



REPUBLIC OF KENYA
IN THE HIGH COURT OF KENYA AT NAIROBI

CIVIL SUIT NO. 275 OF 2000

RAZA PROPERTIES LIMITEDPLAINTIFF

-VERSUS-

PANAFCON ENGINEERING LIMITED..... DEFENDANT

JUDGEMENT

I. RELOCATION AND TRANSFER OF EFFECTS BEFORE CLEARING RENT, AND THEN REFUSAL TO REPAINT AND REDECORATE SUIT PREMISES: PLAINTIFF'S PLEADINGS

The original plaint dated 17th February, 2000 and filed on 18th February, 2000 was amended on 6th November, 2003. It is pleaded that the defendant at all material times, was a tenant of the plaintiff on L.R. No. 209/530, 2nd floor of Impala House, Tom Mboya Street, Nairobi for a six-year period with effect from **1st April, 1999**. The tenancy was based on an *agreement* between the parties dated **15th May, 1999** and specifying as follows:

- (i) the monthly rent payable in advance for the first two years was to be Kshs.67,800/= per month; for the next two years, to be Kshs.81,360/= per month; for the remaining period, to be Kshs.97,650/= per month;
- (ii) “the premises shall be kept redecorated throughout and at the end, or sooner determination of the lease, and left in good tenable condition and repair”;
- (iii) “the tenant do deposit a sum equal to three months’ rent and in default of any of the tenant’s obligations, the landlord may expend the deposit or any part of it in making good such default.”

It is pleaded that sometime, about the end of the December, 1999 when the outstanding rent for the last two months of that year and for the first month of 2000 stood at **Kshs.203,400/=** the defendant “secretly commenced moving its assets, property, equipment, furniture, stationery etc. from the tenancy premises to [an]unknown destination.” In those circumstances, the plaintiff levied distress on the remaining property which realised Kshs.7,910/= leaving an outstanding balance of Kshs.195,490/=.

It is pleaded that the defendant, when it removed its movable assets in December, 1999 did not remove its temporary partitions, did not surrender vacant possession, but kept the premises under lock-and-key, until **14th March, 2000**; and that in the meantime rent continued to accrue at the rate of Kshs.67,800 per month – and this has led to the defendant now being in arrears to the tune of Kshs.331,090/= inclusive of rent for February and March, 2000.

The plaintiff pleads that the defendant, in breach of the tenancy agreement, vacated the suit premises and

refused, failed and/or neglected to repair, redecorate and leave the same in good tenantable condition, and that the plaintiff had to perform those tasks which included:

replacing damaged tiles, and labour: Kshs.69,800/=

repainting the premises, and labour: Kshs.21,315/=

This amounts to a total cost of Kshs.91,115; and allowing for the defendant's security-deposit of Kshs.67,800/=, leaves a net balance of Kshs.23,315. The plaintiff was claiming a total of **Kshs.354,405/=** from the defendant.

II. RENT WAS PAYABLE BY MONTHLY ADVANCE DEPOSIT WHICH WAS PAID YET NOT ACCOUNTED FOR; AND PLAINTIFF ITSELF LOCKED UP THE SUIT PREMISES: DEFENDANT'S PLEADINGS

The defendant's statement of defence and set-off, dated 20th March, 2000 was filed on 21st March, 2000.

The defendant admits having been a tenant of the plaintiff, but differs on the terms of rent payment; the defendant asserts: "the deposit payable was one month's rent of Kshs.67,800/=". It is denied that the defendant had not paid to the plaintiff rents for November, 1999, December, 1999 and January 2000 totalling to Kshs.203,400/= as alleged in the plaintiff's plaint (para.4).

The defendant denies secret relocation from the plaintiff's premises, and "specifically states that due to rent increase it informed the plaintiff of its intention to vacate the premises at the end of December, 1999 and commenced to do so."

The defendant pleads that it was not true it had kept the suit premises locked; and that it was the plaintiff who had refused to allow the defendant to gain access to the premises for the purpose of removing the temporary partitions. The defendant pleads that it has not been in possession of the suit premises since December, 1999; and so the prayer for eviction of the defendant and for possession of the premises, "is superfluous and unnecessary as the defendant is not in possession."

The defendant avers that the distress upon its effects by the plaintiff in December, 1999 had been conducted without notice, and the proceeds arising from sale of the distrained goods, had not been accounted for.

