REPUBLIC OF KENYA

IN THE ENVIRONMENT AND LAND COURT AT NAIROBI

ELC. CASE NO. 383 OF 2017

KTDA FARMERS COMPANY LIMITED...............................PLAINTIFF

=VERSUS=

KEI MART LIMITED .... DEFENDANT

RULING

1. On 23/11/2018, the defendant brought a notice of motion dated 21/11/2018 seeking leave to file defence and counterclaim. The motion was supported by an affidavit sworn on 21/11/2018 by George Kariithi, a director of the defendant. He deposed that the defendant duly instructed the firm of Mohamed Muigai Advocates to enter appearance and defend the suit but the said firm concentrated on interlocutory applications and omitted to file their defence and counter-claim. He further deposed that during the subsistence of the now expired lease, the parties had an understanding that costs of the permanent fittings which the defendant had erected in the demised premises were to be borne by both parties to this suit. He contended that arising from that arrangement, the defendant had a legitimate counter-claim against the plaintiff. He urged the court to grant the defendant the opportunity to file defence and counter-claim.

2. The plaintiff opposed the application through a replying affidavit sworn on 16/1/2019 by John Kennnedy Omanga. He deposed that the defendant was duly served with summons to enter appearance on 16/7/2017 and it entered appearance on 21/7/2017. He added that on 20/3/2018, this court rendered a ruling in respect of the plaintiff's application seeking to evict the defendant from the suit premises, and the court ordered that the suit herein would proceed to hearing as an undefended cause because the defendant had not filed a defence. Mr Omanga further deposed that the defendant had not denied its indebtedness to the plaintiff. He contended that the application was designed to deny the plaintiff its entitlement to rent and was aimed at delaying the determination of this suit. He added that although the defendant made a request for cost-sharing of the costs of the fittings, the board of the plaintiff company merely noted that it would consider the request upon independent valuation but did not accede to the request.

3. The application was canvassed through oral submissions on 7/3/2019. Mr Okemwa for the applicant submitted that there was a mistake on part of counsel who had full instructions to file defence and counter-claim but omitted to do so. He added that counsel's negligence should not be visited on the litigant. Mr Okemwa further submitted that the defendant had an arguable defence and counterclaim. Counsel added that the plaintiff would not suffer any prejudice because the defendant vacated the suit premises and the suit premises had since been leased to another tenant.

4. In response, Ms Opakas, counsel for the plaintiff/respondent, submitted that failure to file defence was intentional because on 18/4/2018 the defendant filed an application dated 17/4/2018 and attached to that application a copy of the ruling in which the court had clearly noted that the defendant had failed to file a defence. She contended that the defendant's contention that it was not aware of the omission to file a defence was therefore a lie. She further submitted that the board of the plaintiffs company merely indicated that it would consider the defendant's proposal for cost-sharing upon independent valuation but it never acceded to the proposal. She added that the valuation report annexed to Mr George Kariithi's affidavit was dated one year prior to the date of the board resolution relied upon by the defendant.

5. I have considered the application together with the parties' rival affidavits and submissions. I have also considered the relevant legal framework and jurisprudence. The key issue falling for determination in this application is whether, in the circumstances of this application, the applicant has satisfied the criteria upon which the court exercises jurisdiction to grant leave to defend a suit and plead a counter-claim.

6. In the case of **Belinda Murai & Others Vs Amoi Wainaina (1978) eKLR, Madan JA** summed up the following approach relating to the question as to whether or not a party should be completely locked out of a court of justice on account of a mistake:

> ***"A mistake is a mistake. It is no less a mistake because it is an unfortunate slip. It is no less pardonable because it is committed by Senior Counsel though in the case of junior counsel the court might feel compassionate more readily. A blunder on a point of law can be a mistake. The door of justice is not closed because a mistake has been made by a person of experience who ought to have known better. The court may not forgive or condone it but it ought certainly to do whatever is necessary to rectify it if the interests of justice so dictate."***

7. Apaloo JA summed up the following approach to a similar question in **Philip Keipto Chemwolo & another v Augustine Kubende (1986)eKLR KAR 103:**

> **"Blunder** ***will continue to be made from time to time and it does not follow that because a mistake has been made that a party should suffer the penalty of not having his case heard on merit."***

8. The learned judge added thus:

> ***"I think the broad equity approach to this matter is that unless there is fraud or intention to overreach, there is no error or default that cannot be put right by payment of costs. The court as is often said exists for the purpose of deciding the rights of the parties and not the purpose of imposing discipline".***

9. In the application under consideration, there is common ground that the defendant was duly served with summons and duly entered appearance on 21/7/2017. Secondly, there is uncontroverted evidence that the defendant failed to pay rent during the subsistence of the tenancy and owed the plaintiff Kshs 19,341,406 as at the time the plaintiff brought this suit. The defendant however contends that it erected some permanent fixtures in the demised premises and it was entitled to cost-sharing in respect of the cost of those fixtures. It is on that account that it seeks to file a defence and plead a counterclaim. The plaintiff's position is that the proposal for cost-sharing came from the defendant who was already in rent arrears and the board of the plaintiff company merely indicated that it would consider the proposal upon independent valuation of the fixtures. It does therefore appear that there is a dispute as to whether or not the defendant was entitled to cost-sharing.

10. Taking the above contextual background into account, the equity approach to take in disposing this application would be to grant the defendant conditional leave to file defence and counterclaim. First, the defendant shall deposit in court the rent arrears of Kshs 19,341,406 within 60 days. Second, the defendant shall pay the plaintiff throw-away costs of Kshs 30,000 within 60 days. In my view, the two conditions satisfy the equity criteria expounded in the prevailing jurisprudence.

11. Consequently, the defendant's notice of motion dated 21/11/2018 is disposed in the following terms:

> ***a) The defendant is granted conditional leave to file and serve defence and counterclaim within 14 days.***
>
> ***b) The defendant shall deposit in court rent arrears of Kshs 19,341,406 within sixty (60) days. Further, the defendant shall pay the plaintiff costs of Kshs 30,000. In default of any of the two conditions, the leave granted herein shall stand vacated and the defence and counterclaim filed shall stand struck out.***
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> ***c) Upon deposit of the money, the parties' respective advocates shall open a joint interest earning account and the money shall be transferred to the said joint account pending the hearing and determination of this suit.***

DATED, SIGNED AND READ AT NAIROBI ON THIS 11TH DAY OF JULY 2019.

B M EBOSO

JUDGE

In the presence of:-

Ms Opakas holding brief for Mr Ohaga for the plaintiff

Court Clerk - June Nafula