



REPUBLIC OF KENYA
IN THE HIGH COURT OF KENYA AT NAIROBI
COMMERCIAL AND ADMIRALTY DIVISION

CIVIL SUIT NO. 820 OF 2010

KENYA KNITTING & WEAVING MILLS LTD.....PLAINTIFF

VERSUS

TRANCEWOOD PRODUCTS LTD.....DEFENDANT

RULING

1. The application before me seeks the striking out of the Plaintiff.
2. As far as the defendant was concerned, the plaintiff was scandalous and frivolous. It is said to raise no triable issues.
3. The defendant is also of the view that the plaintiff was an abuse of the process of the court.
4. Mr. Mungai, the learned advocate for the defendant, submitted the plaintiff ought to be struck out because a claim for a lease of a period of five (5) years and three (3) months should have been registered, if any party wishing to rely on it wished to have the rights and obligations flowing from such a lease enforced.
5. In this case, as there was no registered lease, the defendant submitted that the plaintiff cannot be sustained in law.
6. The defendant placed reliance upon the following words, which are to be found in the Ruling of Odunga J., in **GARIBI LIMITED VS OGILVY EAST AFRICA LIMITED HCCC NO. 211 OF 2007:**

*“With respect to the second issue, it is clear from the evidence on record that the said agreement was neither translated into a formal lease nor registered. The consequences of the failure to register a lease whose term is for more than one year, where the property is governed by the Transfer of Property Act, as is the case in the present case, were enumerated by the Court of Appeal (Wambuzi P. Mustafa JA and Platt JA on 7th July 1977) in **Rogan-Kamper Vs Lord Grosvenor (No.2) [1977] KLR 123; [1989] KLR 367; [1976-80] KLR 558.** In that case the Court recognized that an agreement for a lease is not a lease and therefore cannot be a basis for a suit for specific performance, and cannot itself be regarded as a lease. It was further the court’s view that a contract for a lease is different from a lease and each has a different incidents attaching to it, and one cannot be substituted for the other”.*

7. As the plaintiff herein was founded upon an un-registered lease, the defendant submitted that the plaintiff was frivolous and un-maintainable in law.
8. In answer to the application, Mr. Nyawara, the learned advocate for the plaintiff, submitted that the application was baseless.
9. He pointed out that the defendant was a tenant of the plaintiff.

10. By virtue of that fact alone, the plaintiff submitted that there arose an implied condition of the tenancy, that when the tenant was vacating the leased premises, he had to ensure that the premises were restored to its proper condition. As the defendant had failed to restore the premises, the plaintiff submitted that it had a sustainable claim against the defendant.
11. The plaintiff also said that it was entitled to recover from the defendant, the un-paid rents for the period when the defendant had been on the leased premises.
12. The plaintiff sought an opportunity to lead evidence to prove that the defendant failed to renovate the premises, and also failed to pay some rents.
13. If this court were to strike out the plaint, the plaintiff believes that the court would have utilized a summary procedure to defeat a genuine case against the defendant.
14. The plaintiff also pointed out that there was a lease which had governed the relationship between the two parties until 30th June 2007, when that lease expired.
15. Thereafter, the defendant was invited to accept a further lease.
16. In furtherance of the relationship, the plaintiff provided a letter of offer to the defendant, which was then signed by the defendant.
17. After the plaintiff received the letter of offer, it embarked on preparing a lease, which was then given to the defendant. However, the defendant did not sign the lease.
18. Instead of signing the new lease, the defendant gave Notice to the plaintiff, informing it that it intended to vacate the premises.
19. According to the plaintiff, there was a contract which was embodied in the letter of offer which the defendant had executed. Therefore, when the defendant declined to sign the lease Document, it was deemed to have breached the contract.
20. It was the plaintiff's contention that the only extra benefit which is granted by having it registered was that such registration of a lease granted protection for the parties, as against third parties.
21. But even when the lease was not registered, the plaintiff believed that it nonetheless created obligations as between the parties.
22. Therefore, the plaintiff argued that it had every right to seek to enforce the un-registered lease, against the defendant.
23. According to the plaintiff, this case was distinguishable from the case of **GARIBI VS OGILVY EAST AFRICA LIMITED HCCC NO. 211 OF 2007**, because there was a lease which was drawn but not registered, whilst in the "***Garibi Case***", there was not even a draft lease.
24. In the light of the unregistered lease, the plaintiff submitted that this was not a plain and obvious case, which could be struck out.
25. But the defendant noted that the attempt by the plaintiff, to deny a well known fact, was scandalous. The well known fact was that there was no executed lease document.
26. Therefore, the defendant argued that the plaintiff's case ought to be struck out for being scandalous.
27. The defendant placed reliance on the case of **SAMUEL NDUNGU MUKUNYA VS. NATION MEDIA GROUP LIMITED & ANOTHER HCCC NO. 420 OF 2011**, for the definition of the word "*scandalous*". In that case Odunga J. paraphrased the decision in **J.P. MACHIRA T/A MACHIRA & COMPANY ADVOCATES VS WANGETHI MWANGI & NATION NEWSPAPERS, CIVIL APPEAL NO. 179 OF 1997**, as follows;

"However, the word "scandalous", for the purposes of striking out a pleading under Order 2 rule 15 of the Civil Procedure Rules is not limited to the indecent, the offensive and the improper, and that denial of a well-known fact can rightly be described as scandalous".
28. It was the defendant's further argument that the plaint herein was evasive. Indeed, the defendant contended that the plaint was evasive, as it attempted to conceal or obscure facts. In particular, paragraph 11 of the plaint was said to be guilty of those faults.
29. Therefore, the defendant reiterated its contention that the plaint ought to be struck out, as was discussed in the case of **YOBESH AMORO C/O B.A. OUMA ASSOCIATES, ADVOCATES VS THE HERITAGE AII INSURANCE COMPANY LIMITED, HCCC NO. 691 OF 2005**.
30. In that case, Azangalala J. (as he then was) said;

“A frivolous matter is one that has no legal basis or legal merit. In other words, it is a matter that is not serious, and a vexatious matter is one that inter alia would tend to annoy.

