REPUBLIC OF KENYA

IN THE ENVIRONMENT AND LAND COURT AT MOMBASA

ELC CASE NO. 299 OF 2015

MARTIN GICHUKI

T/A IVORY MOUNT SENIOR SCHOOL.....PLAINTIFF

VERSUS

GLADINGA K LTD.....DEFENDANT

JUDGMENT

It is the plaintiff's case that at all material times to this suit the Plaintiff operates a Secondary School known as Ivory Mount Senior School with 86 Students and he entered into a Lease Agreement with the Defendant on 3rd June 2014 to operate the school on the Defendant's premises while the Defendant is the registered and or beneficial owner of all that piece of land being Plot I L.R No. 3113 situated in the County of Taita Taveta, at Mwatate. That previously the Defendant operated a school on the Suit Property known as Taita Academy. The Plaintiff avers that the said school is duly registered as a business name and also by the Ministry of Education and is fully recognized. The Plaintiff avers that he leased 4 class rooms, 1 staff room, 1 office, specific toilets for boys, girls and staff, 1 dormitory for boys, and 1 for girls, a laboratory, dining hall, kitchen and equipment, a library, desks, chairs, beds, and other amenities around the entire School compound required for the normal running of a school to facilitate in learning of students. That rent was agreed at Ksh. 50,000.00 on a monthly basis for a period of 5 years and the Plaintiff avers that he has been paying his rent and all amenities bills dutifully without fail. The Plaintiff avers that on or about the month of June, 2015, the Landlord, that is, the Defendant started interfering with the Plaintiff's quiet enjoyment of the leased premises and issued threats to terminate the lease without any lawful cause. That the Defendant has issued personal termination notices and others through its advocate and has started threatening the students and even tried to interrupt the learning process. That the Defendant/ Landlord has even gone ahead to interfere with the piped water supply which the Plaintiff pays for. The Plaintiff avers that he is aggrieved by the Defendant's actions and any pleas to the Defendant to stop the interference has gone unheeded to. The Plaintiff prays for the following orders/judgment against the Defendant:-

(a) A permanent Injunction against the Defendant, its servants and or agents and or assigns to stop the illegal interferences of the learning process for the full term of the Lease.

(b) An order that the Plaintiff is entitled to enjoy the full term of the lease un interrupted.

(c) A declaration that the Defendant pays the Plaintiff damages for wrongful termination of the lease.

(d) Costs of this suit.

The defendant avers that there is no valid lease or tenancy between the plaintiff and the defendant, and the plaintiff. That the defendant was not a party to the said impugned agreement, and consequently the suit is incompetent. The agreement dated 3rd June 2014 is not signed by the defendant land owner as required by the law of contract. That the persons who purportedly appended their wet stamp and signatures on the agreement for the defendant had no authority (ostensible or implied) to sign or attest the contract on behalf of the land owner. That the defendant company/land owner did not pass a resolution to let out part of its premises to the plaintiff. The agreement is not sealed with the defendant land owner's seal, and attested by its directors/officials as by law required. There is no authority, express or implied, of the land owner authorising the persons who signed the agreement to commit the company in the intended lease of part of its land. The plaintiff had no capacity to contract and let a premises for a private school which at the time was not registered under the Basic Education Act (BEA) (see section 50 2) b) of BEA).

By a notice issued on 21st April 2016, the plaintiff's tenancy on portion L.R. No. Chawiya/Wusi/Kaya/3113, Taita Taveta, Mwatate was determined on 31st July 2016, (now past), on account of non-payment of mesne profits, for the period between January and July, 2016; June and July, 2016; and, August and November, 2016. The defendant (original plaintiff) also owes Rent deposit of kshs 300,000/= which fell due on 1st January 2015 all totalling to kshs. 2,175,000/=.

By reason of the aforesaid breach of cardinal term(s) of the tenancy agreement relied upon by the plaintiff, it issued a notice as aforesaid

demanding the rent in arrears and Rent-Deposit, and terminating the defendants impugned tenancy with effect from 31st July 2016 (now past). Should the defendant suddenly abandon the premises while still in arrears, which arrears continue to accumulate at the rate of Kshs. 50,000/= per month from 1st November 2016, with an escalation clause of Kshs. 50,000/= every year. The plaintiff prays for an order dismissing the claim by plaint and for judgment for payment of mesne profits as stated above, and for vacant possession upon expiry of the notice on 31st July 2016 (now past), with costs of the counter-claim, and the dismissed suit. The defendant/plaintiff prays that the defendants suit by plaint is dismissed with costs to it, and judgment is entered with costs against the defendant on the counter-claim, for:

1. A declaration that the notice terminating the plaintiff's tenancy is valid; and has taken effect.

2. Immediate vacant possession.

3. Mesne profits from inception until the giving of vacant possession.

4. Kshs. 2,175,000/= being the outstanding amount of rent unpaid at the time of filing suit.

5. General damages.

6. Costs of this counterclaim, and the dismissed action by plaint, both on high scale.

This court has considered the evidence and the submissions therein the plaint was withdrawn and this court proceeded with the counterclaim. The defendant/plaintiff in the counter claim testified that she was the director of the defendant company. She stated that the plaintiff owes them Kshs. 2,175,00/= being rent arrears. That the defendant leased out the facility to the defendant at the cost of Kshs. 50,000/= per month for three months. That a review was to be done on the 15th of September 2014 with a view of increasing rent to Kshs. 100,000/= per month starting September 2014. That the plaintiff occupied the premises for a period of five years and thereafter left. That upon leaving he abandoned the claim in court.

