REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA AT NAIROBI

CIVIL CASE NO.287 OF 2012

JOSEM TRUST CO. LIMITED …...……..……PLAINTIFF

-VERSUS-

MINT HOLDINGS LIMITED ….…….....…..…….....DEFENDANT

RULING

The application before this court is a notice of motion dated 6th August, 2012. It is brought under Order 36 Rule 1, Order 50 Rule 1 of the Civil Procedure Rules and section 3A of the Civil Procedure Act. The applicant seeks the following orders:

i. That the defendant's defence dated 4th July 2013 be struck out summary judgment be entered in favour of the plaintiff for vacant possession of the suit premises being apartment Number 6 situated on Plot Title 209/8181
ii. Summary judgment be entered in favour of the plaintiff for *mense* at the rate of Kshs 52,000/- plus VAT be entered in favour of the plaintiff from 30th April 2006 until vacant possession is delivered therein.
iii. That the respondent bears costs of this application

The motion is grounded on the affidavit of Sarah Mbogua dated 6th August, 2012 where she depones that the lease dated 30th May 2006 expired on 30th April, 2012; that the plaintiff has failed and neglected to vacate the said premises; that the defendant is undeniably a trespasser in the suit premises and has no plausible defense to the suit capable of defeating the applicant's right of summary judgment; that the plaintiff is suffering a great loss to the extent of Kshs. 52,000/- per month and more by the defendant continued occupancy of the premises; that the plaintiff has not accept any rent from the 31st April, 2012; that the defence is only meant to delay the speedy conclusion of this matter.

The defendant filed grounds of opposition dated 26th of October 2012. The said grounds are; The defence in this suit having been filed on the 15th July 2012 an application for summary judgment offends the provisions of Order 36 Rule 1(1) CPR; the suit is incompetent and offends the mandatory provisions of Order 4 Rule 1(4) CPR; the relationship between the plaintiff and defendant was governed by the letter dated 30th May 2006 which specifically provided that the tenancy (not lease) would be renewed every two years and in the view of the provisions of the Landlord and tenant(Shops, Hotel and Catering Establishment) Act this Honourable Court Lacks jurisdiction to adjudicate upon and determine the plaintiff claim; whereas there is no lease between the plaintiff and the defendant there is in existence a tenancy and/or a landlord and tenant relationship between the plaintiff and the defendant governed by the provisions of the Land Lord and Tenant (Shops, Hotels and catering Establishment) Act.

Parties proceeded by way of written submissions. The plaintiff and defendant's counsel filed written submissions on 20th March, 2013 and 5th March, 2013 respectively.

The plaintiff's counsel submitted that the defendant had neglected to vacate the suit premises and expiry of the lease claiming that he is a protected tenant under Cap 301 Land Lord and Tenant's (Shops, hotel and establishments) Act. He submitted that the tenancy commenced by letter dated 30th May 2006 which letter of offer was for a period of 6 years from 1st May 2006 to April 2012, that the defendant's agents Value Zone Ltd after the expiry of the said lease wrote to the plaintiff informing them that they did not wish to re-new the lease and further wrote through their advocates stating that they did not intend to vacate the suit premises. That the defendant failed to yield vacant possession on 31/04/2012 and the plaintiff has not accepted any rent from it from the said date. He further submitted that their 1st prayer falls under Order 2 rule 15 of the CPR which vests the court with powers to strike out pleadings if they are scandalous, frivolous or vexatious, prejudice, embarrass or delay the fair trial of the action or it is otherwise an abuse of the process of the court process. That the defendant's defence is a mere denial and does not disclose reasonable defence to the plaintiff's claim. He urged the court to be guided by the overriding principle and article 159 in striking out the defendant's defence. He relied on the case of ***Environmental management and coordination Act –vs- NEMA*** where the court held:

"justice shall be administered without undue regard to procedural technicalities".

In regards to the argument raised by the defendant that the suit is incompetent as it offends provisions of Order 14 rule 1(4). It was submitted that, where the plaintiff is a corporation, the verifying affidavit shall be sworn by an officer of the company duly authorized under seal of the company to do so; that the affidavit sworn by Sarah Mbogua was proper in that she swore the same in her capacity as the Managing Director of the Plaintiffs and urged the court to disregard the objection as it is unfounded as the same is properly sworn. The plaintiff relied on the case of **Siokwei Tarita –vs- Dr Charles Walekwa** where it was held that;

"what comes out of these two provisions is that a person swearing on behalf of a company needs authority under the corporate seal of the company. But again this is an internal affair and unless there is a protest supported by evidence that the person swearing the affidavit or acting on behalf of the company is not authorized by the company seal, on my part do not see how this can be questioned by an outsider. This is especially so where the person swearing the affidavit is one who is ordinarily expected to act for the company i.e. is vested with ostensible authority".

