



REPUBLIC OF KENYA

IN THE ENVIRONMENT AND LAND COURT

AT NAIROBI

ELC CASE NO. 73 OF 2018

PAMPA GRILL LIMITED.....1ST PLAINTIFF

PAMPA CHURRASCARIA (UNDER ADMINISTRATION) LIMITED.....2ND PLAINTIFF

VERSUS

NORTH LAKE LIMITED.....1ST DEFENDANT

BUENA BIZZ LIMITED.....2ND DEFENDANT

RULING

The 1st plaintiff and the 1st defendant entered into a lease agreement for a term of five (5) years and three (3) months commencing on 1st September, 2012 and terminating on 30th November, 2017 in respect of all that parcel of land known as L.R No. 330/352, Nairobi (hereinafter referred to only as “the suit property”). The 1st plaintiff leased the suit property from the 1st defendant for the purposes of a restaurant business that was operated by the 2nd plaintiff. The plaintiffs brought this suit against the defendants through a plaint dated 19th February, 2018 which was amended on 13th November, 2019. In their amended plaint, the plaintiffs averred that the 1st plaintiff incurred expenses to the tune of Kshs. 37,401,998.33 in repairing and renovating the suit property which amount the 1st defendant had not refunded to it. The plaintiffs averred that by a letter dated 18th September, 2017, the 1st defendant informed the 1st plaintiff that it did not intend to renew the 1st plaintiff’s lease in respect of the suit property upon its expiry on 30th November, 2017. The plaintiffs have averred that despite this notice, the 1st plaintiff paid to 1st defendant a sum of Kshs. 430,691/- on account of rent for the month of December, 2017 which payment was accepted by the 1st defendant.

The plaintiffs averred that through a letter dated 7th December, 2017, the 2nd defendant informed the 1st plaintiff through its advocates, Munyiyo Muli & Company Advocates that the 2nd defendant had entered into a contract with the 1st defendant to lease the suit property and had paid rent to the 1st defendant for the premises. The plaintiffs averred that through the said letter from its advocates, the 2nd defendant demanded possession of the suit property from the plaintiffs. The plaintiffs averred that on or about 4th January, 2018, the 1st plaintiff paid to the 1st defendant a sum of Kshs. 1,292,073/- equivalent to three months’ rent as further security deposit in the expectation that the 1st defendant would renew its lease in respect of the suit property.

The plaintiffs averred that on 15th January, 2018, the 2nd plaintiff filed a suit at the Business Premises Rent Tribunal and obtained an order in Nairobi BPRT Case No. 40 of 2018 (“the tribunal suit”) restraining the 1st defendant from interfering with its quiet possession of the suit property pending the inter-partes hearing of an application for injunction that it had filed in the said suit. The plaintiffs averred that on the same date namely, 15th January, 2018, the 1st defendant moved to the Chief Magistrates Court at Nairobi and irregularly obtained an ex-parte order in Nairobi CMCC No. 9414 of 2017 (“the lower court suit”) for the eviction of the 1st plaintiff from the suit property pending the inter-partes hearing of an eviction application that the 1st defendant had filed before that court. The plaintiffs averred that on 18th January, 2018, Siuma Auctioneers acting on the instructions of the 1st defendant executed the said irregular order from the lower court by illegally and irregularly evicting the plaintiffs forcefully from the suit property.

The plaintiffs averred that during the said forceful eviction, some of the plaintiffs’ properties were stolen while others were seriously damaged. The plaintiffs averred that the goods that were stolen and those that were destroyed were valued at Kshs. 11,942,455/-. The plaintiffs averred that their forceful eviction from the suit property was illegal and irregular for various reasons among them that; as at the time of the eviction, there was an existing order issued by the Business Premises Rent Tribunal (“the tribunal”) restraining the 1st defendant from interfering with the 2nd plaintiff’s occupation of the suit property and that the 1st defendant had accepted the rent for the month of December, 2017 in the sum of Kshs. 430,691/- and a further security deposit in the sum of Kshs. 1,292,073/-. The plaintiffs averred further

that as at the time of their eviction, the 1st defendant had not refunded to the 1st plaintiff a sum of Kshs. 37,401,998.33/- that it had incurred in repairing and renovating the suit property at the commencement of its tenancy and a sum of Kshs. 900,000/- that the 1st plaintiff had paid as the first security deposit under the lease that expired. The plaintiffs averred further that the said eviction orders were obtained by the 1st defendant from the lower court through misrepresentation and concealment of material facts.

The plaintiffs averred that after their unlawful eviction by the defendants from the suit property using the said orders that the 1st defendant had obtained irregularly from the lower court, the 1st defendant mischievously and fraudulently withdrew the lower court suit in which it had obtained the said eviction orders without serving the application pursuant to which the said orders had been issued upon the 1st plaintiff to enable it defend itself. The plaintiffs averred that the said lower court suit was withdrawn by the 1st defendant so as to conceal the illegal and irregular manner in which the said eviction orders were obtained.

The plaintiffs averred that during their forceful eviction from the suit property, some items such as CCTV cameras, safe, generator, power back up, Brazilian Grill and the hoods in steel water tanks remained in the suit property. The plaintiffs averred further that after their forceful eviction, some of their items that included chimneys, wine racks, grill mortars, water pumps, computers, shelves, horse pipe, permanent grill, tents and fixed furniture, DSTV and Zuku dishes, CCTV cameras and safe all valued at Kshs. 3,278, 000/- were converted by the defendants to their own use. The plaintiffs averred further that they lost a lot of items through destruction and theft during the eviction that included; stock at the bar, water, sodas, juices, beers, liqueurs, blended whisky, cognac, malt whisky, Irish whisky, Canadian whisky, American whisky, brandy, aperitifs, gin, vodka, rum, tequila, wines, cigarettes, operating equipment, meat stock in stores and freezer all valued at Kshs. 8,664,455/-. The plaintiffs averred that the total value of their properties that were either converted, destroyed and/or stolen by the defendants was estimated at Kshs. 11, 942,455/-.

