaim does not particularize the month from which the rent arrears began to accrue but only makes reference to the rent arrears owed as at 30th June, 2007.

39. Be that as it may, it is apparent that the original counterclaim was brought on or about the 14th day of January, 2004 and amended pursuant to leave of the court granted on 29th August, 2013, with the amended counterclaim being filed on 5th September, 2013.

40. In view of the foregoing and upon also considering the letter of offer tendered to show that the plaintiff and the 1st defendant enjoyed a contractual relationship beginning 2nd September, 1999, I find that the counterclaim was brought within the statutory timelines and in any event, leave of the court was granted for any amendments to be made.

41. Consequently, this court has jurisdiction to determine the amended counterclaim, and the preliminary objection dated 18th January, 2016 fails.

42. This brings me to the **second** issue for determination. Upon my examination of the material and evidence tendered, it is clear that vide the letter of offer dated 20th August, 1999 the 1st defendant and the plaintiff entered into a lease agreement in respect to the suit property for a period of six (6) years with effect from 2nd September, 1999 and whereby the plaintiff was required to pay rent quarterly in advance at varying rates indicated therein, in addition to paying service charge.

43. The 1st defendant also availed rent statement to show that the balance in rent arrears and service charge for the year 2005 stood at Kshs.1,593,821.75.

44. The 1st defendant further availed the rent statement for the year 2007 indicating that the plaintiff was in arrears of rent and service charge and further availed rent demand notes to indicate demands made for payment of rent owing.

45. The evidence shows that the 1st defendant eventually sold the suit property to a third party by way of the agreement for sale dated 20th March, 2007.

46. I note that the evidence tendered by the 1st defendant was not controverted by the plaintiff at the trial.

47. In the premises and in the absence of contrary evidence, I am satisfied that the plaintiff was in breach of the agreement by virtue of not consistently meeting its obligation to pay the rent and related sums agreed upon. I am therefore satisfied that the 1st defendant has proved the averments made in the amended counterclaim against the plaintiff.

48. I will now address my mind to the **third** and final issue touching on whether the 1st defendant is entitled to the reliefs sought in the amended counterclaim.

49. I already established that the 1st defendant is essentially seeking outstanding sums in rent arrears from the plaintiff in the sum of Kshs.2,175,532.93 as at 30th June, 2007.

50. Upon my examination of the totality of the evidence, I observed that the 1st defendant provided a breakdown of the outstanding arrears and service charge being claimed against the plaintiff. I note in particular that the rent statement on page 55 of the defence exhibits puts the outstanding rent arrears and service at the sum of Kshs.2,002,167.14 as at April/June 2007.

51. In the circumstances, I am of the view that the 1st defendant would be entitled to the sum of Kshs.2,002,167.14 as pleaded and proved.

52. In the end and having considered the evidence before this court, the submissions from the parties and the law applicable, I hereby enter judgment in favour of the 1st defendant and against the plaintiff on the amended counterclaim, in the sum of Kshs.2,002,167.14 together with costs of this suit and interest on the aforementioned sum at court rates from the date of judgment until payment in full. The 2nd defendant is also entitled to costs of the suit. The preliminary objection dated 18th January, 2016 stands dismissed with no order as to costs.

DATED, SIGNED AND DELIVERED ONLINE VIA MICROSOFT TEAMS AT NAIROBI THIS 29TH DAY OF OCTOBER, 2021.

.....

J. K. SERGON

JUDGE

In the presence of:

..... for the Plaintiff

..... for the 1st Defendant

.....for the 2nd Defendant