The defendant seeks a set-off; the defendant had "paid a deposit of rent equivalent to one month's rent being Kshs.67,800/=", and as that sum was not accounted for, it seeks a set-off against the plaintiff's claim.

III. WHAT ARE THE ISSUES FOR RESOLUTION?

The plaintiff's formulated statement of agreed issues dated 25th January, 2001 though deliberately not signed by counsel for the defendant, was filed on 30th January, 2001. These issues are as follows:

- (i) Was there any, or any valid notice of intention to vacate the suit premises by the defendant before the commencement of the suit?
- (ii) Did the defendant attempt to hand over suit-premises keys to the plaintiff's agent?
- (iii) Did the defendant seek to remove temporary partitions installed in the suit premises?
- (iv) Did the defendant attempt to redecorate the suit premises?
- (v) Did the defendant begin to move out of the suit premises secretly without notice, and leaving

arrears of rent outstanding?

- (vi) Did the defendant retain possession of and access to the suit premises until **14th March, 2000**?
- (vii) Did the defendant's surrender of tenancy become effective on 14th March, 2000 and if so, is the plaintiff entitled to rent up to and including the month of March, 2000?
- (viii) At the time of surrender of the tenancy, was the defendant in rent arrears owing to the plaintiff, amounting to Kshs.331,090/= or otherwise, and if otherwise, then how much?
- (ix) Was the tenant obliged to redecorate the tenancy premises at the end/termination/surrender of the suit premises?
- (x) Did the defendant neglect to repair, redecorate and leave the suit premises in tenantable condition?
- (xi) Did the plaintiff redecorate the suit premises at a total cost of Kshs.91,115?
- (xii) Is the defendant entitled to a set-off of Kshs.67,800/=?
- (xiii) Is the plaintiff entitled to a claim of Kshs.354,405/= or otherwise and, if otherwise, then how much?
- (xiv) Did the plaintiff properly levy distress against the defendant, and did the plaintiff account for the proceeds of the sale of distrained effects?
- (xv) What orders should be made as to costs and interests thereon?

IV. TESTIMONY

The plaintiff in this case had one witness, but the defendant was unable to call any witness. The plaintiff has been represented by learned counsel **Mr. Mugambi**, whereas the defendant was at first represented by **Mr. Mung'ao** (holding brief for **Mr. Okeyo**), and then subsequently by learned counsel **Mr. Wanjohi**.

On 7th March, 2005 **Mr. Mugambi** examined PW1, **Iqbal Mohammed Hussein Walji**, an accountant. The witness testified that he had served as the plaintiff's accountant for 22 years, and that the plaintiff was the owner of Impala House on Tom Mboya Street, Nairobi where the suit premises was situated. By an agreement of **18th May, 1999** the defendant had taken tenancy of the suit premises, on the second floor of Impala House, which tenancy was expressed to be for six years as from **1st April, 1999**. The rent payable was Kshs.67,800/= per month during the first two years; Kshs.81,360/= during the next two years; and Kshs.97,650/= during the last two years. The agreement contained a redecoration clause which provided:

“The premises shall be kept redecorated throughout and at the end or sooner determination of the lease and left in good tenantable condition and repair.”

The agreement also had a clause regarding the erection of partitions on the premises:

“Any partitioning required to be done [by] the lessee on the premises will require the consent of the landlord and subject thereto will be carried out by the lessee either by its own workmen or its contractors. The cost of such partitioning will be paid by the lessee and on determination of the lease, the lessee shall remove the partitioning, and reinstate the premises to their original condition at the lessee's own expense.”

The agreement provided for a “security deposit”, in the following terms:

“On the commencement of this lease....to deposit with us as the landlord the amount equal to three months’ rent payable during the first two years of the said term as security for the performance by the tenant of the tenant’s obligations under this lease. If the tenant shall make any default in the performance of any of its obligations herein then the landlord may expend the deposit or any part of it in making good such default and the tenant thereupon shall pay such further sum or sums of money as may be required to make up the deposit. This deposit shall be refundable to the tenant after the expiry of this, and in accordance with the terms of this lease.”

