REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA AT NAIROBI

MILIMANI LAW COURTS

Civil Suit 551 of 2009

QUICK LUBES E.A LTD ……..…….. PLAINTIFF

VERSUS

KENYA RAILWAYS CORPORATION ……..….. DEFENDANT

J U D G E M E N T

1. The Plaintiff's claim is that by a lease agreement dated 20th December, 2002, the Plaintiff let from the Defendant the Defendant's premises known as LR No. 12180 Railway shed supplies yard measuring 63,372 m^2 (hereinafter **"the demised premises")** for a term of 10 years from 1st September, 2002. The lease had a renewal clause for a like period. The tenancy was a controlled tenancy in terms of the provisions of Landlord and Tenant (Shops, Hotels & Catering Establishments) Act Chapter 301 of the Laws of Kenya. That on 16th May, 2009 the Defendants violently evicted the Plaintiff from the said premises whereby the Plaintiff suffered loss amounting to Kshs.61,7878,000/-. That the eviction was without notice and was on the pretext of rent arrears of in excess of Kshs.3,149,358/- yet the Plaintiff had paid Kshs.1,662,240/-. As at the time of eviction, the monthly rent was Kshs.272,545/- which the Plaintiff alleged was agreed upon by intimidation, duress and coercion. The Plaintiff therefore claimed various reliefs in its Plaint dated 31st July, 2009.

2. In its defence dated 1st September, 2009, the Defendant contended that the demised premises measured approximately 330 X 77.5 feet and not as alleged by the Plaintiff, the Defendant denied having received the alleged sum of Kshs.1,662,240/- from the Plaintiff, that the consent to pay the monthly rent of Kshs.274,545/- was lawful, that the Defendant was entitled to deal with the demised premises as it pleased after the lawful termination of the lease between the Plaintiff and the Defendant. The Defendant therefore denied being indebted to the Plaintiff and contended that the Plaintiff's suit was incompetent for want of a statutory notice under Section 87 of the Kenya Railways Act Cap 397. The Defendant prayed for the Plaintiffs claim to be dismissed.

3. In support of its case, the Plaintiff called three witnesses. The Plaintiffs case briefly was that upon leasing he demised premises which was bushy, it invested approximately Kshs.20million by connecting the main services thereto, had the Defendant's chief engineer approve its plans and developed, inter alia, 68 exhibition stores, two bars and restaurants, a food court and car wash facilities. The Plaintiff was collecting monthly rent of Kshs.790,000/-, that on Saturday 16th May, 2009 the Defendant removed the Plaintiff's exhibitors from the demised premises with one (1) hour notice, that the Defendant did not allow the Plaintiff back to the demised premises to date. PW1, the Plaintiff's managing Director explained to the court how the Plaintiff's claim of Kshs.61,787,500/- was arrived at. That on evicting the

Plaintiff the Defendant signed leases with the Plaintiff's exhibitors. On cross examination, he stated that the Defendant had argued that the Plaintiff had occupied a bigger space than that leased by the Defendant but the issue had been settled by consent in September, 2008 when the Defendant increased rent by 13 times, that due to post election violence whose effects spilled over to 2009, the Plaintiff was struggling to pay rent, that after the Plaintiff was locked out, it left behind its equipment and did not know what happened to them. PW1 denied that the Plaintiff had sublet the demised premises arguing that since the same had been taken as an exhibition, 3rd parties were allowed to use the premises as such. He was firm that before eviction, no notice was served upon the Plaintiff.

4. PW1, an accountant by profession testified that the Plaintiff made a profit of Kshs.3,911,595/- in the year 2007, but there was a decline in profit in 2008 because of the increased rent by the Defendant. The Plaintiff also presented the evidence of a qualified valuer to show that the improvement to the demised property was Kshs.19,560,000/-. The valuation was done on 18th May, 2009.

