



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

Civil Case 950 of 2002

KENYA COMMERCIAL BANKPLAINTIFF

VERSUS

JARIBU HOLDINGS LIMITED.....DEFENDANT

JUDGEMENT

In the plaint dated 1st August 2002, the plaintiff sued the defendant for several prayers, most of which was abandoned except prayers;

- (a) Delivery of possession of the demised premises**
- (b) Kshs.2,270,000/= arrears of rent, which was dealt with in an interlocutory application.**
- (c) Costs of this suit.**
- (d) Interest on (b)**

The dispute revolves around that parcel of land known as L.R. No.209/378/10 situated along **Argwings Kodhek** road in **Hurlingham** shopping centre within Nairobi. By a lease agreement in writing dated 30th July 1990, the plaintiff let to the defendant the premises erected on the said parcel of land for a term of 6 years from 1st January, 1990 at a monthly rent of Kshs.120,000/= for the first 3 years of the term and Kshs.138,000/= for the remainder of the term payable in advance. The said lease expired on 31st December, 1995.

It appears the lease was not renewed and the defendant did not give vacant possession of the leased premises to the plaintiff. There is no dispute that the rent was renewed to a monthly rent of Kshs.250,000/= payable quarterly in advance from the year 1996 or thereabout. It was a term of the lease signed between the parties initially in 1990 that the defendant not to lease and/or sub-let the suit premises to 3rd parties without the consent of the plaintiff.

The plaintiff's complaint is that;

- (1) In breach of the lease agreement or the holding over lease, the defendant have leased, let and/or sub-let and continue to so lease part of the premises to 3rd parties without consent.**
- (2) The defendant has failed, refused and/or neglected to pay or tender at the appropriate time and place,**

the rent due and owing to the plaintiff or its agents and despite reminders and request. And at the time of filing the present suit the defendant was in rent arrears of Kshs.2,270,000/=, therefore because of those two breaches, the plaintiff is entitled to vacant possession as prayed in the plaint.

The defendant's defence is that the plaintiff is not entitled to vacant possession because it became a statutory tenant effective from 1st January 1996 paying a monthly rent of Kshs.250,000/=. It is the contention of the defendant that by a written lease agreement dated 30th July, 1990 the plaintiff let to it all that space in the schedule to the lease being the area of the floor space on the basement, ground, first and second floors of the building known as **Hurlingham Building** containing by measurement 17504 square feet. That on the said floor space, are furnished apartment which the defendant has let for the last 12 years. And that the plaintiff has all along consented to the user of the said premises and cannot claim the same were let or sublet to 3rd parties without its consent.

The plaintiff did not call any witness to support the allegations contained in the plaint. **Mr. Kang'atta** learned counsel for the plaintiff submitted that the plaintiff would be relying on materials and various documents exhibited by the defendant which is already part of the record of this court, which material and documents are not contested. The documents include the expired lease agreement made on 30th July, 1990, whose contents are not in dispute. The plaintiff also relied on the contents of the letters dated 8th May, 2001 and 4th October 2001, which are termination notices sent to the defendant. The fact that the two letters are served is not contested. But what is contested is the validity to terminate the tenancy between the parties.

The defendant on its part called one witness, **Mr. Michael Kombo** who is a General Manager of the defendant. The evidence of **Mr. Kombo** is as follows: that the defendant offers services for shops, office accommodation and furnished apartment at the suit premises. The lease which expired on 31st December 1995 was not extended and the defendant continued paying rent as per the lease agreement. The defendant has 4 shops, 30 furnished apartments and 5 office accommodation. The defendant leases the furnished apartments on a short term, with the knowledge of the plaintiff. The witness confirmed to have received the two letters in respect of the termination of the lease agreement by the plaintiff. The witness also stated that the defendant on 5th May, 2005 admitted to have been in rent arrears to the tune of Kshs.2,040,000/= an amount the defendant continued to pay alongside the monthly rents of Kshs.250,000/=. And as at 31st May, 2007 the balance payable was Kshs.598,000/=.

The parties then made written and oral submission after the close of the defendant's case. I have taken into consideration all the relevant material that was presented before me. In particular, I have considered all the relevant documents either produced as an exhibit before me or were exhibited earlier by the parties in support or in opposition to the various applications filed.

