



REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA AT NAIROBI

(CORAM: R MWONGO, J)

MILIMANI LAW COURTS

CIVIL SUIT NO. 291 OF 2008

MENGESHA TEFERA MARIAM.....PLAINTIFF

VERSUS

NEW AL NOOR EXHIBITIONS LIMITED.....DEFENDANT

JUDGMENT

Background

1. The facts of this case are fairly uncomplicated. Sometime in 1996, the late Mr Sheriff Awo, former Managing Director of the defendant company, constructed a business stall enterprise on L.R. No 209/70/1628, along Accra Road in Nairobi. Mr Sheriff invited the plaintiff to take some space in the exhibition stalls and allocated his friend a space. The plaintiff accepted the offer and took up five stalls for use as a photographic laboratory. He paid a deposit of Kshs 440,000/= and took up stalls A15, A16, A17, A30 and A31.

2. Apparently, their arrangements were condensed into a License agreement in 2002 for a renewable term of five years. The first agreement expired on or about 31st December, 2006. By letter dated 1st June 2006 the defendant requested the plaintiff to confirm his intention to renew the agreement for the premises, failing which the defendant would reconstruct the same upon expiry of the term.

3. The parties entered into new agreement for further five year term which, according to the amended plaint, was effective from 1st January 2007, and expiring on 1st January 2012. The defendant terminated the agreement by letter dated 27 June 2008, on the grounds that the plaintiff allegedly wrongfully sublet part of the premises. On his part, the plaintiff asserts that the agreement had express and special terms permitting the plaintiff to sublet part or the whole of the premises to sub-tenants.

4. The exact terms of the new agreement are in dispute. The first written agreement was not produced in court. The second agreement was produced, but it is not signed by the plaintiff. Nevertheless, the plaintiff had paid for the legal service of writing and formalizing the agreement. He relies on the oral agreements he had entered into with Mr Sheriff.

5. The plaintiff claims that as a consequence of the breach of the agreement, he has been exposed to loss of earnings, money spent on renovation and licence renewal fees. He specified the losses as follows:

- a) Licence renewal fee Kshs 810,000/=
- b) Loss of income from subtenants (monthly) Kshs 114,000/=
- c) Renovations Kshs 320,000/=

He plaintiff seeks compensation by way of refund for the licence renewal fee and renovations; and further seeks three years' loss of income in the amount of Kshs 4,674,000/=

6. The defendant's case is simply that the plaintiff entered into an agreement for the premises, but upon sub-letting the same the defendant terminated the agreement. The defendant asserts that: the plaintiff originally signed a Licence agreement in 2002, which had terms including a prohibition on sub-letting; that those terms were incorporated into the renewed agreement and were effective; that the renewed Agreement was evidenced by a form signed by the plaintiff.

7. The defendant seeks termination of the agreement pursuant to the express terms of the license due to the breach thereof, and dismissal of the suit.

8. At the hearing, the plaintiff gave evidence and one Isha Awo Sheriff, a director of the defendant, testified on behalf of the respondent. Both witnesses statements were adopted as evidence in chief and they were cross examined thereon. Each party also annexed documentary exhibits in support of their cases.

9. The plaintiff's testimony is summarized as follows: that he signed a form to renew his agreement for five years from 1st January, 2007 with the defendant by letter dated 1st June 2006; that he did not sign a formal licence agreement and relied on the oral agreement he had with the defendants; that he paid 140,000/= to obtain the lice agreement which was not effected; that the licence agreement exhibited and relied on by the defendant was for a different tenants namely, David Mbui and Anthony Muchai; that the defendants confirmed by letter of 15th March 2007 that he had paid Kshs 810,000/= licence fee; that his oral agreement with the defendant allowed him to sublet the premises based on the friendly relationship he had with Mr Sherriff whose wife's sister was married to the plaintiff's brother; that the subletting arose because his photo lab business was not using all the space he had leased; that he was never served with a notice for termination; that the eviction was on 2nd July 2008 and that he was never refunded any monies he had paid for the premises that at the time of termination of the agreement, he was physically assaulted and removed from the premises and submitted a police abstract in that regard.

