



REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA AT MILIMANI (NAIROBI)

COMMERCIAL AND ADMIRALTY DIVISION

CIVIL CASE NO.99 OF 2007

MEGA EAST AFRICA LIMITED.....PLAINTIFF

VERSUS

ISAIAH KIPLAGAT.....1ST DEFENDANT

JOAN CATHERINE KIPLAGAT.....2ND DEFENDANT

MOSES KIPLAGAT.....3RD DEFENDANT

ROYAL HEALTH FITNESS LTD.....4TH DEFENDANT

J U D G E M E N T

The Plaintiff herein filed this suit against the Defendant for alleged breach of contract for business sale and asset hire. The Plaintiff prays, a declaration that the Plaintiff is discharged from the lease following mutual agreement reached on 23rd November 2006 and refund of good will, rent all interest, interest and charges paid to cooperative bank plus electricity charges all totaling Kshs. 4,076 with interest from 10th November 2006.

The Plaintiff availed 5 witnesses and the Defendant three witnesses. Evidence of 4 of the Plaintiffs' witnesses was taken by Justice Ogolla. The matter was reallocated to me after transfer of Justice Ogolla. Parties opted to proceed from where the case had reached before Justice Ogolla. The Court was informed that the 1st Defendant Isaiah Kiplangat had passed on and that the 1st, 2nd and 3rd Defendants were all directors of the 4th Defendant and that the 2nd Defendant and 3rd Defendant were wife and son to the 1st Defendant respectively.

PW1 who is the Managing Director Manpower Services (K) Ltd. He testified that the 4th Defendant appointed Manpower Services to advertise a hotel in Karen for sale of business. He said that the 1st Defendant showed him the hotel then he went ahead to advertise in the newspaper as shown on page 81 of the Plaintiff's bundle of documents. He said that the advert had all the required particulars as given to him by the 1st Defendant and the Plaintiff was among the many people who were interested; PW1 said that he received a formal offer of 2,750,000 from the Plaintiff for assets, good will and 20 year lease at monthly rent of 200,000 as reflected in page 82 of the Plaintiff's documents. He said that he accepted the offer after discussing with the Plaintiff as shown in a letter exhibited on page 83 of the Plaintiff's documents and added that the acceptance letter had terms of acceptance. pw1 said that he later learnt that there was disagreement between the Plaintiff and Defendants on the issue of space for development.

In cross examination pw1 said that the space available for lease was disclosed in the sketch map. He said that he personally visited the premises and he was shown the limits of the premises to be leased. He said the domestic house and surrounding gardens were not to be left out and that the space behind the servants' quarters was to be let out subject to discussion of terms. He said the space was not covered in the letter of offer. He said the Plaintiff visited the premises and was shown around by the Defendants' manager one Mbugua and on the second time pw1 accompanied the Plaintiff. Pw1 later learnt from the Plaintiff that there was dispute on delineation on the ground.

In re-examination pw1 said parties were to agree on which kind of buildings were to be put in the leased premises.

Pw2 Adrian Ojiambo who was the Plaintiff's lawyer testified that he did due diligence and contacted the seller's lawyer. He said that he went to the site with the seller's lawyer and one Mr. Mbugua showed them the premises. He said he learnt that the owner of the hotel stay in the premises and that apart from the owner's house the rest were to be let out. He said that the house was demarcated by a fence of Cyprus trees and next to the house were: a vegetable garden, chicken house which were not to be leased out. He said they executed a business sale agreement and agreed that Plaintiff was to pay kshs 2,750,000 for good will, existing customers, licence for operating the hotel, stock in trade and assets of the business. He testified that he prepared notice of transfer of business which was not done due to disagreement. He said that the Plaintiff took over the business on 10th November 2006 and the next day, he received information that there was disagreement between Betty Kiplangat and others. He scheduled a meeting with the Defendant's lawyer for 23rd November 2006. The meeting was attended by Plaintiff, Kiplangat, Betty Kiplangat and 2 other directors and it turned out that parties had not agreed on lease of gardens and some assets had been carried out of the hotel on claim that they were not part of the contract; 2nd Defendant was also accused of using the bar without paying or used a credit and money would go to 1st Defendant bank account. He said that it also turned out that assets in the salon were owned by a 3rd party who was taking them away and that many new issues which had not been disclosed emerged.