According to the plaintiff, possession of the suit premises was sought on the basis of the defendant's failure to pay rent and failure to comply with the notice served. It is clear that after the notice was served, the defendant lodged a complaint with the Business Premises Rent Tribunal under Cap 301 which complaint remains unprosecuted. It is the contention of the defendant that the existence of the case before the tribunal precludes this court from determining the nature of the defendant's tenancy in the suit premises.

The tribunal complaint or case was instigated by the defendant and it is incumbent upon parties who file cases before a court of law to ensure that it is determined within the shortest time possible. This court has no control over parties who want to use the court machinery as a tactic to delay the determination of disputes before court. It is clear in my mind that Business Premises Rent Tribunal No.296/2001 was filed by the present defendant in the year 2001 and **Mr. King'ara** Advocate says that the fact the case has not been determined is a recognition of the jurisdiction of the tribunal as the court to determine the issues between the parties. And having consented to the orders before the tribunal, the plaintiff cannot proceed with the matter of eviction.

In my view the tribunal has no powers to issue injunctive orders or orders in the nature and/or import of

an injunction. In any case, a case pending before the business premises rent tribunal cannot oust the original jurisdiction of this court. It is the defendant who field the case before the tribunal and it is incumbent upon it to ensure that it proceeds for hearing so that the dispute between the parties can be resolved. If the party who instigated BPRT No.296/2001 is not willing or is reluctant to proceed, then it cannot be used against the present plaintiff who was taken to court to answer allegations made against it. In the premises, I hold the view that the pending case before the tribunal has no relevance to the issues for determination before this court. In any event the jurisdiction of this court has not been questioned by the defendant in a preliminary manner or otherwise.

The other issue raised by **Mr. King'ara** Advocate is whether this court can determine the issues at stake without the absence of oral evidence on the part of the plaintiff. According to **Mr. King'ara** Advocate a trial entails the articulation of the request for assistance from the court by the person who has brought up a plea before it. And in the circumstances of this case, what is before court is a bare claim on paper, since the plaintiff did not request the court to make any orders. What the Advocate for the plaintiff is asking the court to do is to proceed *suo moto* and issue prayers that have not been asked for orally.

Mr. King'ara Advocate further submitted that unless the plaintiff appears in court at a trial to make a request for orders, this court cannot make any orders from mere submissions. The plaint merely sets out a claim and the law expressly forbids the giving of evidence in a plaint. And since the defendant does not admit the plaintiff's claim or any part thereof, there can be no judgement for the plaintiff.

First and foremost, I agree with **Mr. King'ara** that the law expressly prohibits a party from pleading evidence in a plaint. That is a sound proposition of law, which needs no material support. However, if the issues in dispute largely or substantially relates to documentary evidence, which is before court, then there is no need for the parties to raise issues on clear and uncontroverted facts. It is basic law that facts not in dispute need not to be proved. It is the contention of the plaintiff that its case is based on documents and exhibits already produced before court therefore no need to waste the court's time with evidence already before court, which is not contested by the defendant.

In my understanding the documents central as to the determination before court has been admitted and produced by the defendant. In so long as the case rests on the nature and interpretation of those documents, the plaintiff was justified in not calling any evidence in support of uncontested facts and documents. I therefore think, as earlier ruled that the plaintiff had the legitimate right to proceed the way it did. I do not see any relevance in the objections raised by the defendant.

The defendant says that it does not admit the plaintiff's claim or any part thereof but it did not contest the documents the plaintiff was solely relying in support of its case. Indeed, it is the defendant's witness who produced as exhibits all the central and necessary documents, which documents the plaintiff is relying to proof its claim. The defendant produced the initial lease agreement signed between the parties on 30th July 1990. The defendant also agreed that the said lease expired on 30th December, 1995 and thereafter it continued paying rent to the plaintiff. Further the existence of the two termination notices is admitted and has been produced as exhibits by the defendants. It is therefore my decision that the objection that the plaintiff did not call any witness to prove its case is worthless. In any case, **Mr. Kang'atta** Advocate for the plaintiff submitted that the plaintiff is relying on the materials and various documents exhibited by the defendant which is already part of the record, which material and documents are not contested. The documents which the plaintiff was relying in support of its claim was produced and exhibited by the defendant's witness.

