REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA AT NAIROBI

COMMERCIAL & TAX DIVISION

MILIMANI LAW COURTS

HCCC NO. 330 OF 2009

STEGMA ENTERPRISES LIMITED.....PLAINTIFF

VS.

VIKTAR MAINA NGUNJIRI.....DEFENDANT

JUDGMENT

1. The dispute herein revolves around an alleged illegal eviction in premises on L.R 209/869 and previously well known as Jack and Jill Building situate along Temple Road Nairobi (the suit Premises).

2. The property is owned by Viktar Maina Ngunjiri (Ngunjiri or the Defendant). It is the case of Stegma Enterprises Limited (Stegma) that it has been a tenant on the premises since 1998 until a temporary eviction from 21st March 2009 to 28th March 2009 and a more prolonged one since 4th April 2009 to date. In the period from 1998 to 2009 ownership of the premises changed from R. D Shah and D. Shah to R. L Shah and N. D Shah and eventually to Ngunjiri.

3. Stegma avers that both evictions were malicious, unlawful and illegal. It states that, after the first eviction, it regained possession on the strength of an order in Business Premises Rent Tribunal Complaint No. 363 of 2009 Nairobi (the BPRT Case) which was nevertheless defied by Ngunjiri on 4th April 2009. The particulars of malice and illegality are set out in the Amended Plaint dated 29th September 2011. They include that the eviction was not preceded with a notice and or valid notice; that it was done without it being offered an opportunity to remove or take an inventory of its property; failing to allow Stegma to arrange for alternative premises and rendering the property "uninhabitable" (the Plaintiff's own word) for purposes of its trade.

4. Stegma alleges loss and damage as a result of the eviction. These includes goodwill of Kshs.3,100,000/= allegedly paid to Kenya Patisserie Limited so as to acquire part of the premises. Loss of business at Kshs.30,000/= per day and loss of goodwill in its business which it boosts of building over 10 (ten) years of trading. In addition, in respect to both evictions, Stegma states that it suffered damages through loss of its property. In the first eviction it puts the loss at Kshs.3,847,280/= and Kshs.462,196/= on the second. So as to regain possession on 28th March 2009, Stegma avers that it carried out repairs and refurbishments at a cost of Kshs.412,196/=.

5. On what would be consequential losses, Stegma alleges that due to the setback in business caused by the evictions, its business suffered losses and which led to its inability to pay its loans to East African Building Soceity (now Eco Bank Limited) and Equity Bank Limited. That in exercise of its statutory power of sale, Eco Bank sold Nairobi/Block 111/964 belonging to the directors of Stegma. Stegma pleads that it still owes Kshs.2,791,947.23/= and Kshs.1,675,259.40/= to Eco Bank and Equity Bank respectively.

6. Stegma makes a claim of all the losses which are enumerated above.

7. Vide an Amended Defence filed on 17th October 2011, Ngunjiri virtually denied all the allegations made on the Plaint. However, there was a tacit acceptance that the Plaintiff was at all material times a tenant in the premises but with emphasis that it was not a protected tenant within the meaning and ambit of the Landlord and Tenant (Shops, Hotels and Catering Establishments) Act. Indeed, the tenancy (not protected) was expressly admitted by Ngunjiri when he testified.

8. The taking of evidence began before Hon. Kariuki J and it fell to me to complete the hearing. As will become apparent shortly only a portion of the testimony of the witness is necessary for the complete determination of this matter. Although the parties agreed to a set of 23 issues, those can be compressed to:-

(i) Did the Defendant unlawfully evict the Plaintiff on 21st March 2009?

(ii) Did the Defendant unlawfully evict the Plaintiff on 4th April 2009?

(iii) If the answer to (i) or (ii) above is in the affirmative, what loss did the Plaintiff suffer?

(iv) Has the Plaintiff proved that loss?

(v) What is the appropriate order as to costs?

9. As a starting point, it is common cause that as at 21st March 2009, Stegma was the Defendant's tenant in the suit premises. It is also uncontested that the tenancy was NOT reduced into writing. For that fact and that the business carried out in the premises by the tenant was catering business then the tenancy would be a controlled tenancy within the meaning of Section 2 of the Landlord and Tenant (Shops, Hotels and Catering Establishments) Act (the Act).

