



REPUBLIC OF KENYA
IN THE HIGH COURT OF KENYA AT NAIROBI
CIVIL CASE NO. 392 OF 2013
(FORMERLY ELC NO. 65 OF 2013)

RAJINDER SINGH JUTTLA

BIPIN MAWJEE

MAVJI LALJI VARSANI

HIMATKUMAR KESHAVLAL SHAH

HASMUKH KESHAVLAL SHAH ^{T/A} MINT INVESTMENTS.....PLAINTIFFS

VERSUS

POLO INVESTMENTS LIMITED.....DEFENDANT

RULING

1. By the plaint dated 10th January,2013 and filed on 11th January,2013, the plaintiffs sought:

“

- i. *An eviction order and vacant possession of the suit premises at Land Reference Number 209/2491 along Kimathi Street, Nairobi.*
- ii. *Mesne profits from the 1st day of December, 2012 up to the date of vacation of the suit premises by the defendant at the rate of KShs. 419,305.20 per month.*
- iii. *The costs of this suit.*
- iv. *Interest on items (b) and (c) above at court rates with effect from the 1st day of December, 2012 until the date of payment in full.*
- v. *Any other or further relief that this honourable court may deem just and fit to grant.”*

2. The plaintiff’s case is that they entered into a lease agreement with Clyde House Company Limited. It was an express term that the sale was subject to subsisting leases among them the lease in favour of the defendant. The lease was for a period of six (6) years from 1st November, 2006 to 30th November, 2012 for KShs. 419,305.20 per month. The plaintiff’s notified the defendant of the expiry of the lease and their lack of intention to renew and the plaintiffs demanded vacant possession of the premises. By a letter dated 19th November, 2012 the plaintiffs reminded the

- defendant that the lease was due to expire and demanded payment of rent arrears of KShs. 919,305.00. Despite the notices, the defendant did not make good the plaintiffs' claim.
3. The defendant filed a memorandum of appearance on 12th February, 2013. Before the defendant filed its defence, the plaintiffs filed a Notice of Motion dated 18th February, 2013 seeking summary judgment against the defendant. The plaintiffs relied on the grounds on the face of the application and the supporting affidavit and supplementary affidavit of Mavji Lalji Varsani sworn on 18th February, 2013 and 22nd May, 2013 respectively. He deponed that although the defendant has settled the arrears as at 30th November, 2012. It has refused to give vacant possession of the premises and is illegally in occupation of the premises considering that the lease expired on 30th November, 2012. In the supplementary affidavit, the deponent refuted the defendant's allegation that notice was given to the plaintiff seeking extension/renewal of the lease. He contended that an amount of KShs.500,000/- paid vide cheque No. 001769 was payment of an arrears of rent subject of Business Premises Rent Tribunal Case No. 567 of 2012 and that an amount of KShs. 900,000/- is held in the plaintiffs' account as security as provided for in clause 2(b) of the lease agreement i.e. for the payments of the amounts which may from time to time be owing from the lessee to the lessor for land rent, rates taxes and other charges otherwise for the due performance and observance of the lessee's covenants and conditions. That in such contracts as is between the parties, upon expiry of the lease, such security is normally refunded less any sums deducted due to non- observance of the covenants and conditions on the part of the defendant.
 4. The defendant opposed the application by John Kingori's replying affidavit sworn on 20th May, 2012. He contended that the defendant wrote to the plaintiff's seeking to extend the lease agreement in February, 2012 and forwarded a cheque of KShs. 500,000/- to the plaintiffs. A meeting was held between the parties on 5th December, 2012 in which the defendant was told to write a letter since their earlier letter could not be traced. As late as 15th March, 2013, the plaintiffs indicated that they could not act as some of the partners were out of the country.

He contends that the defendant has not refused to vacate the premises but has been waiting for a response on the way forward from the plaintiffs given the fact that the plaintiffs hold the defendant's deposit of KShs.1.5 Million.

