



REPUBLIC OF KENYA

IN THE ENVIRONMENT AND LAND COURT

AT NAIROBI

ELC CASE NO. 1329 OF 2013

PAUL NG'ANG'A MBUTHIA.....PLAINTIFF

VERSUS

ANASTACIA WARIARA WAGICIENGO.....DEFENDANT

JUDGMENT

1. The plaintiff brought this suit through a plaint dated 5/11/2013. His case was that by a written agreement dated 5/4/2011, he leased from the defendant Land Reference Numbers 209/2820/2 and 209/2820/3 for a period of 6 years. The lease was to expire on 1/5/2017. Subsequently, the defendant issued him with a notice terminating the lease effective 1/8/2012. He added that the defendant continued to interfere with his operations in the suit properties.

2. Consequently, he sought the following verbatim orders against the defendant:

a) A permanent injunction restraining the defendant by herself, her agents and/or servants from evicting or in any way interfering with the plaintiff's quiet possession and enjoyment of the suit premises.

b) General damages.

c) Costs of this suit.

3. In response, the defendant filed a statement of defence and counter-claim dated 3/9/2015. He denied the plaintiff's claim. His case was that, indeed, there was a tenancy relationship whose terms were set out in the letter of offer dated 5/4/2011 and in the subsequent lease document signed on 1/5/2011 and 2/6/2011 respectively. The terms of the lease were as follows: (i) the lease period was to be six years from 1/5/2011; (ii) the rent payable monthly was from 1/5/2013 to 30/4/2015- Kshs 192,500 per month; and from 1/5/2011 to 30/4/2013 – Kshs 175,000 per month; from 1/5/2015 to 30/4/2012- Kshs 211,750,00 per month; (iii) unpaid rent was to attract interest of 1% per month from the due date till payment in full; and (v) in the event the plaintiff defaulted to pay rent, the defendant would be entitled to exercise the right of re-entry resulting into absolute determination of the lease.

4. The defendant further averred that the plaintiff defaulted to pay rent, with the result that as at 1/11/2013, the plaintiff was in rent arrears of Kshs 2,987,500. This prompted the defendant to serve a notice dated 1/11/2013 upon the plaintiff, terminating the lease and invoking the right of re-entry. He contended that the notice of termination was lawful.

5. The defendant made a counterclaim of Kshs 6,242,500 being rent arrears and Kshs 1,295,475 being contractual interest, together totaling Kshs 7,537,950 as at the time of bringing the counter-claim.

6. Consequently, the defendant sought the following verbatim orders by way of counter-claim:

a) The plaintiff's suit be dismissed and the defendant's counter-claim be allowed with costs.

b) The plaintiff does not pay to the defendant the sum of kshs 7,537,950 plus interest thereon at court rates from the date of filing suit until payment thereof in full.

c) Costs of the suit and counter-claim.

d) Interest on costs from the date of judgment until settlement thereof

7. The plaintiff filed a reply to defence and defence to counter-claim dated 22/9/2011 in which he reiterated his claim and denied the defendant's counter-claim.

Plaintiff's Evidence

8. The plaintiff testified as PW1. He adopted his written statement dated 15/11/2019 and produced six exhibits. In summary, his testimony was that he accepted the offer to lease the suit premises in April 2011 but he could not take possession of the premises because the defendant was undertaking renovations. The premises became available in October 2011. The defendant agreed that the plaintiff would undertake some renovation works on the premises and deduct the cost from the monthly rent. Due to delay in renovation works, he started paying rent in October 2011, with the concurrence of the defendant. He paid rent through cheques and bank deposits. By mutual consent, the monthly rent was 150,000 and not Kshs 175,000 as indicated in the lease agreement. As per their discussion of 28/10/2013, the rent arrears stood at Kshs 600,000 but the defendant did not want him to pay rent arrears; she insisted on him vacating the suit premises by 1/12/2013. On 28/10/2013, the defendant showed him a deposit slip of Kshs 2,000,000 which he came to learn was goodwill money paid by a prospective tenant.

9. In cross-examination, he stated that he had a written lease agreement with the defendant. He also had a letter of offer. The agreed monthly rent in the lease was Kshs 175,000. He was to start paying rent in May 2011. He could not remember how much he had paid towards rent. Between 1/5/2011 and 30/4/2013, he was supposed to pay Kshs 175,000 per month but he had paid Kshs 155,000 for the entire period. He did not pay the rent because the building was under renovation by the landlord. He was given the premises in October 2011. He did not inspect the premises before signing the letter of offer. Payments made were reflected in the exhibits. The payments fell short of what he was expected to pay. He did not have documentary evidence to support the works he did on the premises. The lease provided for interest at 1% per month. He vacated the premises in February 2015. He had accumulated rent arrears and interest which he had not paid at the time of testifying. He was not in business at the time of testifying.

