



REPUBLIC OF KENYA
IN THE HIGH COURT OF KENYA
AT NAIROBI
COMMERCIAL AND TAX DIVISION
CIVIL SUIT NO. 820 OF 2010

KENYA KNITTING & WEAVING MILLS LIMITED.....PLAINTIFF

VERSUS

TRANCEWOOD PRODUCTS LIMITED.....DEFENDANT

JUDGEMENT

1. The plaintiff, **KENYA KNITTING & WEAVING MILLS LIMITED**, sued the sum of Kshs. 6,874,496/- as compensation arising out of an alleged breach of a tenancy agreement.
2. According to the plaintiff, it had leased to the defendant, **TRANCEWOOD LIMITED**, the premises **L.T. No. 37/691**, which is located off-Mombasa Road, in Nairobi.
3. The plaintiff stated that the parties had executed an Agreement to Lease dated 30th May 2007, which stipulated that the defendant would occupy the suit premises for a period of 5 years and 3 months, from 1st July 2007.
4. It was the plaintiff's further case that the rent which was agreed upon was Kshs. 230,000/- plus **VAT** per month, and that the said rent would escalate by 20% after every 2.5 years.
5. The defendant is said to have taken up the tenancy, and to have paid the rent until December 2007, when the defendant issued a three (3) months Notice of its intention to vacate the premises.
6. In response to the Notice, the plaintiff informed the defendant that there was no provision for termination of the tenancy.
7. Notwithstanding the plaintiff's response, the defendant vacated the premises.
8. But the plaintiff points out that it was not until 23rd March 2009 that the defendant returned the keys of the premises.
9. When the plaintiff inspected the premises after the defendant had vacated, it found that the said premises were in a state of disrepair. Therefore, the plaintiff said that it was obliged to carry out extensive renovations and repairs, over a period of two-and-a-half months.
10. The plaintiff later rented out the premises for Kshs. 170,000/- per month, from 1st July 2009. In the circumstances, the plaintiff claimed for the rents for the period between January and June 2009, at the rate of Kshs. 230,000/- per month.
11. That claim was later revised downwards, from Kshs. 1,600,800/- for the 6 months, to Kshs. 1,067,200/- for the 4 months between March and June 2009.
12. A further claim by the plaintiff was for the sum of Kshs. 417,600/- which was described as being the rent loss suffered by the plaintiff between July and December 2009.
13. The plaintiff also claimed a sum of Kshs. 3,498,000/- on account of "*loss of rent for the next 33 months*", at the rate of Kshs. 106,000/- per month.

14. In relation to the costs for the dilapidated premises which it had to repair, the plaintiff claimed Kshs. 1,447,050/-.
15. In answer to the plaintiff's claims, the defendant insisted that the parties did not execute any Agreement for Lease.
16. According to the defendant, the document dated 30th May 2007 (*which the plaintiff cited as an Agreement for Lease*), was nothing more than an offer to lease the suit property.
17. As it had never executed any Lease Agreement, the defendant stated that it became a Protected Tenant.
18. By virtue of its status of a protected tenant, the defendant asserted that it was entitled to vacate the suit property after giving to the landlord, a Notice of one month.
19. As the defendant issued a three (3) months notice, which the plaintiff acknowledged receiving, the defendant believes that the relationship between the two parties was terminated lawfully.
20. In relation to the state in which the premises was, at the time the defendant surrendered it to the plaintiff, it was the defendant's case that it restored the premises to its original state and condition before handing it over to the plaintiff.
21. On the issue of the rents that were payable, the defendant insisted that it had paid all the rents. The defendant categorically denied any insinuation that it had under-paid the rents for July, August, September and October 2002.
22. At the trial, each of the parties called one witness.
23. It is common ground that from 2002 the defendant had leased the suit premises. The lease for that period was for 5 years and 3 months, running from 1st April 2002.
24. By a letter dated 16th May 2006, the plaintiff's advocates requested the defendant to execute a Lease which would take effect after the expiry of the initial tenancy.
25. In answer to that request, the defendant's advocates wrote back on 5th July 2006, informing the plaintiff of its intention to vacate the suit premises. However, the defendant did not immediately vacate the premises. Instead, the parties continued exchanging correspondence in relation to both the proposed renewal of the tenancy as well as the money which the plaintiff claimed on account of Insurance Premiums, Site Value Tax and Ground Rents.
26. By a letter dated 30th May 2007 the plaintiff offered to give to the defendant "*a fresh lease of 5 years and 3 months.....*"
27. The terms upon which the fresh lease was being offered were detailed in that letter, and the defendant was requested to sign the letter as its confirmation and acceptance of the terms.
28. The plaintiff made it clear to the defendant that after the defendant had accepted the terms of the fresh lease;