10. In a controlled tenancy under the Act, the tenant enjoys some protection and the termination of or alteration of the terms and conditions of such a tenancy cannot be effected without the giving of the notice required by the Act. In this regard Section 4 of the Act reads:-

(1) Notwithstanding the provisions of any other written law or anything contained in the terms and conditions of a controlled tenancy, no such tenancy shall terminate or be terminated, and no term or condition in, or right or service enjoyed by the tenant of, any such tenancy shall be altered, otherwise than in accordance with the following provisions of this Act.

(2) A landlord who wishes to terminate a controlled tenancy, or to alter, to the detriment of the tenant, any term or condition in, or right or service enjoyed by the tenant under, such a tenancy, shall give notice in that behalf to the tenant in the prescribed form.

(3) A tenant who wishes to obtain a reassessment of the rent of a controlled tenancy or the alteration of any term or condition in, or of any right or service enjoyed by him under, such a tenancy, shall give notice in that behalf to the landlord in the prescribed form.

(4) No tenancy notice shall take effect until such date, not being less than two months after the receipt thereof by the receiving party, as shall be specified therein:

Provided that—

(i) where notice is given of the termination of a controlled tenancy, the date of termination shall not be earlier than the earliest date on which, but for the provisions of this Act, the tenancy would have, or could have been, terminated;

(ii) where the terms and conditions of a controlled tenancy provide for a period of notice exceeding two months, that period shall be substituted for the said period of two months after the receipt of the tenancy notice;

(iii) the parties to the tenancy may agree in writing to any lesser period of notice.

(5) A tenancy notice shall not be effective for any of the purposes of this Act unless it specifies the grounds upon which the requesting party seeks the termination, alteration or reassessment concerned and requires the receiving party to notify the requesting party in writing, within one month after the date of receipt of the notice, whether or not he agrees to comply with the notice.

(6) A tenancy notice may be given to the receiving party by delivering it to him personally, or to an adult member of his family, or to any other servant residing within or employed in the premises concerned, or to his employer, or by sending it by prepaid registered post to his last known address, and any such notice shall be deemed to have been given on the date on which it was so delivered, or on the date of the postal receipt given by a person receiving the letter from the postal authorities, as the case may be.

11. In his witness statement of 4th February 2011, Ngunjiri, the landlord, reveals that he was well aware of the need to give notice to the tenant and states as follows:-

"In October 2008, the City Council of Nairobi, through the Public Health office served me with a Notice for Sanitation of Business Premises demanding that I carry out certain repairs and renovations on my property within (30) days from service of that notice.

In order to comply with the said notice, I issued all the tenants in the said property with Tenancy Termination Notices as required by Section 4 of the Landlord and Tenant (Shops, Hotels and Catering Establishments) Act. Upon issuance of the termination notices, the Plaintiffs together with other tenants disputed the notice and filed a reference in the Business Premises Rent Tribunal thus blocking the planned reconstructions".

12. A consequence of filing a reference to the Tribunal is to stay the effect of the notice. Section 6(1) of the Act provides as follows:-

"A receiving party who wishes to oppose a tenancy notice, and who has notified the requesting party under section 4(5) of this Act that he does not agree to comply with the tenancy notice, may, before the date upon which such notice is to take effect, refer the matter to a Tribunal, whereupon such notice shall be of no effect until, and subject to, the determination of the reference by the Tribunal:

Provided that a Tribunal may, for sufficient reason and on such conditions as it may think fit, permit such a reference notwithstanding that the receiving party has not complied with any of the requirements of this section".

Of March 2009

13. In spite of the subsistence of the reference and therefore a stay of the notice, it is the evidence of Ngunjiri that in March 2009, he erected a hoarding fence around the said property so as to comply with an order of the City Council of Nairobi to renovate and repair the building.

14. The evidence of Mr. Stephen Matheka (PW1) of the events of March 2009 is graphically different. Matheka who is a Director of the Plaintiff says that agents of the Defendant destroyed the Plaintiff's property. Matheka stated that the business was vandalized and his furniture was carried away onto a waiting vehicle while others were scattered. He stated that by the time he arrived at the premises, it was empty.

15. So which version is to be believed? Critical evidence in resolving this matter came from one Robert Kadogo Matamba(PW2). He gave evidence that he took photographs and videos of the events of 21st March 2009. Other than the Plaintiff other tenants were affected by the conduct of the Defendant's agents. One such tenant was a business under the name of Jack and Jill Supermarket. The video shows many people breaking down doors into premises and carrying away some items from the inside. The video and photos shows persons removing iron sheets from one roof of the premises. This vivid evidence is not consistent with the placing of a hoarding fence as stated by Ngunjiri and is more in line with Plaintiff's evidence. On this matter I believe the Plaintiff when he says that items and furniture in his premises were destroyed and that he was evicted. There are photographs that show items strewn all over.

