



REPUBLIC OF KENYA
IN THE HIGH COURT OF KENYA AT NAIROBI
MILIMANI LAW COURTS
CIVIL DIVISION
HIGH COURT CIVIL CASE NO.1964 OF 2001

RAZA PROPERTIES LIMITED.....PLAINTIFF

VERSUS

FRANCIS M MUTUA T/A

MUTUA MBOYA & NZISSI ADVOCATES.....DEFENDANT

JUDGMENT

1. The Plaintiff was at all material times the owner of the premises known as LR No. 209/530 at Impala House, 6th Floor, Nairobi (Suit premises). The Defendant was the Plaintiff's tenant at the suit premises. The Plaintiff's claim is for the sum of Ksh.1,502,300/= which comprises of Ksh.1,306,000/= rent arrears, Kshs.107,300/= cost of repairs and re-decoration, Ksh.89,000/= one month's rent in *lieu* of notice, costs and interest.
2. The claim is denied as per the statement of defence (amended) filed herein. It is stated that the Defendant was the Plaintiff's tenant between, December, 1990 to 31st January, 2001. That the Defendant occupied part of the 6th floor at the suit premises and that rent was payable by all the tenants on that floor collectively. The Defendant denied any knowledge of the money claimed by the Plaintiff.
3. PW1 Ramzan Nanji testified on behalf of the Plaintiff. His evidence is that he is a director of the Plaintiff company. That the Defendant was the Plaintiff's tenant at the suit premises. That the Defendant first occupied half of the sixth floor but later applied in writing for the entire floor. That the Plaintiff gave the Defendant a letter of offer for the entire floor. That the parties entered into a lease agreement on 1st May, 1997 for six years at Ksh.62,000/= per month for two years, Ksh.74,000/= per month for the next two years and Ksh.89,000/- per month for the last two years. The deposit was Ksh.186,000/= less deposit already paid, leaving a balance of Ksh.96,000/=. That the Defendant then occupied the entire floor.
4. PW1 further testified that the Defendant kept issuing bouncing cheques. That the Defendant failed to pay the rent and eventually moved out of the premises without notice on Sunday 19th August, 2001, leaving behind rent arrears of Ksh,1,306,000/=. That the premises were left in a state of disrepair. The Plaintiff instructed their Advocates who wrote to the Defendant. That the Defendant then carried out some shoddy repairs which did not return the premises to it's original position. That the floor tiles and the lighting systems were damaged and the Defendant failed to remove the partitions which he had

erected on the premises. That the Defendant failed to respond to the Plaintiff's further communication and the Plaintiff went ahead to instruct a contractor to repair the premises. The repairs took one month and cost a total sum of Ksh.107,300/=. That the rent for the month of September 2001 when the premises was being repaired was Ksh.89,000/=. The Plaintiff Company's accountant, PW2 Iqbal Mohamed Hussein Walji prepared the Defendant's statement of account and the matter ended up in court.

5. The Defendant described himself as an advocate of the High Court of Kenya practicing with others in the firm name of Mutua Mboya & Nzissi Advocates. He adopted his witness statement as his evidence herein. His evidence is that in January, 1991 their firm of advocates moved into the suit premises. That their firm grew and they moved into bigger space in terms of the letter of offer by the Plaintiff. That there was no lease agreement signed by the parties but that the Defendant accepted the terms and conditions set out in the letter of offer. That there were challenges in executing the lease due to refusal by some of the tenants including three firms of advocates to move out of the 6th floor. That with the blessings of the landlord the Defendant accepted to be collecting rent from the subtenants who were now paying rent to him then he would forward the same to the landlord.

6. The Defendant further testified that everything worked well until February, 2000 when the landlord came up with a substantial figure of outstanding rent and levied distress on the Defendant. That some of the Defendant's and the subtenants' office goods were carried away by the auctioneers. The Defendant was not happy with the Landlord and wrote to inform it that he would no longer collect rent from the subtenants with effect from the month of May, 2000. That eventually the Defendant moved out due to constant harassment by the auctioneers. The Defendant stated that he had no rent outstanding by the time he moved out.

7. The Defendant further stated that the sum of Ksh.186,000/= deposit claimed and rent of Ksh.890,000/= for the months of December 2000 to September, 2001 covers the period when he had already moved out of the premises. That a further sum of Ksh.259,000/= claimed was payable by the firms of Mutisya & Co. Advocates and Kamuyu & Co Advocates and covers the period December, 2000 to September 2001 when they had already moved out. As to the claim of Ksh. 107,000/= for repairs and re-decoration, it is stated that the same were carried out on the space occupied by the aforesaid two firms of advocates. That the sum of Ksh.55,000/= paid to the Landlord by the auctioneers following the sale of the attached goods is not reflected in the statement of account. That the Ksh.40,000/= that the firm of Mutisya & Co Advocates had promised to pay to the Landlord is being claimed from the Defendant. The Defendant contended that he does not owe the Plaintiff any money and that he had no obligation to collect money from the subtenants.

8. At the close of the hearing the parties opted to file written submissions. I have considered the said submissions and the authorities cited.

9. It is not in dispute that there was a landlord and tenant relationship between the parties as from January, 1991. It is common ground that vide a letter dated 9th April, 1997 the Defendant requested for more space. The letter of offer which was signed by the Plaintiff and the Defendant on 30th April, 1997 is also not disputed. Although the defendant has asserted that there was no lease agreement that was executed by the parties, the Defendant has not disputed the terms and conditions set out in the said letter of offer which gives the area to be occupied as 1670 square feet for a term of six (6) years and reflects the rent payable as Ksh.62,000/= per month for the first two years; Ksh.74,000/= per month for the next two years and Ksh.89,000/=per month for the last two years.

