



REPUBLIC OF KENYA

IN THE ENVIRONMENT AND LAND COURT

AT MALINDI

CIVIL SUIT NO. 131 OF 2014

EQUATOR PRODUCTS LTD.....PLAINTIFF

VERSUS

BAOBAB VENTURES LTD.....DEFENDANT

JUDGMENT

BACKGROUND

1. By an Originating Summons dated and filed herein on 11th June 2012, Equator Products Ltd (the Plaintiff) claims breach of a tenancy agreement between itself and Baobab Ventures Ltd (the Defendant) dated 10th July 2008 and claims a number of reliefs in regard thereto including a declaration that the agreement is a legal document binding the parties and that there was an implied term that the tenancy was subject to termination upon one month's notice being given to either party.
2. In addition, the Plaintiff urged the Court to declare that it is entitled to a refund of Kshs 494,167.44/- being money incurred or expended at the instance of the Defendant and further, that the Defendant's demand that the Plaintiff continues occupying the demised premises and paying rent at Kshs 60,000/- per month is a violation of the Plaintiff's fundamental rights as enshrined under Articles 27(2) and 40(2) of the Constitution.
3. The Summons arises from the Plaintiff's contention that it gave the Defendant three months notice to terminate the tenancy and proceeded to vacate the premises but the Defendant insists that the Plaintiff should continue occupying the same and paying rent at Kshs 60,000/- per month.
4. By a Counterclaim dated 11th July 2012, the Defendant avers that it is the lawful owner of all that Plot Shed C 1 at the Kenya Industrial Estates Malindi. Pursuant to a written agreement between the Plaintiff and the Defendant, the Plaintiff rented the Defendant's premises for a period of five years and three months at a monthly rent of Kshs 50,000/- for the first three years and Kshs 60,000/- for the last two years and three months.
5. The Defendant further avers that at the commencement of the lease and due to the fact that there were many other parties interested in the demised premises, it was agreed that the lease be made a non- terminable one for a period of five years in order to secure the Plaintiff's stay thereon. Contrary to the said agreement however, the Plaintiff by a letter dated 30th July 2011 purported to issue a notice of termination of the lease agreement upon the Defendant. The Defendant rejected the termination on the basis that it breached the existing contract.
6. The Defendant further asserts that subsequently on 29th February 2012, it was served by another letter from the Plaintiff's Advocates purporting to terminate the tenancy and that while the parties were still discussing on the way forward, the Plaintiff abruptly abandoned the demised premises deeming the tenancy to have come to an end.
7. It is accordingly the Defendant's case that there still subsists a valid tenancy agreement between the parties and that the Plaintiff's departure from the suit premises has caused it loss and damage and that the same is unlawful and constitutes a breach of contract.
8. Accordingly by way of the Counterclaim the Defendant prays for Judgment to be entered against the Plaintiff for:-

a) An order for specific performance directing that the Defendant pays all outstanding rent at the rate of Kshs 60,000/- per month in accordance with the agreement dated 10th July 2008;

b) Damages for damage caused to the property and for breach of contract;

c) An order of mandatory injunction directed at the Plaintiff directing it to restore the premises to its existing state when it took possession;

d) A declaration that there exists a valid lawful tenancy/lease agreement as between the parties herein and an order of specific performance on the Plaintiff's part; and

e) Costs and interest of this suit.

The Plaintiff's Case

9. When the matter came up for trial however, the Plaintiff did not turn up and its case was dismissed for want of prosecution on 31st September 2019.

The Defence Case

10. At the trial, the Defence called two witnesses in support of the Counterclaim.

11. DW1- Godfrey Karume Macharia told the Court that he is one of the four Directors and the Chairman of the Defendant company. He testified that on or about 10th July 2008, they executed a lease agreement with the Plaintiff for a term of five (5) years and three (3) months. The lease at the request of the Plaintiff had no mid-term exit clause.

12. DW1 told the Court that being a food processing factory, the Plaintiff demanded that they build private toilets for executive, female and male staff and that the Defendant complied with the demand. The Defendant was also required to cut some 12 mature trees in the compound and to put up a boundary fence around the compound.

13. The Defendant did as requested. In addition, on 18th October 2008, the Plaintiff requested for the permission to put up a concrete platform and shelter in the building's entrance. The Defendant granted the permission sought. The Plaintiff also made some unauthorized alterations to the premises.

14. On 30th July 2011, the Defendant received a letter giving it two months notice for the termination of the tenancy. DW1 told the Court that they replied to the letter on 23rd August 2011 drawing the attention of the Plaintiff to the terms of the lease. Thereafter the tenant continued paying rent as agreed.