Of 3rd April 2009

16. The evidence of Matheka is that following the intervention of the Business Premises Tribunal, the Plaintiff retook possession of the shop premises and carried out renovation work as the premises had been left in a state of disrepair after the eviction. The person who carried out the repairs is Dickson Mutua Ndeto (PW2) ,a mason, carpenter, plumber, welder and electrician trading as Tungiia Renovators and Interior Directors. He evidenced that he carried out the repairs upto 3rd April 2009.

17. That on that day he slept in the premises so as to test the plumbing and electrical works which he had fitted so that Mr. Matheka would commence work early on 4th April 2009. His further testimony was that at around 5.30 a.m a group of persons led by an agent of the landlord called Mr. Njoroge descended on that premises, destroyed a new gate (door?) he had installed and all repairs he had carried out. That the group which consisted around 100 people carried away goods, furniture and fittings belonging to the Plaintiff into a lorry.

18. The evidence of Matheka is that, in addition, the people removed the roof, ceiling and iron sheets to the premises.

19. On his part, Ngunjiri stated that:-

"On the 4th April 2009, the Plaintiff vacated the premises pursuant to the notice of termination of tenancy and the order issued on 3rd April 2009".

Ngunjiri stated that although he was out of the country on 4th April 2009, he was aware that the Plaintiff, on his own volition, removed goods from the premises on 3rd April 2009. That thereafter he contracted persons to put up the hoarding again on 4th April 2009 so as to carry out repairs to his premises.It was his further evidence while putting up the hoarding, a commotion erupted and the building was demolished by the members of public.

20. In support of his evidence that the Plaintiff had moved out by 3rd April 2009, Ngunjiri produced a copy of a Ruling in Business Premises Rent Tribunal Case No. 359 of 2009; Jack and Jill Supermarket Limited & 7 others –vs- Victor Maina Ngunjiri(D exhibit 2). In her Ruling, the Chairperson of the Tribunal states that she visited the premises so as to establish whether or not the tenants were still in occupation of the premise. She made the following observation:-

"My investigations have revealed that most of the tenants have indeed vacated or been evicted….The High Court in the case of Rehabatulla properties made it clear that where a tenant has been evicted, the tribunal does not have jurisdiction to put back a tenant, section12(1)(e) too does not envisage the tribunal putting back an evicted tenant….

For the other cases no 397,358,363,361,360/09. I have no jurisdiction. Orders issued on 24.3.2009 are vacated against all the said tenants"

Case No 363 is the reference that had been filed by the Plaintiff.

21. Who again is to be believed in the face of the competing evidence?

22. Other than Ngunjiri himself, no other person gave evidence on his behalf and as he was out of the country on 4th March 2009, his evidence on the events of that day would be a hearsay account. This is then taken against the evidence of PW2 who claims that he was inside the Plaintiff's premises when the invasion took place and the evidence of PW1 who, when called by PW2, found the premises empty and the roof removed.

23. This evidence finds strong corroboration from the evidence of PW3 who took a video (Exhibit 3B) of the events. This Court has carefully

looked at the video and seen some people forcefully make entry into a premises known as Stem Fish and Chips. The Court saw the iron door to the premises removed and taken away. I saw people remove a glass fridge from the premises. Some people were on the roof of the premises removing iron sheets.

24. Ngunjiri in cross-examination and on being shown the video states as follows:-

> "I can see Stem Chips and Chicken. That was for the Plaintiff. I can see people in his premise. I see them removing the door. I see them also removing some other items".

25. Given the above evidence, the Court believes the account of the Plaintiff that there was a forceful eviction on 4th April 2009. The cogent evidence of the witnesses which is supported by video evidence leads this Court to a different conclusion from that reached by the Tribunal. I find and hold that the Plaintiff was still a tenant on 4th April 2009 when it was forcefully evicted.

Loss suffered?

26. In respect to the first eviction, the Plaintiff seeks a sum of Kshs.3,847,280/= on account of damages to equipment, fixtures and fittings, and food. Regarding this loss Matheka prepared a list of items he alleged had been damaged (P. Exhibit Pages 158-160). This is a claim for special damages that needed to be specifically pleaded then proved. While Matheka told Court that all documents that would have helped the Plaintiff establish the claim were taken away during the eviction, I would expect that the Plaintiff would have done more to prove the claim. Perhaps the Plaintiff needed to call evidence of the persons who worked in the cafe to corroborate that what is said to have been damaged were in the premises at the time of the eviction. Without such additional evidence, the Court is unable to hold that the damages under this held were specifically proved. This also applies to the damages of property that happened on 4th April 2009.