10. The defendant testified as DW1. She adopted her written statement dated 3/9/2015 as part of her sworn evidence-in-chief. She produced 6 exhibits. In summary, her evidence was that she let out the suit premises to the plaintiff. The terms and conditions of the tenancy were contained in the letter of offer dated 5/4/2011 and the subsequent lease executed on 1/5/2011 and 2/6/2011 respectively. Among the terms were those set out in paragraph 3 above. The plaintiff breached the contract by failing to pay rent on the due dates or at all, with the result that as at 1/11/2013, the plaintiff was in rent arrears of Kshs 2,987,500. In light of the breach, she sought to exercise her rights under the tenancy contract. The plaintiff brought this suit to challenge the termination notice which she had issued. The plaintiff obtained injunctive orders against her. The plaintiff continued to occupy the premises without paying rent, prompting her to move the court to vacate the injunctive orders. While the application was pending, the plaintiff, on his own volition, vacated the suit premises in March 2015 but failed to pay the outstanding rent arrears. By April 2015, the plaintiff owed her rent arrears of Kshs 6,242,500 and contractual interest of Kshs 1,295,475, making a total of Kshs 7,537,950.

11. He added that he never agreed to a reduction of rent. Before the plaintiff took the premises, he paid Kshs 350,000. The premises were commercial. She never interfered with the plaintiff's occupation of the premium.

12. In cross-examination, she stated that the agreed rent was not Kshs 150,000. There was no change relating to the monthly rent. She signed the lease stipulating the monthly rent. The property was not under renovation. She met the plaintiff at Sarit in 28/10/2013 because the plaintiff was unable to pay rent. Her agent used to issue receipts. She did not show the plaintiff any deposit slip. On 28/10/2013 she proposed termination of the lease in December the same year because the plaintiff was unable to pay rent. She did not know if any of her tenants paid money to her lawyer.

Plaintiff's Submissions

13. The plaintiff filed written Submissions dated 20/12/2019. He filed further submissions on 14/2/2020. He submitted that through an agreement dated 28/10/2013, parties agreed to reduce monthly rent to Kshs 150,000. As at 28/10/2013, the rent arrears were approximately Kshs 600,000. The termination letter by the defendant went against the agreement reached by the parties on 28/10/2013. He had no option but to take legal action against the defendant to safeguard his interests.

14. Regarding the counter-claim, he submitted that the counter-claim was not based on facts because the agreed monthly rent was Kshs 150,000; the lease was terminated by the defendant on 1/11/2013; he remained in the premises because of the court order; and he took possession of the premises in October 2011. He closed his business in the suit premises in February 2015 when it became clear that he could not revive it. He urged the court to award him Kshs 1,724,104 plus interest.

15. In his further submissions filed on 14/2/2020, he submitted that the sum of Kshs 238,403 which he had spent on electrical wiring was to be deducted from the rent arrears of Kshs 590,000. He added that there was no lease between him and the defendant effective 1/11/2013. He urged the court to award him Kshs 2,000,000 based on the deposit slip of the goodwill money which the defendant had showed him.

Defendant's Submissions

16. The defendant filed written submissions dated 4/2/2020. Counsel for the defendant itemized the following as the issues falling for determination in the suit: (i) Did the plaintiff breach his rent payment obligation (ii) Was the defendant entitled to exercise the right of entry under the lease and the law? If so, did the defendant exercise her rights lawfully under the lease agreements (iii) Whether as at 1/4/2015, the plaintiff owed the defendant Kshs 6,242,500 in rent arrears as pleaded in the counter-claim? (iv) Is the defendant entitled to interest on such rent arrears found to be due? If so, at what rate? (v) who should bear the costs of the suit?

17. Counsel submitted that rent arrears due to her from the defendant stood at Kshs 2,987,500 as at 1/11/2013 and in abuse of the court process, the plaintiff moved to court and obtained court orders which he used to evade his contractual obligations. Counsel added that there was no agreement to review rent to Kshs 150,000 per month. Counsel argued that the agreement of 28/10/2013 did not contain a provision on

review of rent. Counsel further argued that parole evidence would not be used to vary the terms of the lease.

18. Counsel further submitted that the rent which remained unpaid was Kshs 6,242,500 as at March 2015. Counsel urged the court to award the defendant contractual interest and costs of the suit.

Analysis and Determination

19. I have considered the pleadings, evidence and submissions placed before the court. I have also considered the applicable legal framework and jurisprudence. Parties did not frame a common statement of issues for determination. Having considered the pleadings, evidence and submissions in this matter, the following are the six (6) key issues falling for determination in this suit: (i) Whether the tenancy contract between the parties in this suit was varied to reduce the monthly rent from Kshs 175,000 to Kshs 150,000; (ii) Whether the defendant breached the tenancy contract; (iii) Whether the plaintiff breached the tenancy contract; (iv) Whether the plaintiff is entitled to the reliefs sought in the plaint; (v) Whether the defendant is entitled to the reliefs sought in the counter-claim; and (vi) What order should be made in relation to costs of this suit. I will make brief sequential pronouncements on the six issues in the order in which they are itemized. My analysis and pronouncements will proceed from the premise that there is common ground that there existed duly executed tenancy contract between the parties. The contract was contained in the lease executed by the two parties on 1/5/2011 and 2/6/2011 respectively.

