



REPUBLIC OF KENYA
IN THE ENVIRONMENT AND LAND COURT AT NAIROBI

MILIMANI LAW COURTS

ELC NO. 203 OF 2016

BRAND CITY LIMITED.....PLAINTIFF

VERSUS

UNITED HOUSING ESTATE LIMITED.....DEFENDANT

JUDGMENT

The Defendant is and was at all material times the registered proprietor of leasehold interest in all that parcel of Land known as L.R No. 209/5812, Nairobi (hereinafter referred to as “**the property**”). By an instrument of lease dated 14th September, 2010, the defendant leased to the Plaintiff two shop premises situated on the ground floor of the property (hereinafter referred to as “**the suit premises**” on terms and conditions which were set out in the said lease. The lease provided among others that the Plaintiff would hold the suit premises for a term of 6 years with effect from 1st April, 2010 and at the expiration of or sooner determination of the said term to deliver up the suit premises to the Defendant. The lease provided further that if three (3) months preceding the expiration or determination of the term thereof the Plaintiff had not exercised its right to renew the same, the Plaintiff was to permit persons authorized by the Defendant or the Defendant’s agents to view the suit premises and if necessary to affix thereon a notice board for re-letting or selling the same.

The Plaintiff’s claim and the Defendant’s counter-claim:

The Plaintiff brought this suit against the Defendant on 3rd March, 2016 seeking the following reliefs:-

- a. A permanent injunction restraining the Defendant from evicting or interfering with the Plaintiff’s quiet possession of the suit premises.
- b. An order compelling the Defendant to renew the lease dated 14th September 2010 for a further term of 6 years.
- c. In the alternative to (b) above, an order that the Plaintiff does remain in occupation of the suit premises for a period of 24 months to enable the Plaintiff find alternative premises to move its business.
- d. Costs of the suit.
- e. Any other relief the court deems fit and just to grant.

In its plaint dated 2nd March 2016, the Plaintiff averred that although the lease that it entered into with the Defendant in respect of the suit premises had an express renewal clause, the Defendant had refused to renew the same and had instead issued it with a notice to vacate and hand over the suit premises on or before 31st March, 2016. The Plaintiff averred that the ambiguity in the said renewal clause prejudiced it in that there was no clarity in the said clause as to when the renewal of the lease was to take place. The Plaintiff averred that in accordance with the said renewal clause, it exercised its right to renew the lease but the Defendant declined its renewal request without assigning any reason. The Plaintiff averred that the notice given to it by the Defendant was inadequate and that it would suffer irreparable loss and damage unless the court intervenes and grants the reliefs sought. The Plaintiff averred that it had obtained an overdraft facility from a bank to finance its business on the suit premises and had a lot of goods and/or stock on the suit premises. The Plaintiff averred further that it had acquired substantial goodwill on the suit premises which could not be compensated by an award of damages.

The Defendant entered appearance and filed a statement of defence and counter-claim on 22nd March 2016. In its statement of defence, the Defendant admitted that it entered into a lease agreement with the Plaintiff on 14th September 2010 which lease was to expire on 31st March 2016. The Defendant admitted further that the lease had a renewal clause. The Defendant contended however that the renewal of the lease was not automatic. The Defendant averred that the Plaintiff did not express a desire to renew the lease and as a result, it served the Plaintiff with a letter dated 18th March 2016 requesting the Plaintiff to vacate and handover the suit premises at the expiry of the lease on 31st March 2016. The Defendant averred further that since the lease had an expiry date which was well known, it was not necessary to serve the Plaintiff with a termination or eviction notice. The Defendant averred further that it was not under any obligation to proffer any reasons or explanation for declining to renew the lease. The Defendant averred that the Plaintiff could not force itself to remain on the suit premises neither could it coerce the Defendant to renew the lease. The Defendant averred further that the Plaintiff's prayer to be allowed to remain on the suit premises for a further period of 24 months is unjustifiable, unreasonable and untenable in the circumstances and urged the court to dismiss the Plaintiff's suit.

In its counter-claim, the Defendant averred that the lease it entered into with the Plaintiff was to expire on 31st March 2016 and as such no notice to terminate the same was necessary. The Defendant averred that the Plaintiff failed to request for renewal of the said lease three (3) months prior to the expiry thereof in accordance with clause 2(ii) thereof. The Defendant averred that the Plaintiff was under an obligation upon the expiry of the lease to deliver vacant possession of the suit premises to the Defendant after the Defendant had notified it that it did not intend to renew the lease. The Defendant averred that upon the expiry of the lease on 31st March 2016 the Plaintiff's right to continue in occupation of the suit premises ceased. The Defendant sought judgment against the Plaintiff for vacant possession of the suit premises and the costs of the counter-claim. The Plaintiff filed a reply to defence and defence to counter-claim.