27. However as regards the repairs and refurbishments carried out after the first eviction, PW2 who did the work corroborated the evidence of PW1. He produced the quotation (details of charges – P. Exhibit Pages 161 -162) for the work carried out and in respect to receipts he stated:-

> "The receipts for the materials bought were in Matheka's office and were taken away in the morning of 4th April 2009. I witnessed this. I slept in the premises overnight".

28. While receipts would ordinarily be the better evidence, the circumstances here are that it is the Defendant's agents who took them away. This handicapped the ability of the Plaintiff to produce the best evidence that would have otherwise been available. The Court accepts the evidence of the quotation and confirmation of the fundi that he was accordingly paid.

29. Let me turn to the claim for goodwill. The Plaintiff seeks goodwill of Kshs.3,100,000/= allegedly paid to Kenya Patisserie Limited on 23rd September 1998 to acquire the business. It also claims another Kshs.2,500,000/= for further goodwill said to be gained overtime due to thriving trade. The Plaintiff produced a sale agreement of 23rd September 1998 (P. Exhibit Pages 79 to 82).

30. The Defendants Counsel proposes that this Court accepts the definition of goodwill adopted by Emukule and Kasango JJ in Ramadhan Mohammed Ali v Hashim Salim Ghanim [2015] eKLR

> "the business advantage, whatever it may be, which a person gets by continuing to carry on and being entitled to represent to the outside world that he is carrying on a business which has been carried for some time previous …"

31. The Plaintiff faces two challenges in regard to the claim of Kshs.3,100,000/= First, the agreement does not specify what portion of Kshs3,100,000/= was for the goodwill. Second, by the time of eviction the Plaintiff had been in the business for at least 11 years and over this period enjoyed the "goodwill" by making profit and there can be no reason to order for it to be paid.

32. As to the claim of Kshs.2,500,000/= being the further goodwill, the same runs into a headwind .In Hon. Attorney General & another –vs- African Commuter Services Ltd [2014] Eklr, in rejecting a party's claim for goodwill, the Court of Appeal observed:-

> "Secondly, since the respondent never went back to the business it was doing before the cancellation, it was not possible to ascertain how much goodwill it would have retained or lost had it reopened its business. We are not satisfied that loss on goodwill had been proved to the required standards. We therefore disallow that claim."

33. As the Plaintiff has not returned back to the business after the second eviction, the Plaintiff would not possibly ascertain the supposed "further" goodwill. As goodwill is a claim in special damages, the inability of the Plaintiff to specifically prove it must lead to its failure.

34. Matheka's testimony was that the Plaintiff through its Directors and Shareholders had charged their property Nairobi/Block III/964 and obtained a loan to finance the Plaintiff's Business. That arising from the eviction, the business could not service the debt as a result of which the property was sold. The Plaintiff makes a claim of Kshs.2,791,947.23/= in this respect.

35. So as to prove the claim, the Plaintiff produce the shareholders accounts at EABS for the period 2000 to 2005 (P. Exhibit Page 145-156), statements as at 31st December 2009 (P. Exhibit Page 166) and statements from 11th January 2006 and 4th February 2010 (P. Exhibit Pages 167 and 168). There was further evidence that on 22nd September 2009 (P. Exhibit 164) Eco Bank instructed their lawyers Majanja Luseno & Co. to issue a statutory notice to Mr. and Mrs Matheka because of default.

36. What this Court must decide is whether this evidence is sufficient to prove the claim. The assertion by the Plaintiff was that although the facility was to its Directors and Shareholders it was to finance the Plaintiffs Business. But the documentary evidence is not consistent with that assertion. The letter of offer dated 24th September 1995 (P. Exhibit Page 17 (a) and (b) and notice of 24th November 1995 (P. Exhibit Page 17 a) show that the purpose of the loan was for purchase of a house (111/964 Hse No. 387 Koma Rock Section 9B). As to allegation that default was because of the sudden close of business, there was need for evidence that default coincided with the eviction. Evidence needed to be led as to what was the month repayment sum and that the Plaintiff had faithfully kept up with the repayments and only failed at the point of eviction.

