



REPUBLIC OF KENYA

IN THE ENVIRONMENT AND LAND COURT AT NAIROBI

ELC CASE NO. 788 OF 2012

BAKARI MOHAMED ABULRAHMAN.....PLAINTIFF

=VERSUS=

SADIK MUCHIKU IMAANA.....DEFENDANT

JUDGMENT

Background

1. The plaintiff brought this suit against the defendant through a plaint dated 30/10/2012. His case was that he was the registered proprietor of Land Reference Number 36/11/1027 on which stood shops. Through an unregistered lease dated 1/11/2007, he leased to the defendant the premises. The term of the lease lapsed on 1/11/2009 but the defendant failed to give vacant possession, despite demand and notice of intention to sue.

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

a) An order for a permanent mandatory injunction directed to the defendant to give vacant possession of the property known as LR NO 36/11/1027, 10th Street, Eastleigh Section II, Nairobi.

b) Mesne profits.

c) Costs of this suit plus interest at court rates until payment in full.

3. The defendant responded to the suit through a statement of defence and counterclaim dated 2/12/2014. His case was that he was at all material times a protected tenant of the plaintiff within the meaning of the Landlord and Tenant (Shops, Hotels and Catering Establishments) Act, Cap 301, a relationship which subsisted at the time the plaintiff brought this suit. Prior to the initiation of this suit, the plaintiff, in a well orchestrated move, sought to irregularly terminate his tenancy; a move which the defendant challenged through two cases in the **Business Premises Rent Tribunal** (the Tribunal) namely; (i) BPRT Number 441 of 2012 and (ii) BPRT no 447 of 2012. The dispute in the Tribunal was fully heard and a determination was made by the BPRT in favour of the defendant.

4. It was the case of the defendant that the plaintiff had, through concedement of facts and fraud, brought this suit, caused a false affidavit of service to be filed, and obtained ex-parte eviction orders against the defendant.

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

a) Damages for loss of business as prayed in Paragraph 18.

b) Special damages.

i. Electricity of Kshs 240,000.

ii. Goodwill Kshs 150,000.

iii. Rent deposit of Kshs 40,000.

c) In the alternative and if the defendant elects to return to the property, an order of mandatory injunction be issued ordering the plaintiff to allow the defendant back to the premises and granting it vacant possession within thirty (30) days of the court orders.

d) Costs of the suit.

