



REPUBLIC OF KENYA
IN THE HIGH COURT OF KENYA
AT MOMBASA
Civil Suit 28 of 2007

EMIRATES AGENCIES (EPZ) LTD.....PLAINTIFF

VERSUS

SIN LANE KENYA (EPZ) LIMITED

LEE HUNG YUAN

LIN SHUI YEN.....RESPONDENTS

RULING

This is an application by the plaintiff for summary judgment. Although Order XII Rule 6 has been invoked, the plaintiff restricted arguments to Order XXXV Rule 1 of the Civil Procedure Rules. Section 3A of the Civil Procedure Act and all enabling provisions of the Law have also been invoked. The reasons for the application are that the amount claimed is lawfully due by the defendants as loss of rent, service charge and cost of repairs to premises demised to the defendant with interest thereon under the lease dated 22nd November 2001; that the performance of the terms of the lease was guaranteed by the 2nd and 3rd defendants; that the first defendant has admitted liability and that there is no defence to the plaintiff's claim.

The application is supported by an affidavit sworn by one Omar Zubedi a director of the plaintiff company. The application is opposed on the basis of Grounds of Opposition by the defendants' advocates.

The plaintiff's claim is contained in the amended plaint filed on 28th September 2007. It is pleaded that by a lease dated 22nd November 2001 the plaintiff let to the defendant premises on L.R. MN/VI/3464 situated at Changamwe Mombasa (hereinafter "the suit premises") for a term of 5 years and 2 months with effect from 1st January 2002 at an annual rent of USD 124,410.00 and annual service charge of USD 12,441 payable quarterly in advance. It is further pleaded that pursuant to the said lease, the plaintiff gave the 1st defendant possession of the suit premises in good state of repair, decoration and condition. By the said lease, the 1st defendant covenanted to keep the suit premises in good state of repair and decoration and at the expiry of the lease to deliver up the possession of the premises in such good state of repair and decoration. It also pleaded that the Lease expired on 28th February 2007 and the 1st defendant yielded up

possession of the suit premises. It is also pleaded that in breach of the said covenant, the 1st defendant failed to keep the suit premises in good state of repair and decoration and at the expiry of the lease, failed to deliver up the possession of the premises in such good state of repair and decoration. It is further pleaded that upon receiving possession of the suit premises, the plaintiff caused the state of repairs of the suit premises surveyed by M/S Paul Wambua Valuers who have estimated the cost of reinstatement of the suit premises to its former state at KShs. 5,314,319.50. It is also pleaded that, a copy of the valuer's report was furnished to the 1st defendant who admitted liability to carry out the said repairs and promised to carry out the same but has failed to do so. By reason of the said breach of covenant, the plaintiff pleads that it has been greatly injured in its reversion and has been unable to re-let the suit premises and has lost the rent and service charge it would otherwise have obtained on such re letting and has suffered loss and damage being

- (a) Loss of rent for the period 1st March 2007 to 31st August 2007 (still continuing) at the rate of USD 124,410 p.a. = USD 62,205
- (b) Loss of service charge for the period 1st March 2007 (still continuing) at the rate of USD 12,441 p.a. = USD 62,250.50
- (c) Cost of repairs KShs. 5,314,319.50
- (d) Cost of Survey Report KShs. 84,000.00

The plaintiff also claims damages for breach of contract. As against the 2nd and 3rd defendants it is pleaded that in consideration for the said lease to the 1st defendant, the 2nd and 3rd defendants jointly and severally agreed to guarantee the payment of the said rent and other sums by the 1st defendant which has failed to comply with its obligations under the lease. In the premises, the plaintiff claims from the 2nd and 3rd defendants jointly and severally the same sums claimed against the 1st defendant under the guarantee.

The defence to the amended plaint was filed on 7th November 2007. Only paragraphs 4, 5 and 6 are pertinent. In paragraph 4 the defendants deny failing to keep the suit property in a good state of repair and decoration. In paragraph 5 the defendants state that the valuation of KShs. 5,314,319.50 is grossly exaggerated since the requisite repairs and decoration if any cannot exceed USD 10,367 which sum the defendant's are willing to pay to the plaintiff. In paragraph 6, the defendants deny paragraphs 10, 11, 12, 13, 14, 15 and 16 of the amended plaint and put the plaintiff to stick proof thereof.

At the hearing of the application, counsel took me through the pleadings, affidavit annexures, Grounds of Opposition and the authorities.

I have considered the application, the pleadings, the affidavit, its annexures, the Grounds of Opposition, the authorities and the submissions of counsel. Having done so, I take the following view of the matter. Is the plaintiff's claim liquidated? The foundation of the plaintiff's claim is the 1st defendant's failure to keep the suit premises in a good state of repair and decoration. Following that failure the plaintiff obtained an estimate of the valuation of the repair cost from M/S Paul Wambua Valuers. The said valuers put the estimate at USD 5,314,319.50. This estimate in my view is not a liquidated demand. It is clearly an estimate. The actual cost of repair has to await the actual repair. Only then can the cost be described as a liquidated demand. But as of now, that aspect of the plaintiff's claim would be subject to proof.

The plaintiff also claims loss of rent for the period 1st March 2007 to 31st August 2007. Whereas that would qualify for the summary adjudication of the court, issues that must be considered along with that claim include the period for which the rent is claimed; what period would the premises take to be repaired? Has there been mitigation of damages? How has the rate been arrived at? Once those considerations are accepted to be factors to be taken into account in computing the payable rent, the sum claimed ceases to be one amenable to the summary adjudication of the court. There is a further claim for

loss of service charge for the period between 1st March 2007 to 31st August 2007 which sum continues to accrue. The plaintiff does not allege that the service charge has been paid. It is therefore money not due to the plaintiff but to another entity altogether. If the plaintiff had paid it would definitely qualify as a liquidated demand. However, as it is now, the plaintiff cannot claim the same in this application. For the same reason the plaintiff's claim for KShs. 84,000/= payable to the valuers cannot be allowed at this stage.

The plaintiff has further in its plaint claimed General Damages for breach of covenant. This claim has not been mentioned in the plaintiff's application for summary judgment. The success of that aspect of the plaintiff's claim will depend largely on the rest of the plaintiff's claims.

Having found that the plaintiff's claim is not a liquidated demand, the fate of its application is sealed as the provisions of Order XXXV do not apply.

With regard to the application for judgment on admission, I have already stated that the same was really not urged before me by counsel for the plaintiff. Correspondence exchanged between the parties however, suggest that the defendant admits liability for the repair. Its argument is that the same is exaggerated. So whereas the admission for the repair is unequivocal the defendant does not admit liability for the sums claimed. That limb of the plaintiff's application would also not be granted even if it had been urged.

I am impelled however to venture the opinion that I doubt if the defence filed by the defendant would survive an application to strike it out in view of the documentary evidence given by the plaintiff in its supporting affidavit. The application has however not be brought under the provisions of Order VI Rule 13 of the Civil Procedure Rules.

For now however, the application for summary judgment is dismissed. Costs shall be in the cause.

Orders accordingly.

DATED AND DELIVERED AT MOMBASA THIS 3RD DAY OF JULY 2008.

F. AZANGALALA

JUDGE

Read in the presence of:

Gor for the Applicant and Jin holding brief for Omondi for the Respondent.

F. AZANGALALA

JUDGE

3RD JULY 2008