37. While the eviction suddenly caused an income shock to the Plaintiff, the Plaintiff needed to provide succinct proof that the default in repayment of the EABS loan and the Equity facility was a consequence of the eviction.

38. The deficiency in proof also characterises the Equity facility. The Plaintiff had averred that its Directors and Shareholders had also charged their property being Matungula/Kyaume/2289 to Equity Bank to obtain a loan to finance the Plaintiffs business and that income from the business repaid the loan. But that as a result of the Defendant's action and the closure of the business, the Plaintiff was unable to repay the loan which stood at Kshs.1,675,259.40/= as at 23rd October 2009 and the charged property faced a sale on the default.

39. To be fair to the Plaintiffs, the statutory notice of 23rd October 2009 (P. Exhibit Page 171 to 172) from Equity Bank Limited to Mr. Matheka indicates that indeed the facility was to Stegma Enterprises Limited (the Plaintiff). What however was not shown to this Court was the repayment schedule that the Plaintiff was to meet and that default happened at the time of or after the eviction. That nexus was important for proving the claim.

40. Next is the claim of loss of business put at Kshs.30,000/= per day. Mr. Cosmos Malombe (PW4) is an accountant by profession. He and a Mr. Justus Matheka prepared a report of income for Stegma Limited for the years ended 31st December 2005, 2006, 2007 and 2008 (P. Exhibit Pages 214 to 383). He told Court that the Plaintiff provided to them Bank Statements and Directors listing of assets. He conceded that the report was based on incomplete records but explained that this was because the primary documents were destroyed at the eviction. This supported the evidence of Mr. Matheka who told Court that the records of the Plaintiff including Tax Returns filed with Kenya Revenue Authority were vandalized at the eviction.

41. The accounts show profits as follows:-

Year

2008 2,074,999.00

2007 1,380,019.00

2006 1,030,342.00

2005 1,064,329.00

The average profit is put at Kshs.1,389,172/= (see P. Exhibit Page 219). The profit from the Plaintiff's own account is a far cry from the sum of Kshs.30,000/= daily profit claimed by the Plaintiff. The Court will go by the documentary evidence produced by the expert.

42. While the Defendant's Counsel made heavy weather regarding the non-production of tax returns, I do not think that the Plaintiff should be begrudged for not producing them because, as Matheka testified, they were destroyed or vandalized in the messy eviction.

43. What has vexed the Court is the period of loss of income which it should award. The Plaintiff has proposed loss of profit from 21st March 2009 "till settlement of the claim". In considering the appropriate period to award, it has to be remembered that the Plaintiff was a tenant in the premises and there is no evidence that it would remain in the premises *ad infinitum*. If the Defendant had sought to terminate the tenancy by following lawful procedure, then the Plaintiff would not have been entitled to any claim. On the other hand, the Plaintiff had been a tenant for 11 years and the least it deserved was an indecent and inhuman eviction. This sways the Court to hold that the Plaintiff deserves loss of income for a period that would be more than the convention, which would ordinarily be the period of lawful notice.

44. Have mulled over the issue, I reach a decision to award loss of profit for two years based on the last year of profit being Kshs.2,074,999/=.

45. As I conclude, I will observe that the manner in which the Defendant carried out the evictions was despicable and indeed cruel not in the least because it was done on two occasions. This may have attracted exemplary damages but which however were not pleaded by the Plaintiff and this Court cannot therefore award. On this, the Plaintiff in Nrb HCCC No. 317 of 2014 Jack and Jill Supermarkets –vs- Viktar Maina Ngunjiri who suffered the same fate as the Plaintiff did a better job at pleadings. Jack and Jill were awarded Kshs.20,000,000/= in exemplary damages! But I can only observe!

46. In the end I enter judgment for the Plaintiff against the Defendant as follows:-

46.1 (a) Costs of repairs Kshs. 411,176/=

(b) Loss of income for 2 years Kshs.4,149,998

Kshs.4,561,174/=

46.2 Interest on the sums on 46.1 at Court rates from the date of filing suit until payment in full.

46.3 The Defendant shall also pay costs of this suit to the Plaintiff.

Dated, Signed and Delivered in Court at Eldoret this 28TH Day of April 2020

F. TUIYOTT

JUDGE

ORDER

In view of the declaration of measures restricting Court operations due to the COVID-19 pandemic and in light of the directions issued by his Lordship, the Chief Justice on 17th April 2020, this Judgment has been delivered to the parties through virtual platform.

F. TUIYOTT

JUDGE

PRESENT: