



REPUBLIC OF KENYA
IN THE HIGH COURT OF KENYA AT NAIROBI
MILIMANI COURTS
COMMERCIAL & ADMIRALTY DIVISION
CIVIL CASE NO. 55 OF 2004

DUBAI BANK KENYA LIMITED.....PLAINTIFF

VERSUS

INSURANCE COMPANY OF EAST AFRICA LTD.....DEFENDANT

RULING

Assessment of damages on undertaking

[1] By a ruling dated 27th October, 2014, this Court held that the Defendant is entitled to damages for the period between 29th June 2007 and 19th October, 2007. The Court then directed parties to file written submissions on assessment of damages payable to the Defendant. Both parties filed submissions which I will consider in my assessment of quantum of damages.

[2] The Defendant submitted that the Defendant's loss consists in income it would have earned had it leased the premises for the current market value for the period between 29th June 2007 and 19th October 2007. They urged the Court to take judicial notice of the fact that property value continues to rise even today. At the time of filing suit, the Plaintiff was paying rent in the sum of Kshs 506,530/- exclusive of service charge. This rent had last been reviewed in 1998. This is the rent that the Plaintiff continued to pay over the 10 years that the matter was pending in Court (including during the period between 29th June 2007 and 19th October 2007). The current rent for the suit properties now stands at Kshs 1,697,376.71 per month (exclusive of car parking fees, service charge and VAT) as at February 2014. The Car Parking fees stood at Kshs 16,000 per month in 2004, the current parking fee stands at Kshs 312,000 per month, exclusive of VAT. Service charge payable by the Plaintiff for the premises has also been increasing over the same period of time. This increase in values, rents and rates on commercial properties was supported by the affidavits of Maina Mwangi and James Kiragu. The damages payable for the period 29th January 2004 up to 31st October 2013 (364 days) when the suit was dismissed are set out at paragraphs 11 to 13 of the affidavit of Maina Mwangi sworn on 27th February 2014 and filed herein on 28th February 2014. But an extract from the affidavit of Maina Mwangi classifies the damages payable for the period between 29th June 2007 and 19th October 2007 (112 days) under two items: 1) Loss in rent of Kshs. **1,495,896.15** which is arrived at as variance between the rent paid of Kshs. 1,870,264.60 and rent that could have been payable on the current rate at the time of Kshs. 3,366,160.75; and 2) Loss in service charge of Kshs. 95,894.75 which is the variance

between the actual service charge debited of Kshs. 507,755.10 and the prevailing charge payable of Kshs. 603,649.85. The Affidavit deposes that there was no loss in parking fees as the parking fees did not change in 2007. Therefore, according to the Defendant, it suffered a total of **Kshs 1,591,790.90, exclusive of VAT and this represents the damages they are entitled to. They claimed VAT at the rate of 16%** on the outstanding amount is payable and should be awarded together with costs.

[3] The Plaintiff also submitted on quantum of damages. They submitted that the Court in its ruling at page 18 stated that;

“I note that the Applicant committed two grave omissions; it did not attempt to inform the plaintiff of any increment in rent on the premises. And two; it did not apply to court for the variation of the earlier order of the Court to make rent payable to be the increased rent”.

And at page 19 of the said ruling, line 2 thereof, the court stated thus;

“...it has not been claimed or shown that the plaintiff did not pay the rent as ordered by the Court, a fact, in the circumstances of the case, which takes away the claim for loss of rent.

In view of these observations by the Court, the Plaintiff thinks that the Defendant's loss does not lie in the income it would have earned had it leased the premises for the current market value for the period between 29th June 2007 and 19th October 2007. This issue was even decided on and is res Judicata. As the Defendant did not move the court to have rents increased or even inform them of the increased rent, they cannot claim loss of rent. Justice Lesiit had left that window open for the Defendant. Quantum on damages cannot, therefore, be based on loss of rent. Further, the report by James Kiragu cannot be relied upon. See the ruling of the court at page 12 where it stated; *the report by James Kiragu cannot be relied upon even if the Defendant was entitled to the damages.* The Court also observed at page 13 of the said ruling, that; *affidavit of Maina Mwangi also provided no basis for the tabulation in respect of service charge from the plaintiff or provided proof of such demand and that the plaintiff declined to pay the increment.* Therefore, the Defendant cannot again rely on the reports for purposes of assessing damages. Those reports cannot form a basis for fair assessment of damages herein. The Defendant has not at all put any evidence before the court on the damages (fair) incurred between the period of 27th June 2007 and 19th October 2007 to enable the court arrive at a determination. The plaintiff is therefore not in a position to know damages incurred by the Defendant between the said time frames in order to respond substantively.

[4] However, in order to conclude this matter, the Plaintiff urged the court to assess fair damages looking at the number of times parties attended court between 29th June 2007 and 19th October 2007 and award costs as stipulated in the Advocates Remuneration Order.

Assessment by Court

[5] Assessment of damages is part of the process which is generally known as inquiry as to damages. Damages payable under an undertaking are in relation to loss which the Defendant suffered under an injunction that had been wrongly issued; an injunction is said to have been wrongly issued in law if the Plaintiff failed at the trial on a case he had pleaded and put forth during the granting of the injunction, or simply because the court took a wrong view of the matter on the evidence which was provided by the Plaintiff. There is ample judicial as well as literary works on this subject which I need not multiply here. In this case, the court found that the Defendant is entitled to damages for loss caused by the injunction which was wrongly issued. Although the Court found that the affidavit by Maina Mwangi fell short of pertinent matters, it is not correct for the plaintiff to draw an inference or assume that means that the Defendant did not suffer loss which was awardable. It has not been alleged by the Plaintiff that rent in commercial

properties including the suit property in such prime location in Nairobi will remain constant for ten years. The Plaintiff is only taking advantage of the omission by the Defendant to apply for revision of the rent. The omission cost the Defendant a huge remedy which would otherwise have been due to them had they applied for revision of rent. That argument was useful in the earlier application and full advantage was accorded to the Plaintiff. It is no longer profitable in assessment of damages based on loss suffered after the court found that the Defendant is entitled to damages and set upon inquiry as to the quantum of the loss suffered. The figures given by Maina Mwangi are indicative of the increase of rent on the suit premises. The Plaintiff arrogantly failed to guide the court on assessment of damages on the false hope that none or only minimal costs would be awardable given the observations by the Court on the affidavit by Maina Mwangi. They failed to address the point being raised by the Defendant that court should take judicial notice of increase of rents on such commercial properties in Nairobi. They deliberately avoided providing any indication on possible increases of rent and service charge during the material times. Inflation and increases on rent on commercial properties in Kenya is a matter of notoriety and cannot be ignored in assessment of damages of the loss of the type in question. I, therefore, reject the arguments by the Plaintiff herein; the plaintiff should know that they took every advantage to pay constant rent for over ten years while they held the Defendant in court on a case and on an injunction which was injurious and not merited at all. They should not push their luck too far. Courts of law should, under the Constitution act fairly and serve real justice. In the circumstances of this case, I am convinced the claim of Kshs 1,591,790.90, on loss of rent and service charge for the period between 29th June 2007 and 19th October 2007 (112 days) is reasonable. Accordingly, I award the Defendant damages in the sum of Kshs 1,591,790.90 plus VAT at the rate of 16%. The sum awarded will attract interest at court rate of 12% per annum from the date of assessment until payment in full. Costs on the assessment of damages are also awarded to the Defendant. It is so ordered.

Dated, signed and delivered in court at NAIROBI this 20th day of April 2015

F. GIKONYO

JUDGE