5. In defence, the Defendant called one witness. The Defendant's case was that the premises leased to the Plaintiff was 25,575 sq. ft for 10 years. The lease was to expire in 2012, that the Plaintiff was in breach of the lease in several ways. That the Plaintiff fell into rent arrears, it sublet the premises to 3rd parties, it constructed structures without the Defendant's authority and also occupied a bigger space than originally leased. That the Defendant did give the Plaintiff notice in accordance with the lease before carrying out the eviction. That the eviction was carried out using the Defendant's security department and the Kenya Railways Police. That the Defendant locked out the Plaintiff on 16th May, 2009 and leased out the premises itself. The Defendant admitted that there was no court order allowing the eviction.

6. The parties adopted the Defendant's statement of issues dated 1st March, 2012 as issues for determination. Those issues may be summarized as following. Whether the Plaint is incurably defective, whether the lease between the parties was a controlled tenancy, whether the Plaintiff was in breach of the lease between the parties, whether the consent entered in HCCC No. 14 of 2008 was valid and its effect on the lease between the parties, whether the eviction of the Plaintiff by the Defendant was lawful, whether the Plaintiff had proved its case for special and general damages and finally the issue of costs.

7. The Defendant's contention is that the Plaint is incurably defective and incompetent for lack of authority to commence the suit. The Plaintiff has denied this fact and contended that the issue was raised too late during PW1's cross examination. I hold the view that the issue of defectiveness of the suit cannot properly arise at this stage because in its Preliminary Objection dated 19th April, 2010 point Nos. 3 and 4 thereof were directed on the defectiveness and incompetence of the suit. That Preliminary Objection was dismissed by Hon. Apondi J by a ruling delivered on 19th May, 2011. No appeal was preferred from the said ruling and that determination still stands.

8. If I am wrong on this which I don't think, still the issue is to be answered in the negative. Firstly, the authority required under Order 1 Rule 13 of the Civil Procedure Rules is not applicable in this case. Here there is only own Plaintiff who has a legal personality. Whilst Order 1 Rule 13 presupposes more than one Plaintiff. Secondly, prior to the coming into effect of the Civil Procedure Rules 2010, (for this suit was filed in 2009), the then order VII Rule 2 only required a Plaint to be accompanied by an Affidavit sworn by the Plaintiff verifying the correctness of the averments therein. Thirdly, I do not think that lack of authority to sue by a company in the circumstances of this case makes the suit fatal.

9. In the case of **Panafcon Engineering Ltd –vs- Kenya Re-Insurance Corporation Ltd HCCC No. 219 of 2003 (UR)** in circumstances similar to the present case, I held that:-

"In my view, it is where a set of directors or some of the members of a company sue in the name of the company where the issue of authority would automatically arise for the reason of costs. It would be improbable that a company could not authorize a suit to recover monies owed to it like in the case before me."

This is the position taken by the Court of Appeal in the case of **East African Safari Air Ltd –vs- Antony**

Ambaka Kegode & Anor (2011) e KLR wherein the court held that a company can after the filing of the suit still have such filing ratified subsequent to the filing. For the said reasons, the Plaintiff's suit is competent and properly before the court for consideration.

10. On the issue of lack of a statutory notice under Section 87 of the Kenya Railways Act, I saw a letter dated 29th May, 2009 by the Plaintiff's Advocates addressed to the Managing Director of the Defendant. At page 3 of PExh1 was a Certificate of Posting No. 0208996 dated 3rd June, 2009. The same was not challenged when PW1 testified. I am satisfied that the provisions of Section 87 of the Kenya Railways Act were satisfied by the Plaintiff in this case.

11. As regards the lease between the parties, my view is that it was not a controlled tenancy. The lease was in writing, it was for a period in excess of five years, it contained a termination clause based on breach of a covenant. In any event, under the provisions of the State Corporations Act, Chapter 446 Laws of Kenya, I believe that for the purposes of Section 2 (1) (b) (ii) Chapter 301 of the Laws of Kenya, the Defendant will fall under the proviso.

