



REPUBLIC OF KENYA

IN THE ENVIRONMENT & LAND COURT

AT MOMBASA

ELC NO 94 OF 2019

ABDULAZIS ASHUR..... PLAINTIFF

VERSUS

STEPHEN MBUGUA GATURA.....DEFENDANT

RULING

1. Coming for determination is the Notice of Motion dated 26th June, 2019 by the plaintiff/applicant brought under Section 1A, 1B and 3A of the Civil Procedure Act, Order 2 Rule 15 and Order 51 Rule 1 of the Civil Procedure Rules seeking orders to strike out the defendant's statement of defence and judgment to be entered for the plaintiff as prayed in the plaint. It is the Plaintiff's case that the defence filed does not disclose any reasonable defence in law, is scandalous, vexatious, frivolous and an abuse of the court process. That the defendant is admittedly in accrued rent arrears that the have further escalated without any payment being effected on the part of the defendant. That the defendant failed to file a Reference to the Business Premises Rent Tribunal upon being served with notice of intention to terminate the controlled tenancy. It is the plaintiff's contention that the defence is a mere denial and discloses no reasonable defence in law as against the plaintiff's claim.

2. The application is supported by the affidavit sworn by the plaintiff on 26th June, 2019. The plaintiff deposes that the defendant was hitherto a tenant occupying the plaintiff's premises on PLOT NO. MSA/BLOCK XVI/870. That the defendant is in accrued and outstanding rent arrears in respect of the demised premises for the period April 2018 to April 2019. The Plaintiff states that the defendant was a perpetual rent defaulter and a distraint process was levied against him but did not yield any recovery. The plaintiff states that he was prompted to issue a notice under the Landlord and Tenant (shops, Hotels and Catering Establishments) Act, Cap 301 Laws of Kenya to terminate the tenancy. Relying on advise the plaintiff believes that in the absence of a reference to challenge the notice of termination of tenancy, the said notice took effect in May 2019 but the defendant has refused, failed and or ignored to comply. That the defendant has failed to remit the rental sum accruing from April 2018 to April 2019 and is therefore indebted to the plaintiff in the sum of Kshs. 182,000/= . The plaintiff states that the defence is merely calculated to frustrate and delay the course of justice.

3. In opposing the application, the defendant filed an affidavit in reply sworn on 16th September, 2019 in which he deposes that his defence raises triable issues. That the plaintiff has not informed the defendant of the proceeds of the distress that was levied, arguing that he runs a shop selling new merchandise, while in the proclamation the distrained property were treated as old merchandise. The defendant states that there was a matter filed at the tribunal which the plaintiff has failed to disclose to the court. The defendant denies that his defence is a mere denial.

4. The application was canvassed by way of written submissions which were duly filed by the parties. I have considered the application and the submissions made. In the case of **Mohamed Mohamed Hatimy –v- Lameck Oluoch t/a Lamathe Hygienic Foods (2019)eKLR**, the Court of Appeal stated:

“in as much as the power to strike out pleadings by a court is discretionary, it should be exercised sparingly and only in the clearest of cases. This is because the consequence of striking out a pleading is that a court does not subject the parties dispute to a full hearing. It follows, therefore, that whenever a court is faced with the question of whether or not to strike out a pleading, it has to strike a balance between two competing rights; on one hand, a party's right to have his/her case determined in a full trial and on the other, an opposing party's right not to be unduly burdened with a suit which is otherwise a non-starter. This much was appreciated by this court in Kivanga Estates Limited –v- National Bank of Kenya Limited (2017)eKLR.”

5. In the plaint, the plaintiff's claim is for vacant possession, rent arrears of Kzshs.182,000/= as well as mesne profits at the rate of Kshs.14,000 from 1st May 2019. It is the plaintiff's case that defendant, who enjoyed a controlled tenancy, was issued with a notice under Cap 301 to terminate the tenancy with effect from 1st May, 2019. That the said notice has since taken effect, but the defendant had not complied with the said notice of termination and has not filed a reference challenging the said notice as required by that Act.

6. In his statement of defence, the defendant has denied the plaintiff's claim. The defendant states that there was a matter in the Tribunal that caused some arrears to accrue and that after the case was dispensed with, the plaintiff and the defendant were to agree on how the arrears of Ksh.168,000/= was to be paid. That instead, the Plaintiff levied distress against the defendant while the defendant was away and that no inventory has been given. The defendant further states that the goods that were attached and sold in public auction were new merchandise and were valued at Kshs.377,380/= which, according to the defendant is more than twice the amount of rent arrears. It is apparent that the defendant does not deny that there is an outstanding rent arrears. The defendant has also not challenged the plaintiff's contention that the tenancy was controlled and that no reference was filed in answer to the notice to terminate tenancy issued to the defendant by the plaintiff. It is clear from the pleadings herein that the defendant's continued occupation of the suit premises is predicated on a tenancy that has been terminated. The defendant has not challenged the notice terminating the said tenancy. The defendant's continued possession of the suit premises is therefore untenable and against the wish of the plaintiff. Whereas the defendant alleges that it is the plaintiff who owes him, there is no counter-claim that has been filed. Accordingly, I find the defence with respect to the prayers for vacant possession, rent arrears and mesne profits as frivolous since there is no reason to justify the defendant's continued possession and the rent arrears is admitted. In other words, I am convinced that there is no substantial question to be tried with respect to the issue of the defendant's tenancy and/or vacant possession and the rent arrears and mesne profits sought by the plaintiff. My find is reinforced by Bullen and Leake and Jacobs precedents of pleadings, 12th Edition wherein the learned authors at page 145 define a frivolous pleading in the following terms:

“A pleading or an action is frivolous when it is without substance or groundless or fanciful and is vexatious when it lacks bona fides and is hopeless or offensive and tends to cause the opposite party unnecessary anxiety, trouble and expenses.”

7. The Court of Appeal in **Delphis Bank Limited –v- Caneland Limited (2014) eKLR** observed that:

“Where there is no plausible defence and it is plain that the defence is a sham or cannot be sustained, it would be pointless to put the parties through a trial that would inflate costs to the disadvantage of the debtor and delay delivery of the justice to the prejudice of the claimant.”

8. For the aforementioned reasons I find that the Notice of Motion dated 26th June, 2019 is merited and the same is hereby allowed. The defendant's defence is hereby struck out and I enter judgment for the plaintiff in terms of prayers (a), (b), (c) , (d) and (e) of the plaint. The plaintiff shall have the costs of this application.

It is so ordered.

DATED, SIGNED and DELIVERED at MOMBASA this 17th day of February 2020.

C.K. YANO

JUDGE

IN THE PRESENCE OF:

Mkomba holding brief for Nyongesa for plaintiff

Ms. Moka holding brief for Mrs. Okoit for defendant

Yumna Court Assistant

C.K. YANO

JUDGE