Pw2 testified that the parties attempted an out of Court settlement and agreed that Mr. mundi of manpower was mandated to preside over a reconciliatory meeting but they failed to agree as the Defendants were asking for 900,000 for stock in trade and Plaintiff was offering 100,000. He said that at the close of the meeting it became clear that the Defendants did not intend to continue with the agreement and on 30th November 2006 the Plaintiff wrote to the 4th Defendant asking for refund of 1.2 million paid in account of rent and 2.7million paid in account of good will. He said that his client moved out after the Defendant failed to attend hand over meeting.

In cross examination pw2 denied that the gardens were not part of the leased premises. He said he visited the premises before the lease was concluded together with the Defendants lawyer Ivy Nyarango. He said the house which was not part of the lease was curved out by Cyprus trees and that the garden formed part of the grounds that were to be let out. He confirmed that discord arose a day after take over on 10th November 2006 due to interference by Defendant and that the Plaintiff left the premises on 2nd December 2006. Pw2 said that after disagreement they had a meeting on 23rd of November and agreed on a number of issues as per the letter dated 24th November 2006. He said parties were to agree on new terms and Plaintiff take over the premises on 1st December 2006 but the Defendants chose to stay away prompting the Plaintiff to vacate the premises on 2nd December 2006.

Pw3 the director of the Plaintiff testified that after handover he agreed with Plaintiff to suspend use of credit card as it was in his name but the 2nd Defendant used her card and together with her daughter caused commotion when the card was rejected. He said he was stopped from constructing extra rooms. He said that the Defendants frustrated the contract.

Pw4 a director of the Plaintiff testified that he visited the premises after the advertisement and he was shown the premises and items mentioned in the advertisement by the manager Mr. Mbugua. He said there large space suitable for gardens and extra space for construction of extra rooms. He said the two places

were separated by Mauritius thorns fence. He confirmed that they paid good will of 2,750,000 and monthly rent of 200,000 and also paid outstanding electricity bill of Kshs 111,868.30. He said that they were in the premises from 10th November 2006 to 1st December 2006 and that they took over the employees of the existing business who helped them run the business. pw4 said that he borrowed Kshs 5,000,000 from cooperative bank to do the business. He however admitted that he has no evidence to show that he borrowed the money from the bank nor paid interest on the money. He stated that the Defendant demanded Kshs 943,967 from him and when he failed to pay they carried away many items which include towels, microwave and photocopying machine.

In cross examination pw4 said that the lease was for 15 years but they were in the premises for 21 days for lack of quiet possession.

Pw5 a certified public accountant confirmed that he took stock and valued items which were being leased by the 4th Defendant to the Plaintiff. He said the 1st Defendant requested Mr. Mbugua the manager to take him around. He took stock and prepared a report which is on page 6 to 8 of the Plaintiff's documents. He was later called to confirm whether the stock he took was what was handed over. He confirmed that was not the position.

Defence availed 3 witnesses. Dw1 who was the 4th Defendant's chief accountant confirmed that on instructions of the 1st Defendant, Mr. Mbugua in his company showed the Plaintiff the premises and that Plaintiff's auditors carried out audit before take over by the Plaintiff on 10th November 2006. He said that the business was run by family and that the 2nd Defendant's stock were to be excluded. He confirmed that the Plaintiff took over business on 10th November and that the employees were given termination letters. He said he never witnessed any misunderstanding as he rendered his resignation on 30th November 2006. He said he was asked to show the Plaintiff the business area which included kitchen, bar, gym and swimming pool and that he is not aware if the Plaintiff was shown any other places. In cross examination he said the 4th Defendant terminated his employment on 10th November 2006 and between 11th November and 30th November 2006 he worked for the Plaintiff but he was not given appointment letter. He said payment through card was stopped by 1st Defendant from 10th November 2006. He denied knowledge of what transpired between Plaintiff and Defendants on the day of handover. He said he witnessed Defendant exit and Plaintiff take over the premises. Dw2 who worked as a supervisor for the 4th Defendant confirmed that their employment was terminated on 10th November 2006 but he does not know how long the Plaintiff carried on business. He said Plaintiff carried on business and left without giving notice. He said that he continued working for Plaintiff after being given termination letter by the 4th Defendant. He said from 10th November to end of November he was paid by the cashier and continued working up to May 2007. He confirmed that he did not have appointment letter. He said for the period he did not know who his employer was. He said that the directors of the 4th Defendant took over the business in May 2007.