12. The other issue for determination is whether the Plaintiff was in breach of the Lease Agreement. This must be answered in the affirmative. It was not disputed that the Plaintiff was hopelessly in arrears of rent. A simple calculation will show that payment of Kshs.1,662,240/- could not have discharged the Plaintiff's entire obligation under the lease as regards payment of rent. PW1 indeed admitted the Plaintiff being in rent arrears. As regards the Plaintiff occupying more space than agreed under the lease, that was proved from the evidence of PW1, PW3 and DW1. However, that breach in my view was remedied and/or negative by the consent order of 25th September, 2008 in HCCC No. 14 of 2008 whereby rent was raised to Kshs.274,545/- per month. That order partially stated:-

"That the Plaintiff to pay rent of Kshs.274,545/- per month in respect of the lease premises on LR NO. 12180, measuring 63,375 sq. ft. commencing 1st May, 2008."

The Defendant contended that the Plaintiff was in breach of lease for having sublet but PW1 testified that since the premises was let out as an exhibition, there was no breach as the lease contemplated that persons would exhibit their waves therefrom. I am in agreement with the Defendant. The express terms of Clauses 12 and 13 were to the effect that the demised premises was to be used by the Plaintiff for storage and exhibition. PW1 admitted that he had sublet parts of the demised premises to 3rd parties who were paying rent to the Plaintiff. To my mind that was breach of those covenants in the lease.

13. The other issue raised was the validity of the consent entered into on 25th September, 2008 and issued on 8th October, 2008. PW1 testified that the Plaintiff was intimidated and coerced into entering into that consent. Having listened to the evidence, I am not convinced that there were any threats or coercion that the Plaintiff was made to bear to have led to the consent is in question. Even if there was any such threats or coercion, I do not think it will have any relevance to this suit because whilst that order was issued on 8th October, 2008, no application was made is that suit or any other suit to set it aside. The order remains in force and valid to that extent. As regards the effect of that consent, the same varied the lease as to the area of the demised premises by increasing the area to 63,375 sq ft and the rent to Kshs.274,545/- per month. Of course, since the Plaintiff fell into arrears of rent it cannot be said that the Plaintiff did fully comply with that order.

14. On the legality of the eviction, the Defendant contended that since the Plaintiff has breached the Lease Agreement by falling into arrears, subletting the premises and occupying a bigger space than let out, it exercised its right under Clause 19 of the Lease. DW1 testified that the Defendant gave notice of termination to the Plaintiff whereafter the Defendant evicted the Plaintiff using its security department and the Kenya Railways Police. The Defendant removed all the occupants and then leased out the premises. The Plaintiff contend that the said eviction was carried out without any notice on a Saturday and without any court order.

15. As regards notice, the Defendant produced at page 21 of DEXh1 a letter dated 14th April, 2009

addressed to the Plaintiff. The penultimate paragraph of that letter read:-

"We wish to advise you that the corporation is not going to entertain this position any longer. Your continuing to write to us is a delaying tactic that will not be acceptable. Please take notice and be cautioned your lease stands cancelled and distress will be levied on you upon expiry of 28 days from the date of this letter if the total amount as indicated is not received." (Emphasis supplied)

The Plaintiff did not deny having received this letter. This was sufficient notice that the lease had been cancelled for reason of rent arrears and that distress was to be levied after 28 days of that letter.

16. That was not all. Instead of distraining for rent after the lapse of the 28 days notice as it had intimated to the Plaintiff, the Defendant in a cowboylike manner descended upon the demised premises on a Saturday 16th May, 2009, ejected everyone therefrom and locked the same. The Plaintiff was never allowed access thereto and lost everything it may have had therein. I have said that the Defendant took possession in a cowboy like manner because, by the use of its security personnel and Kenya Railways Police, that was not peaceable entry. The Plaintiff was not requested to leave the demised premises and complied. His sub-tenants were literally thrown out and the premises locked. Peaceable entry presupposes where a person is requested to hand over possession of the premises and he hands over the keys thereto to the landlord without the landlord having to flex its/his muscle by use of force such as the use of security personnel and/or police. To that end, I hold that the Defendant did not re-enter the demised premises peaceably.

17. Further to the foregoing, the Defendant did not advise the Plaintiff that it was to evict the Plaintiff from the demised premises. It had only alluded to the fact of distraining for rent arrears.

