



REPUBLIC OF KENYA
IN THE HIGH COURT OF KENYA AT MOMBASA
Commercial Civil Case 76 of 2012

1. SHAMSUDIN KHOSLA

2. SHIRIN SHAMSUDIN

KHOSLA.....PLAINTIFFS

VERSUS

AKAMBA PUBLIC ROAD SERVICES

LTD.....DEFENDANT

Coram:
Mwera J.
Siminyu for Plaintiffs
Wameyo for Defendant
Furaha Court Clerk

R U L I N G

The plaintiffs moved the court on 4th June, 2012 under Order 36 rule 1 of Civil Procedure Rules for an order:

(i) that judgment be entered as claimed in the plaint for Shs. 20,146,920/=.

This was based on the ground that there was no defence to that claim and any that is/was, could only frustrate the plaintiffs pursuit of what was rightfully due to them.

The 1st plaintiff swore a supporting affidavit that with the wife/co-plaintiff they were joint owners of property comprised in title numbers MBA/BLOCK XVI/86, 87 and 335. By an agreement dated 23rd March, 2009 the plaintiffs leased the suit premises to the defendant company for five years and three months at a monthly rental of Shs. 200,000/= on an escalating basis as was pleaded (annexure SK 1). Their managing agent was Highway Carriers Limited. The defendant had been in occupation on an earlier lease which, when on expiry the present one was concluded. It was preceded with a letter of offer which the defendant accepted, signed and returned. But when a formal lease was prepared the defendant refused/declined to sign it. Then it terminated the tenancy, wrongfully left the premises with effect from 1st September, 2009 and refused to pay rent. The plaintiffs were not successful in their attempts to re-let the premises or sell the same. Thus the plaintiffs lost up to Shs. 15,006,920/= in rental income and have placed security guards at the premises at a cost of Shs. 3,240,000/= to date. And repairing the premises cost Shs. 1,900,000/= - hence the claim herein. That there was no defence to this claim at all. The record does not easily yield any opposition to this application but then both sides submitted.

The plaintiffs maintained that theirs was a liquidated claim following breach of contract as per the letter of offer dated 23rd March, 2009 which was signed and returned on behalf of the defendant company.

Reference was made to a replying affidavit (see above) which the plaintiffs discounted on the basis that no triable issues could be put up in this case by the defence. Further reference was made to the bundles of documents filed alongside the plaint herein. That the premises had remained unoccupied and attempts to mitigate loss were unsuccessful. The defendant may have expected reduction in rent but not that it was not as agreed upon in the proposed lease. And that the claim herein was based on actual sums set out particularly as per the plaint. And that in HCCC 173/2002 **Hussein Khaki & Others vs. R. M. Vaghela & Another (2005) e KLR**, summary judgment was entered for the plaintiff in a case of identical facts. The court was urged to find the defence filed herein as a sham.

The defendant company urged the court to go the opposite way. That this suit emanated from an earlier lease, January, 2004 to February, 2008 which expired. There were attempts at renewal but the terms and conditions were not mutually agreed. So the defendant did not opt to renew the lease with effect from September, 2009 when negotiations to renew failed. Then section 52 of the Registered Land Act (RLA) was reproduced without specifically clarifying its applicability here. Apparently the suit property is not agricultural and no side stated whether it was registered under Registered Land Act. The court was further told that the defendant paid all rent arrears, including asking the plaintiffs to offset a deposit of Shs. 500,000/= which the defendant had paid in anticipation of renewal. Keys were handed over on 9th December, 2009 and particularly that the plaintiffs had indicated that there was an interested tenant M/S Top Carriers Limited. Even later the plaintiffs went into the process to sell the premises to M/S Minazini Enterprises Limited. To the defendant, both those moves demonstrated that the plaintiff had accepted termination of lease with the defendant. Any loss allegedly incurred was denied either as lost revenue, costs of repairs or security guard services because no invoices were exhibited e.g. for the repairs.

Then there was a position that a statement of defence had been filed late due to unavoidable circumstances. May it be noted that such a defence was not found on the record. However, taking in consideration all that was available to this court to consider the prayer at this stage, it is inclined not to grant that order. Not because neither the replying affidavit nor defence was available for perusal but because the question of whether:

“.....the defendants have now, in breach of the agreement contained in the aforesaid letter of offer wrongfully terminated their tenancy and abandoned the suit premises since 1st September, 2009 (and)have also failed, neglected and/or refused to pay rental for the suit premises,”

needs to be settled at the trial. The plaintiffs have not refuted the position that the defendant handed the keys to them and accordingly they made attempts to relet/sell the premises. Evidence of costs of repair and hiring a security firm need to be presented at the evidence. What was tendered in these proceedings so as to consider to grant/refuse entry of summary judgment was the letter of offer dated 23rd March, 2009 only, carrying a copy of the defendant's cheque for Shs. 232,000/=. It was not said what for.

The plaintiffs in their submission, not only relied on the affidavit in support of the motion, but also proceeded to refer to the documents filed along with the plaint. Rather a novel approach here, but then those documents did not contain invoices/payment documents either.

All in all, the better course here is that the parties have thirty (30) days to prepare this suit for trial as per Order 11 Civil Procedure Rules. The trial will then decide whether in the circumstances, the letter of offer signed to have been signed/accepted on behalf of the defendant company constituted an agreement to enforce as sought here. But even with that, that letter can only relate to rents and not costs for repairs and hiring a security firm.

In sum this application is dismissed with costs.

Delivered on 26th July, 2012.

J. W. MWERA
JUDGE