



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

Civil Case 76 of 1998

KAMWANDU FARM SUPPLIES LIMITED.....PLAINTIFF

VERSUS

JAMES NJEMA T/KENLANDS DAIRY PRODUCTS.....DEFENDANT

JUDGMENT

The plaintiff's claim against the defendant was filed on 17th February 1998; the plaintiff seeks for the following orders:

- (a) Kshs 156,000/= arrears of rent.
- (b) Vacant possession of the said portion of the said premises occupied by the defendant.
- (c) Mesne profits.
- (d) Costs of this suit.
- (e) Interest on (a), (c) and (d) above at court rates.
- (f) Any other or further relief that this Honourable Court may deem fit to grant.

On 17th November 2004 when the matter came up for hearing, the defendant is on record as having indicated to the court that he had no objection to vacate the suit premises and the following order was recorded:

“The defendant should vacate the suit premises within the next ten days from the date hereof. The parties should take a hearing for the rest of the claims.”

The issue for determination therefore is whether the defendant owes arrears of rent and whether mesne profits should be assessed and awarded against the defendant.

Joseph Ndungu Muhia a director of the plaintiff's company testified that his company purchased the suit premises being LR. No. 1144/5553 in Naivasha. Upon the completion and transfer of the title in the plaintiff's favour, M/s Amolo and Gacoka Advocates notified all the tenants in the suit premises including the defendant, that the plaintiff was the new landlords and that the rent payable could be negotiated with the new landlords directly. The plaintiff also wrote to the defendant a letter dated 25th January 1996 informing the defendant that they purchased the suit premises. They indicated in the letter

that a professional valuation of the rent payable was accessed and the defendant was supposed to pay Kshs 6,000/= per month. No response was forthcoming from the defendant, the plaintiff decided to issue him with notice to terminate the tenancy pursuant to the provisions of **Section 4(2) of the Landlord and Tenant (Shops, Hotel and Catering Establishment) Cap 301**.

PW1 testified that he caused the letter to be delivered to the defendant as well as the statutory notice; the defendant's wife by the name Ann Njema acknowledged receipt. The matter was also referred to the plaintiff's advocate M/S Kembi Gitura. After a series of correspondence, the defendant did not vacate the premises nor did he pay the rent, thus the plaintiff filed the present suit.

The defendant gave evidence in support of his statement of defence. The defendant testified that he was tenant in the suit premises paying Kshs 1,700/= per month before the plaintiffs became owners. He admitted that he wrote a letter dated 28th November 1996 stating that he was paying rent of Kshs 1,700/= per month and he objected the increment to Kshs 6,000/= because there was no justification for such an increase. Moreover the defendant was a protected tenant. He denied that he was served with a statutory notice to increase the rent. He also denied that he was served with a statutory notice requiring him to vacate the premises. He alleged that he was forced out by the plaintiff when they damaged the drainage system of the demised premises. The defendant further contended that in 1996, to the time he vacated the premises, he was not carrying out business. The business at the suit premises used to be run by his wife. During cross-examination, the defendant stated that he was not aware that the statutory notice was served upon his wife.

Both parties filed written submissions. Counsel for the defendant argued that the defendant was a protected tenant and any notice to alter the terms of tenancy ought to have been issued in the prescribed form. The defendant denied that he was ever issued with any notice altering the terms and conditions of his tenancy which is governed by the provisions of **Section 4(5) of Cap 301**. He urged the court to find that since no notices were issued the plaintiffs claim was a non starter. Counsel relied on the decision in the case of **Waljee vs. Rose [1976] KLR 25** where the Court of Appeal held that:

“That the appeal would be allowed; no order could be made for the termination of a controlled tenancy except in accordance with the procedure laid down by the Landlord and Tenant (Shops, Hotels and Catering Establishments) Act and there was no evidence of any such order having been made; further, regardless of whether the appellant was properly a licensee or a trespasser, the respondent could only proceed against her for trespass upon proof of actual damage to the reversion and the appropriate remedy in an action in trespass was damages, not an order for possession and mesne profits. Observations on the abandonment or surrender of a controlled tenancy.”

Counsel for the defendant went on to argue that the plaintiff's suit ought to have been filed before the Tribunal as set out under cap 301. Counsel also challenged the claim for mesne profits; he submitted that the plaintiff did not tender any evidence to prove what he claimed as mesne profits. The plaintiff did not determine the damages payable. Counsel thus urged the court to dismiss the plaintiff's case with costs.

The above is the brief summary of the evidence. The facts of the case show that the defendant was given notice by the plaintiff vide a letter dated 25th January 1996 informing him that they were the new landlords and the rent payable was Kshs 6,000/=. The defendant must have received this letter; this is discernable from the correspondence exchanged between the defendant and Ms Kembi Gitura Advocates. The defendant's letter dated 28th November 1996, he contended that the proposed rent of Kshs 6,000/= was without justification, he admits that he had not paid rent for the whole year. What is contested is whether the defendant was served with the statutory notice dated 24th May 1996 which was allegedly received by A. W. James.

The plaintiff testified that all the communication was served upon the defendant's wife who was managing the leased premises. The defendant also agreed that the premises were being managed by his wife. The facts on record reveal that it is more probable than not that the defendant was served with the statutory notice as well. However the statutory notice is not of concern to this court since it was seeking for the termination of the lease and the defendant agreed to, and vacated the suit premises.

The issue to determine is whether the notice to increase the rent was valid. Under Section 4(2) of Cap 301 a Landlord who wishes to terminate a controlled tenancy or to alter the terms or conditions of the controlled tenancy is supposed to give notice to the tenant in the prescribed form. Further under Section 6(1) the tenant receiving the notice and wishes to oppose the notice can refer the matter to the tribunal after which the notice does not take effect until the subject matter is determined by the tribunal.

As the matters stand, the plaintiff did not issue the notice of increase of rent in the prescribed form. The defendant also did not object to the notice even if it was by way of a letter. The defendant has also not denied that he was a tenant in the premises. He contended that he was paying Kshs 1,700/= per month and no rent was paid up to the time he vacated the premises in November 2004. That is a period of 8 years. It is clear that from January 1996 to November 2004 the defendant did not pay rent. The plaintiff is claiming Kshs 6,000/= per month. I am unable to grant the sum of Kshs 6,000/= per month which the plaintiff proposed to increase after he purchased the property. The defendant objected to the rent increase, however, there was no reason why he refused to continue paying Kshs 1,700/= per month or even to deposit the same in the tribunal.

Going by the uncontested evidence, I make a finding that the plaintiff is entitled to rent arrears of **Kshs 1,700 x 12 x 8 = 163,200/=**. The plaintiff testified that he intended to use the premises for his own business and for those tenants who complied with the notice, the plaintiff was getting about Kshs 12,000/= per month. He therefore urged the court to award him mesne profit. From the material on record the plaintiff took possession of his premises in November 2004 and he has been able to renovate it and lease it out. The claim for vacate possession was kind of compromised when the defendant agreed to vacate the premises and a Judge issued the order. In this regard, I find no justifiable reason for awarding damages for mesne profits.

Judgment is entered for the plaintiff in the sum of Kshs 163,200/= with interest from the date of the judgement. The plaintiff shall also have the costs of this suit.

It is so ordered.

Judgment read and signed this 28th day of July, 2008

M. KOOME

JUDGE