Dw3 the 2nd Defendant herein who is the wife of the deceased 1st Defendant and a co-director in the 4th Defendant testified that the contract was between Plaintiff and 4th Defendant and confirmed that Kshs 2,750,000 was paid as good will and value of stock in trade was to be paid later. She said that the lease was signed and assets of 4th Defendant handed over to the Plaintiff. She confirmed that inventory was before handover. She said the company was leasing parking, gym, swimming pool, rooms and grounds for parties. She said 4th Defendant operated on one and half (11/2) acres while the house was on one (1) acre and that they were fenced separately. She said that the garden referred to in clause 1 is where parties/weddings were held. She said consent was to be obtained from the lessor before putting up of cottages and that Plaintiff never wrote to them to ask for anything. She said after handover they put up notice to inform clients that business had changed hands. She confirmed that there was outstanding electricity bill of 111,868.30 which the Plaintiff was to pay and deduct from stock. She said extra space mentioned in paragraph 10 of the lease agreement refer to where rooms were built. She denied that it was to include everything apart from residential house. She said her house had a garden, poultry house and servants quarter; and that they were not included in the 4th Defendant's garden. She denied having

breached the contract by repossessing poultry house and servants quarters. She said it was a mistake for the 4th Defendant to give the Plaintiff 2 rooms of the servants' quarters for use by workers who left work late. She said the Plaintiff paid rent for 6 months. She said they issued a notice to reenter as the business had gone down. She denied making payments using credit card after handover nor threatening anyone. She said she only took utensils which had cracks and glasses which were his son's wedding gifts. She denied using employees for her own errands nor renegotiating for them. She said that the Plaintiff paid rent for 6 months and that they utilized the rent. She said that the Plaintiff run down the business occasioning loss of clients.

In cross examination the 2nd Defendant confirmed that they hired manpower services to advertise the business and that the facilities included large park for wedding receptions. She confirmed that the information given to manpower services did not indicate acreage though she was aware of the acreage at the time of giving out instructions. She said the title deed for the land housing the residential house and business is one. 2nd Defendant confirmed that there was dispute concerning acreage as early as two weeks and that at the time of dispute good will and rent had already been paid. She said the items she took were not listed in the stock but she did not give Plaintiff a list of her own items. She concluded that she did not refund Kshs 2,750,000 and rent.

In re-examination 2nd Defendant said clause 6 of the agreement provide for re-entry when rent is not paid for 2 months. She said 3 months' rent and 3 months deposit had been paid. She said good will is not supposed to be refunded and the 3 months' notice plus 3 months deposit was utilized.

I have considered evidence adduced. There is no dispute that the Plaintiff and 4th Defendant whose directors were 1st to 3rd Defendant all family members entered into an agreement for lease of premises and sale of business. It is not disputed that the Plaintiff moved into the premises on 10th November 2006. From evidence adduced there is no dispute that disagreement arose over space leased and that the Plaintiff vacated the premises on 2nd December 2006 20 days after moving. I wish to consider the following issues;

1. Whether there was misrepresentation on part of the Defendants
2. Whether the contract was frustrated by the Defendants
3. Whether the Plaintiff acted in breach of the contract
4. Whether Plaintiff is entitled to money paid to the 4th Defendant
5. Whether the 1st, 2nd and 3rd Defendants are personally liable

