



THE REPUBLIC OF KENYA

IN THE ENVIRONMENT AND LAND COURT AT NAIROBI

ELC CASE NO E090 OF 2020

FRANCIS MWANGI MAUNJIPLAINTIFF

VERSUS

PETER IRUNGU MWANGIDEFENDANT

RULING

1. The plaintiff initiated this suit through a plaint dated 25/8/2020. His case was that he was at all material times, and up to the time of bringing the suit, the registered proprietor of **Land Reference Number 36/II/13**, situated along 1st Avenue, 11th Street, Eastleigh, Nairobi City County. By a lease agreement dated 1/3/2017, he leased the suit property to the defendant for a period of 6 years from 1/3/2017, at an initial rent of Kshs 350,000 per month, payable monthly in advance. Clause 4(a) of the lease agreement provided for a right of re-entry and recovery of possession of the demised premises by the plaintiff in the event that the defendant defaulted to pay the agreed rent or any other money agreed to be paid under the lease. During the subsistence of the lease, the defendant defaulted in the payment of rent, and as at July 2020, he was in rent arrears totaling Kshs 1,520,000.

2. By an agreement between the plaintiff and the defendant dated 6/7/2020, the defendant acknowledged and confirmed being in rent arrears of Kshs 1,520,000, and covenanted to pay the arrears on or before 10th August 2020. The said agreement dated 6/7/2020 provided that should the defendant fail to pay the arrears on or before 10/8/2020, the plaintiff would be at liberty to exercise the right of re-entry the suit property as provided in the lease and take possession of the suit property, whereupon the lease would determine absolutely. The defendant failed to honour the said agreement dated 6/7/2020 and as at August 2020, he was in rent arrears of Kshs 1,900,000.

3. Consequently, the plaintiff brought this suit, seeking the following reliefs:-

a) An order for the ejectment of the defendant from the suit property known as LR No 36/II/13 and registered in the Government – Lands Registry at Nairobi in vol. N3 Folio 401/21 File 461 under presentation day book No 455 and vacant possession thereof be delivered to the plaintiff.

b) The said sum of Kenya Shillings One Million, Nine Hundred Thousand (Kshs 1,900,000/=), being arrears of rent as at August 2020.

c) Mesne profits at the rate of Kenya Shillings, Three Hundred and Eight Thousand (Kshs 380,000) per month with effect from 1st September 2020, until vacant possession of the said suit property is delivered to the plaintiff.

d) Costs of the suit

e) Interest on (b), (c) and (d) above at court rates.

f) Such other Order relief that this honourable court may deem to grant.

4. The defendant filed a memorandum of appearance dated 21/10/2020.

Immediately after that, the plaintiff brought a notice of motion dated 23/10/2020, seeking summary judgment in the following terms:

a) That this application be certified as urgent and the same be heard ex-parte at the first instance.

b) That judgment be entered in favour of the plaintiff as prayed in the plaint as the defendant has no valid and/or plausible defence to the plaintiff's claim herein.

c) *That the costs of this application be provided for.*

d) *That such other Order and/or relief as this honourable court may deem just to grant.*

5. The said application is the subject of this ruling. The application was supported by the plaintiff's affidavit sworn on 23/10/2020, in which he outlined his case as summarized above. He added that the defendant had no plausible defence to the claim herein because his (the plaintiff's) right to re-enter and take possession of the suit property had crystallized owing to the defendant's failure to pay rent as agreed. He added that the value of the suit property was estimated at over Kshs 150,000,000 and this court was the only court with pecuniary jurisdiction to deal with the question of re-entry into and possession of the demised premises. He exhibited the following documents in support of the plea for summary judgment: (i) the conveyance dated 9/7/1991; (ii) lease agreement dated 1/3/2017; (iii) an undertaking dated 6/3/2020; (iv) agreement dated 6/7/2020; (v) letter dated 7/8/2020; (vi) letter dated 12/8/2020; and (vii) letter on medical expenditure dated 28/8/2020.

