Apa Insurance Limited v Kenya Institute of Management (Civil Suit 204 of 2006) [2023] KEHC 27557 (KLR) (1 August 2023) (Judgment)

Neutral citation: [2023] KEHC 27557 (KLR)

REPUBLIC OF KENYA

IN THE HIGH COURT AT MOMBASA

CIVIL SUIT 204 OF 2006

F WANGARI, J

AUGUST 1, 2023

BETWEEN

APA INSURANCE LIMITED ..... PLAINTIFF

AND

KENYA INSTITUTE OF MANAGEMENT ..... DEFENDANT

JUDGMENT

1. The Plaintiff instituted suit by way of a plaint dated 5th December, 2006 and filed on 7th December, 2006. It sought judgement against the Defendant for: -

    a. The sum of Kshs. 3,483,159/=

    b. Costs of and incidental to the suit; and

    c. Interest at court rates on the principal.

2. The Plaintiff filed its list of witnesses dated January 25, 2019 on January 28, 2019. Contemporaneously with the list of witnesses, it filed a comprehensive list of documents as well as the copies of the said documents in support of its claim on even date.

3. Upon service of the pleadings, the Defendant filed a statement of defence dated February 28, 2007 on March 1, 2007. The Defendant made generalized denials. However, it did not file any witness statement, documents or participate in the suit.

4. I note that though the suit was filed in December, 2006, it only proceeded for hearing on 24th May, 2023 (a record seventeen (17) years after it was filed). I shall address this issue later in this judgement. The matter having gone through the usual motions was heard on May 24, 2023 as earlier pointed out. The Plaintiff called one witness and thereafter proceeded to close its case. The Defendant's case was equally closed.

Plaintiff's Case

5. The Plaintiff's case was presented by one Macknon Ziro Washe who described himself as the Plaintiff's Claims Officer. He told the court that the Plaintiff resulted from a merger of two insurance companies, that is, Apollo Insurance Company Limited and Pan Africa General Insurance Company Limited. This merger was approved by the then Minister of Finance. Prior to the merger, the Apollo Insurance Company Limited had entered into a lease agreement dated 4th August, 2004 with the Defendant.

6. In the said lease, the Defendant had leased the premises owned by Apollo Insurance and which premises were erected on parcel of land subject of Title MOMBASA/BLOCK XIX/18. The term of the lease was five years and three months effective from 1st day of October, 2003. Upon merger of the two insurance companies, the title was now registered in the name of the Plaintiff. All was well until 12th May, 2006 when the Defendant issued a notice to vacate the premises. In the said notice, the Defendant indicated that it was moving out in mid-June, 2006 and handover the premises in mid-July, 2006 after renovations.

7. The notice to vacate was addressed to Knight Frank Kenya Limited who were the Plaintiff's property managers. In a response dated 31st May, 2006, the property managers informed the Defendant that the lease agreement did not have a termination clause and as such, if they wished to vacate the premises, they would be required to pay rent for the unexpired term. This response did not sit well with the Defendant as evidenced by the letter dated 6th June, 2006. Several other correspondences were exchanged but it yielded no fruits.

8. As such, the Plaintiff's claim as against the Defendant was for rent arrears as from 1st July, 2006 to 31st December, 2008 and service charge as from 1st April, 2005 to 31st December, 2008. This amounted to Kshs. 3,483,159/=. That marked the close of the Plaintiff's case. Since the Defendant did not file anything else apart from the statement of defence, its case was also closed. The Plaintiff sought to file submissions.

Plaintiff's Submissions

9. The submissions are dated 6th June, 2023 and filed on 8th June, 2023. Citing the case of Karuru Munyoro v Joseph Ndumia Murage & Another, Nyeri HCCC No. 95 of 1988 cited with approval in Rupa Mills Limited v Daniel Machoka Osoro [2018] eKLR, the Plaintiff submitted that pleadings are mere allegations and that mere filing of a defence is not enough to disapprove a Plaintiff's case. Therefore, it was contended that the Plaintiff's evidence remained unchallenged and uncontroverted.