10. The defendant's testimony was essentially that: the company had a signed licence agreement with the plaintiff; that the agreement had no right to sublet; that the defendant was entitled to terminate the agreement and recover the premises; that the plaintiff was issued with a notice of termination dated 27th June, 2008 on the grounds that the plaintiff had been sub-letting part of the premises; that the that the plaintiff had paid renewal fees of 810,000/= for 5 years and one month; that the defendant did not issue notice of termination;

11. The issues for determination are:

- a) What were the terms of the licence agreement and whether the defendant breached them; and if so
- b) What compensation, if any, is payable to the plaintiff?

Analysis and Determination

Terms of agreement and breach:

12. There is no doubt that the plaintiff first entered into a tenancy or licence arrangement in 2002 under an oral agreement. He occupied Stalls A15, A16, A17, A30 and A31. This is not disputed, and that original agreement is not in issue. It however, explains how the plaintiff came into possession of the premises.

13. There is also evidence contained in a letter by the defendant dated 1st June, 2006 that the original agreement was up for renewal in 2007 for a further five years and one month. There was to be paid a Kshs 60,000/= commitment fee and a balance of Licence fee payable by 31st January, 2007. The renewal letter was signed by both parties. The monthly rent was to be 62,500/= for each stall, later reduced to 53,840/= per month per stall.

14. It is not disputed that the plaintiff paid a total of Kshs 810,000/- as a Licence Fee as shown in the acknowledgment letter written by the defendant on 15th March, 2007. The defendant authorized the preparation of the agreement by copy of the letter to their advocates VV Mule & Co advocates.

15. The parties agreed by letter dated 5th July, 2007 that a pathway would be created through stalls A17 and part of stall A30 which were occupied by the plaintiff. The plaintiff would thus cede Stall A17 and be compensated with Kshs 250,000/=-, and in a addition would be allocated a new stall in lieu of the loss of part of Stall A30. No further evidence was given as to whether these conditions were fulfilled.

16. The said letter, signed by both of the plaintiff and defendant stated, inter alia:

“We at New Al Noor Exhibitions have submitted our plan to construct a pathway in Wing A. This pathway would pass through stall A 17 and part of A30 which is currently leased by Mr Mengesha Tefera.

To compensate Mr Mengesha Tefera we have agreed to pay Kenya sh 250,000 (two hundred and fifty thousand shillings only) for stall A 17. Furthermore we have come to an agreement with Mr Mingus at the Faroe to look at him in new stall in view of the loss of part of stall A 30. This new stall is currently unavailable and will be constructed in due course there will be no additional financial compensation for part of stall A 30 taken up by the new pathway.

This agreement further stipulates that in constructing a new pathway through stalls A 17 and part of stall A 30, we at New Al Noor Exhibitions, we also create a glass partition to allow customers if you are stalls A15 and A16.

This agreement gives New Al Noor Exhibitions full ownership of stalls A 17 and the part of a 30 that will be taken up by the new pathway. Mr Mengesha Tefera thus has no basis for any future compensation in relation to the above.

Mr Mengesha Tefera will only be liable to pay rent on stalls where he retains a lease agreement”

17. From the tenor and content of the said letter, it is clear that the lease/licence agreement between the parties was amended by those terms in the letter. The letter made absolutely no reference to any written licence agreement or to any provisions of the alleged written lease/licence. As such, I am persuaded that it is unlikely there was a single written document containing the terms of the agreement between the parties. As such it is reasonable to conclude that the terms of the parties' agreement are contained in various letters and the original oral agreement pursuant to which the plaintiff was given occupation of the premises.