18. To the Defendant, since the Plaintiff was in breach of the lease, it was entitled to re-enter the demised premises as it did. I do not think so, re-entry does not mean forceable entry. Re-entry must be in accordance with the law. For protected tenancies, re-entry must be through the relevant tribunals whilst for all other tenancies, re-entry must be through a court order directing vacant possession. The actions of the Defendant were deplorable, illegal and unacceptable. This country is under rule of law. If every citizen was to be allowed to enforce his/her perceived rights through self help, we shall be I a state of anarchy which is unacceptable in a democracy such as ours. Rights are and must be enforced through known legal channels but definitely not through self help. The fact that the Defendant's operations are backed by a unit of state coercive power in the name of Kenya Railways Police does not give the Defendant the right to enforce its rights outside the known legal process. The use of that unit in the circumstances of this case was illegal. A landlord cannot evict a tenant in the disguise of distraining for rent!

19. In the case relied on by the Plaintiff of **Gusii Mwalimu Investments Ltd & others –vs- Mwalimu Hotel Kisii Ltd CA No. 160 of 1995 (UR)** Shah JA (as he then was) held:-

"The landlord may also have acted illegally, that is contrary to Section 90 of our Penal Code (Cap 63 Laws of Kenya) which reads:-

90. Any person who in order to take possession thereof, enters on any lands or tenements in a violent manner, whether the violence consists in actual force applied to any other person or threats in breaking open any house or in collecting an unusual number of people and whether he is entitled to enter upon the land or not (emphasis added) is guilty of the misdemeanor termed forcible entry:

Provided that a person who enters upon lands or tenements of his own, but which are in the custody of his servant or bailiff, does not commit the offence of forcible entry."

I have no hesitation whatsoever in holding that the landlord did all it could to obtain the possession unlawfully and the learned judge was entirely right in making the orders he made. If what the landlord did in this case is allowed to happen we will reach a situation when the landlord will simply walk into the demised premise exercising his right of re-entry and obtaining possession extra-judicially. A Court

of Law cannot allow such state of affairs whereby the law of the jungle takes over. It is trite law that unless the tenant consents or agrees to give up possession the landlord has to obtain an order of a competent court or a statutory tribunal (as appropriate) to obtain an order of possession."

I fully agree with that statement and fully apply the same in this case. Accordingly, the Defendant acted illegally in evicting the Plaintiff from the demised premises on 16th May, 2009. Of course, there is no wrong without a remedy.

20. Having come to the conclusion that the Plaintiff had been wrongfully evicted from the demised premises, the other issue to be determined is whether the Plaintiff has proved its case for compensation. I am convinced that it has. The Plaintiff pleaded special damages of Kshs.67,787,500/- and general damages for unlawful eviction and loss of goodwill. On specials the Plaintiff claimed under four heads loss of profits for the balance of the lease (Kshs.10,500,000/-), loss of cost of capital development (Kshs.19,560,000/-), lost items (Kshs.1,727,500) and loss of profits for the 10 years renewable period of the lease (Kshs.30,000,000/-)

21. (i) Lost Items

PW1 testified that since the eviction took place on 16th May, 2009 on a Saturday in his absence, he was locked out and all the Plaintiff's equipment were locked in. The Plaintiff never removed anything. DW1 corroborated this evidence and stated that on ejecting the Plaintiff's sub-tenants, the Defendant locked the demised premises and leased out the same to its own tenants. At the trial, the Plaintiff produced at pages 4 to 9 of PExh2 receipts for the various items it claimed in its Plaint. The documents were produced by consent. PW1 was not challenged on the same. My view is for those reasons, the Defendant cannot at submission level challenge them as having no revenue stamps. That should have been put to Pw1. In any event, I do not think that having been produced by consent, the same can be challenged at submission stage. I accept the same as evidence of the cost of purchase of the items claimed. The same totals Kshs.1,696,500/- I allow that sum as proved.