Agreement on the mode of disposal of the case:

Together with the Plaint, the Plaintiff had filed an application for interlocutory injunction to restrain the Defendant from evicting it from the suit premises pending the hearing and determination of the suit. The Plaintiff's application which was brought by way of Notice of Motion dated 2nd March, 2016 was opposed by the Defendant through a replying affidavit sworn by Amirali Nanji on 22nd March 2016. When the application came up for hearing on 24th March 2016, the advocates for the parties agreed to forego the same and to dispose of the suit on affidavit evidence and submissions. In addition to the affidavits which the parties had filed in support of and in opposition to the interlocutory application for injunction, they agreed to file further affidavits which together were to form part of the evidence in support of their respective cases. The Plaintiff filed a supplementary affidavit sworn by Jayendra Virchand Malde on 24th March 2016 while the Defendant filed a further replying affidavit sworn by Amirali Nanji on 1st April 2016. The parties thereafter exchanged written submissions.

Determination of the parties' respective claims:

I have considered the parties' respective cases as pleaded together with the affidavits filed in proof thereof. I have also considered the submissions by the parties' advocates and the authorities which were cited in support thereof. The parties framed and agreed on the following issues for determination by the court:-

1. Whether the Plaintiff is entitled to an extension of the lease dated 14th September 2010 which expired on 31st March 2016?
2. Whether the Defendant is entitled to vacant possession of the suit premises?

The first issue:

The facts giving rise to this suit are to a large extent not disputed. It is not disputed that the Plaintiff and the Defendant entered into a lease in respect of the suit premises for a term of 6 years with effect from 1st April, 2010. It is also not disputed that the said lease was to expire on 31st March 2016 unless the same was renewed or extended by the parties. The parties are in agreement that the lease had an option to renew clause. What is disputed is whether the said option to renew was properly exercised by the Plaintiff as provided for in the lease. I have carefully perused the lease annexed to the affidavit of JayendraVirchandMalde sworn on 2nd March 2016. With due respect to the position taken by the parties, I have not come across a valid and enforceable option to renew clause in this lease. Clause 2(ii) of the lease which both parties have referred to as the renewal clause provided as follows:-

“During the last three (3) months immediately preceding the expiration or determination of the term hereby granted if the lessee has not exercised its right to renew the lease the lessee shall permit persons with written authority from the lessor or the agents of the lessor at reasonable times of the day and upon a previous appointment having been made to view the premises and to permit the lessor or the agents of the lessor to enter upon the premises and to affix upon any suitable part thereof a notice board for re-letting or selling the same.”

In my view, this clause was intended to allow the Defendant and its agents to gain entry into the suit premises during the last three (3) months of the term of the lease to inspect the same in preparation for re-letting or selling the same once the plaintiff's lease came to an end. The Defendant was to gain such entry only if the Plaintiff had not exercised its right to renew the lease. This clause in my view presupposed that the Plaintiff had a right to renew the lease. The clause itself does not however contain such right. In the article, **Common law treatment of renewal rights in commercial agreements: A special look at franchises, distributorships and the duty of good faith by Adam Ship** that was relied upon by the Plaintiff in support of its submissions, the author has set out the following as the principal prerequisites to the enforcement of renewal right at common law:-

- a. **A right to renew must be rooted in contract, either the primary or a collateral agreement.**
- b. **A renewal clause in any agreement must provide certainty as to the essential terms that will govern the parties during the renewal term.**
- c. **A renewal clause and any conditions precedent expressed thereon must be properly exercised by the grantee in accordance with its terms subject however to certain common law rules that avoid undue forfeiture of rights.**

I am on the view that clause 2(ii) of the lease which the parties have contended to be the renewal clause does not meet the threshold set out above. The clause neither sets out the right to renew the lease nor the terms of such renewal or how the same was to be ascertained. There is also no indication as to how the right was to be exercised. The Plaintiff has argued that the clause is vague and as such the court should apply the *contra proferentem* rule of contractual interpretation and interpret the same against the Defendant who drew the lease. In support of this submission, reliance was put on the cases of **Horne Coupar vs. Velletta & Company, 2010 BCSC 483, CFC Stanbic Bank Ltd. vs. Kenya Revenue**

Authority & Another (2014) eKLR and Mwangi Ngumo vs. Kenya Institute of Management (2012) eKLR.

