



REPUBLIC OF KENYA.

IN THE HIGH COURT OF KENYA AT KAKAMEGA.

CIVIL CASE NO. 143 OF 2010.

OYULE NGATA T/A HANGO PUB :::::::::::::::::::::::::::::: PLAINTIFF.

VERSUS

LEONARD WAKHISI :::::::::::::::::::::::::::::: DEFENDANT.

J U D G M E N T.

1. By a plaint dated 28th September, 2010 the plaintiff claim:-

(a) Declaration that the defendant had started levying distress for rent was unlawful and injunction to restrain the defendant from interfering with plaintiff's peaceful occupation of suit premises;

(b) An audit be taken to determine how much rent had been paid by the plaintiff to the defendant and an order of set off be made;

(c) Any other or further relief that court will deem just;

(d) Costs.

2. The defendant filed defence and counter claim to the plaint. The defendant averred that the plaintiff was in arrears of Ksh. 156,000/= which had accrued and as at September, 2016, the plaintiff was in arrears of Ksh. 450,000/= thus defendant entitled to distress for rent.

3. The plaintiff testified in support of his case. His summary of the evidence is that they entered into a tenancy agreement with the plaintiff to operate business in defendant premises.

4. The same premises were not in good state thus part rent payable was to be applied in repairs and/development of the premises. The plaintiff effected the aforesaid repair/developments. The plaintiff installed electricity, water and civil work of general nature. The plaintiff was paying rent, as he undertook took the aforesaid works. The plaintiff produced bank statement showing payment of various cheques for rent.

5. The defendant was not issuing receipts for the rent paid. However, he would confirm payment via a phone call. The plaintiff thus seeks the prayer set out in the plaint to be granted.

6. The defendant in his part testified by stating that despite service of the counter claim the plaintiff never filed defence thus need for judgment to be entered for claimed amount.

7. The defendant stated that the lease entered on 18th November, 2002 expired on 18th November, 2007.

It was for Butso/Shikoti/1439. The rent payable was Ksh. 10,000/= per month. The plaintiff was to pay Ksh. 10,000/= less Ksh. 4,000/= for repair/improvement of the premises. The development was to be done subject to approval by defendant once the plaintiff had sought and procured a consent from the local authority.

8. It is the defendant's case that no prove of consent for the approval of development/repairs was ever produced nor prove of development or repairs. The payment of rent was not demonstrated with alleged cheques. Thus the defendant entitled to distress of rent. The parties agreed to file and exchange written submissions which they did.

9. Although the issue of jurisdiction was not canvassed by the parties, I note in the defence submissions that it is submitted that the matter ought to have been filed before Business Premises Tribunal to determine the issues of rent and pray court to hold that the suit was filed in the wrong forum. The case of the complainant is the issue of rent payment and the repairs/improvement to the suit premises.

10. The plaintiff is a protected tenant under Cap 301 as the lease was for 5 years and after expiry of the same he became a periodic tenant. This put squarely the dispute in the realm of the Business Premises Tribunal. On another breath, the dispute and relationship of the parties is pegged on occupation and user of land (premises) subject herein. This squarely takes the matter outside this court's jurisdiction by dint of **Article 162** Constitution of Kenya and the authority of **CHENGO** case by the C.A.

11. In the case of **MOTOR VEHICLE, Lilian**, the C.A held that jurisdiction is everything and without it the court cannot move any other step. It would be an exercise in futility for this court to continue to determine the dispute on merit while conscious that it will be a waste of the court resources in contravention of the overriding objectives entrenched in the provisions of **section 1A and 1B of CPA Cap 2010**.

12. The court thus makes the following orders:-

(1) The matter is stayed to await either:-

(i) The plaintiff to lodge dispute at Business Premises Tribunal; or

(ii) Await the posting of the ELC court to enable it to give directions on the dispute.

2. The parties at liberty to seek to place the file before ELC court in either Bungoma or Kisumu as we await the posting of ELC judge in Kakamega;

3. Liberty to apply to above extent granted.

SIGNED, DATED and DELIVERED this **13TH** day of **DECEMBER**, 2016.

C. KARIUKI.

JUDGE.

In the presence of:-

.....**Manyoni H/ for Mukavale****for the Plaintiff.**

.....**Osango for Ondieki** **for the Defendant.**

.....Anunda Court Assistant