



IN THE HIGH COURT OF KENYA

AT NAKURU

CIVIL SUIT NO. 184 OF 2011

JOHN KIMANI WAWERU.....PLAINTIFF

VERSUS

DR. CHRISTOPHER WAITHAKA KARITU.....DEFENDANT

RULING

The Notice of Motion dated 29/1/2013 is brought pursuant to **Order 36 Rule 1** and **Order 51 Rule 1** of the **Civil Procedure Rules**. The plaintiff/applicant prays that the defence filed herein be struck out for being a mere denial and judgment be entered for the plaintiff as prayed in the plaint. The motion is premised on grounds found in the body of the application and a supporting affidavit sworn by the plaintiff/applicant on 29/1/2013.

The applicant claims to be the owner of the suit premises situated at Nyahururu Municipality No.6585/111, known as Gathirimmu Building and the respondent has been a tenant following a lease grant entered into between them on 31/12/1983 (JW1). It is the applicant's contention that on 29/8/2010, the applicant served the respondent with a notice to terminate the tenancy in accordance with **Section 4(2)** of the **Landlord & Tenant (Shops Hotel and Catering Establishment) Act Cap 301, Laws of Kenya**. The applicant contends that he served the notice because he wishes to reconstruct and occupy the suit premises for his own use but the respondent failed to vacate the premises in terms of the two months notice nor did he file any reference to the Tribunal challenging the said notice; that the applicant has been paying Kshs.5,000/- per month since 1983 yet the market value of the premises is Kshs.40,000/- per month. According to the applicant the defence is a sham and does not raise any triable issue.

The respondent opposed the application and filed grounds of opposition to the effect that the application lacks merit, that the defence is not a mere denial but raises several triable issue. Mr. Ngure, counsel for the respondent pointed out that if there were no triable issues, then the applicant should not have filed a reply to defence which is a joinder of issues. The respondent also urged that the defence raises the issue of who the proper landlord of the premises is and whether the applicant has any locus standi in the matter. The respondent contends that an agreement was signed between one Waweru Githirimu and the respondent; there is also the issue of whether the agreement was oral or written and whether it is governed by **Cap 301 Laws of Kenya**. The 4th issue is whether the respondent responded to the notice to terminate the tenancy because he claims that he did by letter dated 19/8/2010 which is annexed by the applicant. The respondent also denies that any notice to terminate tenancy was ever issued but that it was a notice for increase of rent.

I have considered the application and submissions by both counsel. Although the plaint at paragraph 3 states that the lease agreement was made orally, the defendant denies that allegation and alleges that the lease agreement was reduced to writing. A copy of an agreement dated 31/12/83 as No.(g) in defendant's list of documents and annexed by applicant as 'JKW1' in the defendant's list of documents are similar but

relates to Plot 6585/3/3. the plaint relates to Plot 6585/3/111. The Plot numbers seem to differ. The question is whether the alleged agreement relates to the same premises as Nyahururu Municipality Plot 6585/3/111. The other issue is whether the provisions of the **Landlord and Tenant (Shops, Hotels and Catering Establishment) Act Cap 301** applies to the said tenancy.

The lease agreement that is annexed as 'JKW1' is made between Waweru Gathirimu and Dr. Christopher Waithaka. The applicant herein is John Kimani Waweru. The issue is whether John Kimani Waweru is the same person as Waweru Gathirimu. If he is not, does John Kimani Waweru have the necessary locus standi to file this suit?

The other issue raised by the respondent is whether the applicant ever issued any termination notice against the respondent. The applicant has exhibited the purported notice as 'JKW2'. The title of the notice reads **"Landlords notice to terminate or alter of tenancy."** It is clear from paragraph 2 and 3 that the notice was for increase of rent. It reads as follows:-

"2. The alterations which I propose are;

Increase your current office rent from Kshs.5000/- (Read five thousand shillings only) to Kshs.50000/-) Read fifty thousand shillings only).

3. The grounds on which I seek the termination/alteration are:-

- 1. The new rental charges are at par with similar premises situated in the same locality;**
- 2. The property land rates, water payable by the landlord in the demised premises have increased since the premises were let to you the tenant;**
- 3. The present rental charges are not economically viable or profitable in view of the economic recession and inflation in the country;**
- 4. I require you within one month after receipt of this notice to notify me in writing whether or not you agree to comply with the notice as from that date."**

My understanding of the notice is that it is not for termination of the lease but increment of rent. Besides, the notice exhibited is dated 29/7/2012. The plaint reads that notice was issued on 19/8/2010. Annexure JKW2 does not amount to a notice to terminate a lease and does not in any case relate to 19/8/2010.

Lastly, the plaintiff filed a reply to the defence resulting means a joinder of issues. If the defence did not raise any triable issues, then the applicant would have sought to have it struck out instead of filing the reply. It means there are issues that need to be tried at the full hearing.

From the foregoing it is obvious that the defence is not a mere sham but raises several triable issues that require to be interrogated at a full hearing. In the end, the application is hereby dismissed with the plaintiff bearing the costs.

DATED and DELIVERED this 26th day of April, 2013.

R.P.V. WENDOH

JUDGE

PRESENT:

Mr. Mongeri holding brief for Mr. Makori for the plaintiff/applicant

Mr. Mwaniki holding brief for Mr. Ngure for the defendant/respondent

Stephen Mwangi – Court Clerk