REPUBLIC OF KENYA
IN THE HIGH COURT OF KENYA
AT NAIROBI (NAIROBI LAW COURTS)

Environmental & Land Case 19 of 2008

REPUBLIC OF KENYA
IN THE HIGH COURT OF KENYA AT NAIROBI
ELC NO. 19 OF 2008

HORN BILL PUB LIMITED ……PLAINTIFF

V E R S U S

AMBASSADEUR INVESTMENTS (K) LTD ……DEFENDANT

R U L I N G

On 30th October, 2008 the Defendant filed this motion under **Order 6 rule 13 (b), (c)** and **(d)** and **Order 35 rule 1 (1) (b)** of the **Civil Procedure Rules** and **section 3A** of the **Civil Procedure Rules** to have the plaint and defence to counterclaim filed herein struck out as being vexatious, frivolous and an abuse of the process of the court after which summary judgment be entered in its favour against the Plaintiff as prayed in the counterclaim as follows:-

(a) an order that the plaintiff should forthwith vacate and give vacant possession to the defendant of shop number 7 on the ground floor of the building known as Ambassadeur Hotel and Capital House situate on L.R. 209/8688, Nairobi, and

(b) that the plaintiff do pay the defendant *mesne* profits at the rate of KShs. 300,000/= per month with effect from 1st May, 2006 in respect of the shop.

The application was based on the grounds that the Plaintiff's lease for the premises herein expired by effluxion of time on 30th April, 2006 and was not reviewed or extended on 5th May, 2006 the Plaintiff's application for injunction to restrain the Defendant from interfering and/or evicting and/or interrupting the tenancy or further leasing and re-assigning and/or sub-letting the premises was dismissed with costs; that despite the Ruling in the injunction application the Plaintiff has refused to vacate and give vacant possession of the premises and consequently it is a trespasser on the same; and the Plaintiff has not been paying rent from the date the said leave expired thus subjecting the Defendant to great loss of income.

The application was further based on the supporting affidavit dated 30th October, 2008 and sworn by John Maina Kaguma who is a director of the Defendant company. It basically states that by lease dated 30th October, 2001 the Defendant leased to the Plaintiff all that premises known as Shop Number 7 on the ground floor of the building known as Ambassadeur Hotel and Capital House erected on LR. No. 209/8688, facing Tom Mboya Street in Nairobi as more particularly shown for the purposes of identification on the building plan registered in the Registry of Documents, Nairobi in Volume D1 Folio 857/1522 and thereon marked as Shop Number 7 ("SAFEER") (hereinafter called the "premises"). A copy of the said lease was annexed and marked "JMKI". The lease was for a fixed term of 6 years from 1st May, 2000 and it expired by affluxion of time on 30th April, 2006 of which clause 4(a) thereof provided that:-

"At the expiry of the term (the Plaintiff) to yield up the premises in good condition and in accordance with the term of the lease and give up all keys to the premises to the landlord."

The lease did not contain any option for renewal and the Plaintiff's request to be granted a further or a new lease was rejected. A copy of letter from S. M. Muhia & Co. Advocates for the Defendant dated 31st March, 2006 was annexed as "JMK2". On 24th April, 2006 the Plaintiff filed an application for injunction (as indicated in the grounds above) which was dismissed on 5th July, 2006 and in which Ruling the court indicated that the Plaintiff had no right to continue

occupying the premises after the expiry of the lease by effluxion of time on 30th April, 2006. A copy of the Ruling was annexed as "JKM 3". The Defendant filed defence and counterclaim to which the Plaintiff filed Reply to defence and defence to counterclaim. It is the defence to counterclaim that the Defendant depones that it is a mere sham, shadowy, dubious, frivolous, vexatious and/or an abuse of the process of the court, merely aimed at unfairly prejudicing, embarrassing and delaying the expeditious trial of the suit and therefore ought to be struck out. The Defendant went on that in view of the fact that the lease which was for a specific term had expired, the Plaintiff did not have any reasonable cause of action. Subsequent to the Ruling, it was stated, the Plaintiff had refused to vacate the premises, now that it was a trespasser, and the Defendant was suffering loss by way of *mesne* profits at the rate of KShs. 300,000/= per month with effect from 1st May, 2006.

On 21st November 2005 the Plaintiff filed a notice of preliminary objection to the application on the ground that it was an abuse of the court process, was vexatious, frivolous and wrongly filed; the application contained a Ruling as an exhibit but which was incomplete on the face as it failed to indicate who had delivered it and its ratio decidendi; and that no order and/or decree had been extracted and/or applied for and/or contained in the said application.

