REPUBLIC OF KENYA
IN THE HIGH COURT OF KENYA
OF KISII
Civil Case 145 of 2004

GESIMA FARMERS CO-OP SOCIETY ……..…… PLAINTIFF

VERSUS

YUNES KERUBO ORUTA …….……. DEFENDANT

RULING

The plaintiff filed an application by way of Chamber Summons brought under Order **VI rule 13(b)(c)** and **(d)** and **Order XXXV rule 1** of the **Civil Procedure Rules**. The orders sought were that the defence filed herein be struck out and judgment be entered against the defendant as prayed in the plaint. The application was made on the grounds that the defence does not disclose a reasonable defence and that the defence is scandalous, vexatious and an abuse of the court process.

In an affidavit sworn by James Maina, the Chairman of the plaintiff, he deposed that the plaintiff, being the landlord of commercial premises known as KISII TOWN/BLOCK III/132, issued to the defendant a notice of termination of tenancy in accordance with the provisions of the **Landlord and Tenant (Shops, Hotels and Catering Establishments) Act**. The notice was issued on 16th December, 2003 and was based on the ground that the defendant had persistently defaulted in payment of rent and at the time was in arrears amounting to Kshs.114, 400/=. The defendant acknowledged service of the notice but neglected to file a reference to the Business Premises Rent Tribunal, hereinafter referred to as "***the Tribunal.***"

As a result of the defendant's failure to file the said reference, the plaintiff filed a suit before this court seeking a declaration that the tenancy stood terminated with effect from 1st March, 2004. The plaintiff also sought the defendant's eviction from the suit premises, rental arrears of

Kshs.87, 600/- upto and including August 30, 2004 and mesne profits until the date vacant possession shall be given.

The defendant filed a statement of defence and denied all the material contents of the plaint. That notwithstanding, the defendant contended that it was the duty of either party to refer the dispute to the said Tribunal but none of the parties did so.

In her replying affidavit, the defendant admitted that she was a tenant of the plaintiff. Although the defendant did not expressly admit that the said notice of termination of tenancy was served upon her, she deposed that on 18th December, 2003 she paid arrears of rent amounting to Kshs.75, 000/= and a further sum of Kshs.75,000/= on 14th January, 2004. She exhibited a copy of a receipt for Kshs.75,000/= issued to her by the plaintiff and a copy of a Cash Deposit slip for Kshs.75, 000/= into the plaintiff's account at the Co-operative Bank of Kenya. In her view therefore, the said sums, having been received by the plaintiff, the alleged notice of termination ceased to have any effect.

Mr. Minda for the defendant submitted that the notice of termination of tenancy was defective because:

(a) the plot number had not been indicated.

(b) The notice was signed by the landlord's advocate and not the landlord.

(c) It was ambiguous

(d) It was supposed to be issued by the Tribunal, not the plaintiff's advocate.

Mr. Minda added that the statement of defence raises triable issues which should be determined in a full trial.

Although the defendant purported to deny that she was not served with the notice of termination of tenancy, there is a letter annexed to the plaintiff's further affidavit sworn on 6th April, 2006. In that letter, the defendant admitted that the plaintiff's advocate served her with the notice. According to the provisions of **Section 6(1)** of the **Landlord and Tenant (shops, Hotels and Catering Establishments) Act**, hereinafter referred to as "***the Act***", a party served with a tenancy notice and who has notified the requesting party that he does not wish to comply with the notice should refer the matter to the Tribunal.

Where the tenant fails to refer the matter to the Tribunal, the notice takes effect from the date specified therein, see **Section 10** of the **Act**. In this case, it is not in dispute that the defendant did not refer the matter to the Tribunal. Upon receipt of the notice of termination of tenancy, the defendant merely wrote a letter to the plaintiff's advocate and made some payments towards reduction of the arrears of rent. Such payments did not in any way affect the validity of the notice.

Mr. Minda argued that the notice that was served upon his client was defective and gave his reasons for his contention. It is not for this court to rule on the validity of the notice, that is a task left to the Tribunal. But whether the notice was defective or not, the defendant was supposed to refer the same to the Tribunal to investigate and make a determination. I do not agree with Mr. Minda that the tenancy notice is supposed to be issued by the Tribunal and not the landlord. **Section 4(2)** of the **Act** clearly states that it is the landlord who issues such a notice. It can be signed by the landlord or by his advocate for and on behalf of the landlord. The notice that was served stated the plot number and the reasons for termination of the tenancy were well stated.

I have looked at the statement of defence that was filed by the defendant herein. In light of what I have stated hereinabove, does the statement of defence disclose any reasonable cause of defence? Is it scandalous, vexatious and an abuse of the court process?

In **KENYA AIRPORTS AUTHORITY VS QUEEN INSURANCE AGENCY** [2001] KLR 441, the category of what may be described as scandalous includes either indecent, offensive, improper or a denial of a well known fact.

A pleading is frivolous where it is without substance or groundless or fanciful and is vexatious where it lacks bona fides and is hopeless or offensive and tends to cause the opposite party unnecessary anxiety, trouble and expense. Abuse of the court process means misuse of the court machinery or process.

Having carefully considered the statement of defence, I would say that the same is a sham and consists of mere denials, even of the obvious truths that are elsewhere admitted by the defendant in her affidavit. It can rightly be said to be scandalous, vexatious, frivolous and an abuse of the court process. The defendant was no doubt in arrears of rent and even now it has not been demonstrated that she has paid upto date. The notice of termination of tenancy took effect on 1st March, 2004. The defendant's defence does not disclose any reasonable cause of action and I strike it out and enter judgment for the plaintiff as prayed for in the plaint. The defendant shall be given credit for any payments which she has made to the plaintiff and shall pay arrears of mesne profits with effect from 1st March, 2004. The defendant should

vacate the plaintiff's premises within thirty (30) days from the date hereof failing which she will be liable to forceful eviction. The defendant will pay the costs of this suit including the costs of the application.

DATED, SIGNED and **DELIVERED** at **KISII** this **6th** day of May, 2008.

D. MUSINGA

JUDGE.

Delivered in open court in the presence of:

Mr. Soire for the plaintiff

Mr. Minda for defendant.

D. MUSINGA

JUDGE.