



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

Civil Case 566 of 2005

CHIMANLAL MEGHJI NAYA SHAH1ST PLAINTIFF

NITICHANDRA MEGHJI NAYA SHAH2ND PLAINTIFF

VERSUS

OXFORD UNIVERSITY PRESS (EA) LIMITEDDEFENDANT

JUDGEMENT

This Notice of Motion under Order 35 Rule 1 and Order 6 Rule 13 1(b) and (d) of the Civil Procedure Rules, seeks that the defence be struck out and judgement be entered summarily against the Defendant as prayed in the Plaint. It is alleged that the Defendant breached the terms of a lease agreement between the parties herein. And that there are no issues to go for trial as the defence is vexatious, frivolous and an abuse of the court process.

The Plaintiffs are the registered owners in equal shares of L.R. No.209/4360/6 situate in Nairobi and by an agreement dated 14th July, 2003 they leased the said premises to the Defendant for a period of 6 years with effect from 1st January, 2003. The lease was to expire on 31st December, 2008 and the rent agreed was Kshs.110,000/= per month from 1st January, 2003 to 31st December, 2004. and thereafter the rent was to be reviewed from 1st January, 2005 and the amount would not be less than the existing rent of Kshs.110,000/=. The rent was payable quarterly in advance. The lease did not provide and/or contain a termination clause prior to its expiry.

That notwithstanding, the Defendant by a letter dated 8th December, 2004 purported to terminate the lease. And on 29th April, 2005, the Defendant vacated the premises and returned the keys to the Plaintiffs. In a letter dated 23rd June, 2005, the Defendant's Advocates wrote to the Plaintiff's advocates informing them that the lease had been terminated in accordance with Section 101 of the Transfer of the Property Act. The Plaintiffs contend that since the lease did not provide for a termination clause prior to its expiry, the position taken by the Defendant is factually and legally incorrect.

The Plaintiff's claim against the Defendant is for Kshs.4,950,000/= being the rent for the remainder of the lease term which is from 1st April, 2005 to 31st December, 2008. The Plaintiffs now want the court to enter summary judgement in their favour for that sum.

Order 35 Rule 1 states;

“In all suits where a plaintiff seeks

(a) judgement for a liquidated demand with or without interest or

(b) the recovery of land with or without a claim for rent of mesne profits by a landlord from a tenant whose term has expired or been determined by notice to quit or been forfeited for non-payment of rent or for breach of covenant, or against persons claiming under such tenant or against a trespasser, where the defendant has appeared the plaintiff may apply for judgement for the amount claimed or part thereof and interest or for recovery of the land and rent or mesne profits”.

The defence of the Defendant is that the lease provided for a monthly rent payable quarterly in advance on the first day of each quarter month during the term, therefore having given three months notice of intention to terminate the lease, it has discharged its obligation towards the Plaintiffs. And since the lease did not provide and/or contain a termination clause, the Defendant is entitled to give three months notice with payment of full rent due and owing up to the notice period.

It is also the contention of the Defendant that the lease in subject to section 106 of transfer of property Act 1882, which is adopted in the event that a lease makes no provision as to the notice of termination.

Now the Plaintiff claims a sum of Kshs.4,950,000/= being the rent for the remainder of the lease agreement. No doubt the lease was prematurely terminated by the tenant upon giving what it calls three months notice. Equally there is no doubt that the subject lease did not contain and/or provide a termination clause to enable the tenant to end its relationship with the Plaintiffs. Perhaps it is also essential to point out that no landlord can force a tenant to stay in his premises for a particular period whether a lease exists or otherwise. The situation depends on many issues that would determine the relationship either way.

If for example, the lease provide for a fixed period of 6 years and the tenant is unable to pay the rent applicable, then the tenant cannot be heard to say that the landlord cannot end or terminate his lease. In my view where there is no termination clause and the lease is terminated before its period of expiry, the situation that obtains is a breach of a contract. Where the parties are not regulated by their lease agreement as to the nature and mode of notice, if the lease is terminated by either party, then the party offended is entitled to damages for breach of contract. In essence my position is that a lease agreement properly registered is a form of a contract and therefore when there is a default, the terms of breach of a contract aptly applies.

The question that immediately comes to my mind is whether the Plaintiffs’ claim for the breach of the alleged contract amounts to a liquidated claim. According to Black’s Law Dictionary, liquidated claim is defined as;

“claim, amount of which has been agreed on the parties to action or is fixed by operation of law. A claim, which can be determined with exactness from parties’ agreement or by arithmetical process or application of definite rules of law without reliance on opinion or discretion. Claim for debt or damages is liquidated in character if amount thereof is fixed, has been agreed upon or is capable of ascertainment by mathematical computation or operation of law”.