18. The defendant argued, and the plaintiff denied, that there was a signed licence agreement similar in terms to that agreement which they exhibited belonging to David Mbui and Anthony Muchai. During the hearing, and at the instance of the defendant, the Court granted the defendant formal leave to file the signed agreement within thirty days. The record, however, shows that after expiry of the said period the defence counsel stated:

“The application we were to file we did not because the client did not get the lease.... We will rely on our submissions on record”

19. Further, although the plaintiff also paid some money for preparation of the licence agreement, there is no evidence that the same was ever completed or signed by the parties. I therefore find and hold that the terms of agreement are contained only in such undisputed oral or written communications as were referred to or availed by parties.

20. From the evidence availed to the court, there is therefore no proof of the existence or non-existence of a sub-letting clause. It is common ground though that the term of the renewed premises agreement was five years from 1st January, 2007 to 1st January, 2012.

21. It is also not disputed that the plaintiff did sublet parts of Stalls Nos 16, 17, 30 and 31 as shown in his notice to the subtenants dated 4th June 2008, terminating their temporary occupation thereof. The letter of termination signed by the plaintiff was copied to the manager of the defendant, and was produced by the defendant. It was upon becoming aware of this notice to sub-tenants that the defendant terminated the plaintiff's agreement, and directed the sub-tenants to forthwith and in future to pay all rent to the defendant.

22. Where a tenant pays a monthly rent, and in the absence of an agreement on termination, it is trite law that the tenancy is a monthly tenancy, terminable by one months' notice, unless otherwise protected. In the present case, the defendant gave notice of termination on 28th June 2008 and evicted the plaintiff on 1st July, 2008, when a new tenancy agreement was signed by David Mahia and Anthony Muchai. In my view, such termination and eviction did not avail the plaintiff adequate notice.

Compensation

23. The plaintiff has claimed compensation under the different heads shown below. He relied on the cases of **Azim Sameja t/a Business 2000 v Lakhamshi Virpal Shah & 5 Others [2016]eKLR** where the court found that the plaintiff had been illegally evicted and awarded substantial compensation which was proved and damages for unlawful eviction. He also relied on **Republic v Business Premises Rent Tribunal & Another Exparte Davies Motor Corporation Limited [2013]eKLR** which I did not find relevant to the present case.

Licence Renewal fee

24. The plaintiff claims he paid a Licence Renewal fee of Kshs 810,000/= and seeks refund of the same. He produced a letter from the defendant dated confirming as follows:

“ We confirm that the above-mentioned person has cleared his payments in respect of the above-mentioned stalls.

That he has paid Kshs 810,000/= Kenya shillings eight hundred and ten thousand being the agreed Licese fee and he is now entitled to occupy the said stalls

By copy of this letter the advocates are now authorised to prepare the licence the licensee mentioned above.”

25. The plaintiff's evidence was that the Licence fee was to cover the whole period of five years, which is denied by the defendant. Whatever the figure was paid for, it entitled the plaintiff Access to the premises and was paid in addition to the monthly rent. I also note that in the subsequent Licence agreement of David Mbui and Anthony Muchai an amount of Kshs 1,800,000/= denoted as "Licence fee" is payable under Clause 2(b) and is indicated to be non-refundable. I believe it is a fee of similar nature to the Licence fee paid by the plaintiff. In the plaintiff's case, it was that amount that granted him access to the premises.

26. In my view, the amount is refundable as it did not achieve the full purpose intended, and the amount is proved by the defendant's letter.

Loss of income from subtenants

27. The claimed amount for loss of income was Kshs 4,764,060/= for three years' losses. He submitted a table showing the monthly income of Kshs 187,500/= which he allegedly received from each of his ten tenants that had stall "Tables". His calculation showed that after a deduction of the monthly rent and administration and license fee he paid he had a net income of Kshs 132,335/= per month, which he claims.

