



**REPUBLIC OF KENYA**

**IN THE HIGH COURT OF KENYA AT NAIROBI**

**MILIMANI LAW COURTS**

**LAND AND ENVIRONMENTAL DIVISION**

**ELC NO 272 OF 2012**

**PROP INVEST LIMITED..... PLAINTIFF**

**VERSUS**

**AD SCREEN PRINT LIMITED..... DEFENDANT**

**RULING**

1. This is the plaintiff's notice of motion dated 12<sup>th</sup> June 2012. The plaintiff prays for summary judgment against the defendant for delivery up of vacant possession of rental space measuring 5,700 square feet in a building known as Prop Invest Building on L.R No 37/132 Nairobi. On 29<sup>th</sup> November 2012, I granted leave to the plaintiff to withdraw another prayer claiming mesne profits of Kshs 426,300 per month from 1<sup>st</sup> August 2011.
2. The motion is predicated on the deposition of Anne Kiragu sworn on 12<sup>th</sup> June 2012. In a nutshell, she avers that the lease by the defendant over the demised premises expired by effluxion of time on 31<sup>st</sup> July 2011. Negotiations for its renewal had collapsed before that date. The defendant had then brought proceedings before the Business Premises Rent Tribunal at Nairobi. On 23<sup>rd</sup> March 2012 the Tribunal dismissed the defendant's complaint. According to the plaintiff, the defendant's continued stay in the premises is illegal and without any contractual foundation.
3. The defendant contests the motion. There is a replying affidavit sworn by Edgar Desa on 19<sup>th</sup> July 2012. He refers to failed negotiations for renewal before the expiry of the lease. The defendant offered to pay higher rent of Kshs 400,000 per month. The landlord insisted on different terms. In the meantime, the plaintiff continued to receive rent of Kshs 250,000 per month. He contends that this made the defendant a month to month tenant. The defendant denies receipt of a formal notice to deliver up possession. The defendant takes umbrage to a proclamation for arrears of rent of Kshs 2,336,700 and auctioneers fees levied on 11<sup>th</sup> April 2012. The defendant's case is that it is not a trespasser or in illegal occupation. Lastly, the defendant attacks the entire suit for duplicity under section 6 of the Civil Procedure Act. In a synopsis, the defendant avers that there are triable issues that can only be ventilated fully at the trial.
4. I have considered the pleadings, depositions, written submissions by both parties and their brief

addresses to court. The substance of the motion is whether the court should grant summary judgment at this stage. The effect of such an order would be to order the defendant to deliver up vacant possession of the premises at this stage. The motion is brought under order 36 of the Civil Procedure Rules 2010.

5. Order 36 rule 1(1) (b) provides that in all suits where the landlord seeks judgment for recovery of land from a tenant whose term has expired or has been determined by notice, he may apply for judgment. The burden then shifts to the defendant at rule 2 to demonstrate by affidavit or otherwise that it should be granted leave to defend. Such leave will be granted if the defendant demonstrates it has a good defence to the action. This position of the law is buttressed by the provisions of section 25 of the Civil Procedure Act.
6. If a defendant demonstrates there is a triable issue, the court has no recourse but to grant unconditional leave to defend. See the decision in Osondo Vs Barclays Bank International Limited [1981] KLR 30. The same principle is espoused by the Court of Appeal in Momanyi Vs Hatimy [2003] 2 E.A. 600. Again, the purpose of summary judgment is to expedite determination of cases but is an inappropriate procedure where the court is being invited to decide “difficult questions of law which call for detailed argument and mature considerations” and which would best be left to evidence at the trial. See American Cyanamid Co. Vs Ethicon Limited [1975] 1 ALL ER 504, [1975] AC 396.
7. This general principle can be again gleaned from the old case of Churanjilal & Co Vs Adam [1950] 17 E.A.C.A 92 where Sir Graham Paul V-P said of summary judgment application:

*“ .. It is desirable and important that the time of creditors and of courts should not be wasted by the investigation of bogus defences. That is one important matter but it is a matter of adjectival law only, embodied in Rules of Court, and cannot be allowed to prevail over the fundamental principle of justice that a defendant who has a stateable and arguable defence must be given the opportunity to state it and argue it before the court. All the defendant has to show is that there is a definite triable issue of fact or law”*

8. When I juxtapose the law against the facts, I find further as follows. On the face of it, the lease by the defendant over the demised premises expired by effluxion of time on 31<sup>st</sup> July 2011. It was a 10 year lease commencing on 27<sup>th</sup> July 2001. The lease was never renewed. The defendant concedes that fact. The contractual foundation granting the defendant possession has thus collapsed. See Fair Acres Development Limited Vs Margaret Apondi Olouch Nairobi, High Court Civil case 124 of 2004 (unreported). And if there was any doubt, it has been removed by the ruling of the Business Premises Rent Tribunal in Tribunal case No 781 of 2011 Adscreen Print Limited Vs Prop Invest Limited. Those are the same parties. They were litigating over the same tenancy. The tribunal held on 23<sup>rd</sup> March 2012 as follows:

*“For the tenant to persuade me that there exists a tenancy relationship between the parties, he must produce evidence to prove that the landlord unequivocally accepted the Kshs 250,000. However it is on record that the parties have never agreed on the rent payable. Though the landlord received the rent of Kshs 250,000/-, he did protest and insisted that the tenant should pay rent as per the proposed lease to avoid being distrained.*

*From the foregoing it is clear that there is no tenancy relationship between the parties, leave alone a controlled one. I would accordingly vacate the orders issued on 3/11/2011, dismissing the complaint with costs”.*

9. The Business Premises Rent Tribunal is a competent judicial organ recognized by the constitution. It is imbued with jurisdiction to determine whether or not a tenancy is a controlled tenancy and generally to ascertain rents or terms of a tenancy. That is clear from its parent statute, Landlord and Tenant (Shops, Hotels and Catering Establishments) Act, section 12. The claim by the defendant of an implied month to month tenancy was the subject of the above determination.

It was dismissed. The finding by the Tribunal is beyond peradventure. The plaintiff states the defendant has not appealed that finding to the High Court.

10. The matter however does not end there. At paragraph 11 of the plaint, the plaintiff “confirms that there is no suit pending and there have been no previous proceedings between the parties over the same subject matter”. That I find strange because the defendant refers to other pending proceedings at the High Court in ELC No 205 of 2012 *Ad screen Print Limited Vs Prop Invest Ltd*. They are the same parties. The subject matter relates to the tenancy in this suit. To be fair to the plaintiff, at paragraph 8 of the plaint in the present suit, it does make reference to the latter suit as follows:

*“The distress action prompted the defendant to move the High Court for restraining orders under certificate of urgency in HC ELC 205 of 2012 Ad screen Print Limited Vs Prop Invest Ltd which were granted to it on 20<sup>th</sup> April 2011 and later extended to 4<sup>th</sup> July 2012 by the Honourable Mr. Justice Waweru, on condition that the defendant pays mesne profits of Kshs 250,000 per month in the intervening period”.*

11. The plaintiff does not contest that the other suit is pending. I have looked at the prayers in the plaint in that suit: they were for an injunction to restrain the defendant (the plaintiff in this suit) from distressing for rent and an order for valuation. The present suit has different prayers for recovery of the suit premises and mesne profits of Kshs 426,300 per month. I would distinguish the two suits by either party except for the following: The parties entered into a consent in the other suit under which the defendant continues to pay rent of Kshs 250,000 per month and which the plaintiff continues to accept. That means that the defendant is in occupation with the knowledge and licence of the plaintiff. True, the Business Premises Rent Tribunal has found there is no tenancy. By continuing to accept the rent, the plaintiff cannot be heard to say that the defendant is an illegal tenant or trespasser. But the plaintiff has now brought the present proceedings praying for recovery of the demised premises. It cannot in my view be a serious defence that the Landlord has in the meantime continued to accept some rent. Faced with the expired lease and the determination by the Tribunal, that is not a triable issue now.

