



REPUBLIC OF KENYA

IN THE ENVIRONMENT AND LAND COURT OF KENYA

AT MOMBASA

ELC NO. 389 OF 2016

YUSUF MOHAMED JIWA T/A JIWA PROPERTIES 1ST PLAINTIFF

SOROYA INVESTMENTS LIMITED..... 2ND PLAINTIFF

-VERSUS-

FLORENCE WANGARI MWANGI 1ST DEFENDANT

JOYCE NJOKI 2ND DEFENDANT

GRACE NJERI 3RD DEFENDANT

JUDGMENT

(Suit by landowner and agent seeking vacant possession and mesne profits from defendants who had intended to lease the suit premises; plaintiffs having made an offer to the defendants to lease the suit premises; there being conditions for acceptance of the offer including payment of deposit; defendants making payment of deposit but cheque for rent in advance being returned unpaid; plaintiffs allowing defendants to take possession of the suit premises for purposes of renovation and defendants proceeding to do so; plaintiffs declining to issue the defendants with a lease due to the non-payment of the returned cheque and seeking to have the defendants vacate the premises; defendants making counterclaim for the cost of renovation, refund of deposit and loss of business; letter of offer only making payment of deposit by defendants as condition for acceptance; payment of rent in advance and legal fees not a condition in the letter of offer so irrelevant that the cheque for these were returned before a lease was drawn; no formal lease drawn and no lease could be implied so no landlord/tenant relationship; plaintiffs allowing the defendants to proceed with renovation before the lease and having benefited from the improvements made by the defendants; plaintiffs liable to refund the defendants the costs of renovation and the deposit; no orders made in respect for mesne profits or loss of business; plaintiffs to shoulder costs of the suit)

1. This suit was commenced through a plaint which was filed on 9 December 2016. The 2nd plaintiff is the registered proprietor of the land parcel Mombasa/Block XX/45A situated along Moi Avenue, Mombasa, and popularly known as Yunis Building, while the 1st plaintiff is the property manager of the 2nd plaintiff. The plaintiffs have pleaded that on 12 October 2016, they made a written offer to the defendants to lease a premise measuring 600 square feet on the ground floor of the said building, to commence on 1 December 2016 (the suit premises). The plaintiffs have pleaded that the offer was open for acceptance within 10 days, and among the terms expressed therein were payment of deposit of Kshs. 270,000/=, first quarter rent of Kshs. 270,000/=, and legal fees of Kshs. 45,132/=. It is pleaded that the 1st defendant collected the Letter of Offer on 12 October 2016 and returned it on 27 October 2016 with a banker's cheque of Kshs. 270,000/= (being the deposit) and two personal cheques for the first quarter rent and legal fees. It is pleaded that the 1st defendant then requested to access the premises in order to have her contractor take measurements which the 1st plaintiff obliged. It is pleaded that the personal cheque for Kshs. 270,000/= (being advance quarterly rent) was returned unpaid due to insufficient funds and this development was communicated to the 1st defendant who promised to replace it by close of business of 24 November 2016. It is averred that no replacement cheque was availed, and on 25 November 2016, the plaintiffs wrote to the 1st defendant that their offer had lapsed. It is pleaded that despite this, the defendants have refused to instruct their contractor to stop works and vacate the premises. The plaintiffs further plead that in disregard to a clause in the Letter of Offer, which required the defendants to obtain prior written consent of the plaintiffs, the defendants caused substantial structural alterations to the premises. It is further pleaded that the defendants have forcefully taken over the premises and removed locks placed by the plaintiffs.

2. In the suit, the plaintiffs seek the following orders (slightly paraphrased for brevity) :-

(i) A declaration that the offer made to the defendants lapsed for want of acceptance.

(ii) A permanent injunction to restrain the defendants from forcefully occupying the suit premises.

(iii) An order of eviction of the defendants from the suit premises.

(iv) An order to have the defendants restore the suit premises back to its original condition or in the alternative, the money paid by the defendants be utilised towards restoring the suit premises to its original condition.

(v) An order for the defendants to pay mesne profits for the period of their illegal and forceful occupation of the suit premises.

(vi) Costs and interest.