6. The defendant opposed the application through a replying affidavit sworn on 1/12/2020. He deposed that the application did not meet the threshold of Order 36 of the Civil Procedure Rules. He added that he was tricked to go to the plaintiff's advocates where he was coerced to sign the agreement dated 6/7/2020, and he signed the said agreement without the benefit of reading it or having it explained to him. He alleged that the plaintiff took advantage of his illiteracy. He further contended that by filing this suit, the plaintiff had violated the provisions of **Section 6** of the Civil Procedure Act because there existed **Nairobi CMCC No 3081 of 2020** in which the plaintiff had sworn an affidavit indicating that he had been collecting rent from the subtenants.

7. The defendant contended that the following were the verbatim triable issues disclosed in this suit: (i) He had never been served with a one month notice of re-entry; (ii) There was a similar case involving the parties proceeding in CMCC No 3081 of 2020; (iii) Under the provisions of the land Act, a lessee had a right of recourse by filing a suit in court; (iv) The constitution which was superior to the Civil Procedure Code, gave a party unconditional chance to be heard in any court case; (v) This particular suit did not satisfy the provisions of Order 36; (vi) He had disputed the alleged rent arrears. He had denied that he signed the alleged agreements; (vii) He had demanded that the plaintiff accounts for all the money that he had collected from his tenants; (viii) He had accused the plaintiff for unlawful conversion of his investments simply because the plaintiff was driven out of greed to take over his business unlawfully and yet he was using his investments of over Kshs.4,000,000.

8. The application was canvassed through written submissions dated 9/3/2021, filed by the firm of *Kimondo Mubea & Company Advocates* and rejoinder submissions dated 7/6/2021. Counsel contended that the issue for determination in the application was whether the plaintiff had made out a case for summary judgment. Counsel submitted that the defendant had not contested the terms of the lease and his obligations under the lease and the plaintiff's right of re-entry under clause 4(a) of the lease. Counsel added that the fact that the defendant was in rent arrears had been admitted in writing by the defendant in an agreement dated 6/7/2020. Counsel for the plaintiff further submitted that the defendant's contention that he was not a party to the agreement dated 6/7/2020 was a blatant falsehood because the defendant's advocates had, through a letter dated 7/8/2020, acknowledged the agreement and requested for extension of the deadline for paying the rent arrears to 31/8/2020.

9. Counsel for the plaintiff added that the defendant having failed to pay the rent arrears, the plaintiff was entitled to the premises as provided under the lease. Counsel added that the defendant had not rebutted the plaintiff's evidence demonstrating that he was in rent arrears. Counsel further submitted that the plaintiff was not a substantive party in **Nairobi CMCC No 3081 of 2020** because the said suit was filed by **Mary Wamaitha Kagotho & 5 others** against **Upstage Kenya Auctioneers & 2 others**. Counsel contended that the subject matter in the said suit was completely different from the subject matter in the suit herein. Counsel added that the value of the suit property herein was Kshs 150 million and the pecuniary jurisdiction of the Chief Magistrate Court was at Kshs 20,000,000. Counsel urged the court to grant the plea for summary judgement.

10. The defendant filed written submissions dated 21/5/2021 through the firm of *J W Wanjohi & Company Advocates*. Counsel for the defendant itemized the following as the issues falling for determination in the application: (i) *Does this honourable court have jurisdiction to hear and determine this matter?* (ii) *Of what purpose shall this honourable court serve by granting the prayers sought in the application dated 23rd October 2020?;* (iii) *Does the defendant have a defence to the claim;* (iv) *Where in the lease did it provide that the tenant shall be evicted and all his investments shall thereafter remain and belong to the landlord;* and (v) *Has the plaintiff lawfully re-entered the demised premises?*