“.....a formal lease may be prepared, with normal conditions for signature by both parties.”
29. There is no doubt that the plaintiff prepared the formal lease, which it sent to the defendant.
30. As the plaintiff's witness, **KAMAL BHUSAN JOSHI**, said, the tenants did not sign the lease, although it was submitted to them.
31. But it was not just the defendant who failed to sign the lease, the plaintiff also did not sign it.
32. Nonetheless, the plaintiff submitted that the initial tenancy which runs from 2002 to June 2007 was extended by a further term of 5 years and 3 months.
33. I find no factual or legal basis for the plaintiff's contention concerning the alleged extension of the tenancy relationship for 5 years and 3 months.
34. By virtue of the fact that the defendant continued occupying the suit premises after the original tenancy relationship expired, they are deemed to have carried over.
35. However, as the parties did not execute the proposed renewal or extension of the original lease, or even the "*fresh lease*", as the plaintiff termed it, the terms of that document cannot be binding on the defendant.
36. If anything, I find that the defendant had made a counter-offer to the plaintiff, in relation to the need to incorporate a provision for the termination of the proposed lease, which was to run from July 2007.
37. The plaintiff rejected the defendant's said counter-offer. Therefore, there was no meeting of the minds between the parties regarding

what should happen from July 2007.

38. However, the defendant continued being in occupation of the suit premises. Such occupation was not premised on the draft lease which none of the parties had signed.

39. It therefore follows that the tenancy relationship between the parties was not reduced in writing.

40. That which had been put in writing was not acceptable to the two parties and therefore did not, and could not form the basis upon which their relationship was governed.

41. Accordingly, I find that the tenancy relationship between the parties was “controlled”, in accordance with the definition of a controlled tenancy, as spelt out under Section 2 of the Landlord & Tenants (*Shops, Hotels and Catering Establishments*).

42. In the event, the tenancy relationship was terminable by Notice, through a One Month Notice.

43. The duration of the appropriate notice is discernable from how regularly rents are paid. If rents are payable monthly, the tenancy is a monthly one.

44. This case is thus comparable to that of **ROGAN-KAMPER Vs LORD GROSVENOR (No.2) [1976-8-] 1 KLR 558**, where at page 567, Mustafa J.A. said;

“Here the tenant had entered into possession of the premises with the permission of the landlord. There was consensus and a tenancy was created by payment and receipt of rent.

.....

The tenancy created by the payment and receipt of rent was a monthly one terminable on fifteen day’ notice in terms of section 106 (of the Transfer of Property Act).”

45. On his part Wambuzi P. had the following to say, at page 572;

“I agree with the reasons given by Mustafa J.A. that as no lease was executed in accordance with the contract of 29th September 1969, no lease for five years and one month was created and no stipulations as to termination could be implied. The rights of the parties are governed by the relationship which was created between them by possession of the suit premises and payment and acceptance of rent, which is a monthly tenancy.”

46. Later still, Platt J.A. expressed the following view, at page 567;

“The actual tenancy created by possession and payment of rent is an unwritten tenancy, and is therefore controlled, because the definition of tenancy includes ‘tenancy agreements’ and tenancies created by ‘operation of law.’ ”

47. I have quoted extensively from that authority because it not only is binding upon this court, but more so because it correctly spells out the legal position.