On the first issue, the 2nd Defendant confirmed that Manpower Services (K) Ltd were contracted to advertise lease of premises and sale of business & hire of assets; this led to execution of 2 contracts one between 1st Defendant and Plaintiff for lease of the premises and the second between the 4th Defendant and its 3 directors who are 1st to 3rd Defendant on one part and the Plaintiff on the other part. The managing director manpower services confirmed that he visited the premises before the advertisement and he was shown the limits of the premises to be leased. He confirmed that premises to be leased included the surrounding gardens and space. On perusal of copy of the advertisement note from the advertisement, facilities listed include large park suitable for wedding reception & children's playground. It is evidenced that after taking over the premises, the Plaintiff learnt that the gardens were not meant to be part of the contract. Counsel for the Defendant submitted that the advert was an invitation to treat. It further indicated preference would be to give all the listed facilities to a single client but vendor could consider giving the sports/gym complex to separate client. Invitation to treat is an expression of willingness to negotiate. From the advert what the vendor was willing to negotiate on is the sports/gym complex but not the space for wedding receptions. By the vendor turning around to want to negotiate on the ground amounts to misrepresentation. The Plaintiff was made to believe that the grounds were not

subject to further negotiations. This is confirmed by the lease dated 10th November 2006 in which the premises being leased is described to mean

“all that complex erected by the lessor on the property comprising a bar, restaurant, hair salon, gymnasium, health club, swimming pool, borehole and grounds except the lessor’s residential house...”

From the above it is evident that at the time of taking up the premises, Plaintiff believed the grounds were included as part of the space he was leasing and what was excluded was the residential house. I therefore find that the 1st Defendant misrepresented to the Plaintiff that the leased premises included the grounds.

I now wish to consider whether the sale of business and asset hire business was frustrated by the Defendants. I have found above that there was misrepresentation in so far as grounds for constructing cottages is concerned. The lease agreement is connected to the business sale and asset hire. The business could operate peacefully if the lease agreement was honored. Besides misrepresentation on lease agreement, it is evident that there was no disclosure on assets that were to be taken over by Plaintiff and those that belonged to 2nd Defendant. The Plaintiff also indicated that some assets in the salon belong to a 3rd party. This is confirmed by a letter dated 12th November 2006 by manager of 4th Defendant addressed to Ann Murangi allowing to continue with the Tenancy of the salon at monthly rent of 30,000. In the letter he hoped that the new management will welcome her on board. The sale of business agreement done 2 days before include salon as business being sold. Salon equipment are listed as among the assets being sold. Though the 2nd Defendant testified that the items she took were hers, some broken and others gifts for her son’s wedding that should have been disclosure before execution of the agreement. This amounts to clear frustration from the 1st Defendant and his family. I find that the Defendants frustrated the sale of business and hire of assets contract.

Thirdly, did the Plaintiff act in breach of the contract? It is not disputed that the Plaintiff paid the amount agreed being rent for 6 months and Kshs 2,750,000 being good will. Despite meeting the requirements the Plaintiff was unable to peacefully operate business due to frustration on part of the Defendants. It is not disputed that within 2 weeks of takeover there were disagreement concerning lease of premises and assets. This is confirmed by meeting held on 23/10/2006 to try to resolve the issues; after failure to resolve the dispute, the Plaintiff asked for refund as shown by letter dated 4th December, 2006. The Defendants Counsel has indicated that the Plaintiff failed to give 30 days’ notice to the Defendants to rectify default. It is however not denied that the default on part of Defendants was the subject of the meeting held on 23/10/2006. The meeting was followed by a letter for refund of money paid by the Plaintiff to Defendants. Evidence adduced shows that Plaintiff asked for refund of money paid by letter dated 4/12/2007. I construe that to be a sign intention to repudiate the contract. Prior to that the issues in dispute were discussed between parties yet Defendant alleges that they were not notified of default. No breach has been demonstrated on part of the Plaintiff

It follows therefore that Plaintiff is entitled to refund of good will paid 2,750,000. rent of Kshs 1.2million which was paid as admitted by the 2nd Defendant. Kshs. 300,000 being rent for the days the Plaintiff occupied the premises plus rent for 30 days from the date Plaintiff vacated the premises to be deducted from Kshs. 1,200,000/-. Rent refund is therefore Kshs. 900,000/-.

From the foregoing I find that Plaintiff is entitled to refund of Kshs 3,761,868.30(2,750,000+900,000+111,868.30).

I therefore enter judgment for the Plaintiff against the Defendants for Kshs 3,761,868.30 plus costs and interest.

Judgment dated, signed, and delivered at Nairobi this 29th day of September, 2017.

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RACHEL NGETICH

JUDGE

In the presence of:

..... :Court Assistant

..... :Counsel for the Plaintiff

..... :Counsel for the Defendant