11. On the issue relating to the jurisdiction of this court, counsel for the defendant submitted that because there subsisted Nairobi **CMCC No 3081 of 2020**, Section 6 of the Civil Procedure Act barred this court against proceeding to dispose this suit. On the purpose to be served by the court by granting the relief sought in the application dated 23/10/2020, counsel submitted that the application had been overtaken by events because the plaintiff ejected the defendant from the demised premises in August 2020 and he had proceeded to collect rent from the subtenants to recover the arrears. On whether or not the defendant had a defence to the plaintiff's claim, counsel submitted that the draft defence exhibited by the defendant raised the issues itemized in the replying affidavit. On whether the lease provided that the defendant would be evicted and all his investments would remain and become property of the plaintiff, counsel submitted that under clause (e) (ii) of the lease, the fixtures and fittings were to remain property of the defendant. On whether re-entry into the demised premises by the plaintiff was lawful, counsel for the defendant submitted that the re-entry was unlawful because the plaintiff did not obtain a court order prior to re-entering the demised premises and taking possession thereof. Counsel urged the court to dismiss the application

12. I have considered the application together with the defendant's response and the parties' respective submissions. I have also considered the relevant legal framework and jurisprudence. The single question falling for determination in this application is whether the plaintiff/applicant has satisfied the criteria upon which a trial court exercises jurisdiction to grant an order of summary judgment.

13. The principle governing exercise of jurisdiction to grant summary judgment under Order 36 of the Civil Procedure Rules was outlined by the Court of Appeal in **Moi University v Vishua Builders Limited Civil appeal No. 296 of 2004** in the following words:

“The law is now settled that if the defence raises even one bonafide triable issue, then the defendant must be given leave to

defend.a triable issue does not mean one that will succeed.”

14. In **Patel v E. A. Cargo Handling Services Ltd (1974) EA 75** Duffus P outlined the following principle which, for many years, has guided our trial courts whenever they are invited to exercise jurisdiction in a plea for summary judgment:

“In this respect, defence on the merits does not mean, in my view, a defence that must succeed, it means as Sheridan J put it, “trialable” that is an issue which raises a prima facie defence and which should go to trial for adjudication.”

15. In **Continental Butchery Limited v Samson Musila Ndura Civil Appeal No. 35 of 1997**, the Court of Appeal outlined the rationale for the remedies of summary judgment and the relevant guiding principle as follows:

“With a view to eliminate delay in the administration of justice which would keep litigants out of their just dues, or enjoyment of their property, the court is empowered in an appropriate suit to enter judgment for the claim for the plaintiff under summary procedure provided by Order 35 subject to there being no triable issues which would entitle a defendant leave to defend. If a bonafide triable issue is raised, the defendant must be given unconditional leave to defend but not so in a case in which the court feels justified in thinking that the defences raised are a sham.”

16. In the application under consideration, there is common ground that parties entered into a lease agreement dated 1/3/2017 and the defendant covenanted to pay monthly rent of Kshs 350,000 for the 1st and 2nd years of the lease. The defendant covenanted to pay monthly rent of Kshs 380,000 for the third and fourth years of the lease. He further covenanted to pay monthly rent of Kshs 410,000 for the fifth and sixth years of the lease. He covenanted to pay the monthly rent in advance on or before the 10th day of every month, clear of all deductions whatsoever.

17. Further, the parties in this suit agreed as follows in relation to the right of re-entry and repossession of the demised premises and determination of the lease:

“If the rent or any other moneys hereby reserved or any part thereof shall at any time be unpaid for fifteen (15) days after becoming payable (whether lawfully demanded or not) or if any of the other covenants on the part of the lessee herein contained shall not be performed and observed then and in any of the said cases thereof in the name of the whole and thereupon this lease shall determine absolutely but without prejudice to the right of action of the lessor in respect of any antecedent breach or any of the covenants on the part of the Lessee herein contained;”

18. There is evidence that the defendant defaulted to pay rent for several months. Consequently, parties to the lease and to this suit entered into an agreement dated 6/7/2020 pursuant to which the defendant acknowledged being in rent arrears of Kshs 1,520,000 and covenanted to pay the arrears in full on or before 10/8/2020. Further, the defendant mutually agreed with the plaintiff that in default of payment of the above arrears as agreed, the plaintiff was to exercise his right of re-entry into the demised property and take possession of the property and that the lease would stand determined.