10. The bone of contention is whether the Defendant occupied the entire space of the 1670 square foot six floor or whether there were other tenants occupying the said area and if so who was responsible for collecting rent from the said tenants. The evidence of PW1 and PW2 is that these other tenants were not known to them and that if they existed then they were the Defendant's subtenants. The Defendant's evidence on the other hand is that he initially accepted the responsibility of collecting rent from the subtenants but that from 30th May, 2000 he was no longer responsible for collecting rent from the subtenants and had vide letter dated 10th May, 2000 surrendered the area occupied by the subtenants to

the landlord.

11. The Defendant's evidence regarding the subtenants and the collection of rent from the subtenants is rather inconsistent. The Defendant in his evidence in chief stated that no rent was owing yet during cross examination he admitted having issued cheques that were dishonoured. At one point during cross examination the Defendant admitted that he was co-existing with the subtenants without problems up to the time the auctioneers levied distress on his property. The Defendant in the same breath then turned around and admitted financial constraints which made things get out of hand. The Defendant also admitted that prior to year 2000 he had not raised the issue of the subtenants. The terms of the offer clearly indicated that there was no subletting of the premises. Indeed the Defendant had nothing in writing to support his assertion that he surrendered half of the floor occupied by subtenants to the Landlord. I find and hold that the subtenants were the Defendant's responsibility.

12. Although the Defendant has admitted having been collecting rent from the subtenants prior to the date he stated he surrendered the area occupied by subtenants to the landlord, there are no details in his evidence on the rent collected and whether he remitted the same to the landlord. The Defendant when pressed for answers during cross-examination in respect of the rent paid stated that he could not remember the amount he paid to the landlord. He could not also remember the details of his own complaint to the Auctioneers licensing Board in respect of the distress for rent.

13. It is clear from the evidence of the Defendant that he did not make good the bounced cheques. Indeed in the Defendant's letters to the Plaintiff dated 28th January, 2000, 10th February, 2000 and the dishonoured cheques produced by the Plaintiff as exhibits attest to the irregular payment of rent and the existence of arrears. There is no evidence that the Defendant gave notice when he left the premises. The landlord is therefore entitled to the rent for the month of September, 2001.

14. The letters marked "without prejudice" including a letter dated 10th August, 2001 generated objections from the Defendant regarding their admissibility. I have considered the arguments made by the parties and the authorities cited. I am satisfied that the position of the law is that the said rule is not absolute and the court may look at the "without prejudice" materials for a variety of reasons as the justice of the case requires. As stated by the Court of appeal in the case of **Ibrahim Musa Mohamed & another v Guardian Bank Ltd [2014] eKLR** while quoting from the case of **Tomlin v Standard Telephones & Cables Ltd [1969] 3ALL ER 201**:

"what is the meaning of the words without prejudice, I think they mean without prejudice to the position of the writer of the letter's if the terms he proposes are not accepted. If the terms proposed in the letter are accepted a complete contract is established and the letter, although written without prejudice, operates to alter the old state of things and to establish a new one."

(See also **Yusra Restant Ltd v Kenya Conference of Catholic Bishops & another [2014] eKLR**; **Mumia & Sugar Co. Ltd & another v Beatrice Akinyi Omondi [2016] eKLR**)

15. In the instant case, the letters dated October 2000 and 3rd May, 2000 written by the Plaintiff indicate cheques received and state the outstanding rent. The letter by the Defendant dated 11th August, 2001 made proposals for payment. There was no acceptance of the contents or proposals in the said letters and the same are not admissible as evidence herein.

16. The Defendant in his evidence admitted having not redecorated the premises. He also admitted that the premises were not inspected when he left. Without any inspection the Defendant cannot be heard to say that he left the premises in the state that he rented the same in. In any event, the Defendant admitted that repairs were carried out to the premises occupied by the subtenants. This court has already held above that the subtenants were the Defendant's responsibility. The landlord's claim for the sum of Ksh.107,300/= paid to the contractor who carried out the repairs is supported by the receipts issued by the contractor. Although the production of the said receipts was objected to the receipts were made in the normal course of duty and the evidence that the maker of the documents has since passed away remains uncontroverted. This court overrules the objection to the production of the said receipts.

17. The Plaintiff's evidence (PW1) is that the claim of Ksh.186,000/= paid as rent deposit may not have been credited to the Defendant's account. I therefore give the Defendant credit for the said amount. The sum of Ksh.55,000/= claimed by the Defendant as the amount realized by the auctioneers from the sale of the distrained goods was denied by the Plaintiff. The Defendant had no document to show what was sold by the auctioneers and how much was paid to the Plaintiff. He who alleges must prove. I find no proof of the payment of the sum of Ksh.55,000/= to the Plaintiff.

18. In the upshot, I find the Plaintiff has proved it's case on a balance of probabilities save for the sum of Ksh.186,000/=. Consequently, I enter judgment for the Plaintiff against the Defendant for the sum of Ksh.1,316,300/=: costs and interest.

Dated, signed and delivered at Nairobi this 24th day of Nov., 2017

B. THURANIRA JADEN

JUDGE