



**REPUBLIC OF KENYA
IN THE HIGH COURT OF KENYA
AT NAIROBI (MILIMANI COMMERCIAL COURTS)**

CIVIL CASE 535 OF 2005

NAIROBI INSTITUTE OF BUSINESS STUDIES LTD.... PLAINTIFF

VERSUS

**PIONEER HOLDINGS (AFRICA) LTD.....
.....DEFENDANT**

JUDGMENT

The plaintiff, Nairobi Institute of Business Studies, filed suit against the defendant, Pioneer Holdings (Africa) Ltd seeking judgment to be entered against the defendant for the sum of KShs.743,431/=, interest and costs. The plaintiff averred that the said amount was paid to the defendant as security deposit for the lease in respect of part of LR No.209/4286 (*hereinafter referred to as the suit premises*), and which lease had been terminated by the plaintiff when the plaintiff issued a month's notice of termination to the defendant on 30th April 2003. The plaintiff averred that the said sum of KShs.743,431/= comprised of the security deposit of KShs.659,581/= being in respect of the lease agreement between 1st June 1999 and 30th September 2002. The plaintiff further claimed a sum of KShs.63,850/= being in respect of month to month tenancy agreement between 1st November 2002 and 31st May 2003. The plaintiff averred that after it issued the notice of termination of the lease, and further having vacated the leased premises, the defendant refused or failed to pay the security deposit hence the plaintiff's decision to file the present suit.

When the defendant was served with summons to enter appearance together with a copy of the plaint, it duly appointed an advocate to act on its behalf. The defendant further filed a defence to the claim and counterclaimed for a total sum of KShs.3,636,106/= together with interest from 1st June 2003 and costs of the suit. In its defence, the defendant denied owing the plaintiff the amount pleaded in plaint. The defendant denied that the lease agreement in respect of the suit premises was a month to month tenancy as alleged by the plaintiff. It averred that the lease in respect of the suit premises was for a period of five (5) years and three (3) months commencing from 1st October 2002. The defendant stated that it had previously leased to the plaintiff its premises situated at the 1st and 3rd floors of the suit premises, but later consented for the plaintiff to consolidate its leases in respect of the two separate floors into one lease in respect of one floor, being the 2nd floor.

The defendant stated that the sum of KShs.743,431/= which was paid by the plaintiff as security deposit in respect of the previous leases for the premises at the 1st and 3rd floors, was transferred to the lease in respect of the consolidated lease of 2nd floor. The defendant averred that since the plaintiff had breached the terms of the tenancy in regard to its obligations in the said lease, the defendant was not entitled to

refund the said security deposit paid. The defendant asked the court to dismiss the plaintiff's suit with costs.

In its counterclaim, the defendant averred that it had entered into a lease agreement with the plaintiff whereby it agreed to lease part of its premises, being the 2nd floor of the suit premises for a term of five (5) years and three months effective from 1st October 2002. The defendant averred that it consented to the request made by the plaintiff to undertake major alterations to the said 2nd floor so as to make the said premises suitable for the plaintiff's requirements. The defendant averred that it incurred expenses which translated into a loss when the plaintiff unlawfully terminated the lease.

The defendant particularized the special damages it allegedly suffered when the plaintiff terminated the lease. It urged the court to compel plaintiff to pay for the cost of re-letting the premises, cost of re-decorating the premises, arrears of rent as at 31st May 2003, loss of rent and share of outgoings for June 2003, re-instatement expenses to original status, legal costs for the preparation of the lease and the costs of renovation of the demised premises situate at the 2nd floor of the suit premises. In total, the defendant counterclaimed for the sum of KShs. 3,636,106/=.The defendant urged the court to hold the directors of the plaintiff personally liable for the loss in view of the personal guarantees that they executed in favour of the defendant.

The plaintiff filed a reply to the defence and a defence to the counterclaim. The plaintiff joined issues with the defendant and put the defendant to strict proof on the averments made in the defence. The plaintiff denied that it had entered into a lease agreement with the defendant for a period of five (5) year and three (3) months. The plaintiff denied executing any lease agreement for the said period of five (5) years and three months in respect of the demised premises as alleged by the defendant. The plaintiff denied requesting the defendant to undertake renovations of the 2nd floor of the suit premises and further denied agreeing to foot the bill for the said renovations.