20. The first issue is whether the tenancy contract between the parties was varied to reduce the monthly rent from Kshs 175,000 to Kshs 150,000. Parties to this dispute entered into the tenancy agreement on the basis of a letter of offer dated 5/4/2011. The letter of offer was subsequently succeeded by a lease dated 5/4/2011 but executed by the parties on 1/5/2011 and 2/6/2011 respectively. Neither of the parties disputes the lease. The plaintiff, however, contends that the terms of the lease were orally changed. The defendant's case is that the terms of the lease were never changed.

21. The written and signed lease contained a clear provision on the rent payable monthly. Under the parole evidence rule, where the intention of the parties is clear from the document signed by the parties, parole evidence cannot be used to vary the clear terms of the document. The Court of Appeal emphasized this principle in **Twiga Chemicals Industries Limited Versus Allan Stephen Reynolds [2014] EKLK** in the following words

“The parole evidence rule is a well-granted rule in law. The general rule is that the intention of the parties to an agreement should be ascertained from the document as is it deemed that what the parties intended is what was stated in the agreement”

22. The plaintiff contended that the parties varied the terms of the lease through the document dated 28/10/2013. The said document did not provide that the parties were varying the monthly rent from Kshs 175,000 to Kshs 150,000. There is therefore no evidence to suggest that the terms of the lease were varied. If the parties intended to vary the lease, they could have executed a document clearly stating that they had varied the monthly rent. My finding on the first issue therefore is that there was no variation of the terms of the tenancy contract between the parties to this suit.

23. The second issue is whether the defendant breached the tenancy. The third issue is whether the plaintiff breached the tenancy contract by failing to pay rent. I will determine the two issues concurrently because they both revolve around the question of the breach. The plaintiff was entitled to enjoy quiet possession of the suit premises if he paid rent as agreed and discharged his other obligations in the tenancy contract. The plaintiff admitted at paragraph 5 of his written witness statement that he fell into rent arrears. He moved to court to obtain a court order after the defendant served him with a notice terminating the tenancy on account of his failure to pay rent in the manner provided in the lease. The plaintiff similarly admitted in his evidence during cross-examination that he ran into rent arrears.

24. Under clause 7 of the lease, the defendant was entitled to re-enter the premises and take possession of the premises in the event of breach by the plaintiff. This is the contractual right which the defendant exercised. This is what prompted the plaintiff to dash to court and obtain court orders. Upon obtaining the court order, the plaintiff continued to stay in the suit premises without paying the agreed rent. In his own evidence he left in February 2015. Having assessed the evidence at the full trial, the court is satisfied, on account of the plaintiff's admission of failure to pay rent, that the plaintiff breached the lease and the defendant was entitled to issue the notice she issued. I find no breach on part of the defendant.

25. Issues (iv) and (v) relate to the reliefs available to the parties. I have made a finding that there was no breach by the defendant. It therefore follows that the orders sought by the plaintiff against the defendant are not available. In any event, the relief sought by the plaintiff was principally in form of a permanent injunction. First, the plaintiff moved out of the suit premises on his own volition in 2015. Secondly the term of the lease was to lapse in 2017. It is now 2020. None of the orders sought by the plaintiff in the plaint is available in the circumstances. The plaintiff submitted that the court should award him certain monies. Regrettably that plea was never made in the plaint he filed. The court cannot award him what he did not claim in the plaint.

26. The defendant made a counter-claim of Kshs 7,537,950 which consisted of rent arrears and interest. The plaintiff left the suit premises in February 2015. I have looked at the tabulation of the defendant alongside the plaintiff's evidence. The following were rents payable for the material period when the plaintiff was in the suit premises.

(i) 1/5/2011 to 30/4/2013 @ Kshs 175,000 for 24months – Kshs 4,200,000

(ii) 1/5/2013 to February 2015 @ Kshs 192,000 for 22months – Kshs 4,235,000

Total Kshs 8,435,000

27. Evidence tendered by the plaintiff showed that he paid Kshs 2,485,000 for the entire period of the lease.

28. Consequently, the sum owed to defendant is Kshs 5,950,000. I will award the defendant the above sum of Kshs 5,950,000.

29. It was the duty of the defendant to specify the exact day from which the contractual interest was to be reckoned and against what exact amount. She did not discharge that evidential duty. In the circumstances, I will not award the contractual interest claimed. I will instead award interest at court rate from the date of filing the counter-claim.

Disposal Orders

30. In light of the above findings, I make the following disposal orders in this suit:

a) The plaintiff's suit is dismissed for lack of merit.

b) The defendant's counterclaim is allowed only in the sum of Kshs 5,950,000 plus interest at court rate from the date of filing the counter-claim.

c) The Plaintiff shall bear costs of this suit and the counter-claim.

DATED, SIGNED AND DELIVERD AT NAIROBI ON THIS 28TH DAY OF JULY 2020.

B M EBOSO

JUDGE

In the presence of: -

The Plaintiff Acting in Person

Ms. Kibore for the defendant

Court Clerk – June Nafula