12. It is not clear why the plaintiff filed this fresh suit instead of a suitable counterclaim in ELC 205 of 2012. Whatever the reason, the present proceedings may violate section 6 of the Civil Procedure Act. The section prohibits the court from proceeding with a suit where another suit between the same parties over the same subject matter is pending. But as I have stated, ELC case 205 of 2012 is an action by the tenant to restrain distress for rent. The present suit is the landlord’s suit for recovery of the premises and mesne profits. Order 36 rule 1(1) (b) of the Civil Procedure Rules entitles the landlord to seek summary judgment. There is hence a sense in which the subjects of the two suits are different though they relate to the same parties and premises. I have no doubt that the defendant is hanging on the tenancy by a thin string: it is highly doubtful that he can cling onto it any further. To my mind, even if this action were to go to a full trial the question of tenancy is a foregone conclusion: The ten year term of lease was determined by effluxion of time; and the tenant’s subsequent action to enforce the tenancy in the Business Premises Rent Tribunal was dismissed.

13. The defendant states that he has not been given a formal notice to quit the premises. The plaintiff retorts that no such notice is necessary. Is this a triable issue? On expiry of a formal lease by effluxion of time, no formal notice to leave the premises is required. The reason is a logical one: the tenant, unless the lease is renewed, is mandated by contract to surrender the premises on a certain date. A competent Tribunal with statutory jurisdiction has dismissed the tenant’s claims that he subsequently became a month to month tenant. Order 36 rule 1(1) (b) states that an action for summary judgment lies “by a landlord from a tenant whose term has expired or been determined by notice to quit .....”. The defendant may not be a trespasser but the plaintiff has brought this action to recover possession. The expiry of the term lease supersedes the requirement for a formal notice. I am thus unable to say that the question of notice to quit is a triable issue.

14. In the result I find that there is no arguable or stateable defence to the action for recovery of the premises. This is a commercial dispute. To hold otherwise would be anathema to the very basis of a formal lease: to define in a concise and enforceable manner the rights and duties of the parties to the lease and to specify the term of the lease. I would thus return to the words of Sir Graham Paul V-P in *Churanjilal & Company Vs Adam* [1950] 17 E.A.C.A 92: It is desirable and important that the time of creditors and of courts should not be wasted by the investigation of bogus defences. I thus find that this is a suitable case for summary judgment on the plaintiff's prayer for recovery of the premises.

15. That said, I am well alive that the parties have a consent in ELC No 205 of 2012. The defendant is in possession by virtue of that consent order made on 20<sup>th</sup> April 2012 in that suit. It will be up to the parties to determine whether to sustain or review the consent in that suit. I can neither interfere with that order of consent in that suit nor do I have the basis for doing so. Secondly, I stated at the beginning that the plaintiff withdrew the prayer for summary judgment for mesne profits of Kshs 426,300 per month prayed in the plaint. Accordingly, the remainder of the suit on that claim shall proceed on trial on the merits.

16. The orders that commend themselves to me to grant are as follows:

- a. **THAT** summary judgment be and is hereby entered in favour of the plaintiff against the defendant for delivery up of vacant possession of office space measuring 5,700 square feet on the 1<sup>st</sup> floor, Prop Invest Building situated on L.R No 37/132 Nairobi.
- b. **THAT** the claim by the plaintiff in prayer 13(b) of the plaint for mesne profits of Kshs 426,300 per month from 1<sup>st</sup> August 2011 shall be set down for trial.
- c. **THAT** the plaintiff shall have costs of this motion.

It is so ordered.

**DATED** and **DELIVERED** at **NAIROBI** this 24<sup>th</sup> day

of January 2013.

**G.K. KIMONDO**

**JUDGE**

**Ruling read in open court in the presence of**

Ms Rashid for Mr. Mr. Omuga for the Plaintiff.

Mr. Kariuki for the Defendant.