(ii) Loss of cost of capital improvement development

The Plaintiff claimed Kshs.19,560,000/- under this item. PW1 testified that when the Plaintiff took possession of the demised premises in 2002, it was bushy with no services. The Plaintiff put a perimeter face, cleared the bush, excavated the area, laid concrete slabs, partitioned the place to create exhibition stalls, connected main services and constructed car wash services. These were approved by the Kenya Railways Chief Engineer. He produced at page 2 PExh3 the approved plan dated 22/05/01 referenced GR1/7/366. In total, sixty eight (68) exhibition stalls were constructed with a food court, car wash, and two (2) bars. He told the court that the Plaintiff spent close to Kshs.20million. Having considered the evidence produced, the total rent of Kshs.790,000/- per month collected from the facility and the Plaintiff's Audited Accounts for the years 2007 and 2008 produced at pages 30 to 55 of PExh1 which show the Plaintiff's non-current assets (property, plant & equipment) standing at Kshs.19,964,470/- as well as the evidence of Pw2, I am satisfied that the Plaintiff has approved that it lost its capital investment in the demised premises to the tune of Kshs.19,560,000/-

(iii) Loss of profits for 3 ½ balance of the lease

It was commonly agreed that the lease was to run up to 31st August, 2012 (see Clause 1 of the lease at page 4 of DW1). The Plaintiff was evicted on 16th May, 2009. There was three years and three (3.3) months left on that lease. The Plaintiff's Audited Accounts for the years 2007 and 2008 shows the profits after tax for those years to be Kshs.2,738,118 and Kshs.1,353,937/-, respectively. The average monthly profit for those two years would be Kshs.170,502/30. A business is expected to make a profit. I am satisfied that by being evicted, the Plaintiff lost the expected profit it could have made for the 39 months the lease remained unexpired. This is so since I have found that the eviction was illegal. Had the Defendant followed due process, this item on loss of profit, in my view, would not have arisen. Now that it did not, the same must be considered. I do not accept the Plaintiff's claim for Kshs.250,000/- as the monthly profit. From the produced accounts, the average monthly profit is Kshs.170,502/-. Since DW2

testified that the increased rent had led to the decrease in profits, I will award a sum of Kshs.150,000/- per month for 39 months. Accordingly, I award a sum of Kshs.5,850,000/- under this item.

(iv) Loss of profits for 10 years renewable period of the lease

The Plaintiff claimed Kshs.30,000,000/- under this head. Although the lease had a renewal clause for a subsequent period of 10 years, Clause 19 thereof stipulated that renewal would be subject to the Plaintiff not being in breach of the lease. The relationship between the parties for the period 2002 – 2009 was rocky. There was no love lost between the two thereby leading to the illegal eviction. I doubt if the said lease would have been renewed by the Defendant. In any event, there was no evidence that the Plaintiff would have exercised the option to renew and/or the Defendant would have granted the same. Accordingly, I reject this claim.

22. As regards general damages for wrongful eviction and loss of goodwill, I have already held that the eviction was illegal. It is no doubt that the Plaintiff suffered loss of opportunity as well as damage. The goodwill in the business went up in smoke. I am satisfied that the Plaintiff is entitled to compensation for the said loss and damage. In the case of **Rev. Simon Ndungu Mungai & Anor –vs- Municipal Council of Kiambu (2011) e KLR**Hon. Musinga J awarded Kshs.2million for unlawful eviction. Considering the circumstances of this case and considering that I have already awarded the Plaintiff loss of profits for three (3) years an award of Kshs.2million will be adequate under this head.

23. Accordingly, I hold that the Plaintiff has proved its case on a balance of probability and I enter judgment on behalf of the Plaintiff against the Defendant as follows:-

a) The Plaintiff was not a protected tenant under Chapter 301 of the Laws of Kenya.

b)The Plaintiff's eviction by the Defendant on 16th May, 2006 was illegal and unlawful.

c) Special damages of Kshs.27,106,500/-

d)General damages of Kshs.2,000,000/-

24. Since costs follow the event, I also award costs of the suit to the Plaintiff together with interest thereon from the date of this judgment until payment in full.

It is so decreed.

DATED and DELIVERED at Nairobi this 28th day of September, 2012.

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A. MABEYA

JUDGE