3. The defendants filed defence and counterclaim. They accepted that they did pay the sum of Kshs. 270,000/= as deposit and issued the two personal cheques. They however pleaded that they advised the plaintiffs not to present the personal cheques on the material day, but the plaintiffs went ahead to do so, hence its return as unpaid. It is pleaded that they later agreed with the plaintiffs to have the cheques replaced by 24 November 2016 and that they did in fact replace the said cheques but the plaintiffs declined to accept them. They denied being notified that the offer has lapsed. They pleaded in their counterclaim that the plaintiffs declined to accept rent for the first quarter even after being presented with a cheque for the same after agreement. It is contended that the plaintiffs started interfering with their peaceful occupation despite giving them access and permission to renovate and proceeded to lock the premises. In the counterclaim they seek the following orders :-

(i) An order of refund of the deposit paid together with the legal fees for the lease.

(ii) An order that the plaintiffs refund the defendants the cost of renovation.

(iii) An order that the plaintiffs pay the defendants for the loss of business as from 1st December 2006 to date.

(iv) Costs of the counterclaim and interest.

(v) Any other relief that the Honourable Court may deem fit to grant.

4. I probably need to mention that while these proceedings were pending, the defendants proceeded to the Business Premises Rent Tribunal (BPRT) and obtained some orders. The proceedings before the BPRT were however stayed by this court (Komingoi J) following an application by the plaintiffs.

5. PW-1 was the 1st plaintiff. He relied on his witness statement which more or less reiterates the contents of the plaint. The statement also mentions that the plaintiffs attempted to take possession of the premises on 26 November 2016 but the 1st defendant physically refused to leave the premises and ordered the works (renovation works) to continue. That evening, the 1st plaintiff placed his padlock at the door and dispatched day and night guards. It is also stated that on the night of 7 December 2016, the 1st defendant stormed the premises with seven goons, who overpowered his guards, broke the plaintiffs' locks and accessed the premises. According to him, the defendants did not meet the contents of the letter of offer on rent. He mentioned the bounced cheque and in his view the offer lapsed. He admitted having given the defendants permission to access the premises but denied that he allowed them to make any alterations. He stated that they have been unable to access the premises since 2016 because the defendants placed padlocks at the door. Cross-examined, he stated that he gave the defendants the keys on the strict understanding that it was for inspection of the suit premises. He agreed that he was told not to bank the personal cheque until a later date. He banked the cheque later but it was dishonoured. He testified that she (1st defendant) asked for more time to bring a replacement cheque by 24 November 2016. He stated that he did not see a letter by counsel for the defendant forwarding a banker's cheque (to replace the dishonoured cheque). He pointed at his letter dated 25 November 2016 as being the one that cancelled the offer. He asserted that access to the premises was limited for purposes of the defendants getting estimates for renovation. On re-examination, he testified that access was on condition that all money had been paid which was not done.

6. DW-1 was Florence Mwangi, the 1st defendant. She testified that she saw the premises advertised and she approached the 1st plaintiff. She was taken to view the premises and a Letter of Offer was made which she signed. She testified that the lease was to commence in December 2016 with the month of November being left free for purposes of a fit out. She proposed to make a cheque post-dated to three weeks but the 1st plaintiff asked for a current cheque and promised not to bank it unless he first called her. She was then given the keys to the premises and she started renovations which she did for two weeks. Her aim was to put up an executive barber shop and salon. While she was doing the tile works and painting the premises, the 1st plaintiff informed her that he was going to bank the cheque but she told him not to. He however went ahead to bank it and it was dishonoured. The 1st plaintiff then demanded a replacement by cash on the following day or else he would throw out her workers. She stated that on 25 November 2016, she came with cash but the 1st plaintiff did not want to see her and the lady in his office stated that they had instructions not to receive any money from her. She reported the matter to the police who forced the 1st plaintiff to open the premises and they continued with renovations. The following day, the 1st plaintiff locked the premises and refused to cooperate. She proceeded to do a banker's cheque which the plaintiffs refused to take. She testified that she did not receive the cancellation letter of 25 November 2016 and what she got was an email from an Advocate called Emma. She denied not fulfilling her obligations. She testified having lost business and also having suffered embarrassment. Cross-examined, she stated that the personal cheque she gave was to be deposited 10 days after its issue. She did state that she filed a matter before the Business Premises Rent Tribunal, which directed her to draw a banker's cheque for rent and she prepared one dated 6 December 2012. She conceded that she had no letter to commence renovations but asserted that the 1st plaintiff gave her permission to do so. She mentioned that she undertook the constructions for 3 weeks.

