



REPUBLIC OF KENYA
IN THE HIGH COURT OF KENYA
AT MOMBASA
CIVIL CASE 6 OF 2011
KINGFISHER PROPERTIES LIMITEDPLAINTIFF
VERSUS
JIVACO AGENCIES.....DEFENDANT

Coram:

Mwera J.
Siminyu for Plaintiff
Mkan for Defendant
Court Clerk Furaha

RULING

The plaintiff's prayers in a notice of motion dated 8th March, 2012 were sought under sections 1A, 1B, 3A of Civil Procedure Act and order 36 rule 2 (1) (b) of the Civil Procedure Rules:

- (i) that judgment be entered in its favour as regards:-
 - (a) vacant possession of property No. MANYARA BUILDING MBA/BLOCK 1/351;
 - (b) rent arrears of Shs. 232,000/=;
 - (c) mesne profits of Shs. 46,000/= with effect from July, 2010 until giving of vacant possession;
 - (d) interest on (b) and (c) above; and
 - (e) costs.

The grounds stated that the defendants had not raised any triable issues. They were given a notice to terminate their tenancy on 2nd March, 2010 as per section 4 (2) of the Landlord & Tenant (Shops, Hotels and Catering Establishments) Act for habitually failing to make payment but did not object to the notice duly served. So the tenancy terminated but the defendants refused to give vacant possession. The defence filed was a mere denial.

Taj Thanawalla, the director of the plaintiff company, swore the supporting affidavit exhibiting the termination notice of 2nd March, 2010 (Annexure TTI). That the notice was in a prescribed manner; the defendants did not object/challenge it. So the tenancy ended on 2nd July, 2010. They have not given vacant possession. The defendants owed rents of Shs. 232,000/= in arrears and since the tenancy expired, mesne profits at Shs. 46,000/= have been accruing. Hence this application for judgment to facilitate execution.

In the replying affidavit of Vimal Shah, a partner/defendant in M/S Jivaco Agencies, it was averred that the Business Premises Rent Tribunal (BPRT) had the mandate to determine whether the termination notice took effect or not. That the defendants delivered to the plaintiff cheques for rents up to December, 2010 which were returned. So the claim herein was illegal. The defence raised triable issues and the plaint was incurably defective on account of the verifying affidavit. The suit ought to be dismissed. As at this point it may be noted that the rent cheques allegedly delivered to but returned by the plaintiff have not been exhibited and there is no application as at this stage to strike out the suit due to this or that defect.

There was then filed a notice of preliminary objection stating that the plaint herein was not accompanied with a verifying affidavit, witness statements or list of documents. If this ground can be disposed of here, the record has it that when the plaint was filed on 17th March, 2011, it was accompanied with a verifying affidavit. It also had a resolution by the plaintiff company authorizing T. Thanawalla to swear an affidavit on its behalf. Also filed was a witness statement by Taj Thanawalla plus documents. Indeed the defendant's contention is that the amended plaint filed on 28th February, 2012 did not have a verifying affidavit. That appears so. However, in some past cases such an affidavit has been held not necessary for an amended plaint. The cases of **Microsoft Corporation vs. Mitsumi Computers Garage [2001] 2 EA 460** and **Twictor Investments Limited vs. Euro Bank Limited & Another [2006] eKLR** were cited and this court agrees.

To dispose of the preliminary objection first, this court is satisfied that the same lacked merit and it is dismissed with costs. In this court's view this notice of objection should have been considered alongside the merits of the application to save money and time. Anyway, the same may be canvassed in twenty one (21) days. Costs to the applicant.

Delivered on 19th July, 2012.

J. W. MWERA

JUDGE