It was further submitted that the letter of offer signed by both parties was for a period of 6 years and there are numerous cases where it has been held to be as good as a lease. To support this argument the applicant referred to the case of ***Dynamic Institute of Management and Accountancy (DIMA) Ltd -vs- Apollo Insurance Company Ltd*** where it was held;

"the letter of offer aforesaid constituted an agreement for lease by extension a written tenancy for a period not exceeding 5 years which excludes it from being a controlled tenancy in terms of section 2(1) cap 201."

It was submitted that it was improper for the defendant to claim that the lease was renewable for 2 years and that what was renewable after 2 years was the rent increment at the rate off 10% after every 2 years; that the written agreement must be read in its entirety to determine its true meaning; that the plaintiff has not accepted any rent from the defendant since the lease lapsed. The case relied on for this argument is the Court of Appeal case of ***WJBlakeman Ltd –vs- Associated Hotel Management Ltd*** where it was held;

"the only circumstances under which there could be a monthly tenancy after the expiry of the lease is when there is a holding over act on the part of the lessor indicating recognition of the tenancy. Here in this case the rent had not been accepted and there was no overt act on the part lessor which acknowledged the tenancy. There is no evidence that the lessor that there was acceptance and continuous of tenancy, to the contrary all the evidence shows that the lessor did not want the tenancy to continue after its expiry. I therefore find that there was no monthly tenancy created by holding over after the

expiry of the lease and consequently the tribunal reference is therefore nor relevant to these proceedings. I hold that these proceedings cannot be held in abeyance by the tribunal reference."

Further submission were that the tenancy is not a controlled one for reason that the agreement was for 6 years which expired at the affluxion of time, the plaintiff was not willing to enter into any agreement with the defendant and the plaintiff has not accepted any rent from the defendant since the same lapsed; that the tenant had notice that the same would not be renewed prior to the expiry of the said lease; that it was not in dispute that the said lease and was set to expire on 31/04/2012 and the tenant was well aware that the tenancy would not be renewed therefore the defendant ought to have vacated the premises on or before 31/04/2012; that it is clear the defendant's claim is scandalous, frivolous or vexatious ment to delay fair trial and as such the plaintiff should be given vacant possession together with mense profits; that the tenancy is not controlled one and therefore is not subject to Cap 301 Land lord, and tenant (Shops Hotels and catering establishments).

The defendant's counsel submitted that the plaintiff's application on the prayer on striking out the defendant's defence was not in compliance with Order 2 Rule 15 of the Civil Procedure Rules and that the same is fatal; that the plaintiff's application lacks focus, direction and is hopelessly confusing; that the applicant is submitting on matters no pleaded nor addressed on the grounds on the face of the application; that by urging the court to ignore Order 2 Rule 15 by invoking Section 1A and Article 159 of the Constitution seeks to invite chaos; that Article 159 bestows the word "UNDUE' and this is in itself is recognition of the usefulness and sanctity of subsidiary legislation; that striking out is a drastic measure in that it denies either party an opportunity to be heard. Therefore it must be exercised sparingly in the clearest of cases for this they relied on the case of ***D.T. Dobie & Company –vs- Muchina (1982) KLR1*** where it was held;

"The court ought to act very cautiously and carefully and consider all facts of the case without embarking upon trial thereof before dismissing a case for not disclosing a reasonable cause of action or being otherwise an abuse of the court. At this stage, the court ought not to deal with any merits of the case for that is a function solely reserved for the judge at trial as the court itself is not unusually fully informed so as to deal with the merits "without discovery, without oral evidence tested by cross examination in the ordinary way."

That the prayer for summary judgment is unavailable to the plaintiff on account of Order 36 Rule (1) CPR; that the remedy for summary judgment is only available where a defendant has appeared but not filed a defence. It was submitted that the defendant filed a defence on 5/07/2012. On Order 4 Rule 1(4) CPR it was submitted that the same provides that:

"(4) where the plaintiff is a corporation, the verifying affidavit shall be sworn by an officer of the company duly authorised under the seal of the company to do so"

That despite Sarah Mbogua deponing that she is the director of the said office she has not evidenced any authority under seal, for this argument the respondent relied on the case of ***Siokwei Tarita Ltd –vs- Dr. Lectary Keiyo Kibor Lelei (unreported)*** *addressed an objection that no resolution by the plaintiff's company was annexed in the plaint and therefore the suit must fail."*

It was further argued that without compliance with Order 4 Rule 1(4) CPR the court should strike the suit "*suo moto*' or upon a motion by a party. He admitted that the letter of offer for lease was for a period from 1st May, 2006 to 30th April, 2012, but referred the plaintiff to a clause stipulating that *"renewable every two years";* that the said tenancy was controlled in that the said letter provided that

Lease will be for a term of 6 years renewable every 2 years starting 1/05/2006

Breach of covenant that if the rent agreed or any part thereof state remains unpaid for fourteen days (14) days after becoming payable (whether lawfully demanded or not) of if at any time thereafter the tenant is in breach if any of the covenants or conditions referred to in the standard from lease it will be lawful for the land lord to re-enter the premises or any part thereof in the name of the whole and the lease shall be

absolutely terminated.