7. DW-2 was one Harris Kirombo, a Quantity Surveyor. He presented a report valuing the works that the defendants had undertaken in the premises. He did testify that the works were unfinished and that there are materials on the ground. He stated that the defendants had created a

mezzanine floor using steel and MDF Boards and placed a false gypsum ceiling on aluminium channels. On the front, she had placed granite tiles. He divided the works into 3 sections, that is preparation works, the works done, and the materials on site meant to finish the works. He estimated the improvement costs at Kshs. 997,930.60/-. He stated that there was no demolition of walls and what was removed was the door and the floor. A stone block partition between a toilet and shower were also brought down. He thought that it would be minimal work to bring back the premises to its pre-existing condition. He however opined that it would be unnecessary to re-renovate the premises back because what has been done is an improvement of the premises. He pointed at the mezzanine floor which he thought was an advantage due to the extra space created. The plaintiffs also had a quantity surveyor's report which the parties agreed to admit by consent.

8. I invited counsel to file written submissions, which they did, and I have taken note of the submissions made by both counsel for the plaintiffs and defendants.

9. The genesis of the dispute between the parties is the Letter of Offer dated 12 October 2016 and it is from this document that I wish to begin my analysis of this matter. The Letter of Offer has 25 clauses but it is not necessary for me to copy the whole of it here for it is only a few clauses of it which appear to be in dispute. Generally, what the plaintiffs were offering the defendants was the suit premises for a term of 5 years and 6 months at some specified rent. The lease was set to commence on 1 December 2016 provided all the conditions in the Letter of Offer were met. The clauses in dispute, in my view, are clauses 8, 12, 17, 23, 24 and the last paragraph of the said letter. These clauses are drawn as follows :-

Clause 8 : Security Deposit – Together with the acceptance of this offer the tenant will pay a deposit equal to One (1) quarter's rent being Kenya Shillings Two Hundred and Seventy Thousand (Kshs. 270,000/=). This deposit will be retained by the Landlord as security for the due performance by the tenant of his/her/its obligation under the lease. The deposit will, subject to the provisions of this letter, be refundable without interest to the tenant after the expiry of the lease and delivery up of possession of the premises in accordance with the covenants contained in the lease.

Clause 12 : Partitioning, Fixtures and Fittings – You will be responsible to provide such partitioning, fixtures and fittings as you may require subject to the Landlord's prior written approval.

As such you will be required to obtain the Landlord's prior written approval through its architects at your costs (sic) of the purposed design and layout of the interior of the premises. Before commencing of any alteration or improvement to the interior you will submit plans of the intended layout and design specifying the materials to be used and shall not carry out improvements or alterations without the Landlord's prior written consent.

The tenant will be responsible for the partitioning of the office to meet its requirements such as partitioning to the specification of the building architect.

Clause 17 – Possession of the Premises – You will not be entitled to take possession of the Premises until such time as you execute a formal Lease and pay all sums specified in this Letter of Offer. We may however at our discretion, allow you access to the Premises to carry out the fit outs provided you have executed the Letter of Offer and paid all the sums mentioned there in. Should the Landlord grant possession prior to these conditions being fulfilled and/or the Lease being executed by the parties, the Company agrees and confirms that the use and/or occupation of the Premises in such manner shall not create a "controlled tenancy" as defined by the Landlord and Tenants (Shops, Hotels & Catering Establishments) Act Cap 301, Laws of Kenya.

Clause 23 : Legal Costs and Expenses – All costs and expenses of preparing and completing the lease including legal fees, stamp duty, other disbursements and value added tax (VAT) will be for your account. Upon your confirmation that you wish to proceed, you will be required to pay a deposit on account of costs and expenses. The balance (if any) will be paid upon demand by the landlord or its advocates. This sum shall be paid directly to the firm of advocates by way of a banker's cheque or cash.

Clause 24 : Acceptance – By accepting the terms of this letter of offer, the tenant is deemed to approve the standard form of lease and agrees to execute and return the lease within Five (5) days when it is submitted to the tenant together with the remittance to cover the Landlord's advocates estimates of their charges for completion of the lease which is payable by the tenant immediately on demand.

10. The last paragraph of the Letter of Offer states as follows :-

This invitation will remain open for acceptance until the close of business on the 10th day from the date hereof and may be accepted upon the following terms :-

This letter is sent to you in triplicate. Acceptance shall be in writing on the duplicates of this letter and shall be effective only when signed in duplicates of this letter together with unconditional payment of the deposit specified hereunder shall be received by us. If such written acceptance and payment under deposits specified hereunder is not received within the above-stipulated period this offer will lapse.