I am in agreement with the Plaintiff that where there is an ambiguity in a contract, the contract should be construed or interpreted against a party who drew it. In this particular case however, I do not find any ambiguity in clause 2(ii) of the lease. The clause simply did not provide for the renewal of the lease and no rule of interpretation would cause what is not, to be. In my view, the parties seem to have forgotten to insert an option to renew clause in the lease. This court cannot read into or insert such clause in the lease through interpretation or otherwise.

In the case of **Sands vs. Mutual Benefits Ltd.[1971]E.A 156** which concerned an option to renew a lease, the court held that;

“in the absence of agreement or a method of securing agreement to the new rent there was no effective renewal of the lease”.

In that case, Chanan Singh J. reviewed a number of authorities on the subject among them British Columbia Court of Appeal case of **Young vs. Van Bienen (1953), 3 D.L.R 702** where Bird J.A stated among others that;

“Determination of the questions raised on the appeal, in my opinion, depends upon whether the respondent under the terms of the option, acquired any right to a tenancy of the premises which is enforceable in law, and if so, whether that right subsisted at the date of service of the demand for possession. An agreement for a lease, if its terms are sufficiently certain, may be specifically enforced, like any other contract, but if the parties fail to express what they mean with reasonable certainty, the agreement is unenforceable, and will be held void.”

In the said case, the said judge stated further that:

“It must be certain when the term is to begin and how long it is to continue, as well as the rent to be paid.”

There is no doubt from the foregoing that what the parties herein have referred to as the option to renew the lease dated 14th September 2010 cannot pass the test of certainty. There is also no evidence that the Plaintiff exercised the purported option to renew the lease in accordance with the terms thereof. It follows that, if clause 2 (ii) of the said lease was intended by the parties to provide for an option to renew the lease then it is unenforceable.

Having found that the lease between the Plaintiff and the Defendant did not have a valid and enforceable renewal clause; I find no basis for the Plaintiff’s claim for extension of the said lease. The same applies to the Plaintiff’s plea to be allowed to continue occupying the suit premises for a period of 24 months to give it time to look for alternative premises to move its business. As rightly submitted by the Defendant, the lease between the parties was for a fixed term. It was to expire by effluxion of time unless earlier terminated on account of breach. The Defendant was not under any obligation to serve a notice of termination upon the Plaintiff. The issue of the notice served upon the Defendant being inadequate or insufficient does not therefore arise. For the foregoing reasons, my finding on the first issue is in the negative.

The second issue:

As I have stated above, it is common ground that the Plaintiff and the Defendant entered into a fixed term lease commencing on 1st April 2010 and expiring on 31st March 2016. The lease as I have found above had no valid renewal clause. The lease expired by effluxion of time on 31st March 2016. After the expiry of the lease, I can see no justification for the Plaintiff’s continued occupation of the suit premises. As was held by Mbogholi Msagha J. in the case of **R & K Investments vs. Evanson Gitau (1998) eKLR** that

was cited by the Defendant, after 31st March, 2016 there was no relationship between the Plaintiff and the Defendant which could be supported by any principle of law or equity.

In the case of **Kasturi Limited vs. Nyeri Wholesalers Limited (2014) eKLR**, that was also cited by the Defendant, the Court of Appeal stated that:-

“A tenant cannot impose or force himself on a landlord. In the instant case, when the lease between the parties expired, it was incumbent upon the Appellant to give vacant possession.”

From the foregoing, there is no justification for denying the Defendant possession of the suit premises. It is my finding therefore that the Defendant is entitled to vacant possession of the suit premises. Issue number two is therefore answered in the affirmative.

Conclusion:

On the basis of my findings on the two issues that were presented before the court for determination, I find no merit in the Plaintiff's claim against the Defendant and the same is hereby dismissed. On the other hand, I find the Defendants counter-claim well founded. I therefore enter judgment for the Defendant against the Plaintiff as follows:-

1. The Plaintiff shall vacate and handover vacant possession of the two (2) shops which it occupies on the ground floor of the building situated on LR No. 209/5812, Nairobi forthwith and in any event not later than sixty (60) days from the date hereof failure to which the Defendant shall be at liberty to apply for warrants for its forceful eviction.
2. The Defendant shall have the costs of the suit and the counter-claim.

Delivered and Dated at Nairobi this 2nd day of September 2016.

S. OKONG'O

JUDGE

In the presence of

Mr. Ogutu h/b for Ratemo for the Plaintiff

Mr. Machaira h/b for Mr. Ngaita for the Defendant

Ms. Kajuju Court Assistant