19. It was within the above context that the plaintiff came to this court. It is also within the above context that the plaintiff exercised the right of re-entry took possession of the suit property. The defendant’s attempt to disown the agreement dated 6/7/2020 has exposed him as a dishonest tenant. I say so because on 7/8/2020 [three days before the deadline for paying the rent arrears] his present advocates wrote to the plaintiff’s advocates acknowledging the agreement and seeking extension of the deadline in the following terms:-

“... Sir, in view of the agreement dated 6th July 2020 between your client and ours, and also the deadline of 10th August, 2020, we kindly request that you give us an appointment within next week so that my client can give a report on the directions given in court on 11th August, 2020. In view of all these pending applications in court which our client has been forced to defend, we kindly request that your client give ours until 31st August, 2020 to atleast pay your client the monthly rent and to address the pending rent arrears.”

20. The defendant has not given any controverting evidence to demonstrate

that the acknowledged rent arrears were subsequently paid on or before 10/8/2020. The purported draft defence is therefore a sham and a scheme by the defendant to keep the demised property without paying the agreed rent. It would be unconscionable for this court to allow the defendant to use the court process to achieve that scheme in the face of the above evidence.

21. The defendant invoked Section 6 of the Civil Procedure Act as a ground for finding that there were triable issues in this suit. I do not agree with him because the issues in the suit the defendant is citing is not the same as the issues in this suit. Further, the plaintiff is not the claimant in the said suit and cannot use that suit as a platform to enforce the lease dated 1/3/2017 and the agreement dated 6/7/2020. Section 6 of the Civil Procedure Act is therefore inapplicable in the circumstances of the present suit.

22. The defendant urged the court not to grant the application because it had been overtaken by events in that the plaintiff had already taken possession of the demised property. While it is true that the plaintiff took [and lawfully so] possession of the suit property, it is clear from the affidavit of the defendant that the defendant expects the plaintiff to find a way of collecting rent to recover the arrears which the defendant owed and thereafter allow the defendant back into the suit property. It is therefore necessary that a conclusive pronouncement is made regarding the rights of the parties to this dispute.

23. The defendant raised the issue of his fixtures. In my view, that is not a defence to the plaintiff’s claim. My understanding is that the fixtures were to be dealt with in accordance with the lease, upon the defendant clearing all the rent arrears and attendant costs. The fixtures cannot be a basis for keeping the plaintiff out of his property when the defendant has failed to discharge his contractual obligations under the

lease.

24. I have considered all the matters which the defendant itemized and contended were triable issues. None is. The relationship between the parties to this suit was that of lessor and lessee. The lessee failed to pay rent. The lessor has invoked the lease and the mutual agreement between the parties. To allow a defaulting lessee the opportunity to run away from his contractual obligations while keeping the demised premises would be unconscionable.

25. The totality of the foregoing is that the court is satisfied that the plaintiff has met the threshold for grant of summary judgment under Order 36 of the Civil Procedure Rules. My finding on the single issue in this application, therefore, is that the plaintiff has satisfied the criteria upon which our courts exercise jurisdiction to grant summary judgment.

26. In the circumstances, summary judgment is entered in favour of the plaintiff against the defendant in terms of **prayers (a), (b) and (d)** of the notice of motion dated 23/10/2020. Because the plaintiff terminated the lease and took over the premises in August 2020, which period is fully covered by the award in (b) above, there will be no award in terms of mesne profits.

DATED, SIGNED AND DELIVERED VIRTUALLY AT THIKA ON THIS 27TH DAY OF OCTOBER 2021

B M EBOSO

JUDGE

IN THE PRESENCE OF: -

MR MUNGAI FOR THE PLAINTIFF

MR WANJOHI FOR THE DEFENDANT

COURT ASSISTANT: LUCY MUTHONI

NOTE:

This application was heard and a ruling date fixed when I was stationed at Nairobi (Milimani) Environment and Land Court Station. Subsequent to that, I was transferred to Thika Environment and Land Court Station. This is why I have delivered the ruling virtually at Thika.

B M EBOSO

JUDGE