The plaintiff testified that he entered into a lease agreement with the defendant on 3rd June 2014 to operate the School on the Defendant's premises while the Defendant is the registered and or beneficial owner of all that piece of land being Plot I L.R No. 3113 situated in the County of Taita Taveta, at Mwatate. That rent was agreed at Kshs. 50,000.00 on a monthly basis for a period of 5 years and the Plaintiff avers that he has been paying his rent and all amenities bills dutifully without fail. The parties did not have a meeting to review the rent. That the defendant later appointed an estate agent Athsall Investment to collect rent on their behalf. They later sent a demand letter dated 27th March 2018 PEx5. The letter stated that the rent arrears were Kshs 300,000/= for the period upto February 2018 and March rent of Kshs. 50,000/=. The defendant entered into another tenancy agreement with the agent on the 1st May 2018 with the rent of kshs.50,000/= PEx4. PEx 5 was also a notice to vacate upon the expiry of the lease on the 9th April 2018. The defendant confirms appointing Asthsall Investment as an agent to collect rent on their behalf but states that it was from the date they were appointed and they were not aware of the previous amounts.

In the instant case l find that the lease agreement was not registered, it therefore was reduced to a periodic tenancy. In the case of **Mega Garment Limited -v- Mistry Jadva Parbat & Co.(EPZ) Limited (2016)eKLR**, the Court of Appeal discussed the status of an unregistered lease and stated as follows:

> ***"The time-honoured decision of this court in Bachelors Bakery Ltd –v- Westlands Securities Ltd (1982) KLR 366 which has been followed in a long line of subsequent decisions elucidates the status of an unregistered lease. It reiterates and confirms the firmly settled law, first that a lease for immovable property for a term exceeding one year can only be made by a registered instrument; that a document merely creating a right to obtain another document, like the one in this dispute, does not require to be registered to be enforceable; that such an agreement is valid inter partes even in the absence of registration, but gives no protection against the rights of third parties. That exposition of the law hold true in this case…"***

Be that as it may, it is not disputed that the plaintiff and the defendant entered into a lease agreement on 3rd June 2014 to operate the School on the Defendant's premises while the Defendant is the registered and or beneficial owner of all that piece of land being Plot I L.R No. 3113 situated in the County of Taita Taveta, at Mwatate. That rent was agreed at Kshs. 50,000.00 on a monthly. The agreement stated that a review will be done on the 15th September with a view of increasing the rent to Kshs. 100,000/= per month. No evidence was adduced to show that this review was done. The use of the word will in the lease agreement would suggest that the review was optional indeed by a demand letter dated 27th March 2018 PEx5 from the defendant's agent the rent demanded was Kshs. 50,000/= per month. And that was not all as the plaintiff entered into another tenancy agreement with the agent on the 1st May 2018 with the rent of kshs.50,000/= PEx4. I find that the defendants have failed to establish that the rent was increased to Kshs 100,000/= per month. The defendant testified that their agent only collected rent for the period he was appointed and did not know about the arrears. This is not reflected in the demand notice. Indeed it came out in evidence that the defendant was present when the plaintiff vacated the premises and confirms that she allowed him to do so. It is noted that the plaintiff vacated unconditionally and even withdrew the case against the defendant. I find that the defendant is now estopped from demanding rent arrears when she is the one who gave notice to vacate and even allowed the plaintiff to do so. In this regard I am guided by the case of **Serah Njeri Mbobi vs John Kimani Njoroge Civil Appeal No. 314 of 2009** in which it was held;

> ***"The doctrine of estoppel operates as a principle of law which precludes a person from asserting something contrary to what is implied by a previous action or statement of that person….It therefore follows that where one party by his words or conduct, made to the other party a promise or assurance which was intended or affect the legal relations between them and to be acted on, the other party has taken his word and acted upon it, the party who gave the promise or assurance cannot afterwards be allowed to revert to the previous legal relationship…"***

The said agent Athsall Investment was never called to corroborate the defendant's case that the rent was still outstanding including mesne profits and how much. For those reasons I find that the defendant has failed to establish their case on a balance of probabilities and I dismiss it with costs to the plaintiff.

It is so ordered.

DELIVERED, DATED AND SIGNED AT MOMBASA THIS 23RD DAY OF MARCH 2022.

N.A. MATHEKA

JUDGE