The Plaintiffs’ claim that the rent would be Kshs.110,000/= per month from 1st January, 2003 to 31st December, 2004. and thereafter the rent would be reviewed for 2 years from 1st January, 2005 to 31st December, 2006 which amount would not be less than the existing rent of Kshs.110,000/= per month. The rent was to be reviewed subsequently after the expiry of the second period of 2 years. The Plaintiffs claim a sum of Kshs.990,000/= for the period between 1st April, 2005 to 31st December, 2005 but subsequently it appears the rent is calculated at the rate of Kshs.110,000/= per month.

Admittedly the Plaintiffs claim the rent for the whole period of the lease agreement which remaining at the time of the alleged termination. In law a party faced with a breach of contract is obliged to mitigate his/her loss, so that the liability and obligation of the parties is minimized with no much detrimental

effect. Here there was a lot of opportunity for the landlords to mitigate their losses if the lease was terminated in April, 2005. the remaining period was about 3 years and 8 months, which the Plaintiffs now claim against the Defendant. There is no evidence to show, that the Plaintiffs have not gotten another tenant for the remaining period. It is incumbent upon the landlord of a premises to take the necessary steps to look for tenants. They cannot just sit back and say the tenant who left would have to shoulder the rent for the remaining lease period.

What happens if the tenant cannot afford to pay the rent agreed and he wants to vacate the premises? What happens if the market is depressed and due to that economic depression, the tenant is unable to meet his obligation? It is because of such circumstances that landlords of premises vacated by tenants are required to look for other tenants. The landlord cannot perpetually wait and waste the premises simply because he had a fixed lease with no termination clause.

In this case, I have no evidence to show the premises could not be rented for the remainder of the lease period. The property in question is within Nairobi and I cannot speculate that the said premises would have no tenant up to 31st December, 2008, when the lease was to expire. In my view what the Plaintiffs are claiming only amounts to a breach of contract, hence damages. The Plaintiffs are not claiming a clear liquidated claim but what appears to be general damages. There is a possibility that the premises had been rented to another tenant. If such happens, the landlord would only be entitled for the period the premises remained vacant. There is even a possibility that they might have gotten an increased rent, therefore to condemn the Defendant to pay for the whole period would amount to a great injustice. In my view this case has some elements of equity and its inequitable to allow a party to benefit twice because of a perceived wrong.

In my view summary judgement is a draconian measure because the court is only availed affidavit evidence. And mostly the court would grant summary judgement in only the clearest of cases in which the facts are undisputed and the applicable law is clear. It is my position that leave to defend must be given unless it is clear that there is no real and substantial question to be tried. And that there is no dispute as to the facts or law, which raises a reasonable doubt that the Plaintiffs are entitled to judgement. To shut out a Defendant who has triable issues is to make him liable for a claim, which is not clear.

The summary jurisdiction conferred by Order 35 must be used with great care and a Defendant out not to be shut out from defending unless it is very clear indeed that he has no chance in the action under determination. Therefore summary judgement should not be granted when any serious conflict as to the matter of fact or any real difficulty as to matter of law arises. I think the points raised by the Defendant are really arguable and the same calls for a full hearing between the parties. The court has to determine the effect and nature of the lease agreement between the parties especially when there is no termination clause. The court has also to determine the amount of damages that follow from the alleged breach of the agreement. Perhaps the court would investigate and/determine whether the Plaintiffs actually rented the premises, the rent gotten and the period the premises remained vacant.

I appreciate that in an appropriate case the it may give judgement for the Plaintiff upon determining a suitable question of law without a full trial of the action. Equally I am aware that the mere fact that an assertion has been made in an affidavit by the Defendant does not ipso facto provide leave to defend, the Defendant must satisfy the court that it has a fair or reasonable probability of showing a real or bona fide defence and that the evidence is capable of belief. I think the evidence put forward by the Defendant is credible to warrant a full hearing of the dispute. The Plaintiffs wants this court to determine the amount payable by the Defendant through affidavit evidence.

In my view every affidavit filed cannot be treated as truthful and on face value when perhaps every probability and circumstances might point to the contrary. The defence set up need only show that there is a triable issue or question. I have applied two tests to the defence of the Defendant, which are;

(1)Is what the defendant says credible

(2)Is there a fair or reasonable probability of the Defendant having a real or bona fide defence to be

determined at the trial.

I am satisfied that the defence has passed the two tests and the appropriate thing to do in such circumstances is to allow the defence to proceed to full hearing.

In the premises the application dated 22nd June, 2006 is dismissed with costs to the Defendant.

Dated and delivered at Nairobi this 21st day of March, 2007.

M. A. WARSAME

JUDGE