15. DW1 testified that sometime in February 2012, he visited the suit property and found some workers removing metal enforcing and surrounding the concrete platform at the entrance of the building. DW1 requested to see the Plaintiff's Managing Director but did not succeed to see him. Subsequently on 29th February 2012, DW1 received yet another long letter giving them a month from 1st March 2012 to terminate the lease.

16. The Defendants replied to the letter on 6th March 2012 again rejecting the termination. The Plaintiffs thereafter forwarded the keys to the demised premises to the Defendant's lawyers. DW1 further told the Court that the Plaintiffs moved away from the premises without repairing the same.

17. DW2- Robert Mutua Karume is the Managing Director of the Defendant Company. He testified that when they leased the demised premises to the Plaintiff, they took a development loan from Equity Bank Ltd on the strength of the rental income that they would get. The Plaintiff initially refused to sign the lease that gave an option to terminate the agreement by giving notice of six (6) months.

18. Reiterating DW1's evidence herein, DW2 testified that on 30th July 2011, the Plaintiff gave them notices of termination of the lease. In August 2011, the Defendant wrote back to the Plaintiff indicating there was no mid-term exit clause in the lease. The Plaintiff's thereafter continued to pay rent.

19. DW2 told the Court that later on in February 2012 they received another letter from the Plaintiff's lawyers terminating the contract. The Plaintiffs thereafter proceeded to hand over the Keys to the premises to the Defendants lawyers. The Defendants were not invited to visit the premises for hand over to enable them assess whether or not there were damages inside the premises.

20. DW2 further testified that the abrupt loss of rent from the Plaintiffs caused the Defendant a lot of distress in raising funds to meet their obligations on loan repayments to Equity Bank.

Analysis and Determination

21. I have considered the pleadings herein, the oral testimonies of the Defendant's witnesses as well as the evidence adduced before this Court. I have also considered the written submissions filed herein by Mr. Matini, Learned Advocate for the Defendant.

22. Both the Plaintiff and the Defendant herein are limited liability companies. By an Agreement in writing executed by their representatives on 10th July 2008, the two companies entered into a tenancy agreement wherein the Plaintiff did rent the Defendant's premises known as Plot Shed C-1 situated at the Kenya Industrial Estates, Malindi for a term of five (5) years and three (3) months with an option to renew. It was a term of the said Agreement that for the first three (3) years of the term, the Plaintiff would pay rent of Kshs 50,000/- per month while for the last two (2) years and three (3) months, the monthly rent would be revised upwards to Kshs 60,000/- per month.

23. Some three years after they entered into the tenancy agreement, the parties appear to have disagreed on a number of issues. This state of affairs can be glimpsed from a series of correspondences the parties engaged in mid-2011. Those disagreements appear to have been prompted by an attempt by the Plaintiff to make some adjustments to the demised premises.

24. By its Letter dated 2nd June 2011 addressed to the Defendant's Managing Director Robert Karume, the Plaintiff which was using the premises for processing fruits and vegetables rendered itself as follows:-

"Subject: Request for building adjustments

Dear Mr. Karume,

Thanks for our meeting two weeks ago. As discussed, Equator Kenya Ltd is introducing a new crop and after discussions with our clients, we see the need to do some adjustments to the building.

The adjustments would be the following:-

1. Concrete floor and roof between building and cold store in order to operate some machines there.

2. Additional drying area in the backyard for which we would like to change the current setting and add sand/coral stones.

For any further clarification, please do not hesitate to contact us. I am looking forward to hearing from you soon."

25. The Defendant responded to the said letter on 14th June 2011. While stressing the need for the intended adjustments to be restricted to the boundaries of its piece of land, the Defendant's Managing Director penned off the Letter to the Plaintiff as follows:-

"Finally, in view of the increased use of the outlined area within our perimeter fence, we propose an increase in the monthly rent that will also take into consideration the current lease and expected rental increase as stipulated within the same lease. As I had earlier indicated, we would appreciate another visit to the premises with Mr. Karume to further consult with you before you make any changes, at your earliest convenience."

26. In a terse response to the Defendants dated 30th July 2011, the Plaintiff addressed the Defendant as follows:-

"Subject: Termination of Tenancy Agreement

Dear Mr. Karume,

We wish to terminate the tenancy agreement for your premises at Shed C1/Kenya Industrial Estates, Malindi from 30th September 2011.

During the period 1st August (to) 30th September 2011, we request that we utilize the deposit placed with you in July 2008.

We wish to take this early opportunity to thank you for your support during our tenancy period.

27. Seemingly taken aback by this new state of affairs, the Defendant wrote back to the Plaintiff on 23rd August 2011 rejecting the termination. The Defendant further sought to draw the attention of the Plaintiff to two issues stated in their letter as follows:-

"1. That the authorized and witnessed contract did not deliberately have a mid-term exit and hence your referred notice breaches Clause 1.2 of the Agreement.