The plaintiff reiterated that the lease in respect of the suit premises was terminated in accordance with the law after the same was vitiated by events and happenings caused, initiated and contributed by the defendant. The plaintiff denied that the directors of the plaintiff had executed personal guarantees in respect of the said lease and put the defendant to strict proof thereof. The plaintiff averred that the defendant was not entitled to the special damages claimed in its counterclaim and urged the court to dismiss the defendant's counterclaim with costs.

This suit was listed for hearing on 2nd April 2008. On that day, the plaintiff sought adjournment on the ground that the principle witness of the plaintiff as held up in some personal business. The defendant objected to the application for adjournment. This court reluctantly granted the application for adjournment after observing that the reason put forward by the plaintiff in seeking adjournment was invalid. The court granted the plaintiff the last adjournment.

The hearing of the case was adjourned to 15th July 2008. On the morning of that day, again the plaintiff applied for adjournment on the ground that the plaintiff's managing director had been taken ill on that morning. In view of the fact that the plaintiff's counsel failed to produce any evidence in regard to the alleged illness of the plaintiff's principal officer, and further in view of the previous order made by the court granting the plaintiff last adjournment, the court rejected the plaintiff's application for adjournment. Hearing was scheduled for 2.30 p.m. on the same day. The court thought that the plaintiff would take advantage of the brief adjournment granted to avail its witnesses. At 2.30 p.m., counsel for the plaintiff again reiterated that the plaintiff's witness was still sick and was unable to attend court to adduce her evidence. The court rejected the explanation. The court ordered the plaintiff to proceed with its case. Mr. Wanjohi, counsel for the plaintiff told the court that in the circumstances the plaintiff had no evidence to offer. The court dismissed the plaintiff's suit with costs on account that no evidence was adduced in support of the plaintiff's claim. The court directed the defendant to proceed with its counterclaim.

The defendant called one witness to testify in support of its counterclaim. The witness, Zul Zulfikar Ali

Nimji, a director of the defendant testified as DW1. After considering his evidence and the closing submissions made on behalf of the plaintiff and on behalf of the defendant, the facts of this case are as follows:

The plaintiff had a tenancy agreement in respect of the 1st and 3rd floors of the suit premises. The said tenancy subsisted from the period 1999 to 2002. In 2002, the plaintiff indicated its desire for the defendant to consolidate the plaintiff's leases which were in respect of tenancies two separate floors. The plaintiff negotiated with the defendant to occupy the 2nd floor of the suit premises. The defendant granted the plaintiff a lease to occupy the 2nd floor in exchange for the plaintiff surrendering the leases in respect of the 1st and 3rd floors.

According to correspondence exchanged between the plaintiff and the defendant at the time and which were produced as defendant's exhibits No.1 (a) and (b), the plaintiff agreed to lease the premises in the 2nd floor for a period of five (5) years and three (3) months. According to the schedule which was annexed to the letter of agreement dated 27th August 2002 (*which was signed by the managing director of the plaintiff*), the plaintiff agreed to pay a monthly rent of KShs.266,567/= for the first year and KShs.305,000/= monthly rent for second year. The plaintiff further agreed to pay 5% annual increment in monthly rent for each subsequent year until the 5th year. The plaintiff agreed to pay service charge, site value tax and ground rent for the lease period.

According to DW1, upon the plaintiff agreeing to the terms of the new lease, it made a request to the defendant for certain renovations to be undertaken in the said lease premises so that the same could be made suitable for the requirements of the plaintiff. It was DW1's testimony that the defendant expended a total sum of Shs.2,071,950/= to renovate the suit premises to accord with the requirements of the plaintiff's architect. He further testified that a lease was prepared by Messrs Shapley Barret & Co. Advocates and sent to the advocates of the plaintiff for execution. Although the defendant signed the lease, the advocates of the plaintiff did not return the duly signed lease to the advocates for the defendant.

After the defendant had undertaken renovations on the suit premises to the specifications of the plaintiff, the plaintiff took possession of the suit premises on 1st October 2002. Negotiations took place between the plaintiff and the defendant regarding whether the defendant would consider leasing more space to the plaintiff. The negotiations broke down and on 30th April 2003, the plaintiff wrote to the defendant giving one month's notice of the termination of the lease. The plaintiff informed the defendant that it would vacate the leased premises by 31st May 2003. The defendant did not accept the said notice of termination and insisted that in view of the existence of the five (5) year and three (3) months lease, the plaintiff could not terminate the lease in the other than in the manner provided by the lease.