PW1 testified that the rents for both November and December, 1999 had remained unpaid; so that it became necessary, on 29th December, 1999 to instruct Whitestone Auctioneers to levy distress. Distress was to be levied in respect of rents for November and December amounting to **Kshs.135,600/=**; and it was levied on 30th December, 1999. Proclamation was made on that date, with the demand that the rent in arrears be cleared within seven days. The outstanding rent-payments were not made; and on 13th January, 2000 the defendant’s goods were distrained – a fact acknowledged by Whitestone Auctioneers by their letter of 17th January, 2000 (plaintiff’s exhibit No.4). The auctioneers later conducted sale at a public auction, on 28th January, 2000; and the sale realised only Kshs.15,900/= from which the auctioneers retained Kshs.7,990/= for their own charges, and paid over to the plaintiff the net balance of Kshs.7,910/= (plaintiff’s exhibit No.6A).

The auctioneers by their letter of 5th February, 2000 to the plaintiff (plaintiff’s exhibit No.6A) gave the information that “the tenant herein shifted to Jubilee Insurance Exchange, 6th Floor, Room 608 but are trading as **Ndarugu Merchants**. We have also noted they locked the premises [and] we are trying to liaise with them to get the keys.”

PW1 testified that the defendant moved out of the suit premises and handed over the door keys on **14th March, 2000**, but they did not at that stage remove their constructed partitions in the premises. It was only from that date, that the plaintiff could now re-enter the premises. On **23rd March, 2000** the plaintiff’s advocates wrote to the defendant’s advocates, regarding clearance of the defendant’s partitions constructed in the suit premises (plaintiff’s exhibit No.9). The said letter reads in part as follows:

“Since your client handed over keys for the [suit] premises on 14th March, 2000 at around 10.30a.m. (i.e., your **Mr. Kariuki** to our client’s **Mr. Walji**) it has taken your client ten (10) days to clear the partition and debris thereof.

“Your client should now undertake the necessary repairs, redecoration and painting soonest. **But** since our client continues to suffer loss, if your client does not do so within the next five (5) days (including the weekend) ours will do the same from **Thursday, 31st March, 2000** in order to mitigate its costs, and the charges shall be invoiced to yours.”

PW1 testified that the defendant failed to do the repairs and redecoration, and that it became necessary for the plaintiff to do it. This entailed the making of a repairs contract for the floor; the making of a contract for renovations labour; the purchase of materials (plaintiff’s exhibits Nos.10A, 10B, 10C; 10D). The plaintiff expended Kshs.63,800/= on new PVC tiles; and Kshs.21,315 on paints.

V. SUBMISSIONS OF COUNSEL

1. **Cross-examination raised no new issues, defence brought no evidence, plaintiff’s evidence unchallenged: Submissions for the Plaintiff**

Learned counsel **Mr. Mugambi** submitted from the evidence that the tenancy agreement between the parties had been for a period of six years as from **1st April, 1999**. The plaintiff had instructed auctioneers to levy distress in respect of rent arrears for November and December, 1999 totalling to Kshs.135,600/=. By the time the auctioneers distrained the defendant’s goods in January, 2000 the outstanding rent arrears was Kshs.203,400/=.

Learned counsel submitted that the cross-examination which followed the testimony of PW1, “did not raise any issues but confirmed the evidence-in-chief.” Since the defendant brought no evidence before the Court, it was urged, “the plaintiff’s evidence remains unchallenged.”

Counsel submitted that since the defendant only handed over vacant possession of the suit premises on **14th March, 2000** it should be considered that rent had accrued right through, from November, 1999 to March, 2000. And as the defendant after removing its partitions on the premises had done no repair or redecoration, “the plaintiff was bound and entitled to mitigate its losses by repairing, redecorating and repainting the premises”, which tasks entailed a cost of **Kshs.91,115/=**. For the principle of **mitigation of losses** in contract, counsel relied on **R.W. Hodgkin’s The Law of Contract in East Africa** (Nairobi: Kenya Literature Bureau, 1975), pp.206 – 207. The learned author of that book states:

“Despite the fact that it is the defendant that is in breach of his obligations it does not release the plaintiff from all further duties. The main burden now placed on the plaintiff’s shoulders is that he must make an effort to minimise his losses...The test is what the reasonable man would have done in the particular circumstances of the case. The Court does not demand that the innocent party involve himself in a considerable expense in order to mitigate his losses.”

Counsel urged that the plaintiff was entitled to the sums of money claimed and that the plaintiff had proved its claim on a balance of probabilities.

