



REPUBLIC OF KENYA

High Court at Nairobi (Nairobi Law Courts)

Civil Suit 516 of 2011

GERALD GIKONYO MAINA.....1ST PLAINTIFF

HERBERT NGUNYI KAMAU.....2ND PLAINTIFF

KIRUBI KAMAU.....3RD PLAINTIFF

DUNCAN KIONGA.....4TH PLAINTIFF

GERALD GIKONYO KANYUIRA.....5TH PLAINTIFF

KABIRO NG'ANG'A.....6TH PLAINTIFF

MACHARIA KIMANI.....7TH PLAINTIFF

SAMUEL KARIU RUIYI.....8TH PLAINTIFF

MARY WANGARI GIKONYO.....9TH PLAINTIFF

PHILIS WANGECHI MWANGI.....10TH PLAINTIFF

MARGARET WANGARI KARIUKI.....11TH PLAINTIFF

-VERSUS-

**SHAFIQUE PYRAHI BHATIA
T/A BHATIA AUTO (K) LIMITED..... DEFENDANT**

RULING

1. Before me for determination is a Notice of Motion application by the Plaintiff dated 15th May 2012 which seeks orders that the defendant's statement of defence dated 16th January 2012 and filed on 17th January 2012 be struck out and that judgment be entered in favour of the Plaintiff for vacant possession of the suit premises and for rent arrears, mesne profits and VAT all in the sum of Kshs. 2,276,000/- for the period upto the month of May 2012. The Applicant further prays for further mesne profits at Kshs. 80,000/- per month and VAT upto such time as vacant possession shall be granted.
2. The application is premised on the grounds set out on the face of the Notice of Motion and is further buttressed by an affidavit sworn by one of the co-plaintiffs Kirubi Kamau on 15th May 2012.
3. The Plaintiffs' case is that they served upon the Defendant a Tenancy Termination Notice dated 20th September 2010 seeking to terminate the tenancy with effect from 1st December 2010. The reason for the termination was that the Defendant had defaulted in paying rent for a period of two months after such rent had become due and payable. The Tenancy Notice was issued pursuant to Section 4(2) of the Landlord and Tenant (Shops, Hotels and Catering Establishments) Act, cap 301 of the Laws of Kenya. The Plaintiff avers that the Defendant upon service did not file a reference with the Business Rent Tribunal as required under Section 4(2) of cap 301 aforesaid before the effective date hence the tenancy stood terminated with effect from 1st December 2010 in terms of Section 10 of that Act. Consequently, the Defendant has no right whatsoever to continue in possession of the premises.
4. In addition, the Plaintiff contends that by a letter dated 16th November 2010, the Defendant through his advocates admitted that he owed rent arrears of Kshs. 928,000/- and indeed proposed to settle the arrears by installments. Since then, no rent had been paid. The Defendant had failed to produce any material before the court to support his contention that he was misled into failing to refer the matter to the Business Premises Rent Tribunal or that he had paid any rent since the letter of 16th November 2010.
5. The Defendant opposes the application through a Statement of Defence dated 16th January 2010 and a replying affidavit sworn on 4th June 2012. The Defendant contends that he did not file a Reference at the Business Premises Rent Tribunal before the effective date as he was misled by the Plaintiffs into not filing the Reference. He claims that the Plaintiffs misled him into believing that they were re-looking at the accounts, which was never done. The Defendant also claims that he stopped paying rent when he insisted on being provided with either ETR receipts or in the alternative, be credited with the amounts collected by the Plaintiffs as VAT and that such amounts be applied to settle rent arrears.
6. Counsel for both parties filed written submissions to buttress their respective cases.
7. I have carefully considered the application on the basis of the affidavit evidence tendered for and against as well as the submissions by counsel for the Applicant.
8. Order 2 Rule 15 (1) of the Civil Procedure Rules allows this court to order to be struck out any pleading on the grounds, *inter alia*, that it is scandalous, frivolous and vexatious or may prejudice, embarrass or delay fair trial of the action; or if it is otherwise an abuse of the court process.
9. The above grounds were tested in the case of **DT Dobie & Company (Kenya) Limited vs. Muchina**

[1982] K.L.R 1 where the court held as follows:

“no suit ought to be summarily dismissed unless it appears so hopeless that that it plainly and obviously discloses no reasonable cause of action and is so weak as to be beyond redemption and incurable by amendment. If a suit shows some semblance of a cause of action, provided it can be injected with real life by amendment, it ought to be allowed to go forward”.