5. Parties canvassed this application by way of written submissions. The plaintiffs reiterated the averments in the supporting and supplementary affidavit and submitted that the defendant has not demonstrated that it should be given right to leave to defend the suit. It is their position that should the defendant have wished to demonstrate that it had a valid claim; it could have annexed the draft defence to its replying affidavit. It was further submitted that even if the court were to rely on the irregularly filed defence, it contained mere denials and falsehood and cannot amount to a defence raising triable issues. The plaintiff relied in *Nairobi HCCC No. 124 of 2004, Fairacres Development Limited v. Margaret Apondi Olotch t/a M.A. Kiosk, Bachelor's Bakery Ltd v. Westlands Securities Ltd (1982) KLR, Gohil v. Wamai (1983) KLR* and *Heptulla v. Noormohamed (1984) KLR* submitted that in all the authorities it was held that where a lease/contract is for a specific term, upon expiry of such term the defendants in those cases were trespassers and were bound to give up possession of the respective premises with or without notice from the plaintiffs and the landlords/plaintiffs thereof were entitled to possession of the respective premises and mesne profits.
6. The defendant on the other hand submitted that the plaintiffs' denial to the defendant's allegation that there was a meeting on 5th December, 2012 is triable and should be canvassed at full trial. It was further submitted that mesne profits claimed by the plaintiff is an unliquidated damage that has to be proved. It was also submitted that the plaintiffs are unlikely to suffer irreparable loss that cannot be compensated in costs since they claim mesne profits.
7. The principles that guide the courts in considering an application for summary judgment have been settled in various cases. In **Shah v. Padamshi (1984) KLR** where it was held:

"4) Caution should be exercised in granting summary judgment as it is a drastic remedy involving the denial of the party against whom it is given his right to defend the claim made against him.

5) *In dealing with applications for summary judgment, if a triable issue is found to exist, the court must order a trial even if the court strongly feels that the defendant is unlikely to succeed at the trial.*”

8. The court in *Interglobe Services Ltd v. Hama Ware Housing Ltd (2014) e KLR* stated as follows:

“The principles which guide our courts in determining applications for summary judgment are not in dispute. In Industrial & Commercial Development Corporation v. Daber Enterprises Ltd (2000) 1 EA 75 this court stated that the purpose of the proceedings in an application for summary judgment is to enable a plaintiff to obtain a quick judgment where there is plainly no defence to the claims. To justify summary judgment, the matter must be plain and obvious and where it is not plain and obvious, a party to a civil litigation is not to be deprived of his right to have his case tried by a proper trial where, if necessary, there has been discovery and oral evidence subject to cross-examination. (See also CONTINENTAL BUTCHERY LTD V. NDHIWA (1989) KLR 573)...the Court of Appeal for Eastern Africa in the case of Souza Figuerido & Company Ltd v. Mooring Hotel Ltd (1959) EA 425 that, if the defendant shows a bona fide triable issue, he must be allowed to defend without conditions...’ Regarding what constitutes triable issues, in KENYA TRADE COMBINE LTD V. SHAH, Civil Appeal No. 193 of 1999, this court stated as follows-

“In a matter of this nature, all a defendant is supposed to show is that a defence on record raises triable issues which ought to go for trial. We should hasten to add that in this respect a defence which raises triable issues does not mean a defence that must succeed. The defendant is at liberty to show by whatever means he chooses, whether by defence, oral evidence, affidavits or otherwise, that his defence raises bona fide triable issues...Where bona fide triable issues have been disclosed, the court has no discretion to exercise in regard to the defendant’s right to defend the suit...”

9. In *Moi University v. Vishva Builders Limited Civil Appeal No. 296 of 2004 (UR)*, it was stated as follows:

“The law is now settled that if the defence raises even one bona fide triable issue, then the defendant must be given leave to defend.”

The defendant has in paragraph 7 of the statement of defence stated that *“...the plaintiffs at the meetings declined and have continually declined to accept rents from the defendant citing the fact that they weren’t certain whether they would continue to be owners of the building or not and because some of the plaintiffs had proceeded to the United Kingdom on personal business. The defendant was thus advised to await their decision details whereof are well within the plaintiff’s direct knowledge...”*The issue herein raised by the defendant is an issue that has to be tried to ascertain its correctness. It is therefore a triable issue. In the circumstances and in view of the foregoing, I disallow the application herein. Costs shall be in the cause.

Dated, Signed and Delivered in open court this 18th day of December, 2014.

J. K. SERGON

JUDGE

In the presence of:

.....for the Plaintiff

.....for the Defendant