2. That the Board (of Directors of the Defendant) demands that you continue paying your rent at the new rate of Kshs 60,000/- from 1st August 2011 to your final stay as any unused deposits is catered for in Clause 3.2 of the said Agreement."

28. The said Clause 1.2 of the tenancy Agreement provided as follows:-

"1.2. The terms of the Tenancy Agreement will be five years and three months with effect from 1st August two thousand and Eight."

29. On the other hand, Clause 3.2 of the Agreement required the Landlord Defendant to refund any unused deposit paid by the tenant at the end of the tenancy period.

30. In their Counterclaim filed herein on 12th July 2012 the Defendant asserts at paragraph 5 thereof as follows:-

5. That at the commencement of the lease and specifically at (the) Defendant's instance, it was agreed to secure the Defendant's stay by making the said lease of non-terminable lease for a period of five years with guarantees for the tenancy to run the full

period intended with no mid-term termination clause. This was due to the fact that there were many other competing parties interested in leasing the property.”

31. That assertion was indeed repeated by the Defendant’s director and Chairman Godfrey Karume (DW1) at the trial herein where he testified that the lease had no mid-term exit at the request of the Plaintiff. While the Plaintiff had at Paragraph 4 of its Defence to the Counterclaim denied that they had made any such request, it was clear to me that they had executed the tenancy agreement inclusive of Clause 1.2 thereof.

32. As it were, many commercial leases in this country have a minimum term of five years and three months or beyond and will usually not have a termination clause. Whereas there is nothing really magical about the period, that clause is usually introduced in order to exempt the lease from qualifying as a controlled tenancy.

33. Controlled tenancies are governed by the Landlord and Tenant (Shops, Hotels and Catering Establishments) Act. The said Act generally deprives landlords of certain rights over their properties in order to protect the tenant. It is therefore not surprising that owners of such commercial properties invariably seek to avoid the application of the Act by eliminating any provisions in the lease which would give it the character of a controlled tenancy.

34. In the matter before me, it is clear to me that the Plaintiff entered into the tenancy Agreement with the Defendant dated 10th July 2008. Thereafter the Plaintiff made some adjustments to the suit premises in order to accommodate the nature of the business they were carrying out in the demised premises. And while the tenancy agreement stipulated the term as five years and three months, on 30th July 2011, some three years into the tenancy, the Plaintiff purported to terminate the same by giving the Defendant two months notice.

35. When the Defendant rejected the termination, the Plaintiff abruptly moved out of the demised premises after sending the keys thereof to the Defendant’s Advocates. According to the Plaintiff, the omission to include an early exit clause in the tenancy agreement meant that the tenancy could be terminated by either party giving a month’s notice to the other. That unfortunately is not borne out of the tenancy agreement executed by the parties. As the Court of Appeal stated in ***National Bank of Kenya Ltd –vs- Pipeplastic Samkolit (K) Ltd (2002) (EA 503:-***

“A Court of law cannot rewrite a contract between parties, the parties are bound by the terms of their contract, unless coercion, fraud or undue influence are pleaded and proved. There was not the remotest suggestion of coercion, fraud or undue influence in regard to the terms of the Charge.”

36. Similarly in the matter before me, there was not the remotest suggestion that the Plaintiff was coerced or misled into executing the tenancy agreement.

37. In the circumstances herein, I was persuaded that the abrupt and premature termination of the tenancy agreement has caused the Defendant damage and loss. I therefore find merit in the Defendant’s Counterclaim.

38. In terms of the damages suffered, the Defendant produced at the trial herein a Valuation Report prepared by one Haron Tsuma Hare dated August 2014. That Report quantifies the repairs required for the damage done to the demised premises at Kshs 243,270/-. I am satisfied that the cited amount is reasonable. It was however my view that the Defendant was under an obligation to mitigate their losses by taking back the premises once the keys thereof were handed over to their lawyers. I therefore decline the invite to award damages for breach of contract.

39. Accordingly Judgment is hereby entered for the Defendant as against the Plaintiff in terms of the Counterclaim as follows:-

a) An order of specific performance is hereby issued directing the Plaintiff to pay all outstanding rent at the rate of Kshs 60,000/- per month for the balance of the period of the lease commencing 1st August 2011.

b) Damages assessed at Kshs 243,270/-.

c) Interests on ‘a’ and ‘b’ above at Court rates until payment in full; and

d) Costs of this suit.

Dated, signed and delivered at Malindi this 28th day of February, 2020.

J.O. OLOLA

JUDGE