The defendant insisted that the tenancy could only be terminated in the manner provided in the lease agreement. The defendant demanded that the plaintiff makes good the amount that it had expended in renovating the suit premises to suit the requirements of the plaintiff. There were other amounts that were outstanding from the plaintiff to the defendant that the defendant demanded to be reimbursed before the lease could be terminated.

The plaintiff vacated from the suit premises on 6th June 2003. To mitigate its loss, the defendant instructed a letting agent to secure a tenant for the said premises. The defendant paid commission to the letting agent. The said agent was able to secure a tenant for the suit premises. The said tenant took occupation of the said leased premises on 1st July 2003. It was the defendant's claim that it should be paid special damages that was occasioned by the plaintiff's unlawful termination of the lease as particularized in the counterclaim.

On its part, in its closing submissions, the plaintiff urged the court to find that the defendant had failed to establish its case to the required standard of proof. It was the plaintiff's submission that since the defendant was able to secure a tenant for the premises that were vacated by the plaintiff, and further since the new tenant was enjoying the renovations that were undertaken by the defendant, the court should find

that the plaintiff was not liable to pay any special damages to the plaintiff.

Having carefully considered the pleadings filed by the parties to this case and further having evaluated the evidence adduced by the defendant in support of its case, the issues for determination are twofold; firstly, what was the nature of lease that existed at the time the plaintiff issued notice terminating the tenancy, and secondly, whether the defendant established a case to entitle this court grant the prayers sought in its counterclaim. As regard the first issue, it is not disputed that no formal written lease agreement was entered between the plaintiff and the defendant.

Although the defendant produced a copy of the unexecuted lease in respect of the suit premises, what was evident was that the plaintiff and the defendant entered into an agreement for a lease. Some of the terms of the lease were set out in correspondence that was exchanged between the defendant on the one hand, and the plaintiff and its advocate Messrs A. N. Ndambiri & Co. Advocates on the other. In all the said correspondence, it was not disputed that the plaintiff took occupation of the leased premises at 2nd floor on the understanding that the formal lease in respect of the suit premises would be executed later. The term of the said lease was five (5) years and three months. In the said correspondence, it was not specifically stated the circumstances under which the lease could be terminated.

I have considered the correspondence exchanged between the defendant and the advocate for the plaintiff and particularly the letter by Messrs A. N. Ndambiri & Co. Advocates dated 9th December 2002 and 20th February 2003. In the said letters, the plaintiff acknowledged receipt of the draft lease which had been prepared by Messrs Shapley Barret & Co. Advocates. In the said letters, the said advocates notified the defendant that they had handed over the lease in respect of the suit premises to the plaintiff for execution. They further acknowledged that the plaintiff had agreed to pay the legal fees in respect of the preparation of the said lease agreement. The plaintiff did not return the said lease to the defendant before issuing notice to terminate the lease, and later vacating the lease premises, a month after issuing the said notice.

The plaintiff argued that since the lease agreement was not executed between the plaintiff and the defendant, the tenancy that existed between the plaintiff and the defendant was a month to month tenancy as provided under Section 106 of the Transfer of Property Act. The plaintiff therefore argued that it complied with the law when it issued the one month notice before vacating the suit premises. On its part, the defendant argued that since the parties had negotiated and even agreed on the terms of the tenancy, there existed a lease agreement even though the same was not formally reduced into writing.

I have considered the said argument made. Upon evaluation of the facts of the case, I do hold that there existed a contract between the plaintiff and the defendant to enter into a lease agreement. Although the lease agreement was not executed, the intention of the parties could be discerned from the correspondence that was exchanged between the plaintiff and the defendant. That intention is a binding contract that is capable of being enforced by the court. As was held by Law, Ag. VP in Grosvenor vs. Rogan-Kamper [1974] EA 446 at page 448:

“Furthermore, the trend of judicial decision in East Africa has been for the courts to enforce unregistered leases or agreements for leases as contracts inter partes, where the contract is one capable of being specifically enforced and does not affect the rights of third parties. As was said in Figueiredo & Co. vs. Moorings Hotel, [1960] E.A. 926:

“The question is not the creation of an estate or interest in land but whether a term in a contract or a term of tenancy at will can be enforced.”