6. The suit came up for hearing before this court on 22/7/2019. The plaintiff was not in court to prosecute his claim. Satisfied that the plaintiff had been properly served with a hearing notice, the court dismissed the plaintiff's suit and proceeded to hear the defendant's counter-claim.
7. The defendant testified on 2/3/2020 as DW1. He adopted his written statement dated 2/12/2014 as his sworn evidence-in-chief. His evidence was that, the plaintiff did not serve him with summons to enter appearance in this suit. He only learnt of the existence of this suit when he received a mail on 17/4/2013 from the High Court notifying him of the delivery of a ruling which was slated for 22/3/2013. He contended that he was a legal tenant of the plaintiff on the suit property since 1998. The plaintiff served him with an illegal termination notice on 29/2/2012. The intended termination was based on the ground that the plaintiff needed to carry out renovations on the demised premises. He moved to the BPRT in Nairobi BPRT No 441 of 2012. The Tribunal heard the dispute and held that he was a protected tenant. In Nairobi BPRT No 447 of 2012, the Tribunal ordered that he pays rent via Mpesa or deposit it in court if the plaintiff declined to receive rent. That the court in its ruling rendered on 16/5/2013 ordered that neither the plaintiff nor the defendant would have any dealings with the suit property. However, the plaintiff illegally broke into the suit premises and removed the defendant's belongings. During that process, the defendant's goods were stolen. As a result, he suffered loss.
8. Subsequently, the defendant filed written submissions dated 26/2/2020 through the firm of Ali & Company Advocates. Counsel framed the following as the two issues falling for determination in the suit: (i) whether the defendant's eviction from the two shops in the suit property was lawful; and (ii) whether the defendant was entitled to the prayers sought in the counter-claim.
9. On the first issue, counsel submitted that the notice to vacate the suit premises was not *bonafide* because the plaintiff issued it for the purpose of obtaining vacant possession and leasing the demised premises to a new tenant. Counsel urged the court to take judicial notice of the judgment in Nairobi BPRT 441/2012 in which the Tribunal had made findings on the notice and had invalidated (dismissed) the plaintiff's notice of termination. Counsel added that the Tribunal's judgment had not been challenged. Counsel faulted the plaintiff for bringing a fresh suit and concealing material facts relating to the dispute.
10. On the second issue, counsel submitted that the claim for damages for loss of business was supported by Exhibit 8 which consisted of a bundle of documents kept in the ordinary course of business. He contended that the bundle contained documentary evidence of inventory of stock before the impugned eviction, his expenditure as well as his income and the profit made for various trading periods when the business was in operation. Counsel added that the defendant had adduced evidence to demonstrate that his lease was cut short. Relying on the decision in **David Njuguna Ngotho v Family Bank Limited & Another [2018] eKLR**, counsel urged the court to award general damages as particularized in paragraph 18 of the Counter-claim.
11. On special damages, counsel submitted that the defendant had proved that he leased the two shops and had paid to the plaintiff security deposit of Kshs 40,000. He added that the defendant had tendered payment slips relating to electricity bills paid since eviction till 2016 when the suit property was illegally leased to a third party.
12. Counsel further urged the court to award the defendant costs incurred through substituted service of hearing notice totaling Kshs 41,760.
13. I have considered the pleadings, evidence and submissions before court. I have also considered the relevant legal framework and jurisprudence. The plaintiff's suit was dismissed on 2/3/2020 for non-attendance. Secondly, the defendant's counterclaim was uncontested. Consequently, the single question falling for determination in this suit is whether the plaintiff has proved the various limbs of his claim to the required standards.
14. What emerges from the evidence placed before court is that the defendant was a tenant of the plaintiff occupying two shops located on the land. In the absence of any controverting evidence, the court is satisfied that the defendant has proved the allegations made in the counterclaim in relation to the termination of his tenancy and in relation to his eviction from the two shops. What remains to be determined is whether the defendant is entitled to the reliefs sought in the counter-claim.
15. Prayer (a) is a plea for general damages for loss of business in terms of paragraph 18 of the counter-claim. It is not disputed that the defendant carried out business in the two shops. The defendant urged the court to assess loss of business in relation to the butchery at Kshs 3,000 per day from 13/5/2013 till the date of judgment. The defendant also urged the court to assess loss of business in relation to the miraa shop at Kshs 50,000 per month. The said tenancy was protected within the meaning of the Landlord and Tenant (Shops, Hotels & Catering Establishments) Act. With a view to terminating the tenancy, the plaintiff issued a termination notice which was challenged by the defendant and invalidated by the Business Premises Rent Tribunal (the Tribunal). It is also apparent from the evidence before this court that the plaintiff deliberately withheld critical information from the court and caused a false affidavit to be filed indicating that he had served the defendant with summons to enter appearance. The defendant tendered evidence to the effect that the plaintiff evicted him from the two shops and caused them to be leased to a third party during the subsistence of preservative orders issued by Gacheru J on 16/5/2013. The defendant's evidence against the plaintiff is wholly uncontroverted.
16. I have looked at the documents presented by the defendant in support of the plea for general damages. None of them can be said to be conclusive proof of loss of business. It is not clear why the defendant did not deem it necessary to present audited accounts together with tax returns relating to at least one year preceding the impugned eviction. In my view, the handwritten and self-authored documents presented by the defendant do not constitute conclusive evidence in relation to loss of business. None of the documents produced by the defendant is a document known in the commercial world. There are no invoices of any kind, no delivery notes, no bank documents, and no tax documents. The court is not therefore convinced that there is a proper basis for assessing damages in the sums demanded by the defendant. In the circumstances, I will grant the defendant nominal damages for loss of business assessed at Kshs 500,000.
17. Prayer (b) relates to special damages. Counsel argued that the defendant had "filed payment slips for electricity bills paid since his eviction". The alleged electricity payment slips were not among the 8 exhibits produced by the defendant. Similarly, no proof was tendered

in relation to the other itemized limbs of special damages. The claim for special damages was, in my finding, not proved to the required standard.

18. There was no prayer (c) in the counterclaim. Prayer (d) is an alternative prayer. Having granted prayer (a), I will not grant the alternative prayer. Prayer (d) relates to costs of the suit. Costs follow the event. There is no good reason why the defendant should not be awarded costs of the suit. The defendant will have costs of the suit. The said costs will inevitably include costs of newspaper notices.

Disposal Orders

19. In light of the above findings, I make the following disposal orders:

a) The plaintiff's suit is dismissed for non-attendance and for lack of evidence.

b) The defendant's counter-claim is allowed to the extent that the defendant is awarded nominal damages for loss of business in the sum of Kshs 500,000.

c) The plaintiff shall bear costs of this suit which shall include costs relating to newspaper notices.

DATED, SIGNED AND DELIVERED AT NAIROBI ON THIS 22ND DAY OF JULY 2020

B M EBOSO

JUDGE

In the presence of: -

Mr Kassim for the Defendant

Court Clerk - June Nafula