The plaintiffs averred further that they suffered loss of profits estimated at Kshs. 61,223,995/- for 2018 financial year. The plaintiffs averred that as a consequence of the 1st defendant's breach of the plaintiffs' legitimate expectation that their lease would be renewed and their subsequent illegal forceful eviction from the suit property by the defendants, the plaintiffs had suffered loss, mental anguish, anxiety and had been deprived of their constitutional right to utilize the suit property.

The plaintiffs sought judgment against the defendants for;

- a. Kshs. 37,401,998.33 being the amount incurred by the 1st plaintiff in the repairs and renovation of the suit property.
- b. Kshs. 900,000/- being the first security deposit.
- c. Kshs. 430, 691/- being the rent for December, 2017.
- d. Kshs. 1,292,073/- being further security deposit.
- e. Kshs. 61,223,995/- being loss of profits for the year 2018.
- f. Kshs. 11,942,455/- being the value of the goods/assets converted, stolen and/or destroyed or damaged during the illegal eviction.
- g. Interest on the above.
- h. General and punitive damages.
- i. Costs of the suit plus interest.

The defendants were served with Summons to enter appearance and appointed the firm of Masore Nyang'au & Co. Advocates to act for them in the suit. The said advocates did not file a defence on behalf of the defendants to the plaintiffs claim. The suit was fixed for formal proof and the plaintiffs called three witnesses in proof of their claim against the defendants. Prior to the commencement of the hearing, the court was informed that the defendants' advocates on record had been served and having satisfied itself that service was indeed effected upon the firm of Masore Nyang'au & Co. Advocates, the court allowed the hearing of the matter to proceed. The defendants' advocates did not appear at the trial. After the close of the plaintiffs' case, the court directed the parties to make closing submissions in writing. The plaintiffs filed their submissions on 24th August, 2020 while the defendants did not file submissions.

The court fixed the matter for judgment on 11th February, 2021. While perusing the file for the purposes of writing the judgment, I noted from the record that on 26th April, 2018, the firm of W.G. Wambugu & Co. Advocates had filed a notice of change of advocates dated 25th April, 2018 through which the said firm took over the conduct of the defendants' case from the firm of Masore Nyang'au & Co. Advocates. It is not clear from the record whether the plaintiff's advocates were served with this notice of change of advocates. When the matter came up on 1st October, 2020 for the fixing of a date for judgment, Mr. Nyangau from the firm of Masore Nyang'au & Co. Advocates and Mrs. Wambugu from W.G. Wambugu & Co. Advocates appeared in court. From the record, Mr. Nyangau told the court that he had no objection to Mrs. Wambugu taking over the conduct of the case on behalf of the defendants. Mrs. Wambugu on her part told the court that she had just been instructed by the defendants and that she was yet to file a notice of change of advocates and obtain the defendants' file from the firm of Masore Nyang'au & Co. Advocates. Mrs. Wambugu asked the court to adjourn the fixing of a judgment date to give her time to take over the conduct of the matter. The application by Mrs. Wambugu was opposed by the plaintiffs' advocate. The court after considering the submissions from both parties refused the application by Mrs. Wambugu and fixed the suit for judgment today.

As I have mentioned earlier, from the record, the firm of W.G. Wambugu & Co. Advocates came on record in this matter on behalf of the

defendants on 26th April, 2018. This fact was not known to the court until the court started the process of writing the judgment in the matter. It also appears that even the advocates for the plaintiffs were not aware of this fact. All the affidavits of service on record show that the said advocates were all along serving the firm of Masore Nyang'au & Co. Advocates on behalf of the defendants. It was that firm that was served with the amended plaint, a hearing notice and submissions. The plaint was amended on 15th November, 2019 while the hearing of the suit took place in 2020. When the plaint was being amended and the suit fixed for hearing, it was the firm of W.G. Wambugu & Co. Advocates that was on record if we go with the notice of change of advocates on record which even Mrs. Wambugu seems not to have been aware of. If it is true that it was the firm of W.G. Wambugu & Co. Advocates that was on record for the defendants and that the plaintiffs' advocates had been informed of this change of advocates, then the hearing of this matter that took place on the basis that the defendants were represented by the firm of Masore Nyang'au & Co. Advocates would be irregular and liable to be set aside.

In the circumstances, I am of the view that it is necessary to determine the issue of representation of the defendants before writing the judgment pending herein. The judgment risks being set aside for irregularity should it turn out that the hearing was conducted without notice to the advocates who were on record for the defendants. I would therefore invite the firms of Mutua, Nyongesa & Muthoka Advocates for the plaintiffs and, Masore Nyang'au & Co. Advocates and W.G. Wambugu & Co. Advocates on behalf of the defendants to address the court on the issue of representation of the defendants in this matter. Upon hearing the advocates for the parties, the court will give further directions and orders in the matter regarding the pending judgment.

Delivered and Dated at Nairobi this 11th Day of February 2021

S. OKONG'O

JUDGE

Ruling delivered virtually through Microsoft Teams Video Conferencing Platform in the presence of:

Mr. Makhoka for the Plaintiffs

Mrs. Wambugu for the Defendants

Ms. Ms. C. Nyokabi-Court Assistant