



REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA AT MOMBASA

ELC NO. 257 OF 2013

ZAINAB ABDUL LATIF VALANIPLAINIFF

-VERSUS-

MOHAMED KHIZER AYUB KHAMISADEFENDANT

RULING

1. The plaintiff's application dated 11th March 2015 and brought under section 1 A, 1 B and 3 A of the Civil Procedure Act and order 2 Rule 15 of the Civil Procedure Rules seeks the following orders ;

1(a) Judgement be entered in favour of the Plaintiff for vacant possession of premises on Plot No. MSA/BLOCK XLVI/78 to be given within 30 days from date of order, mesne profits and costs as prayed in the Plaint.

1(b) And/or in the alternative judgement be entered for vacant possession of premises on Plot No. MSA/BLOCK XLVI/178 to be given within 30 days of order and matter proceeds for assessment of mesne profits, damages and costs.

2) In addition to prayer 1(b) herein above it is hereby ordered that pending the hearing and determination of the suit herein on the aspect of mesne profits, damages and costs, the Defendant do deposit a sum of Kshs. 1,936,000/= within thirty (30) days from making of such order, into the Plaintiff's Account being the total amount of rent that would be payable by the Respondent from 1st October 2013 to 31st May, 2015 at the rate of Kshs 96,800/= per month had the Plaintiff not terminated the tenancy and to continue to so deposit a sum of Kshs. 96,800/= by 1st day of every month commencing from 1st June, 2015 until final determination of the suit herein.

3) The Court be pleased to order that unless the above accrued rent is deposited within the time limits set out in prayer (2) above, the Defendant's defence shall stand dismissed with costs and judgement entered in favour of the Plaintiff as prayed in the Plaint whereby damages and costs are to be assessed later on a date to be given but vacant possession and payment of mesne profits to be paid within 3 days from date of order.

4) Costs of this Application be provided for.

2. The application is supported by the grounds on the face of it and the affidavit sworn by Zainab Valani — the plaintiff. The applicant deposes that they had a landlord/tenant relationship with the Respondent/defendant which expired on 30th September 2013 after she served the Respondent with termination notice. She deposed that the Respondent's continued stay in the premises amount to trespass. The applicant deposed that she has neither received nor accepted rent from the demised premises from the

time notice was served.

3. The application is opposed by the defendant/respondent vide his replying affidavit filed on 5th May 2015. The Respondent admits that he has been a tenant paying a monthly rent of Kshs 96,800 payable quarterly. He deposed that the letter dated 27.7.2013 terminating his tenancy was legally defective and of no effect hence the tenancy continues to legally subsist.

4. The Respondent deposed further that the initial lease expired on 31.12.2012 but Applicant continued to collect rent quarterly and only issued termination notice on 27.7.13. He stated that they had an oral agreement to repair the house and he used the sum of Kshs 9008101= on the repairs. It is his argument that granting the orders sought would deviate from the principle, "***Audi Alterum Portem***". Lastly he deposed that he pleaded through his defence filed to be allowed to deposit the rents accruing in Court.

5. The parties then filed written submissions supported by various case laws. The plaintiff gave a summary of the facts on the background of her case. She cited clause 8 of the lease which mandated the Respondent to carry out all the internal repairs and clause 11 which required the landlord to do external repairs. The plaintiff submits that their relationship having terminated, she asks the Court to grant partial judgement in terms of prayer 1(a). She relies on the statutory provisions and case law of **Katsuri Ltd vs Nyeri Wholesalers (2014) eKLR** and **Peter Mbutia vs Samson Osman (2014) eKLR**.

6. The defendant submitted on background of the orders sought and why the same cannot be granted because they go against the tenets of natural justice. He relied on the cases of **Republic vs Public Procurement & Complaints Review Board Ex parte Invesco Assurance Co. Ltd (2014) eKLR** and **Msagha vs C. J & 7 others (2006) 2 KLR 553** to support this submission.

7. The defendant also distinguished the judicial authorities relied on by the Applicant stating that they were all on summary judgement unlike the present application which is premised on order 2 for striking out pleadings.

Secondly that the Katsuri case and Peter Mwangi were all decided without reference to the provisions of the new Constitution and the new Civil Procedure Rules 2010.

8. The Respondent also blames the Applicant for filing application after application instead of fixing this matter for hearing. Further, the rent sought is not a condition upon which pleadings can be struck out. He urged the Court to dismiss the application with costs.

9. The present application is premised on the overriding objectives and Order 2 Rule 15 1 (b), (c) and (d) of the Civil Procedure Rules. Order 2 rule 15 allows suits to be struck out or amended at any stage of the proceedings if it is scandalous, vexatious, would delay a fair trial of the matter or is an abuse of the Court process. The Applicant in the body of her application or grounds has not set out whether the Respondent's pleadings are scandalous or vexatious or will delay fair trial in this matter.

10. In the Respondent's view by their submissions is that the application ought to have been filed under Order 36. However this applies only where the defendant has not filed a defence as happened in the Katsuri case supra. Be that as it may, I will consider whether the orders are available to the Applicant. The applicant stated in her grounds that by a letter dated 27.7.2013, she terminated the Respondent's tenancy and she expected vacant possession. The Respondent did not comply hence she filed this suit and subsequently the application.

11. The Respondent on his part stated this letter terminating the tenancy was illegal and was of no effect. The reason for the illegality was not given but this Court presumes that since the Respondent is claiming rent was paid quarterly probably the notice ought to have been 3 months instead of the time contained in the letter.

12. In the letter dated 27.8.2007 which gave the Respondent occupation, there is only indication of monthly rent. It did not state mode of payment of rent was quarterly. The letter of 27.7.2013 gave sixty

(60) days notice. The Respondent did not challenge this notice before this suit was filed on 12th November 2013. I am unable to see any defence he would have to the claim for vacant possession given that he did not challenge the notice served.

13. The Respondent deposed that they had an oral agreement for repairs in the amount out of which he expended costs totalling 900810/=. The Applicant in the prayers sought for mesne profits and damages to proceed to be assessed. The defendant's expenses will be taken care of during such assessment. I do find merit in prayer 1 (b) of the application and grant it.

14. The Respondent shall hand over vacant possession of the suit premises MSA/BLOCK XLVI/178 within 30 days of delivery of this ruling. Thereafter this matter be listed for assessment on the mesne profits and or any set off from the defendant's claims if any.

15. I will not deal with prayer 2 and 3 as there was already an order made on 6.10.15 for the defendant to commence paying outstanding rents. If there is any balance, then appropriate orders will be made once the mesne profits is assessed. Costs of the application is awarded to the Applicant.

Ruling Dated and Delivered in Mombasa this 12th day of February 2016

A. OMOLLO

JUDGE