



**REPUBLIC OF KENYA
IN THE HIGH COURT OF KENYA
AT MALINDI**

Civil Suit 23 of 2009

**RAHMA SAID OMAR BATHEIF.....
PLAINTIFF**

=VERSUS=

OMAGWA ANGIMA

RAGIRA ANGIMA

***t/a* OMAGWA ANGIMA & CO.**

ADVOCATES.....DEFENDANT

RULING

The application by way of Notice of Motion dated 2nd June 2009, seeks for summary judgment as prayed in the plaint. It is made pursuant to the provisions of Order XXXV Rules 1,2 and 3 of the Civil Procedure Rules. It is based on grounds that;-

1. The Plaintiff/applicant is the landlord of the premises on Plot No.1213 Malindi. The Defendant was a tenant paying a monthly rent of Kshs.15,000/- per month.
2. The Plaintiff terminated the tenancy by a notice dated 23/1/08.
3. The Defendant was to refer the notice to the Business Premises Rent Tribunal, if he opposed the said Notice.
4. The Defendant failed, and neglected to refer the Notice to the Business Premises Rent Tribunal and the Notice took effect.
5. The Defendant has no credible defence to the plaint and the defence filed herein is a sham calculated to delay and deny the Plaintiff's lawful claim.

The application is supported by the affidavit sworn by applicant in which he states that Defendant was highly irregular in payment of his rent and by a Notice dated 23/1/08, the Plaintiff served upon the Defendant a notice terminating the said tenancy – the said notice is marked RSOB1.

The said notice required the Respondent to inform applicant in writing whether he would oppose the notice and file a Reference to the said Notice in the Business Premises Rent tribunal within 60 days of the

service of the said notice.

The Defendant informed the Plaintiff of his intention not to comply with the Notice but failed to file a Reference, so the Notice took effect and the tenancy was terminated. He terms the defence filed as a sham and urges the court to enter judgment in his favour summarily.

The application is opposed, and Respondent in his replying affidavit depones that the tenancy was for 5 years and three months, which therefore removed it from the provisions of cap 301 as it was not a controlled tenancy. He points out that, the defence raised contests the application of Cap 301(Landlord and Tenant) Shop, Hotels and Catering Establishments Act) which would then make the notice invalid. Further that even if the Notice took effect, then the applicant failed to move the court in good time and has been caught mapping.

It is also his contention that the application addresses one aspect of the suit, that is the prayer for vacant possession, without addressing the issue of alleged rent arrears and mesne profits which are clearly contested. He also states that 2nd Defendant has not been served.

At the hearing of the application, Mr Khatib reiterated the grounds on the face of the application, saying there was due compliance with the provisions of section 4 (2) of Cap 301 and Respondent acknowledged service of the Notice. He also made reference to provisions of section 6 of the Act, regarding steps that Respondent ought to have taken if he was contesting the notice and Respondent failed to do so.

As to this not being a controlled tenancy, Mr Khatib submits that these are simply delaying tactics, because nothing would have been easier than for Respondent to annexe a copy of the tenancy agreement to confirm that the terms ousted the jurisdiction of the court in the matter.

Mr Khatib also asks this court to consider that the Respondent does not deny the rent was 15,000/- per month and only denies that the arrears amount to Kshs.240,000/-. It is also pointed out that despite these denials, no receipts have been annexed by Respondent to confirm payments of the accrued rent.

Mr Angima submits that there are two parties sued and only one has been served and he wonders what will be the fate of the 2nd defendant. The pleadings refer to Defendant on the hearing but the body refers to defendants. It is not clear whether Ragira Angima is another person, or its an additional name of the person referred to as Omagwa Angima.

In any case paragraph 2 describes the defendants as male adults (in plural) meaning there are two people. Does that mean the application is invalid? I think not, the application refers to one defendant – Omagwa Angima and I think that the intention is for summary judgment to be entered against Omagwa Angima – the Plaintiff know what he intends to do with Ragira Angima – for purposes of this application Ragira is not named – so that limb of argument by Mr Angima does not stand on the way of the application.

Mr Angima insists that this court has no jurisdiction to entertain the matter and that the reason why Respondent did not file a Reference with the Business Premises Tribunal is because the matter does not fall under the Act. He says there is an amount which was supposed to be paid by the Landlord's brother and was never credited.