Mr. Mugambi sought orders that costs be taxed under Schedule VI (Costs Payable in the High Court] as provided under Rule 50A of the Advocates (Remuneration) Order. On what account? Because the rules concerning the pecuniary jurisdiction of the Subordinate Courts have changed since the suit was first filed on 18th February, 2000 and, by that time the claim intended exceeded the jurisdiction of Magistrates and had to be brought before the High Court. Only while this case has been in progress has the pecuniary jurisdiction of the Chief magistrate been enhanced, from Kshs.500,000/= to Kshs.3,000,000/=.

(2) Since the Plaintiff did levy distress, it must be deemed to have taken possession in December, 1999 – Submissions for the Defendant

Learned counsel **Mr. Wanjohi** submitted that the defendant’s liability in rents to the plaintiff could not be extended beyond **December 1999** when the plaintiff had distrained, and later sold its belongings and effects. His further reason for such an interpretation was that the rents due not having been paid, and the defendant’s goods having been distrained, the natural thing would have been for the plaintiff *to break* into the suit property and take possession – and so it should be assumed that after December 1999, the plaintiff was in possession. Counsel contended that the levying of distress upon the defendant, *implied that the defendant could not further stay in the suit premises*, doing business without essential office equipment, and the defendant must have vacated and so the plaintiff was in possession.

VI. FINAL ASSESSMENT

The general tenor of the defendant’s submissions, both as filed by their former advocates, M/s. Otieno Okeyo & Co. Advocates on 3rd July, 2006 and as orally made by their current advocate **Mr. Wanjohi**, on 2nd November, 2006 amounts, in my view, to an endeavour to fill in evidentiary gaps occasioned by the fact that the defendant called no witnesses. Indeed, the design of those submissions has appeared, with much respect to counsel, as an apology of cross-examination. That would not bring to the test the main plank of the plaintiff’s case, which is founded on a valid *tenancy agreement* between the parties; the agreement has contractual effect, and the defendant is *bound* to its terms.

From the terms of the tenancy agreement, and from the evidence of the defendant’s failure to pay rents; to remove its constructed partitions on the suit premises; and to redecorate after finally, in March 2000 removing those partitions, it follows that the plaintiff is entitled to rents up-to and including the month of **March, 2000**. The plaintiff, moreover, had to **mitigate its losses** by moving to redecorate the premises, after it requested the defendant to do it but to no avail.

Insofar as the defendant did not *remove its partitions* installed in the suit premises until sometime about **23rd March, 2000** I must assume the defendant, for all practical purposes, remained in possession of that premises during the month of March, 2000; and hence the defendant must pay rent for the period running upto that month of March.

The removal of partitions, moreover, must have left lots of impressions on the décor of the suit premises which the defendant would have had to rectify; but in this case the **plaintiff** did it; and I hold that this would have to be on the **defendant's account**.

VII. DECREE

On the facts of this case, and taking into account the submissions of counsel, I will make a finding in favour of the plaintiff, and make a specific decree as follows:

- (a) The defendant shall pay to the plaintiff the unpaid rent arrears, in the sum of Kshs.331,090/=, with interest at Court rate with effect from 1st November, 1999 until payment in full.
- (b) The defendant shall pay to the plaintiff the cost of repairs and redecorations, in the sum of Kshs.23,315/= ? to bear interest at Court rate with effect from 1st April, 2000 until payment in full.
- (c) The defendant shall pay the plaintiff's costs in this suit, with interest at Court rates as from 18th February, 2000 until payment in full.
- (d) The plaintiff's costs as provided for herein shall be taxed under Schedule VI of the Advocates (Remuneration) Orders.
- (e) Any such application or motion as may arise out of the Judgement herein, shall be heard and disposed of before a Judge of the Civil Division of the High Court.

DATED and DELIVERED at Nairobi this 17th day of November, 2006.

J. B. OJWANG

JUDGE

Coram: Ojwang, J.

Court clerk: Mwangi

For the Plaintiff: Mr. Mugambi, instructed by M/s. Mugambi Mungania & Co. Advocates

For the Defendant: Mr. Mung'ao, instructed by M/s. Otieno Okeyo & Co. Advocates, and subsequently by Mr. Wanjohi, instructed by M/s. J.W. Wanjohi & Co. Advocates.