The plaintiff's Advocate at the start gave notice that the plaintiff would not call any witness but would rely on the documents already before court. The defendant after my ruling submitted itself to the jurisdiction of this court and went further to produce all the documents which the plaintiff said was relying in support of its case. It is my view that if all materials necessary for the determination of the issues and dispute were produced by the defendant, this court cannot say the case of the plaintiff has not been proved because no witness appeared before court. I am in agreement with **Mr. Kang'atta** Advocate that the purpose of a trial is to prove facts in issue, it is not a formality but to prove the facts in dispute. That is the essence of section 61 of the Evidence Act Cap 80 Laws of Kenya

all the relevant facts are admitted, parties need not call evidence to prove facts admitted or not in dispute. I do not understand the point of calling a witness to testify on the fact that the tenant had failed to pay rent, when that fact had been admitted and there is a judgement on record. It is therefore my decision that there was no need for the plaintiff to call evidence to discount, what is already admitted.

It suffices to say that the plaintiff said that it would rely on the evidence before court either placed by the parties through affidavit or pleadings. When the defence witness gave evidence, he only reproduced what was already before court. All the exhibits produced by the defendant through affidavit evidence, through various applications filed by the parties and determined by court. In my understanding the question that remains for determination is whether the tenancy between the parties was a controlled tenancy and whether the same could be terminated otherwise than with the provisions of Cap 301 Laws of Kenya.

There was no written lease agreement subsisting at the time, the plaintiff sought to terminate the tenancy. But at the beginning there was a lease agreement which expired on 30th December 1995, which thereafter the defendant claims to have become a controlled tenant. It is the position of the plaintiff that after the expiry of the lease, the effect was a holding over of the lease in terms of Section 116 of Indian Transfer of Property Act. There is no dispute that the defendant had been served with a termination notice.

The initial lease agreement was in respect of 4 shops, 30 furnished apartments and 5 office accommodation and the terms was provided in the lease agreement signed, executed and registered. The monthly rent was for Kshs.120,000/= for the first 3 years of the term and thereafter Kshs.138,000/= for the remainder of the term lease. At the time the termination notices was given in 2001 the rent payable was Kshs.250,000/= per month. It means the parties adjusted the rent several times to that figure. It also means that at the time, the rent was being adjusted from Kshs.138,000/= per month to the current sum of Kshs.250,000/= there was no lease agreement. It is also clear that the defendant gave out the shops to the plaintiff and the rents from the said shop is being collected by the plaintiff or its agents.

According to the defendant's witness the initial lease agreement prohibits the tenant from using the premises otherwise than for residential purposes. The defendant is using the let out portion for furnished apartments. And that the plaintiff has all along approved the user of the said premises and cannot claim the same were let to 3rd parties without its consent. The defendant also appears to have given back the offices and shops to the plaintiff, therefore substantial portion of the initial space is with the plaintiff's use or control. **Mr. Kombo** under cross examination from **Mr. Kang'atta** Advocate replied;

“Serviced and furnished apartments are residential premises as opposed to shops and office accommodation” the shops is being let by the landlord to the respective tenants who collect rents from them. We are only moving the apartments and the rest of the property is being let out by the landlord....I do agree that the premises were to be used exclusively for residential purposes according to the lease agreement”.

It is the plaintiff's case that the tenancy of the defendant is not controlled tenancy in terms of the provisions of the Landlord and Tenant (shops, Hotel and Catering Establishment) Act Cap 301 of the Laws of Kenya, therefore the notices dated 8th May, 2001 and 4th October, 2001 terminated the said tenancy and the defendant should give vacant possession. The defendant's witness confirmed that the premises were to be used exclusively for residential purposes and that the defendant never obtained written authority from the plaintiff to utilize any part of the property other than for residential purposes.

The lease also provided that the landlord was at liberty to terminate the lease if the rent remains due for 21 days. And that at the time the landlord issued the termination, the tenant was in huge and substantial rent arrears. The sum of shs.2,040,000/= was the figure the defendant agreed to be outstanding from the period of tenancy i.e. from July 1990 to May 2005. The said rent arrears arises from the inception of the tenancy agreement way back in 1990. And on 31st October 2001 when the defendant went to the tribunal and filed BPRT No.296/2001, it was in rent arrears to the tune of Kshs.1,500,000/=. And even at the time, the present suit was filed in August 2002, the plaintiff was claiming a sum of Kshs.2,270,000/=.

