



REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA AT NAIROBI

COMMERCIAL AND ADMIRALTY DIVISION

CIVIL SUIT NO. 36 OF 2018

THE UNIFORM SHOP EAST AFRICA LIMITED.....PLAINTIFF/APPLICANT

VERSUS

LAVINGTON SHOPPING COMPLEX LIMITED.....1ST DEFENDANT

FREDRICK MURUNGA.....2ND DEFENDANT

KENNETH NYAGA MWINDI.....3RD DEFENDANT

RULING

1. It is not denied, in this case, that the Uniform Shop East Africa Limited (hereinafter referred as the Uniform Shop) has been a tenant, since August 2014, at the property of Lavington Shopping Complex Limited (herein after referred to as the Landlord). The uniform shop filed this case against the Landlord seeking orders for account of rent, service charge and insurance premium. The uniform shop also sought for an order for loss of business which was to be proved at the hearing.

2. By its plaint the uniform shop pleaded that it entered into a verbal lease agreement, with the landlord for a period of 5 years at a quarterly rent of Ksh 809,150/=. That the said rental amount together with service charge has continually been paid by the Uniform Shop. That despite those payments the Landlord issued a notice to levy distress for rent against Uniform Shop. The Uniform Shop filed a Notice of Motion dated 25th January 2018 seeking restraining orders against the Landlord to stop execution of distress for rent against Uniform Shop.

3. An ex parte order was granted on 29th January 2018 restraining the Landlord from effecting distress for rent. The court by an order made on 20th March 2018 ordered the Uniform Shop to pay Ksh 5 million by 23rd March 2018, toward the rent arrears due, and in default the ex parte order of 29th January 2018 would stand vacated.

4. The Landlord in filing its defence on 28th September 2018 counter-claimed against the Uniform Shop and its two directors namely **Fredrick Murunga** and **Kenneth Nyaga Mwindi**. By that counter claim the Landlord prayed for judgment for Ksh9,118,360.81, as rent arrears against the Uniform Shop and the same amount against the two directors as guarantors of the Uniform Shop.

5. This Ruling is directed at the Notice of Motion application dated 16th January 2019, filed by the Landlord. The application seeks the defence to the counter-claim be struck out and judgment be entered in favour of the Landlord against the Uniform Shop and its two directors. The application is based on the grounds that the said defence to counter claim is bare denial without triable issues; that it is frivolous, vexatious and is intended to prejudice and delay this action; and that it is in the interest of justice that it be struck out and judgment be entered as prayed.

6. The application is opposed by the Uniform Shop and its two directors, by grounds of opposition and replying affidavit. That opposition is that the Landlord failed to furnish the Uniform Shop with audited accounts showing the rent paid and the service charge. The application was also opposed on the ground that the application offends the provisions of the Constitution and that to strike out the defence to counter claim would deny the Uniform and its directors the right to be heard.

ANALYSIS AND DETERMINATION

7. I have considered the application and the parties affidavit evidence. It is important to state at this time, that the application under consideration is brought under order 13 Rule 2 and Order 2 Rule 15 of the Civil Procedure Rules. Order 2 is the one that provides under which circumstances the court will strike out pleadings. Order 13 Rule 2 provides for entry of judgment on admission. A relevant case to consider herein, is **VEHICLE and EQUIPMENT LEASING LIMITED v COLA JUICES KENYA LIMITED (2017) eKLR** where the

Judge considered the circumstances under which judgment would be entered on admission. This is what the judge stated:

“In the case of **Ideal Ceramics Ltd –v- Suraya Property Group Ltd** HCCC No. 408 of 2016 (unreported), the court stated as follows:

[16] The law on summary procedure vide a judgment on admission is now relatively clear. The purpose of the law laid out under Order 13 of the Civil Procedure Rules is to ensure that a party whose entitlement is evidently due and admitted does not wait for determination by the court of a non-existence question. It is undesirable to litigate when there is no question or issue of fact or law. The summary process in this regard assists in ensuring that unnecessary costs and delays are not invited.

[17]The court’s power to enter judgment on admission is discretionary: see Cassam vs. Sachania (supra). The discretion is to be exercised only in cases where the admission, whether express or implied, is plain, clear, unconditional, obvious and unambiguous: see Choitram vs. Nazari (supra) and Momanyi vs. Hatimy & Another [2003]2 EA 600. The admission ought to be obvious on the face thereof and leave no room for doubt.

[18]An admission may be formal (typically an admission made in the pleadings) or informal (typically admissions made pre-action being filed in court but after demand has been made).”

8. The Landlord by its application, under consideration, stated through the affidavit of its Chief Executive that the Uniform Shop entered into “Heads of Terms of Lease” dated 17th June 2014, under which the Uniform Shop accepted the terms of the lease to be prepared. That the Uniform Shop owed rent amounting to Ksh 9,118,360.81 which continues to accrue so long as the Uniform Shop remains in occupation of the rented premises. The Landlord attached to the application statements of the rental due which statements reflect cheques issued by the Uniform Shop and which cheques were dishonoured on presentation. Those statements of account reflect the amount claimed in the counter-claim. Those statements were not denied by the Uniform Shop nor did the Uniform Shop deny issuing rental cheques that were dishonoured. More importantly however is that the Uniform Shop was ordered by the court to pay some of the rent arrears of Ksh 5 million in March 2018 which amount, according to the Landlord, has not paid.

9. I can’t but agree with the submissions made by the Landlord that the defence filed by the Uniform Shop is mere denial which does not raise any triable issue. I do therefore find there is merit in the application for striking out the defence and entry of judgment but only in respect to the Uniform Shop. That however is not the case in respect to the directors of the Uniform Shop.

10. Those directors were sued as guarantors of the Uniform Shop. On a prima facie basis I find that there is no guarantee clause in the “**Heads of Terms**” of lease which states that the directors were guaranteeing the indebtedness of the Uniform Shop. The said director other than simply being identified as guarantors that document did not state what they were guaranteeing. Accordingly their defence cannot be struck out, it raises, in my view, triable issue. The triable issue, amongst others, is whether the directors of the Uniform Shop guaranteed the indebtedness of the Uniform Shop.

11. In view of the above the Notice of Motion application dated 16th January 2019 partially succeeds. Having so succeeded I am of the view the Landlord is entitled to costs of the application against the Uniform Shop and the directors are entitled to their costs.

CONCLUSION

12. In the end I grant the following orders:

a. The defence of The Uniform Shop East Africa Limited to the Counter-claim, filed in court on 11th October 2018 is hereby struck out.

b. Judgment is hereby entered for Lavington Shopping Complex Limited as against The Uniform Shop East Africa Limited for Ksh 9,118,360.81 plus interest at court rate from the date of filing the counter-claim until payment in full.

c. The costs of the Notice of Motion dated 16th January 2019 are awarded to Lavington Shopping Complex Limited as against The Uniform Shop East Africa Limited and costs of that Notice of Motion are awarded to Fredrick Murunga and Kenneth Nyaga Mwindi as against Lavington Shopping Complex Limited.

DATED, SIGNED and DELIVERED at NAIROBI this 4th day of October, 2019.

M. KASANGO

JUDGE

Ruling read in open court in the presence of

Sophie Court clerk.

..... FOR THE PLAINTIFF

.....FOR THE 1ST DEFENDANT

.....FOR THE 2ND DEFENDANT

.....FOR THE 3RD DEFENDANT