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

Civil Case 690 of 2004

PIONEER HOLDINGS (AFRICA) LIMITED…….……
PLAINTIFF

VERSUS

A. N. ISMAIL as Chairman

S. MUTUNGI as Treasurer and

S. N. ANJICHI as Secretary of THE KENYA INSTITUTE OF BANKERS…….DEFENDANT

R U L I N G

By a Chamber Summons dated 13th January 2006, the plaintiff has sought to strike out the Defence dated 28th June 2005. The plaintiff has also sought judgement as prayed in the plaint. And finally, the plaintiff sought costs of the application itself.

The basis for the application is the plaintiffs belief that the Defence herein consisted of nothing more than a bare denial, which could not be sustained. The plaintiff feels that the Defence could not successfully resist the claims set out in the Plaint, as the said Defence raised no valid or arguable defence.

It is common ground that the defendant was a tenant in the building known as PIONEER HOUSE. At the material time, the tenancy was the subject matter of a Further Lease dated 28th March 1995. Under that Further Lease the defendant leased the demised premises for a term of six (6) years, with effect from 1st December 1994. Therefore, there is no dispute about the fact that the lease was to expire on 30th November 2000.

In what has now become major point of historical reference in Kenya, there was a major bomb blast in the city of Nairobi, on 7th August 1998. This is the way the said event has been described in the replying affidavit of Mr. Stephen Naman Anjichi, which was sworn on 21st February 2006:

"**THAT on 7th August 1998 there was an explosion caused by a bomb or bombs targeted at the Embassy of the United States of America which was at the time located NEXT to the said Pioneer Building, the demised premises, the subject of this suit. The said bomb explosion is a matter of local notoriety."**

Indeed, I should add that the "**Bomb Blast**" is a matter of international notoriety.

The said "**Bomb Blast**" was responsible for setting in motion the developments which gave rise to this case. That is because the said "**Bomb Blast**" caused damage to the building within which the demised premises was located. Arising out of the damage occasioned to Pioneer House, the defendant asserts that the demised premises were inhospitable.

Indeed, it is common ground that on 17th August, 1998, the Plaintiff issued a circular to all the tenants of Pioneer House, including the defendant. By the said circular, the plaintiff expressed themselves in the manner following:-

"**To Esteemed Tenants and Visitors of *PIONEER HOUSE, Moi Avenue, Nairobi.***

The Board of Directors and Management of THE PIONEER GENERAL ASSURANCE SOCIETY LIMITED, wish to extend their heartfelt condolences to the bereaved families and wish the injured a speedy recovery. We regret the damage and disruption caused as a result of the BOMB EXPLOSION of Friday, August 7th 1998.

The Management is however making every effort to rehabilitate the damaged facilities and restore services back to normal as soon as possible.

Unfortunately, the building was declared "Out of Bounds" last week and even to date, the authorities have advised that the building should not be used until such time, professional evaluations to the structure and services are completed to their satisfaction.

This evaluation exercise is in progress and in the meantime we feel duty bound to advise our tenants, their customers and business associates, that they will be entering the building *at their own risk and The Company will not accept any responsibility.*

We trust you appreciate our position and very much regret the inconvenience caused by this tragic event."

Notwithstanding that circular, the plaintiff's case is that the Pioneer Building did not suffer such destruction as would have rendered it substantially and permanently unfit for the purposes for which it was let to the defendant, as envisaged by Section 108 (e) of the Transfer of Property Act. The said section reads as follows**:-**

"**In the absence of a contract or local usage to the contrary, the lessor and the lessee of immovable property, as against one another, respectively, possess the rights and are subject to the liabilities mentioned in the rules next following, or such of them as are applicable to the property leased –**

(e) if by fire, tempest or flood, or violence of an army or of a mob, or other irresistible force, any material part of the property be wholly destroyed or rendered substantially and permanently unfit for the purposes for which it was let, the lease shall, at the option of the leasee, be void.

Provided that, if the injury be occasioned by the wrongful act or default of the leasee, he shall not be entitled to avail himself of the benefit of this provision."

Clearly, the proviso abovecited is inapplicable to this case as the "**Bomb Blast**" was never attributed to the defendant.

The question, however, is whether or not the demised premises were "**destroyed or rendered substantially and permanently unfit**" for the defendant's use.

In the plaintiff's view, even if the position taken by the defendant were taken as reflective of the factual position, the building would only be deemed to have been "**severally damaged**", but not destroyed.

On the other hand, the defendant points, first, at the circular dated 17th August 1998, as an indication as to the requirement by "**the authorities**," and also of the plaintiff, that tenants, their customers and business associates were to stay away from Pioneer Building. The requirement that the building was to remain out of bounds was to remain in force until such time as the said building had been evaluated by professionals.

Clearly, during the time of the said evaluations, the demised premises could not have been put to the use for which it was let. However, that did not necessarily imply that the building had been substantially and permanently destroyed, for by the time the circular was issued the "**professional evaluations as to the structure**" was in progress.

According to the plaintiff, the professional evaluation resulted in the issuance of a report which gave the building structure a clean bill of health. However, the defendant points out that the Chairman of the Association of Consulting Engineers, Mr. Evans Goro did issue a press briefing in which he stated, that as at 20th August 1998, Pioneer Building was one, out of at least 10 buildings, which suffered "**severe structural damages**"

In the light of that statement, the defendant contends that it will be calling Mr. Evans Goro as a witness, to produce his report.