It is therefore clear that the defendant having unequivocally admitted being in rent arrears for quite a long

period, then it means that there is a fundamental breach of the relationship of landlord/tenancy. In my understanding a breach resulting from failure to pay rent due and owing is a fundamental ingredient to enable the landlord to get back its premises. The first step in a relationship between a tenant/landlord is prompt payment of rent as and when it is due. And the failure of the tenant to pay rent gives the landlord the opportunity to get back vacant possession of the suit premises. I hold the view that the acts and omissions of the defendant entitles the defendant the right to get back its premises.

The question is the nature of tenancy to place between the parties and whether it is controlled. The plaintiff's contention is that the premises having been let out to the defendant for residential use only, the tenancy could not be said to be a controlled tenancy within the meaning of Cap 301 Laws of Kenya. And that the same had therefore been lawfully terminated in terms of section 106 of the Transfer of Property Act by way of service of the termination notices dated 8th May 2001 and 4th October 2001, receipt of both, which had been acknowledged by the defendant.

The defendant on its part, contends that it became a statutory tenant with effect from the expiry of the lease at 30th December 1995. It is clear that the defendant is carrying a business of a furnished apartments allegedly leased or let on a short term basis. Section 2(1) of Cap 301 laws of Kenya is clear in its definition of what constitutes a controlled tenancy. Such tenancy must be in respect of either a shop, hotel or a catering establishment. Hotel means any premises in which accommodation or accommodation and meals are supplied or are available for supply to five or more adult persons in exchange for money or other valuable considerations.

No doubt the defendant obtained the suit premises initially for residential purposes only and no consent of the landlord was sought and obtained by the defendant. I am therefore in agreement with **Mr. Kang'atta** Advocate any use of the suit premises by the defendant for purposes other than residential and without written permission of plaintiff would be in clear breach of an express term and condition of the initial lease. It is therefore incumbent upon the defendant to show and/or demonstrate that it had obtained permission of the plaintiff for any subsequent change of the user of the suit premises. It is not available to the tenant to change the user of the suit premises without the consent of the owner and then allege that it is a controlled tenant.

It is my decision that the leasing out of the suit premises as furnished apartments on short term basis i.e. one month or so by its nature does not make the relationship a controlled tenancy. In my understanding the user of the suit premises as furnished apartment is not a controlled tenancy and cannot fall within the provisions of Cap 301 Laws of Kenya. I therefore make a finding and hold that the suit premises does not fall within the provisions and requirement of Cap 301 Laws of Kenya. I agree with the Advocate for the plaintiff that a furnished apartment is essentially a residential house like any other dwelling house and cannot be construed to be a hotel, hence the defendant is not within the realm and protection of Cap 301 Laws of Kenya.

In conclusion, it is clear that the suit premises does not fall within Cap 301 Laws of Kenya and it is also clear that the defendant is has been in rent arrears for a long period of time. The defendant was served with a valid termination notice, which it acknowledged, therefore the plaintiff is entitled to an order of vacant possession resulting from the breach of the defendant.

All in all I am satisfied that the defendant has committed a fundamental breach of its tenancy agreement and/or relationship by failing to pay its rent as and when it is due. That is a mandatory obligation, failure of which ipso facto determines the relationship of tenant/landlord.

Order: I direct the defendant to give vacant possession of the suit premises within the next 15 days failure of which the plaintiff shall be entitled to an order of eviction. The plaintiff is also entitled to payments of all rents due and owing, plus costs of this suit.

Dated and delivered and Nairobi this 26th day of November, 2007.

M. A. WARSAME

JUDGE

Court: Judgement delivered in open court in the presence of Mr. Fraser for the plaintiff and **Mr. King'ara** for the defendant.

M. A. WARSAME

JUDGE

26.11.2007

Mr. King'ara: I seek an order of stay for 90 days within which either to comply with the order of apply for a stay formally because it is our contention the tenancy is controlled and cannot be terminated by this court.

Mr. Fraser: I have no objection for 30 days and it is more than sufficient.

Court: Stay of execution is granted for 45 days.

M. A. WARSAME

JUDGE