The issues which arise are;-

1. Does this court has jurisdiction in this matter.
2. Are there triable issues raised in the statement of defence
3. Is summary judgement expected to cover all prayers or in part.

It is instructive that neither party has annexed the tenancy agreement to decision regarding the status of the tenancy. It is however not disputed that a tenant/landlord relationship exists between the parties. The

pleadings simply state that defendant/Respondent is a tenant. It is the Respondent who alleges that it is not controlled tenancy, so it was incumbent on the one alleging such a status to prove by annexing the tenancy agreement – Respondent has not done that

Section 4 (2) of Cap 301 provides as follows;-

“A landlord who wishes to terminate a controlled tenancy or alter, to the detriment of the tenant, any term or condition in, or right or service enjoyed by the tenant under such tenancy, shallnotice in that behalf to the tenant in the prescribed form”

For this court to then be pursuant that this was not a controlled tenancy, the Respondent should have annexed that grant. Paragraph 4 of the Respondent’s argument would have meant that he did not require to file a notice – in the absence of that then he has been caught up with section 6 of cap 301 which states that;-

“A receiving party who wishes to oppose a tenancy notice, and who has notified the requesting party under section 4 95) of this Act, that he does not agree to comply with the tenancy notice, may before the date upon which such notice is to take effect refer the matter to a Tribunal, whereupon such notice shall be of no effect until.....the determination of the reference.....”

Paragraph 4 of the plaint pleads that the tenancy was based on a rent of Kshs.15,000/- per month - this is not denied by the Respondent. The rent arrears upto 31st December 2007 is pleaded as being Kshs.195,000/- to this added rent arrears from January 2008 to March 2008 to give a total of rent arrears being Kshs.240,000/- and topped up with mesne profits of Kshs.15,000/- with effect from 1st April 2008 till vacant possession is given. It would appear that applicant wants both vacant possession and payment of the rent arrears since the applicant seeks for summary judgment to be entered as prayed in the plaint.

To this extent , then, Mr Angima seems to have misapprehended the prayers because the arguments centered more on the issue of vacant possession and glossed over the rent arrears and mesne profits. I think the two go hand in hand, the court needs to consider whether from the pleadings rent arrears and mesne profits is proved in order to order for vacant possession.

The defendant declined being served with a legal notice. A copy of that notice is annexed – it is dated 23rd January 2008. Although on the face of it there is nothing to show that it was served, this is confirmed by a letter from the firm of Omagwa Angima & Otara Advocates dated 22nd February 2008 addressed to the landlord’s advocate and which read as follows;-

“Reference is made to the Notice to terminate tenancy served upon us. In response to the said notice, we would like to inform you that we oppose it in entirety”

That negates what is pleaded in paragraph 4 of the statement of defence. I think the issue as to whether this matter relates to a controlled tenancy or not has already been addressed in the earlier part of this ruling. Which leaves us with one other issue – has Respondent made some payments, so that the sum claimed should be less than 240,000/-? According to paragraph 8 of the defence, the 1st defendant avers that the Plaintiff received through her brother Salim Bathef Kshs.100,000/- being payment on rent on account of fees that their father’s estate owed, and this has not been taken into account.

The implication is that this is a set off – yet the issue among correspondence on the subject matter of the estate referred to, that has been annexed . There was no specific date as to when this money was received or where it was received – no receipts - nothing to support what is alleged so as to persuade this court that the same is an issue worth taking for trial.

The upshot then is that no triable issues are raised whatsoever. Consequently I enter judgement in favour of the plaintiff as against Omagwa Angima t/a Angima & Co. Advocate (1st defendant) in the sum of Kshs.240,000/-(Two hundred and forty thousands only) being rent arrears up to March 2008.

2. Mesne profits calculated at Kshs.15,000/-per month with effect from 1st April 2008 until date of vacant possession.
3. Omagwa Angima to give vacant possession of the premises within 60(Sixty) days from today.
4. Costs of the suit awarded to the Plaintiff.
5. Omagwa Angima to bear costs of this application

Delivered and dated this 23rd day of November 2009 in Malindi.

H. A. Omondi

JUDGE