



REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA AT MOMBASA

Civil Case 254 of 2004

VELJI SHAMJI CONSTRUCTION LTD.PLAINTIFF

VERSUS

WESTMALL SUPERMARKET LTD.DEFENDANT

J U D G M E N T

By a plaint dated 22nd November 2004, Velji Shamji Constructions Ltd., the plaintiff herein, sought for the following orders against Westmall Supermarket Ltd. the defendant herein,:

- (i) *A declaration that the lease/tenancy has expired by effluxion of time.*
- (ii) *Vacant possession*
- (iii) *Mesne profits at the rate of Kshs.16,000/- p.m. with effect from June 2004 until vacant possession.*

Or

In the alternative mesne profits of double the amount of monthly rent last payable on the expire lease effective June 2004 till vacant possession.

- (iv) *Costs of the suit.*

When served with the plaint the defendant filed a defence denying the plaintiff's claim.

When the suit came up for hearing the plaintiff tendered the evidence of one witness. Praful Halai (P.W.1) produced before this court the title deed in respect of Plot No. 5646/1/M.N. to prove that the aforesaid parcel of land is owned by the plaintiff company. P.W.1 also produced a lease agreement entered between the defendant and the plaintiff executed on 15th February 1999. In the lease agreement the plaintiff agreed to let to the defendant shop No. 1 on the ground floor of the buildings standing on Plot No. 5646/1/M.N. at a monthly rent of Kshs.20,000/- with effect from the 1st day of March 1999 for a period of 5 years 3 months. The lease was due to expire on 31.5.2004. The aforesaid lease also showed that the amount of yearly rent kept on changing by 15% p.a. P.W. 1 told this court that at some stage the parties negotiated to adjust the rent downwards from Kshs.20,000/- to Kshs.16,000/- per month when it became evident that the defendant was finding it difficult to raise the monthly sum stated in the lease. In view of this the rent increments proposed in the lease agreement was not implemented. The other terms of the lease agreement never changed. P.W. 1 told this court that the defendant failed to seek for the renewal of lease within three months before the expiry of the lease. P.W. 1 said that the plaintiff had no

intention of renewing the lease because the plaintiff intended to change the use of the property from Commercial to residential. P.W. 1 produced in evidence duly approved copies of the building plans. P.W. 1 also produced a letter which expressed the plaintiff's desire not to renew the lease. There is also the evidence of a letter written to the defendant dated 10.6.2004 through Ghalia & Ghalia Advocates demanding for vacant possession of the demised premises before filing this action. The plaintiff now seeks for judgment as prayed in the plaint on the basis of the evidence tendered.

On behalf of the defence, Douglas Mwangi Mutere (D.W.1) testified. He confirmed having re-negotiated the monthly rent to be adjusted downwards from Kshs.20,000/- to Kshs.16,000/-. D.W. 1 said he bought the defendant's business as a going concern and that he claimed that he did not recognize the lease agreement and that is why he managed to renegotiate the monthly rent to Kshs.16,000/- which amount he paid until 31.5.2004 when the plaintiff refused to accept receiving rent. D.W.1 produced cheques written in favour of the plaintiff which were returned. D.W.1 said that he is of the view that he is still a month to month tenant. D.W. 1 contended that the lease executed on 22.2.99 was a letter of offer hence there was no tenancy agreement signed between the parties. He sought to justify this position by producing letters requesting the defendant to visit the plaintiff's advocate's office to sign a new lease which D.W. 1 said he flatly refused to accede to because he did not agree with the terms therein. D.W. 1 claimed he was not aware when the lease would expire. D.W. 1 prayed for the suit to be dismissed.

At the end of the evidence the learned advocates appearing for the parties were granted leave to file and rely on written submissions. I have considered those submissions plus the evidence tendered. The learned advocates did not file the agreed issues. From the evidence and the submissions, I think the following issues arose for my determination:

First, whether or not there was a tenancy agreement. Secondly, if the answer to the above is in the affirmative whether or not the same has expired by effluxion of time. Thirdly, whether or not the plaintiff is entitled to the orders sought for in the plaint.

On the first issue the fact is that the defendant went into occupation of the demised premises upon signing the letter of offer dated 22/2/99. No other lease agreement was signed thereafter until the term specified in the letter of offer lapsed. What is clear is that the agreement contained in the letter of offer fell outside the provisions of Landlord and Tenant (Shops, Hotels and Catering Establishment) Act (Cap 301, Laws of Kenya

it was not a controlled tenancy as proposed by the defendant. Cap 301 Laws of Kenya does not apply because the term of the tenancy was beyond 5 years. In my view the agreement contained in the letter of offer is an agreement within the meaning of Section 106 of the Transfer of property Act of 1882 hence valid even in the absence of registration. The defendant has claimed that it is not aware of the agreement. I do not believe the defendant's witness over this issue. It is not conceivable for a prudent businessman to buy a going concern without investigating the terms of lease of the premises in which the business occupied. It is conceded by the defendant's witness (D.W.1) that he negotiated for the rent to be adjusted downwards from Kshs.20,000/- to Kshs.16,000/-. The defendant knew the existence of the letter of offer which basically contained the terms of the tenancy. A similar situation like the one obtaining in this case was dealt with by the court of Appeal in the case of Bachelors Bakery Ltd =vs= Westlands Securities Ltd. [1982] KLR 366: Whereby the court held inter alia that:

(i) The parties entered into an agreement exceeding 5 years making the agreement a contract falling under the Transfer of Property Act 1882, Section 106. Such an agreement is valid between the parties even in the absence of registration.

(ii) The agreement between the parties was an unexecuted lease and not an agreement for lease. The appellant had the full benefit of the term which it freely negotiated and was now bound to give up possession upon the expiry of the term.

I think I have already said enough over this issue.

On the 2nd issue as to whether or not the lease expired by effluxion of time. It is admitted by the parties that their tenancy relationship was guided by the terms of the letter of offer dated 22/2/99. According to that agreement, the tenancy over the demised premises was to last for 5 years 3 months with effect from 1st March 1999 and ending on 31st May 2004. there was evidence that the parties negotiated and in fact agreed to alter the terms regarding the monthly rent. The other terms which included the period of tenancy was left intact. Going as per the decision of the court of Appeal in the Bachelors Bakery Ltd. Supra, I am convinced that the defendant had full benefit of the term which was freely negotiated and hence the defendant is bound to deliver vacant possession to the plaintiff upon the end of the period. I am satisfied that the evidence has proved that the time contained in the letter of offer expired by effluxion of time on 31.5.2004. In view of my finding, I am convinced that the plaintiff had the right to demand vacant possession its premises. The plaintiff cannot be forced to continue entertaining the occupation of the defendant against its will.

The last issue in this matter relates to the prayers sought for in the plaint. I have already stated that the tenancy has been terminated by effluxion of time. It is clear from the plaint that the plaintiff prayed for vacant possession, mesne profits at Kshs.16,000/- per month from June 2004 until the date of vacant possession. In my humble view, at the expiry of the 5 years 3 months on 31.5.2004, the defendant became a trespasser in the plaintiff's premises. The defendant had no business in refusing to deliver vacant possession of the premises to the plaintiff. This court gives the plaintiff an order of vacant possession. The defendant is ordered to deliver to the plaintiff vacant possession within a period of 30 days from the date hereof. I also give the plaintiff mesne profits assessed at Kshs.16,000/- per month with effect from the month of June 2004 until the date of vacant possession. The plaintiff shall also be paid costs of the suit.

Dated and delivered at Mombasa this 9th day of February 2007.

J.K. SERGON

J U D G E