The Plaintiff filed a replying affidavit through its director James Kimondo. He stated that the Directors of the Plaintiff negotiated and signed two leases with then directors of Ambassadeur (Kenya) Ltd. The lease was executed for Shop Number 7 which now houses the "Hornbill Pub" and a second lease was executed for Shop Number 3 which housed **"Hornbill Eating House"** and **"Hornbill Fast Food"** – hereinafter referred to as the **"premises".** Each lease was executed on 30th October, 2000 and was to last 6 years. In addition, there was negotiated a sub-lease to enable the Plaintiff to sub-let a portion of the premises to Simba Telecom. Subsequent to that and for over one year, Simba Telecom paid a monthly rent of KShs. 90,000/=. The Directors of the landlord sold the entire premises and the company managing the assets to the Defendant company without any change to the obligations of the parties. However, the Defendant unilaterally negotiated a new arrangement with the sub-tenants who begun paying a monthly rent of KShs.40,000/= directly to them (the Defendants). The matter was raised by the Plaintiff's advocates – Mugo Otunga & Company Advocates- without response. In the meantime, the Defendants continued to accept rent of KShs. 90,000/= from the Plaintiff for Hornbill Pub from December, 2001. The matter eventually went to an arbitrator – Mathew Kanyi who heard the parties on 11th March, 2003 but has since not produced the result. There is therefore still the issue regarding the rent payable. The Plaintiff stated they have a good defence to the counterclaim. The deponent went on that the last rent per month was KShs. 161,427/= and even if one were to consider the 10% annual increase the amount payable would be KShs. 236,344/43. He stated that the lease did not even envision a 10% of increase per annum. The claimed KShs. 300,000/= per month would therefore be a just enrichment.

John Maina Kaguma swore a supplementary affidavit reiterating that the lease had expired and therefore that there was no triable issue. He deponed that the said sub-lease had contravened the lease. Regarding the monthly *mesne* profits payable by the Plantiff, Kaguma swore that even if the amount was not KShs. 300,000/= the Defendant was willing to go by the admitted KShs. 236,344/43 to get judgment on admission.

The case between the Plaintiff and the Defendant begun on 24th April, 2006 when the former sought that the later be restrained from interfering and/or evicting and/or interrupting with the tenancy and/or further leasing and/or reassigning and/or subletting the premises comprises in shops 7 and 3 and operated as Hornbill Pub and Hornbill Eating House/Hornbill Fast Food respectively "pending the determination of the suit". Also sought was an order that the notice dated 31st March, 2006 served on 5th April, 2006 be deemed to be null and void and illegal. The plaint made reference to the two leases and the subletting of part of the premises to Simba Telecom which the Plaintiff said was with the permission of the Defendant. There was the arbitration whose outcome had not been known. The Plaintiff stated that in February, 2004 it initiated negotiations on the issue of renewal of the lease despite which the Defendant had given the notice above. Together with the plaint was filed a chamber application for interlocutory injunction under **Order 39 rules 1, 2** and **3** of the **Civil Procedure Rules**, which application was heard by Justice Azangalala and Ruling delivered on 5th July, 2006 dismissing it with costs. The court found that the lease between the parties had been determined by the effluxion of time, and therefore that the Plaintiff did not have a *prima facie* case. The Defendant sought to rely on this finding to say that the Plaintiff has no reasonable cause of action and has no defence to the counterclaim.

What did the Defendant say in the Defence and counterclaim? The Defendant admitted there were two leases but which were separate and distinct. It was denied that there was any content sought or received to sublet. The Defendant stated that after it discovered the Plaintiff had sublet part of the premises it regularized the matter with the sub-tenant but that the Plaintiff illegally and unilaterally withheld rent at the rate of KShs. 90,000/= per month from December, 2001 until April, 2006. He denied any negotiations to renew the lease and stated that, in any case, the lease did not contain the option for renewal. The suit was filed on basis that the Defendant had threatened to evict the Plaintiff. While stating that the lease had expired on 30th April, 2006, the Defendant denied any such threats. The Defendant then counterclaimed for amounting to KShs. 2,894,019/= with interest, *mesne* profits at the rate of KShs. 30,000 per month with effect from 1st May, 2006 in respect of Shop Number 7, and an order of vacant possession in respect of Shop Number 7.

The reply to defence and defence to counterclaim were filed on 3rd May, 2007. The Plaintiff stated that there was an oral agreement between the parties on or about 1st September 2000 in which consent was given to the Plaintiff to sublet part of the premises to Simba Telecom. The agreement was between the Plaintiff and the then directors of the Defendant; that following that sub-letting was done in open and about 308 square feet was apportioned and converted into a shop in front of Tom Mboya Street. The sub-tenancy was effective for a year running from September 2000 to September 2001 for which Simba Telecom duly paid the rent due through two cheques for two month period in advance being KShs. 540,000 per 6 months. Contrary to the assertions in paragraph 5 of the counterclaim, the Plaintiff alleges that the Defendant did not inform it of any pro-rata rent that would be in effect on or about 1st July, 2001. The Plaintiff further pleaded that following the expiry of the lease on 1st May, 2006 the leased premises are subject of a controlled tenancy within the meaning of the law

The application for injunction by the Plaintiff on which the Judge ruled was on basis of the plaint, the supporting affidavit and annextures and the replying affidavit and annextures. Whatever findings that were made were preliminary and for the purpose of the interlocutory order that had been sought. The present application seeks to attack the defence to the counterclaim as it alleges the defence is a sham and an attempt to delay the course of justice. The two applications, although based on basically the same circumstances in the dispute between the two parties, are usually resolved on different considerations and principles of law. The summary request being made is based on **Order 35 rule 1 (1) (b)** as the Defendant seeks judgment to recover the premises with a claim for rent and *mesne* profits. Through summary procedure the Defendant is entitled to claim even part of the rent and *mesne* profits, on top of the premises.