48. As the authority was cited by the plaintiff, I believe that he accepts the findings of the learned Judge of Appeal.

49. It follows that the claim for rent for the 33 months, which the plaintiff deemed to be the remainder of the lease period, was not sustainable.

50. Meanwhile, the plaintiff did not provide evidence to prove;

a) that there were months when the tenant had paid lesser amounts than the monthly rental sums; or

b) that the defendant left the premises in a sorry state of repair; or

c) that the plaintiff, whether directly or through the new tenant (Stantech Motors) carried out extensive repairs to the premises.

51. PW1 testified that he did not have any documents to prove that the plaintiff carried out the repairs.

52. In view of the confirmation by the plaintiff, that Stantech Motors took over the premises on 1st April 2009, I find that the claim for rents for the period between April and July 2009 cannot be sustained against the defendant. I so find because the plaintiff had already let out the premises to another tenant. In those circumstances, it would be wrong for the plaintiff to demand payment of rent from the tenant who had already vacated.

53. Although the new tenant was paying rent at the rate of Kshs. 160,000/- per month, I find no legal justification for saddling the defendant with the difference between that amount and the amount which the defendant had been paying as rent.
54. The defendant had no duty to ensure that the plaintiff got another tenant who would continue paying rent at the same rate as the defendant had been paying.
55. And as the defendant vacated after issuing a valid Notice to the plaintiff, I find that the defendant's action of vacating the suit premises was lawful. Therefore, the court cannot penalize the defendant when it had not been shown that the defendant had acted unlawfully when it handed possession of the suit premises back to the plaintiff.
56. On the question of Ground Rent, I note that in the letter dated 3rd April 2002, the plaintiff had indicated that the defendant was liable to pay the same at the rate of Kshs. 11,591/-.
57. By its letter dated 5th July 2006, the plaintiff demanded payment for Ground Rent for the period between 2002 and 2006.
58. The defendant did not show that it paid any of the sums due on account of Ground Rent.
59. However, it was the defendant's submission that the claims were time-barred.
60. This suit was filed on 1st December 2010. As the claim for the payment of Ground Rent was founded upon the contract between the parties, it ought to have been brought within six (6) years from the date when the cause of action accrued.
61. I take Judicial Notice of the fact that Ground Rents are payable once every year, in arrears. In other words, payment is not due at the beginning of the year; it is due at the end of the year.
62. By my calculations, therefore, the Ground Rents for 2002 and 2003 were payable more than six (6) years before suit was filed. I find that the plaintiff lost the legal right to claim those sums, pursuant to the provisions of the Limitation of Actions Act.
63. However, the Ground Rents for 2004, 2005 and 2006 are payable by the defendant.
64. Using the figures cited by the plaintiff, in its letter dated 5th July 2006, I find that the defendant is liable to pay Ground Rents amounting to Kshs. 34,683/-.
65. PW1 confirmed that the contract between the parties did not mention Insurance. Therefore, I find that there is no legal basis for the claim for Insurance Premiums.
66. The letter dated 3rd April 2002 expressly stated that the defendant would pay the Site Value Tax of Kshs. 16,900/-.
67. Therefore, the defendant should have been paying the same.
68. To the extent that the plaintiff's claim in that respect dates back to the years 2002 and 2003, the same is time-barred.
69. However, the defendant is liable to pay the Site Value Tax for the years 2004, 2005 and 2006. By my calculations, that adds up to Kshs. 50,700/-.
70. In the final analysis, I grant judgement in favour of the plaintiff for Kshs. 85,383/-. The said sum will attract interest at Court rates from 1st December 2010 when suit was filed.
71. As regards the costs of the suit, I find that Justice demands that each party should meet its own costs. I so find because the bulk of the plaintiff's claims were dismissed. Therefore, the defendant's defence was, in principle, very robust. It would be unfair to order the defendant to pay costs of the suit which it has largely succeeded in defending.

DATED, SIGNED and DELIVERED at NAIROBI this 21st day of March 2018.

FRED A. OCHIENG

JUDGE

Judgement read in open court in the presence of

Nyawara for the Plaintiff

Miss Wambugu for Mungai for the Defendant.