10. On the lease agreement, it was submitted that the Defendant's conduct to vacate the Plaintiff's property before 31st December, 2008 was akin to unlawfully terminating the lease prematurely. The Plaintiff indicated that the lease agreement dated 4th August, 2004 did not contain a termination clause. As such, its position was that the Defendant could not unilaterally terminate the lease mid-term.

11. The Court of Appeal decision in Kenya Commercial Bank Limited v Popatial Madhavji & Another [2019] eKLR was cited in support. Further reliance was placed in the case of Chimanlal Meghji Naya Shah & Another v Oxford University Press (EA) Limited [2007] eKLR to buttress the its position that where there is no termination clause and the lease is terminated before the period its period of expiry, the situation that obtains is a breach of a contract. It was thus the Plaintiff's position that the Defendant's action caused the Plaintiff to suffer losses for the remainder of the lease. It thus sought the court to prevent the Defendant from breaching the unexpired lease period by making the Defendant pay the sum of Kshs. 3,483,159/= as damages for breach or the lease remainder period.

12. The Plaintiff lastly submitted that it could not hold the Defendant a prisoner in its property by compelling it to live in its will and accepted possession of the property but reserved its right to claim damages for the wrongful breach of the lease. The Plaintiff thus sought for the suit to be allowed as prayed.

Analysis and Determination

13. I have considered the pleadings, Plaintiff's evidence both oral and documentary, the submissions together with the authorities relied upon by the parties as well as the law and in my view, the following issues are for determination;

    a. Whether the lease agreement existed between the parties

    b. If the answer to (a) above is in the affirmative, whether the same had a termination clause;

    c. Whether the Plaintiff is entitled to the prayers sought;

    d. Who bears the costs?

14. On the first issue, the background facts are largely undisputed, namely that the Defendant and one Apollo Insurance entered into a lease agreement for a term of five years and three months. Indeed, the correspondences exchanged between the parties confirms as much. Though the Defendant at paragraph 3 of its defence tries to distance itself from the merger of Apollo Insurance Company Limited and Pan African Insurance Company Limited to create the Plaintiff, it does not escape this court's eye that in the lease agreement entered into between the parties, Apollo Insurance was described as the Lessor and where the context so admits shall be deemed to include its successors and assigns.

15. When the Defendant appended its signature on the lease agreement, it is deemed that it was aware of what it was required of it. The Defendant, in fact, was advised of the change and it issued a cheque in favour of the Plaintiff. It was thus not open for the Defendant to re-introduce the issue of the parties' identities when it had in fact acquiesced. Section 120 of the *Evidence Act* is instructive of this. The Defendant is estopped from pleading otherwise. Therefore, I have no issue finding that the first issue was answered in the affirmative.

16. Turning on to the second issue, the lease agreement dated 4th August, 2004 did not have a termination clause. Having been executed by both parties, it is deemed that all of them understood the terms of lease and thus it was not open for one to sneak in clauses that were never agreed. It is trite that the terms of a contract bind only the parties to it as they are the one who have a right to sue in the event of breach. Out of the many clauses stretching to five (5) schedules, none of them related to termination. Therefore, the court has no business in introducing a clause which the parties themselves deemed it fit not to be part of their bargain.

17. In National Bank of Kenya v Pipeplastic Samkolit (K) Ltd & Another [2001] eKLR, the Court of Appeal had the following to say: -

> " A Court of law cannot re-write a contract between the parties. The parties are bound by the terms of their contract, unless coercion, fraud or undue influence are pleaded and proved..."

18. The lease agreement executed by both parties remained the primary document that guided their relationship. If any term which either of the parties thought ought to have been part of the lease was excluded, that party would have to live with the consequences of non-inclusion of that clause unless they can demonstrate that its non-inclusion was deliberate and was instigated by the other party or that it was purely a mistake.

