



REPUBLIC OF KENYA
IN THE HIGH COURT OF KENYA AT MOMBASA
Civil Suit 213 of 2010

UNIVERSAL EDUCATION TRUST FUND.....PLAINTIFF/APPLICANT

VERSUS

ABDILLAHY KHAMIS MAZRUI.....DEFENDANT/RESPONDENT

RULING

This is an application by the Plaintiff under provisions of **Order XXXV Rules 1(1) (a) & (b) (2) and (3), Oder XII rule 6, Section 3A of the civil procedure Act**. The Plaintiff seeks the following orders:

- (a) That summary Judgment be entered in favour of the plaintiff against the Defendant in the sum of Kshs. 1,050,000.00.**
- (b) That the Defendant be ordered to give vacant possession of House no. 2 on plot no. MN/11269/1271 & 1272 to the Plaintiff.**
- (c) That the Plaintiff be awarded mesne profits at kshs. 15000.00 per month from 1st July 2010 until payment in full.**
- (d) That the costs of this application be provided for.**

The grounds on which the Plaintiff claims are that:

The Plaintiff claims a liquidated sum of Kshs. 1,050,000.00 being rent in arrears owed by the Defendant.

That the Defendant has admitted the existence of a tenancy agreement with the Plaintiff and has not denied there are arrears owing to the Plaintiff.

That the Defendant has admitted to being in arrears of rent in respect of the Property

That the Defendant has admitted failure to comply with the condition of the agreement and there admitted to breach of terms of the said agreement

That the Defendant has admitted to be in continued possession of the suit property despite failure to make prompt payment of rent.

That the Defence filed is a sham and does not raise any triable issues.

The application is supported by an affidavit sworn by Twalib Hatayan who is the Managing Trustee of the Plaintiff. The affidavit states that the Defendant was a tenant employee of the Plaintiff and there was a lease agreement dated 30th October 2003 at a monthly rent of kshs. 15,000. Rent was to be deducted from the salary of the Defendant. The agreement has been annexed to the affidavit as annexure TH1. The agreement further provided an option to purchase the property after 5 years. It is said that the Defendants employment was terminated on the 18th August 2004. But despite the termination the Defendant continued to occupy the suit premises. Also annexed to the supporting affidavit is a demand letter dated 2nd February 2008 by the Plaintiff Advocates terminating the Plaintiff's tenancy and demanding from the Defendant the payment of the sums of kshs. 615,000 in rent arrears. There is a reply to this letter by the Defendant's Advocate which admits that the defendant is in arrears of rent but seeks clarification of the amount actually outstanding. The letter further states that the Defendant

proposes to pay the arrears by paying monthly installments of kshs. 30,000 per month with effect from the month of July 2008. The Defendant also stated that he made improvements to the property and if he has to give vacant possession then proper valuation should be done to refund on his cost of improvement.

There is no reply on record by the Defendant or his advocates to the Plaintiffs application for Summary Judgment. There is a proof of service of the application on the Defendant advocates and a return of service by Alfred Ouma dated 14th day of September 2010 is on record.

There is defence and counterclaim by the Defendant on record. The defendant states that he is a purchaser in possession. That he has initially taken possession as a tenant of the suit premises at a monthly rent of Kshs. 15,000. The Defendant also states that he made improvements to the property.

I have considered the application of the Plaintiff, the Supporting affidavit thereof. The application come before me for hearing on the 15th September 2010 where only the Advocate for the Plaintiff appeared. It was confirmed to this court that the Defendant's Advocate was served and an affidavit of service was on record. The Defendant has not filed any replying affidavit to the application for summary judgment.

The only agreement between the parties is the lease agreement dated 30th October 2003. The agreement in short provided as follows:

- a) That the Defendant was an employee of the Fund (the Defendant).**
- b) That the fund is a creation of the TAL group of companies set up to take care of needy students and has acquired 11 houses in Mombasa on Plot Nos. MN/1/1269, 1271 and 1272 Nyali.**
- c) The fund agreed to offer the employee (Defendant) 23 years 5 months lease agreement with option to purchase the property known as house no. 2 subject to the conditions of the agreement.**
- d) The fund is to deduct Kshs. 15,000 from the employee as monthly rent every month commencing 30th October 2003 which amount shall be treated by the fund as rent of the house for the first 5 years.; and thereafter shall be treated as both rent and installment towards the purchase of the House.**
- e) The price of the house known as house no. 2 was Kshs. 4,237,454.00.**

f) The employee has agreed that the facility of purchase has been given to him after completion of 5 years from 1st October 2003.

g) The Employee has agreed that the monthly deductions shall be taken as rent if he leaves employment before 5 years and no claim for refund shall be entertained.

h) The employee agreed that should he decide to get out of the scheme at any time during the term, the payment made shall be taken as rent for the premises.

In view of the above and the material before the Court, the question now is whether the Plaintiff has proved its claim entitled to summary judgment at this stage.

Order XXXV of the Civil Procedure Rules provides as follows:

1(1) in all suits where a Plaintiff seeks judgment for

a) Liquidated demand with or without interest; or

b The recovery of land, with or without a claim for rent or mesne profits, by a landlord from a tenant whose terms has expired, or been determined by notice to quit, or been forfeited for non-payment of rent or for breach of covenant, or against persons claiming under such tenant or against a trespasser.

Where the Defendant has appeared the Plaintiff may apply for judgment for the amount claimed, or part thereof, and interest, or for recovery of the land or rent or mesne profits

It is not contested that the Defendant's employment was terminated before the 5 years. It is not contested that the Defendant continued to be in possession of the suit property since 30th October 2003. The Defendant has through his advocates acknowledged to be in arrears of rent. The Defendant has been issued notice to vacate the suit premises and pay rent arrears.

It is my holding that the option to purchase the suit property was conditional on the tenant serving for 5 years from the 30th October 2003. However the Defendants employment was terminated on 18th August 2004.

In the case of **Visha Builders Ltd Vs. Moi University 2002 KLR** the Court held that where a plaintiff makes a demand for summary judgment, the Defendant must demonstrate to the court that it should have leave to defend the suit. Once a defence is filed the Court must be satisfied that the defence raises prima facie triable issues.

In the case of **KABUTO CONTRACTORS LIMITED -VS- KARURI CIVIL ENGINEERING LIMITED** (2005) eKLR the court while affirming the Holding in the case of **GICIEM CONSTRUCTION COMPANY VS AMALGAMATED TRADERS & SERVICES (1983) KLR 156** held that

“a party who opposes an application for summary judgment ought to place evidence by way of affidavit showing some reasonable ground of defence in accordance with order XXXV rule 2 of the Civil Procedure Rules”.

As sated above no replying affidavit was filed by the Defendant.

In the present case I am satisfied that the Plaintiff has proved its application for summary Judgment.

I allow the plaintiff application dated 2nd August 2010 and it is hereby ordered as follows:

- a) That summary Judgment is entered in favour of the Plaintiff against the Defendant in the sum of kshs. 1,050,000.
- b) That the Defendant is hereby ordered to give vacant possession of house no. 2 to the Plaintiff within 30 days from the date of delivery of this order.
- c) That the Plaintiff is awarded mesne profits at Kshs. 15,000 per month from 1st July 2010 until delivery of the vacant possession to the plaintiff.
- d) That the Defendant pays the costs of the application.

DATED AND SIGNED AT NAIROBI ON THIS 16TH DAY OF JULY 2012.

M.K IBRAHIM
JUDGE

DATED AND DELIVERED AT MOMBASA ON THIS 25TH DAY OF JULY 2012.

R.M. MWONGO
JUDGE