It is significant to note that at paragraph 9 of the replying affidavit of Mr. Stephen Naman Anjichi, he makes reference to an "**assessment report carried out by himself (Mr. Evans Goro) and members of his Association, detailing their preliminary findings after the bomb explosion."**

Obviously, the said report of preliminary findings could not constitute the final evaluation of the demised building. Indeed the undated report which was issued by the Chairman of The Association of Consulting Engineers of Kenya expressly states, inter alia, as follows:-

"**Most Importantly ACEK cannot pass any of the buildings as safe for normal operations of the numerous tenant businesses without first obtaining access into the affected buildings for detailed surveys with respect to structural soundness and the functional state of the services such as electrical installations, lifts, plumbing, drainage and fire fighting/prevention/alarm systems."**

In other words, the report sought to be relied upon by the defendant was neither final nor conclusive about the structural damage to the building.

Nonetheless, the question that remains unanswered is whether or not by their circular dated 17th August 1998, the plaintiff can be deemed to have abdicated its responsibility to guarantee the structural soundness of the Pioneer Building. On my part, but without purporting to make any final adjudication on the issue, it would appear that if the defendant did choose to use the demised premises subsequent to that circular, they would have been putting themselves, their customers and associates at risk. Whether or not that meant that the premises were actually unfit for the purposes for which it was let, is thus arguable.

I also hold the considered view that by simply calling upon the plaintiff to carry out the requisite repairs to the building, the defendant cannot be said to have established that the building could be repaired after the explosion. The defendant were not experts in that line, and can only therefore be deemed to have been expressing their hope that the building would be repaired.

To my mind, although the plaintiff has now exhibited a report by BROWN & ROOT ENGINEERING CONSTRUCTION, dated 2nd September 1998, which shows that the building did not suffer "**major structural damage**", the plaintiff has not demonstrated to the court that the said report was drawn to the attention of the defendant. If anything, the plaintiff has not responded to the defendant's contention that by 23rd December 1998, when the defendant decided to vacate the demised premises, the plaintiff had not yet withdrawn its circular dated 17th August 1998.

By implication, it is only with the benefit of hindsight that one can now state that "**the building is structurally safe for occupation**", as was stated in the report by Brown & Root Engineering Construction. In effect, by the date when the defendant vacated the premises, he would not have known that the building was structurally safe. Therefore, it would only be fair to allow the defendant an opportunity to try and persuade the court, if they can, that their decision to vacate the premises was justifiable.

In arriving at this decision I have been largely influenced by the observation in the report by Brown & Root Engineering Construction, whereat they observed, at paragraph 3.5.1; that:

"***Temporary Partitions, Doors and Windows*.**

These elements of the building suffered the greatest damage.

All the internal partitions, doors, glazing and framing were all destroyed in the following areas, although a little partition material could be salvaged in some of them.

(a) Kenya Institute of Bankers offices on 1st floor……."

The question which will need to be addressed is whether or not the demised premises was fit for purposes for which it was let when in that state. In that regard, the defendant did write to the plaintiff on 19th August 1998 stating categorically that:

"**Presently the said offices were severely damaged and physically inhospitable."**

The defendant's said contention seems to find support in the report by Brown and Root Engineering Construction. But, as to whether or not it would be a sufficient basis for legally terminating the tenancy earlier, is an issue which I feel ought to await determination after the facts are ascertained.

I am aware that I have delved into the substance of the affidavits, both in support and in opposition to the application herein. The defendant's replying affidavit, in particular would appear to contain material which is not embodied in the Defence. For that reason, the plaintiff had submitted that, in determining the application, the court ought only to be guided by the pleadings.

In the case of **GENERAL ACCIDENT INSURANCE CO. (K) LTD V MUTUMA [1995 – 1998] 1 EA. 65** at p. 68, the Court of Appeal held as follows:

"**As a general rule it is not open to a court to base a decision on an unpleaded issue, as happened in this case. The exception to that general rule is, as we stated in the case of *Odd Jobs v Muhia [1970] E.A. 476*, where it appears from the cause followed in the trial that the unpleaded issue has been left to the Court for decision."**

In my considered view, as soon as the plaintiff deemed it necessary to delve in-depth, into the issues as to whether or not the demised premises were destroyed or had been rendered substantially unsuitable for the purposes for which they were let, that implied, as a matter of necessity, that the court was being called upon to make a decision on the issue. Therefore, although the issue had not been expressly pleaded in the Defence, the parties, by the manner in which they conducted this application, did call upon the court to decide it. Having done so, I have come to the conclusion that paragraphs 9 and 11 of the Defence do give rise to tirable issues. Accordingly, the Defence is not a sham and does not call for striking out.

In the circumstances, bearing in mind the wisdom of the Court of Appeal **in D.T. DOBIE AND COMPANY KENYA LIMITED V MUCHINA [1982] KLR 1**, I believe that:

"…… **the Court should aim at sustaining rather than terminating a suit. A suit should only be struck out if it is so weak that it is beyond redemption and incurable by amendment. As long as a suit can be injected with life by amendment, it could not be struck out."**

In this case, I find that the plaintiff will have to satisfy a trial court as to how soon, after the "Bomb Blast", the demised premises became suitable for the purpose for which they were let out to the defendant. That issue is critical because it would help determine the date from when the defendant could be deemed to have been enjoying the benefit of its tenancy. I say so because it would appear to be inequitable for a landlord to be demanding rents from his tenant for a period when the landlord has expressly told the tenant that if the tenant entered the premises which had been let to it, the landlord would not accept any responsibility, as the building had been declared "**Out of Bounds**."

For all those reasons, I hold that the plaintiff has failed to satisfy the court that the defence herein should be struck out. Therefore, the application dated 13th January 2006 is hereby dismissed with costs.

Dated and Delivered at Nairobi this 25th day of July 2006.

FRED A. OCHIENG

JUDGE