There is no dispute that the lease between the parties in respect of Shop 7 was for a fixed term without any option for review and there was no requirement for a notice**. Clause 3 (4)** of the said lease ("JK1") provided as follows:-

"At the expiry of the Term to yield up the premises in good repair and condition and in accordance with the lease of the terms of this lease and to give up all keys of the premises to the landlord."

Justice Azangalala also made reference to the position in England as indicated in **Halsbury's Laws of England 4th Edition Reissue Vol. 27 (1) at paragraph 209** which is as follows:-

"A lease for a term generally requires no notice to quit at the end of the term, whether the term expires by effluxion of time or on the happening of an event on which it is expressed to determine."

The Defendant wrote to the Plaintiff on 31st March, 2006, in response to the Plaintiff's request for renewal, to say it had no desire to review the lease on its expiry on 30th April, 2006. "JK4" refers. Ideally, therefore, the lease expired on 30th April, 2006 by the effluxion of time. There is no dispute that the plaintiff has continued in occupation. It says that it has become a controlled tenant.

It is not in dispute that the Defendant had the right under the lease to re-enter the premises without notice upon the term of the lease determining. It did not. The lease prohibited the sub-letting of the premises without consent. The Plaintiff sub-let the premises to Simba Telkom. It says it did this on basis of oral consent provided by the former owners of the leased premises. The Plaintiff says this was an open sub-letting. The suit premises were subsequently bought by the Defendant whose directions say that when they found the Plaintiff had sublet the premises without written consent they, instead of re-entering as the Plaintiff was in breach, they proceeded to regularize the occupation by the sub-tenant by entering into a tenancy with it. This was done to avoid the creation of a controlled tenancy. The parties had a dispute over this sub-tenancy and the matter was referred to arbitration. The Plaintiff claimed the sub-tenant saying it was entitled to rent. The Defendant claimed this sub-tenant became its tenant. The resolution of this dispute is outstanding and may determine how much rent, if at all, the Plaintiff owes the Defendant. This is because the Defendant states that the Plaintiff, as a result of this dispute, withheld part of the rent. Simba Telkom was paying the Plaintiff KShs. 90,000/= a month. When this sub-tenant went into arrangement with the Defendant it begun paying KShs. 40,000/= rent directly to the new landlord, as it were. The Plaintiff states that the Defendant nonetheless continued to receive rent from it (the Plaintiff) less KShs. 90,000/= from December 2001. It is under these circumstances that the counterclaim is being challenged. The Plaintiff alleges that it has become a controlled tenant. There is also dispute as to the rent or *mesne* profits payable, if at all. In the case of **Postal Corporation of Kenya –Vs- Inamdar & 2 Others [2004] IKLR 359,** the **Court of Appeal** reiterated the principles of law that need to be satisfied before summary judgment can be entered. If the Defendant raises even one *bona fide* triable issue, then he must be given leave to defend. Unless the point in dispute is clear and unarguable such that to grant leave to defend would be a waste of time the Defendant has to be allowed to defend the case. In **Banque Indosuez –Vs- D. J. Lowes & Company Limited Civil Appeal No. 79** of **2002** at **Mombasa,** the **Court of Appeal** observed as follows:-

"It is trite that the basis of an application for summary judgment under Order XXXV is that the defendant has no defence to the claim. See:-

Zola & Another –Vs- Ralli Brothers Ltd and Another [1969] EA 691. Rule 2 (1) of Order XXXV requires that the defendant to show either by affidavit, or oral evidence or otherwise that he should have leave to defend the suit. It is manifest that the onus is on the defendant to satisfy the court that he is entitled to leave to defend the suit and that he will not be given leave to defend the suit if all he does is to merely state that he has a good defence on merit. Again, he must go further and show that the defence is genuine or arguable or raise triable issues. He must show he has reasonable ground of defence to the question. A mere denial of the claim will not suffice ……..”

It should always be borne in mind that an application under **Order 35** seeks a summary remedy in which the Defendant is being denied the opportunity of the usual trial where parties testify and are allowed to call witnesses and can produce documentary evidence, and all these are subjected to the scrutiny of cross-examination. The court should therefore be careful and cautious in seeking to determine a case by this summary procedure.

The application was also brought under **Order 6 rule 13 (b), (c)** and **(d)**. The Defendant sought to show that the defence to the counterclaim was scandalous, frivolous or vexatious; or may prejudice, embarrass or delay the fair trial of the action; or and it is otherwise an abuse of the process of the court.

I have considered the facts that this application has presented. I have considered the written submissions by counsel and the principles of law applicable. I am of the view that the Plaintiff has a *bonafide* defence to the counterclaim. The application is therefore dismissed with costs.

DATED AND DELIVERED AT NAIROBI
THIS 27TH DAY OF SEPTEMBER 2010

A. O. MUCHELULE
J U D G E