8. In the application before me, the Defendant admits existence of a landlord-tenant relationship between himself and the Plaintiffs. He further concedes that he did not file a reference within the period allowed under Section 4(2) of the Landlord and Tenant (Shops, Hotels and Catering Establishments) Act cap 301. There is further a written admission by counsel for the Plaintiff vide letter dated 16th November 2010 that rent arrears in the sum of Kshs. 928,000/- are acknowledged and that the Defendant was committed to settle the amount in installments.

9. From my perusal of the defence by the Defendant, I find the same to be comprised of essentially two limbs. The first limb of his defence is that the Plaintiff misled him into believing that he ought not to have filed a reference. I have perused the material placed before me in relation to this contention and established that by a letter dated 8th November 2010 addressed to the Defendant by his own advocates, Gachie Mwanza & Co. Advocates, the Defendant was informed that the advocates had issued a Notice of Non-Compliance with a termination notice and that they were in the process of preparing the reference for filing in court. This letter was written well after the termination notice had been served vide letter from the Plaintiff's advocates dated 20th September 2010. In my view, as of 8th November 2010, the Defendant had already made up his mind to file a reference against the termination notice and there was no plausible reason as to why the reference was not filed on time. The letter of 11th November 2010 from the Plaintiff's property agent in my view did not give the impression that the issue of rent arrears could be sorted out of court but merely invited the Defendant to raise any queries he had with regard to the claimed rent arrears. If anything, that letter carried a firm threat that if rent was not paid within 7 days from the date of the letter, legal action would be commenced. I do not therefore find this limb of defence as raising a triable issue meriting subjection of the matter to a full trial. Not when the Defendant admits receipt of the termination notice as well as his failure to file a reference.

10. The second limb of the Defence is that the Defendant has all along been paying rent but has not been issued with ETR receipts by the Plaintiff. That is why he was unable to continue paying rent. In my view, this limb of the Defence constitutes an admission that the Defendant has not been paying rent on account of the Plaintiff's failure to provide the ETR receipts. In a claim for delivery of vacant possession, I find the dispute as to provision of ETR receipts for rent paid while being related to the performance of the tenant's obligations to be rather remote. In that regard, the Defendant ought to have demonstrated that it has been paying rent irrespective of the Plaintiff's failure to avail the ETR receipts. If anything, the Defendant should have been paying the net rental amount and withheld the VAT portion until the dispute was resolved. I therefore hold that the issue of provision of VAT receipts or of accounting for VAT paid is one of taking accounts and which is capable of being resolved by this court outside the ambit of a full trial.

11. Consequently, having considered the application in totality, I am minded to compromise the application in the following orders:

- 1) That the Notice of Motion be and is hereby allowed in terms of prayers (a) and (b) subject to order (4) below.**
- 2) That judgment be and is hereby entered for the Plaintiff in the admitted sum of Kshs. 928,000/- being the rent arrears inclusive of VAT as at 30th November 2012.**
- 3) That the remainder of the Plaintiff's claim for rent arrears, mesne profits and VAT be assessed by the Deputy Registrar of this court within 21 days from today and that such assessment do give full account as to the VAT paid by the Defendant including ETR receipts thereof.**

- 4) That there be stay of execution of orders (1) and (2) above pending assessment of rent payable.
- 5) That this matter be fixed for mention within 30 days from today for further orders of the court.

IT IS SO ORDERED.

DATED, SIGNED AND DELIVERED AT NAIROBI THIS 18th DAY OCTOBER 2012.

**J.M. MUTAVA
JUDGE**