That case was cited and followed in Clarke vs. Sondhi, [1963] EA 107. At p.112 CRAWSHAW, J.A. quoted with approval the following extract from Mulla on the Indian Transfer of Property Act:

“The transferor is not debarred from enforcing a right in respect of property which is expressly provided by the terms of the contract. So if the contract were an agreement of lease not provable because of want of registration, the lessee could not resist a demand for rent.”

The judge's view that there was no valid lease (or agreement for a lease) led him to apply S.106 of the Transfer of Property Act, and hold that the agreement between the parties must be deemed to have resulted in a lease from month to month, and accordingly was within the competence of the Landlord and Tenant (Shops, Hotels and Catering Establishments) Act (Cap. 301). The opening words of S.106 read "In the absence of a contract ... to the contrary". In my view there was such a contract between the parties, evidenced by the agreement of 29th September 1969. Its material terms are sufficiently stated: the names of the lessor's agents, the name of the lessee, the description of the property, the term and its commencement, and the rent agreed to be paid. This contract could have been ordered to be specifically performed at the instance of either party."

It is therefore clear from the foregoing that the fact that no formal lease agreement was executed between the plaintiff and the defendant, did not imply that the plaintiff is not bound by the terms of the agreement that it entered into before the said formal lease was executed.

It was evident from the said correspondence exchanged between the plaintiff and the defendant (particularly the letter dated 27th August 2002 written by the defendant and the schedule to the said letter which was signed by the plaintiff), that the parties herein entered into an agreement intending to create a lease for a period of five (5) years and three (3) months in respect of the suit premises. The said agreement did not provide for the termination of the lease before the expiry of the said term of the lease. I do therefore hold that the one month's notice issued by the plaintiff to terminate the lease was invalid since it was not contemplated in the agreement. The plaintiff is therefore liable to compensate the defendant for the period that the suit premises remained unoccupied before the new tenant took occupation in July 2003.

As regard whether the defendant was entitled to be compensated for the cost of re-letting the premises and the cost of re-decorating the premises, I do hold that the defendant established a proper case for payment of the said costs. Under Section 108 (m) of the Transfer of Property Act, a lessee is bound to restore the leased premises to the condition that it was at the he was put into possession save for changes caused by normal wear and tear. The plaintiff vacated the suit premises before it re-decorated the same. The defendant further proved that it paid legal fees to Messrs Shapley Barret & Co. Advocates for the preparation of the lease which the plaintiff declined to sign even after the same had been executed by the defendant. The defendant was not at fault when it paid legal fees to the said advocates so that the lease could be prepared.

As regard whether the defendant is entitled to be paid costs of reinstatement expenses to the original status of the suit premises, I am in agreement with the plaintiff that since the new tenant took over the premises and is undertaking similar business to that of the plaintiff, the defendant did not incur any further expense in putting the said premises in a condition that was suitable for the purposes of the new tenant. I am of the view that the defendant suffered no loss as it was not required to undertake new renovations to suit the requirements of the new tenant. I further agree with the plaintiff that it would be unconscionable to enter judgment in favour defendant for the cost of renovation of the demised premises to the sum of KShs.2 million since the defendant suffered no prejudice and was able to retain and indeed utilize the said renovations to its advantage.

In the initial agreement between the plaintiff and the defendant, it was agreed that upon determination of the lease, the defendant would retain possession of the partitions that were installed during the renovations. From the evidence adduced by the defendant, it was apparent that the new tenant agreed to take up the premises on account of the renovations that had been undertaken in the suit premises. I will therefore disallow the defendant's claim under this head.

The upshot of the above reasons is that the plaintiff's suit is hereby dismissed with costs since the plaintiff offered no evidence in support of its case. The defendant's counterclaim is allowed on the following terms:

(a) *Special damages*

- (i) cost of re-letting the premisesKShs.149,151/=
- (ii) cost of re-decorating the premises KShs.440,000/=
- (iii) arrears of rent as at 31st May 2003 KShs. 6,083/=
- (iv) loss of rent and share of outgoing for the month of June 2003.... KShs.298,302/=
- (v) legal costs for the preparation of the lease.....KShs.269,120/=
- TOTAL KShs.1,162,656/=

(b) Cost of the suit.

(c) Interest on the special damages awarded shall be paid from the date of filing suit.

DATED at NAIROBI this 20th day of NOVEMBER, 2008.

L. KIMARU

JUDGE