



REPUBLIC OF KENYA
IN THE HIGH COURT OF KENYA AT NAIROBI
Civil Case 124 of 2004

FAIRACRES DEVELOPMENT LIMITED.....PLAINTIFF

VERSUS

MARGARET APONDI OLOTCH T/A M.A. KIOSK RESPONDENT

R U L I N G

This Notice of Motion under Order 35 rules 1 (1) (b) and (2) of the Civil Procedure Rules seeks:

- 1. Summary Judgment in favour of the Plaintiff and against the Defendant for an Eviction Order and vacant possession of the suit premises L.R. No. 209/290/4/1 at The Chancery Building, Valley Road, Nairobi.**
- 2. Summary Judgment for the Plaintiff against the Defendant for mesne profits from 1/12004 upto the date of vacation of the above premises at the rate of K.Shs.9,394/64 per month.**
- 3. Costs of this application and the suit with interest at court rates from the date of filing this suit until payment in full.**

The application is dated 4/6/04, and supported by an Affidavit by Shantilal Vaghji Shah of even date and is on the grounds that:

- I. The agreed term of the Lease expired on 31/12/03
- II. The Lease Agreement dated 23/2/1999 did not provide for renewal of the lease.
- III. The Defendant/Respondent failed to grant the Plaintiff/Applicant vacant possession of the suit premises.
- IV. The ends of justice shall be served only if summary judgment is granted as prayed herein above.

In opposition, the Defendant/Respondents, in their Replying Affidavit aver that:

- a. During the continuance of the lease, she never breached any of the terms and conditions of the same and that she never defaulted in paying the quarterly rent.
- b. It was both the intention of the parties and an implied term in the lease agreement that the lease shall be renewed at the instance of the Defendant.
- c. The Defendant informed the Plaintiff of her intention to renew the lease and in January 2004 sent the Plaintiff a banker's cheque for the quarterly rent.

- d. The Plaintiff in contravention of the above intention and term failed to renew and or give any reason for non-renewal of the lease.
 - e. The suit is misconceived and premature as the lease provides for settlement of disputes by way of arbitration and no such reference has been made.
2. In the interest of justice the suit should be referred to full trial so as to determine the issues herein.

Order 35 rule 1 (1) (b) be under which the application is brought provides as under:

“In all suits where the Plaintiff seeks judgment for the recovery of land, with or without a claim for rent or 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 judgment for the amount claimed, or past thereof, and interest, or for recovery of the land and rent or mesne profits.”

I have carefully read the terms and conditions of the Lease Agreement between the Plaintiff/Applicant, and the Defendant/Respondent, dated 23/2/1999, and the following are clearly stated in the said Agreement:

Under Clause 2 of the said Lease Agreement, the duration of the lease is a specific term of 5 years and six months (5 ½ years) with effect from 1/7/1999 up to 31/12/03. There is no provision for renewal of the lease upon the expiry of the said lease period. The agreed upon monthly rent, was K.Shs.9,394/64; payable quarterly.

From the pleadings and the submissions by the learned counsel for both sides, it is common ground that the lease expired on 31/12/03, as per the agreement. But the Defendant contends it was the intention of the parties and an implied term in the lease, that the same could be renewed at the instance of the Defendant and that the Plaintiff did not reserve the right of renewal to itself.

I have carefully gone through the Lease Document, and confess my failure to discover such an intention or implied term for renewal for the lease, on the incidence of either party. Counsel for the Defendant was unable to point to such provision in the document to the court also.

Under Clause 3mm of the Lease Document, the tenant- Defenant herein – is bound to yield up the premises to the landlord – the Plaitiff herein is upon the determination of the said term of 5 ½ years except, where such date falls on a Sunday or a Public Holiday in which course the lease expires on the business day immediately following.

On the basis of the foregoing, the term o the lease was to expire on 31/12/03, and the Plaintiff in their letter dated 22/12/03 notified the Defenant as much, and reminded the Defendant to ensure release of the vacant possession of the premises by 31/12/03 as per the Lease Agreement. But strangely enough, the Defendant wrote to the Plaintiff on 9/1/04 enclosing the first quarters rent and asking the Plaintiff to acknowledge receipt of the same. The cheque was returned to the Defendant as there is no provision for renewal of the lease in the Lease Document.

On this point, I wish to reiterate the role and place of this court with regard to contracts and or agreement. If it not the duty of the court to write contracts for the parties. The courts role is to interpret the terms and conditions of the contracts and or agreements voluntarily entered into by the parties and to enforce such contracts and the terms thereof.

But the court will embark on exploratory expeditions of terms of a contract where no such terms exist in such contract, or where the terms of the contract are so beatably clear that no interpretation is called for.

In the instant case, the lease was for a term specific and upon the expiry of such period or term, the lease automatically came to amend. This was on 31/12/03. Accordingly, it was futile for the Defendant to purport to renew the lease by their letter of 9/1/04, together with the purported cheque for the quarterly rent. There was no lease at the said point in time; and there cannot be a rental payment in the absence of a lease, or where the lease has expired and has not been renewed.

Learned Counsel for the Defendant submitted, and in line with the Defendant's Replying Affidavit that the matter should have gone to an arbitration, as provided for under clause 7 of the Lease Agreement. In the absence of such reference, the learned counsel submitted that the suit herein is premature. This is also in the Defendant's defence, at paragraph 7.

With all due respect to the learned counsel for the Defendant, this submission is totally misconceived. It is trite law that arbitration clauses apply only where is a dispute between the parties, on a matter covered in the agreement and by the arbitration clause. But all these pre-suppose such a dispute arising during the subsistence of the agreement – here the Lease Agreement.

In the instant case, the Lease Agreement terminated/expired on 31/12/03. Anything happening thereafter cannot be called a dispute between the parties for after that date, there was neither an agreement, and if there is no agreement/contract, there cant be parties.

To put the above concept in arbitration language, there must be a dispute and there cant be a dispute if there is no contract within which the arbitral clause is but a part and parcel of.

On the basis of the above reasons and conclusions, I hold that with effect from 1/1/2004, the Defendants were trespassers in the suit premises herein, the Lease Agreement which had given them possession of the said premises having expired on 31/12/2003.

Accordingly, the application herein, succeeds and I order as follows:

1. Enter Summary judgment for the Plaintiff and against the Defenanant and grant an Eviction Order against the Defenanant, and order that the Defenanant forthwith give vacant possession of the suit premises of L.R. No. 209/290/4/1 at the Chancery Building, Valley Road, Nairobi.
2. Enter Summary Judgment for the Plaintiff and against the Defendant for mesne profits from 1/1/2004 upto the date of the vacation of the afore-mentioned suit premises at the rate of K.Shs.9,394/64 per month.
3. Defendant to pay interest of the total sum in 2 above at court rate from the date of filing of this suit till payment in full.
4. Defenanant to pay the costs of both this application and the suit to the Plaintiff/Applicant.

DATED and delivered in Nairobi, this 13th Day of June, 2005.

O.K. MUTUNGI

JUDGE