28. The defendant disputed the amounts and urged the court not to take them into account as they were unproved figures. They cited the case of **Firozali Noor Mohamed v Elias Kapombe Toka & 3 Others [1981] KLR 325**. There the court held that the claimant must prove the damages claimed; that it was not enough to write down figures of particulars of claim and throw them at the head of the court saying: "This

is what I have lost; I ask you to give me these for damages”

29. I agree with the defendant. The plaintiff has merely made a narration of income and expenses. He did not avail invoices or records of receipts for either income or expenses. He did not even demonstrate that there were ten tenants obliged to make payments to him. His were bare allegations that can curry no favour with the court. The claim under this head is unproved and fails.

Renovations

30. The plaintiff claimed Kshs 320,000/= as compensation for repairs he carried out at the stalls. In proof of the renovations, he attached receipts as exhibits P 13 and P14. I have carefully perused the receipts. The receipt of 30 March 2007, for Kshs 200,000/= merely indicates that it is for “renovation of stalls”. It does not itemise the renovations made nor indicate whether the renovations would generally referred to as landlord’s obligations or tenants obligations. On that basis that receipt is discounted. To that extent, the claim fails.

31. As for the receipt dated 12 July 2007 itemises electrical materials plus cuts, two tables, paints and shop decorating materials and labour. It is not clear no evidence was given to clarify what plus cuts and two tables were for, and so these items are discounted. I find that the other items namely, electrical materials, shop redecorating and labour adding up to 43,000/= plus 29,000/= are payable, and awarded the same in the amount of Kshs 74,000/=.

Costs

32. The documentation on file produced by the plaintiff shows that the defendant wrote a letter on 25th October 2012 to the plaintiff offering to settle the suit by making as follows:

“...Our client has instructed us that the parties have agreed to settle out of court for Kshs 1,000,000/= in full and final settlement, each party to bear its own costs.

Please confirm this is the position to enable us deal further”

The plaintiff lawyers responded to the letter on 26th October, 2012, indicating that they would revert. There is no indication that there was a response to the letter.

33. The said letter, whilst being an acknowledgement by the defendant that it was willing to pay the plaintiff, also indicates that it was an open offer on the table that included a settlement of costs, which offer was not taken up by the plaintiff. Clearly, if it had been so taken up, no further costs would have been incurred in prosecuting and defending the case. The letter was not marked generally “without prejudice” and so can be used in evidence herein and in the determination hereof, but the defendant did not make any such argument.

34. I appreciate that the offer was not in the exact vein of a *calderbank* offer, which are offers that are specifically made “without prejudice save as to costs” (See **Calderbank v Calderbank [1975] 3 All ER 333**, where the English Court of Appeal held that where a winning party in litigation refuses an earlier settlement offer made by the losing party, the losing party may produce the settlement offer as evidence towards the appropriate level of costs payable. Thus, if the winning party’s award of damages is less than the earlier settlement offer, then the losing party may have to pay less costs to the winning party than normal, because the legal proceedings had been unnecessarily prolonged

35. I consider that if the plaintiff had accepted the defendant’s offer, the costs from the date of the offer for settlement cannot be attributable to the actions of the defendant. I was minded to order that each party shall carry its own costs from the date of the offer. However, since the plaintiff has been awarded more that was offered, he shall be entitled to all the costs.

Disposition

36. Given all the foregoing, I enter judgment for the plaintiff in the following terms:

a) Licence agreement fees:	Kshs. 810,000.00
b) Loss of income from sub-tenants	Kshs -Nil-
c) Renovations	Kshs. 74,000.00
d) General damages:	
- for eviction without giving adequate notice; and for assault	Kshs 150,000.00
Total award	Kshs 1,034,000.00

37. Interest shall accrue on items a) and c) at court rates from the date of filing suit.

38. The plaintiff shall also have the costs of the suit.

Orders accordingly.

Dated and Delivered at Nairobi this 29th Day of January, 2019

RICHARD MWONGO

JUDGE

Delivered in the presence of:

1. Namia holding brief for Musimbi for the Plaintiff
2. Kounah for the Defendant

Court Clerk: Mr. Adika