19. None of the above have been demonstrated and I have no hesitation to hold that the lease agreement dated 4th August, 2004 did not contain a termination clause and thus the parties conscientiously left it out. As decreed in National Bank of Kenya (supra), this court has no business rewriting the terms of a contract when it appears the parties deliberately left that term out.

20. On the third issue, the Plaintiff sought for a sum of Kshs. 3,483,159/=. The amount was arrived at after calculating the rent and service charge which the Plaintiff would have received by the end of the lease which was 31st August, 2008. In Kenya Commercial Bank Limited v Popatial Madhavji & Another [2019] eKLR, the Court of Appeal while dealing with an almost similar issue held that where an agreement to lease for a period of five years three months had resulted, termination of the lease mid-term was not available. Therefore, any notice of termination mid-way could not arise and the party was obligated to continue to occupy the premises for the entire period of the lease. I am bound by the above decision.

21. Similarly, Warsame, J (as he then was) while addressing an almost similar issue in Chimanlal Meghji Naya Shah & Another v Oxford University Press (EA) Limited [2007] eKLR, held that a landlord cannot force a tenant to stay in his premises for a particular period whether a lease exists or not. It was further held that a lease agreement which is properly registered is a form of contract and where default arises, the terms of breach of contract arises.

22. Though the Defendant indicated that its decision to terminate the lease was due to increase in its capacity, it is instructive to note that there was no clause in the lease agreement that mandated the landlord to provide additional space in the event of such an increase. The court has no capacity to extend that which the parties agreed unless the contract is said to be unconscionable. Having appended its signature to the lease agreement, the Defendant was bound by each and every clause of the lease and this court has no business stretching what the parties expressly agreed. The lease term was five years three months.

23. Having cut short the agreed term, I have no hesitation to hold that the Defendant was liable to pay for the remainder of the term. Whether the Plaintiff got another tenant or not thereafter is immaterial as the Defendant waived its right to bring such issue for this court's deliberation. At the end, I hold that the Plaintiff firmly established that it was entitled to the amount of Kshs. 3,483,159/= as sought and I have no qualms in awarding the same.

24. Lastly, it is a hallowed principle that costs follow the event. This is what section 27 of the *Civil Procedure Act* mandates. Though I am alive that courts retain the discretion on costs, I see no reason why the Plaintiff should be denied the costs of the suit. In the circumstances, I award costs to the Plaintiff.

25. Before I pen off, this being a liquidated claim, it is naturally expected that the amount of Kshs. 3,483,159/= ought to attract interest at court rates from the date of filing suit, that is, 7th December, 2006, simple arithmetic shows that interest alone would be more than Kshs. 8,000,000/=.

26. As indicated at the beginning of this judgement, there was no specific reason why a simple claim such as the present one would take seventeen (17) years to prosecute. It was the Plaintiff's duty to ensure that the matter was prosecuted timeously. In fact, had the Defendant taken this matter seriously, this case was a proper candidate for dismissal for want of prosecution.

27. Though filed in 2006, compliance documents were filed as late as 2019. Several notices to show cause why the matter ought not to be dismissed for want of prosecution are evident. As such, even though I have found that the Defendant ought to pay the Plaintiff the sum pleaded, it would be onerous

to condemn the Defendant to pay interest on the judgement sum from the date of filing. In the circumstances, I order that the judgement sum shall attract interest from the date of judgement.

28. Following the foregone discourse, the upshot is that the following orders do hereby issue: -

    a. Judgement is entered in favour of the Plaintiff as against the Defendant for the sum of Kshs. 3,483,159/=

    b. The judgement sum shall attract interest from the date of judgement;

    c. The Plaintiff is awarded the costs of the suit;

    Orders accordingly.

DATED, SIGNED AND DELIVERED AT MOMBASA THIS 1ST DAY OF AUGUST, 2023.

.....

F. WANGARI

JUDGE

In the presence of;

Ondego Advocate for the Plaintiff

N/A for the Defendant

Abdullahi, Court Assistant