The defendant contended that the tenancy is a controlled one and referred to section 2(1) of the Land lord and Tenant (Shops, Hotel and catering Establishment) Act Chapter 301 where it provides;

*"**Controlled tenancy**" means a tenancy of a shop, hotel or catering establishment –*

a. *Which has not been reduced into writing and which (is for a period not exceeding five years)*
b. *contains provision for termination otherwise than for breach of covenant within 5 years from the commencement thereof, or*

On this argument the respondent relied on the case of ***Sundereji –vs- Clyde House Company Ltd (1984) KLR 499*** where the High Court had entered a summary judgment against a tenant and the court of appeal set aside the judgment, dismissed the application for summary judgment and directed the suit to proceed to trial.

He questioned if the court could determine the issue if there was a controlled tenancy without taking oral evidence. He referred the court to the letter of offer and indicated that two issues arose;

a. whether the lease is renewable every two years and;
b. whether it will be lawful for the land lord to re-enter the premises or any part thereof in the name of the whole and the lease shall be absolutely terminated.

It was submitted that the matter should proceed to trial so that the clause may be constructed and adjudicated upon. The respondent sought to emphasis that its case is not that there was no tenancy, but rather that the offer letter created a controlled tenancy and that this being the case the authority cited by the applicant ***Nairobi Civil appeal No. 18 of 2000 Dynamic Institute of Management and Accountancy (DIMA) Ltd. –vs- Apollo Insurance Company Ltd (unreported)*** is irrelevant and inapplicable to the issues raised in both the suit and the application under consideration. The respondent submitted that the process of terminating a controlled tenancy is specifically provided for by Section 4 of the Land Lord and Tenant (Shops, Hotel and catering Establishments) Act which provides that;

"Notwithstanding the provisions of any written law or anything contained in the terms and conditions of controlled tenancy , no such tenancy shall terminate or be terminated , and no term or condition in, or right or service enjoyed by the tenant of, any such tenancy shall be altered otherwise then in accordance with the following provisions of this Act".

I have considered the affidavits and written submissions filed by both parties. It is not in dispute that the tenancy emanated from the letter of offer signed by both parties dated 30th May 2006. That the same provided the terms for the said tenancy. However the clause on the period of the tenancy appears not clear as the same provides that, ***"the lease will be for a term of six (6) years renewable every two years (2) starting 1st May, 2006***".

The applicant has moved the court under Order 36 Rule 1 which provides as follows;

In all suits where a plaintiff seeks judgment for a

a. *Liquidated demand with or without interests ; or*
b. *The recovery of land, with or without a claim for rent or mense profits, by a landlord from tenant whose term has expired or been determined by notice to quit or been forfeited for no-payment of rent or for breach of covenant, or against persons claiming under such tenant or against a trespasser, where the defendant has appeared but not filed a defence the plaintiff may apply for the amount claimed, or part thereof, and interest, or for recovery of the land and rent or mense profits.*

It is clear from the plain reading of the above provision that an application seeking summary judgment is

only considered in instances where the defendant has entered appearance but has failed to file a defence which is not the case in the present case, as the defendant filed their defence on 5th July 2012, which in my view would have been challenged under Order 2 Rule 15. As it is now the application cannot be granted.

On the issue on competence of the suit I have considered the submissions on this. The provisions of Order 4 Rule 1(4) provide that;

"Where the plaintiff is a corporation, the verifying affidavit shall be by an officer of the company duly authorized under the seal of the company to do so."

The plain reading of this provision is that a verifying affidavit of a plaint where the plaintiff is a corporate the deponent of the verifying affidavit must specifically state that he or she has authority by the company to swear the affidavit and file suit. This has not been indicated in the verifying affidavit Sarah Mbogua. I respect the findings of my brother in the case cited by the plaintiff on this issue but my view is that when a company is suing it must comply with Order 4 Rule 1(4). The plaintiff still has chance to comply. As I conclude this ruling it is notable that the lease was for a term of 6 years from 1st May 2006, if am to go by this provision the lease expired on 30th of April 2012 and therefore there is no lease between the parties. It is evident that the applicant does not wish to renew the lease. A tenant cannot continue to be in occupation of a premises if the landlord doesn't wish to renew the lease, if a notice has been issued. It is evident that the respondent has not been paying rent since May 2012 a fact that is not disputed by the defendant. Even if he considers himself a month to month tenant the respondent should have been paying rent. Although the application fails because the orders sought cannot be granted under Order 36 Rule 1 it would be in order if the parties sat and agreed on the way forward. The plaintiff can persue its claim for vacant possession and "*mense"* profit at a full hearing. Costs shall be in the cause.

Orders accordingly

Dated, signed and delivered this **20th** day of **February** 2014.

R. E. OUGO

JUDGE

In the presence of:-

…….For the plaintiff/Applicant

……For the Defendant/Respondent

……...……..Court Clerk