Upon receipt of your confirmation and the deposits required and subject to confirmation from the Landlord, we will arrange for the Lease to be sent to you for execution. The Lease must be executed within Seven (7) days of its delivery to you, failure to which negotiations may be terminated without reference to you.

The lease will become binding upon execution by the tenant, the Landlord and any chargee whose consent may be required. Possession shall be granted upon the signing of the Lease by the tenant and payments of the sum of Kenya Shillings Five Hundred and Eighty Five Thousand, One Hundred and Thirty Two (Kshs. 585,132.00) in cleared funds.

Notwithstanding, this matter remains subject to lease, the Landlord will be entitled to retain out of the deposits paid under this letter any costs and expenses incurred in preparing and negotiating the lease if you do not execute the lease within the period specified above. Any balance will then be returned to you.

11. It will be seen from the above that the Letter of Offer did stipulate at Clause 8, that together with the acceptance, the tenant (defendants) needed to pay a deposit of one quarter rent, being Kshs. 270,000/=. I have gone through the Letter of Offer and I have not seen any other payment that was required to be paid together with the acceptance. The last paragraph of the letter at Clause (c) only applies to possession, and it states that possession shall be granted on signing of the lease and on payment of the sum of Kshs. 585,132.00/= (though again under Clause 17, possession could be given after executing the letter of offer and making payment, for purposes of renovation). The last page of the Letter of Offer has the acceptance, and I have seen that it was signed by the defendants. That acceptance requires the defendants to enclose a sum of Kshs. 585,132.000 which is broken down as deposit of Kshs. 270,000/=: first quarter rent of Kshs. 270,000/= and Legal fees and stamp duty of Kshs. 45, 132/=. To me, this is a departure from the terms of the Letter of Offer, which as I have stated, at clause 8, only required payment of the deposit of Kshs. 270,000/=. Payment of legal fees, is covered in Clause 23, which it will be seen stipulates that this will be payable on confirmation that the defendants wish to proceed. Any balance was to be paid upon demand by the advocates or the Landlord. In my view, there was thus confusion created by the acceptance, which mentioned that there was enclosed the amount of Kshs. 583,132/=. As far as I can see, once the acceptance was signed and a sum of Kshs. 270,000/= made, the other payments would have had to await the formal execution of the Lease, once the document was made available. I do not see how the plaintiffs can now claim that the defendants were in any breach of the terms in the condition of offer. What the plaintiffs needed to do was to forward the lease for execution, and then await payment of the first quarter rent and the money for registration of the lease, which in any case, could have awaited a demand by either the landlord or the advocates preparing the lease, who in any case were the landlord's advocates. It is therefore my opinion that the plaintiffs could not cancel the Letter of Offer based on the bounced cheque, for it was not a requirement for the payments in the bounced cheque to be made before the lease was formally drawn and executed. The only payment that was required to signal acceptance, was the sum of Kshs. 270,000/=: being the deposit, and this was paid by way of banker's cheque. Other monies would have been due once the lease is drawn and signed.

12. The other issue raised by the plaintiffs, apart from the bounced cheque, is the claim that the defendants had no permission to renovate the premises. I have set out clause 12 of the Letter of Offer which relates to partitions, fixtures and fittings. It is true that before any partitioning was to be done, the defendants needed to make available the plans thereof to the Landlord for approval and approval needed to be in writing. Clause 17 of the Letter of Offer could allow possession for purposes of renovation pending execution of the formal lease. The plaintiffs have of course complained that they never gave any written authority for the renovations. The defendants on the other hand contend that they were granted access and permission to renovate. My own view of the matter is that despite the Letter of Offer stipulating that written consent was necessary, the plaintiffs, through their conduct, waived this requirement and they are now estopped from relying on Clause 23 of the Letter of Offer. I say so because the plaintiffs opened the premises to the defendants for renovations. They cannot now claim that they were not aware of the on-going renovations for these were not done under the cover of darkness or by any stealth. DW-1 testified that these renovations went on for a period of 3 weeks. The plaintiffs do not pretend to say that they issued any written or verbal warning to the defendants to stop the renovations. If they felt prejudiced by the renovations, all the plaintiffs needed to do was to inform the defendants not to proceed, for reason that they have not approved the said renovations. As I have mentioned, by not taking any action, any reasonable person would deem that the plaintiffs have no problem with the renovations, and thus the doctrine of estoppel comes into play to stop the plaintiffs from now claiming the rights under Clause 23 of the Letter of Offer. The plaintiffs cannot therefore succeed in their claim to have the premises returned to their pre-existing state for they gave their tacit approval for the renovations.