A scandalous pleading would be one that would not be admissible in evidence, such as making an imputation on character when character is not in issue”.

31. Both the parties have cited the decision in **D.T. DOBIE & COMPANY (KENYA) LTD VS MUCHINA [1952] KLR 1** as the leading authority on applications for the striking out of pleadings.
32. In that case, the Court of Appeal emphasized the need to act very cautiously and carefully when considering all the facts of the case, but without embarking upon a trial of the case. The Court said;

“At this stage, the court ought not to deal with any merits of the case, for that is the function solely reserved for the Judge at the trial, as the court itself is not usually fully informed so as to deal with the merits “without discovery, without oral evidence tested by cross-examination in the ordinary way”. As far as possible, indeed, there should be no opinions expressed upon the application which may prejudice the fair trial of the action or make it uncomfortable or restrict the freedom of the trial Judge in disposing of the case in the way he thinks fit”.

33. That is why the Court of Appeal reminded us that we should aim to sustain a suit rather than dismissing it summarily, unless the case was plainly and obviously impossible.
34. In the case of **YAYA TOWERS LIMITED VS TRADE BANK LIMITED (IN LIQUIDATION) CIVIL APPEAL NO. 35 OF 2000**, the Court of Appeal said;

“No suit should be summarily dismissed unless it appears so hopeless that it plainly and obviously discloses no reasonable cause of action and is so weak as to be beyond redemption and is incurable by amendment”.

35. In this case, the plaintiff asserted that the defendant was a tenant of the plaintiff.
36. It is the contention of the plaintiff that the tenancy relationship had commenced prior to 30th May 2007.
37. The said date is significant because it identifies the date when, according to the plaintiff, the tenancy relationship was renewed through *“an agreement to lease dated 30th May 2007, terms of which were duly accepted by the Defendant”*.
38. It is the plaintiff’s further contention that the defendant took up the tenancy and paid rent upto December 2007, when the Defendant gave to the plaintiff, a three months Notice of its intention to vacate the premises.
39. It is the plaintiff’s further contention that the defendant left the premises in a sorry state of disrepair.
40. As a result, the plaintiff says that it took two – and – a – half months to renovate the premises.
41. On its part, the Defendant denied executing any lease with the plaintiff. As a consequence, the defendant deemed itself to be a protected tenant.
42. It would appear that the defendant was thereby acknowledging the fact that it was, at some point in time, a tenant of the plaintiff.
43. The point of divergence between the two parties appears to be whether or not the defendant was a protected tenant, who was entitled to vacate the premises after giving a 3 months notice to the plaintiff.
44. To my mind that is an issue that arises from the pleadings.
45. The defendant also asserted that it restored the premises to their original state and condition before vacating the premises in February 2009.
46. As the plaintiff contends that the premises were left in a sorry state of disrepair, I hold the view that the trial court will be required to determine the issue regarding the state of the premises, at the time when the defendant vacated.

47. Another issue relates to the question of rent. The plaintiff asserted that some monthly rents were under-paid, whilst others were not paid at all. But the defendant insists that it paid all rents in full.
48. It will therefore be the function of the trial court to determine those twin issues, after receiving evidence from the parties.
49. In my considered view, the plaintiff's claim cannot be said to have been founded upon an alleged registered lease. At no time has the plaintiff said that its claims were founded on a registered lease.
50. In my understanding, the claim is founded upon the terms of a "Agreement to Lease dated 30th May 2007", whose terms the defendant is alleged to have accepted.
51. Would such acceptance, if proved, give rise to the obligations which the plaintiff has asserted, upon the defendant? The converse is equally true, that the trial court may accept the defendant's contention, that because there was no registered lease, the claims against the defendant were unfounded.
52. Those are real issues, which must, in my considered opinion, be placed before the trial court for determination.
53. I find nothing scandalous or vexatious about the claims in the plaint.
54. I also find that the plaint is not otherwise an abuse of the process of the court.
55. The trial court would need to determine whether or not the manner in which the defendant terminated its relationship with the plaintiff was lawful.
56. In the case of **GARIBI VS OGILVY EAST AFRICA LIMITED HCCC NO. 211 OF 2007**, Odunga J. alluded to the question as to whether or not;

"... the failure by the defendant to return the keys before July 2005, in any way adversely affected the plaintiff's attempt to secure a tenant".

57. That is one of the issues which would need to be determined, as it has been raised in the plaint.
58. Also there is the question as to whether or not the failure to restore the premises to its proper state, (if it is proved by the plaintiff), would give rise to a claim for un-paid rent during the time when the plaintiff was renovating the premises.
59. In the final analysis, there is no merit in the application to strike out the plaint. I therefore dismiss the said application, with costs to the plaintiff.

DATED, SIGNED and DELIVERED at NAIROBI this 17th day of September 2014.

FRED A. OCHIENG

JUDGE

Ruling read in open court in the presence of

Mrs. Macharia for Mungai for the Plaintiff.

No appearance for the Defendant.

Mr. C. Odhiambo, Court clerk.