13. I appreciate however, that the terms in the Letter of Offer were all subject to a formal lease being prepared by the parties. The Letter of Offer indeed mentions at Clause 24 that the tenant must approve the standard form of lease and return it within 5 days, though of course this contradicts paragraph (b) of the last paragraph of the letter which stipulates 7 days. It doesn't however matter, for I have not been informed that there was any formal lease that was ever executed. There certainly could not have been, because through the letter dated 25 November 2016, the plaintiffs proceeded to cancel the letter of offer "on account of your (plaintiffs) non acceptance." As I have demonstrated above, I do not believe that there was any material breach on the part of the defendants on the terms of offer, and they would have expected the plaintiffs to offer them a lease. But again, all this was subject to a formal lease, and without any formal lease, one cannot say that there was any landlord-tenant relationship, and none can be implied because no rent under the lease was ever paid.

14. My take of the matter is that the parties need to be taken back to the position that they were in before the Letter of Offer. The defendants with the consent of the plaintiffs did renovate the premises and my position is that they are perfectly entitled to a refund of the money that they expended together with interest from the date of the renovations. I have seen the reports by the Quantity Surveyors, and it is clear to me that the owner of the premises has benefited or stands to benefit from the renovations made. It is in fact superfluous, as DW-2 testified, to pull down the renovations, for they are an improvement of the premises. The just order to make therefore is to order the plaintiffs to refund the defendants the cost of renovations together with interest from the time that they were made. The defendants have also not derived any benefit from the deposit that they made and they are thus also entitled to a refund of the same with interest from the time that the money was paid. Having said that, I need to determine the costs of renovation. The plaintiffs' valuer gave the value of Kshs. 729, 301.28/=. The defendants' valuer gave the sum of Kshs. 997, 930.60/=. I heard the valuer of the defendants and his quantification was well explained. I never heard the valuer of the plaintiffs and his report was never subjected to cross-examination. The fact that his report was admitted by consent does not mean that its contents were also admitted. On my part, I have no reason to contest the report of the defendants' valuer. I will thus value the costs of the renovations at Kshs. 997,930.60/=.

15. Both parties made claims for mesne profits against each other. I have already said that there was never a lease. The plaintiffs cannot therefore claim any mesne profits. In any case, the plaintiffs had a duty to mitigate their loss. They could have done this by allowing the defendants to continue operating as this litigation went on, subject to payment of rent. They did not do so. In fact, I wonder on what reasoning the plaintiffs could have left the premises to remain idle for all this time then claim that they deserve to be compensated for that time by the defendants. That to me, was completely unreasonable and uncalled for. The defendants cannot also claim any money for loss of business for the same reason that the plaintiffs cannot claim, that is, there was no lease. Without prejudice to the above, nothing stopped the defendants from mitigating their loss by conducting their business elsewhere. From the foregoing, I am not persuaded to make any order for mesne profits or loss of business for either the plaintiff or defendant.

16. I believe that I have dealt with all issues save for costs. It will be seen that my view of the matter is that there was no breach on the part of

the defendants on the Letter of Offer. One would therefore have expected the plaintiffs to tender a formal Lease for execution by the defendants. For that reason, the costs of this suit will be shouldered by the plaintiffs.

17. In summary, I make the following final orders :-

(i) That a declaration is hereby issued that there is no formal lease executed between the plaintiffs and defendants and therefore no formal landlord-tenant relationship exists between the parties.

(ii) That the plaintiffs jointly and/or severally, do refund to the defendants the renovation costs of Kshs. 997,930.60/= with interest at court rates from the time of filing of the counterclaim until payment in full.

(iii) That the plaintiffs jointly and/or severally, do refund the defendants the sum of Kshs. 270,000/= paid as deposit for the premises, with interest at court rates from the time that it was paid, until settlement in full.

(iv) That no order is made in respect of mesne profits or loss of business in favour or against either plaintiffs or defendants.

(v) That the plaintiffs will pay the costs of this suit.

18. Judgment accordingly.

DATED and delivered this 21st day of APRIL 2020

JUSTICE MUNYAO SILA

JUDGE, ENVIRONMENT AND LAND COURT

AT MOMBASA