REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA AT NAIROBI

CIVIL CASE NUMBER 433 OF 2011

KENTON (K) LIMITED. ……...……...……. PLAINTIFF

VERSUS

ESSAR TELECOM KENYA LIMITED. ……..... DEFENDANT

J U D G M E N T

The Plaintiff filed this suit against the Defendant on the 12th October, 2011, claiming Ksh. Two Million Five Hundred Thousand (Ksh.2,500,000/-), general damages for loss of user since 2008, costs of restoring the property to its earlier position and the costs of the suit.

The suit herein is based on a letter of offer signed on the 2nd October, 2008 by the Plaintiff and the Defendant (as it then was), Econet Wireless Kenya Limited to lease part of the Plaintiff's property being plot No. A Mavoko Municipal Council to them, for construction through Ericson GTI Telecom Ltd of a base transreceiver station and installations of its telecommunication equipment.

The terms of the letter of offer were that the Defendant would pay an annual rent of Ksh. Two Hundred and Fifty Thousand Only (Ksh.250,000/-) payable annually in advance and the lease was to be for an initial term of ten (10) years from 1st July, 2008, with an option to renew.

The Defendant through Ericsson GTI Telecom commenced a technical survey and though the terms of offer stipulated that they inform the Plaintiff of its suitability in 7 days, they did not do so until 20th August, 2009, when the Defendant terminated the offer on grounds that they found the site to be structurally unsound. By then, the Defendant had excavated the property ready for construction of the base.

The Plaintiff alleges that on termination of the letter of offer, it lost the rent it was to receive for the 10 years period when the lease was to be in effect at the rate of Ksh. Two Hundred and Fifty Thousand (Ksh.250,000/-) annually which amounts to Ksh. Two Million and Five Hundred Thousand (Ksh.2,500,000/-) for ten years.

The Plaintiff avers that it suffered loss as its property was not restored to its original state after excavation and further that it has not had use of the property since 2008 as the letter of offer did not allow the Plaintiff to offer the premises to anyone else. As a result of the foregoing, the Plaintiff alleges that he suffered loss and damage as claimed in the plaint and it has prayed for judgment to be entered against the Defendant.

The Defendant filed a defence on the 7th November, 2011 denying that the Plaintiff was the registered owner of the plot No. A, Mavoko Municipal Council and has put the Plaintiff to strict proof thereof. The

Defendant admitted having signed the letter of offer with the Plaintiff but avers the following: -

a) The offer set out in the said letter was conditional and the terms thereof were only binding on the parties upon satisfactory completion of the technical review/engineering survey and upon issuance to the Plaintiff of a confirmation in writing to that effect.

b) The Defendant entered the premises and excavated small area thereof for purposes of the technical survey.

c) Upon technical engineering survey, the said property was determined to be unsuitable for construction of a base transreceiver station.

d) The Defendant duly advised the Plaintiff of the said unsuitability and accordingly the offer lapsed.

e) The Defendant required part of the premises measuring 12 metres by 12 metres and at no time did the Defendant restrict the Plaintiff's use of the premises.

According to the Defendant, its obligation to pay rent was only to arise upon positive assessment of the premises and leasing of the same and that due to delay in obtaining all the necessary approvals, the said survey could not be completed in time as initially forecasted hence the delay in communication to the Plaintiff on the unsuitability of the premises for the Defendant's purposes until in August, 2009.

The Defendant further denies that the Plaintiff lost rent as alleged. It averred that after the notification, it made an offer to restore the Plaintiff's plot to its original state and even dispatched a contractor to the premises, but the Plaintiff rejected the said offer and refused the Defendant's contractor access to the premises. It is the Defendant's defence that it only required part of the premises measuring 12 metres by 12 metres and at no time did the Plaintiff restrict the Defendant's use of the premises.

The Defendant averred that it has always been ready and willing to refill the excavation and the same has been frustrated by the Plaintiff refusal to allow the Defendant's contractor's access to the property. It is therefore, the Defendants' case that the Plaintiff is not entitled to the Order for restoration. The Defendant prays that the Plaintiff's suit be dismissed with costs.

A reply to defence was filed on 14th November, 2011 wherein the Plaintiff avers that the Defendant failed to inform it in 7 days as per the terms of the letter of offer of the suitability of the property and only informed it a year later.

The Plaintiff further avers that it was unable to use the property and could not make any plans for the property as the non-communication of the Defendant amounted to the technical survey being presumed successful by the Plaintiff. That there was undue and unreasonable delay in informing the plaintiff of its property unsuitability which was inconsistent with the terms of the letter of offer and their non-communication resulted in a presumption that the technical survey had been successful.

The Plaintiff reiterates that it is entitled to rent that was to be paid over the ten year period. It averred that the Defence is a mere sham, it raises no triable issues, it is frivolous and vexatious and should be struck out.

During the hearing, a Mr. Newton Kamau Ng'ethe testified as PW 1. He told the court that he is the Chief Executive Officer of the Plaintiff. He adopted his witness statement filed in court on the 12th October, 2011 as part of his evidence in chief. In his testimony, he told the court how the Defendant approached the Plaintiff in the year 2008 wanting to build a telephone booster on the Plaintiffs land and after several meetings between Senior Officers of the Defendant company and the Engineers, the Defendant and the Plaintiff entered into a deal and they gave the Plaintiff a letter of offer dated the 2nd October, 2008 which he fully signed on behalf of the Plaintiff. According to the said letter of offer, the Defendant was to pay to the Plaintiff a sum of Ksh.250,000/- per year as rent.

It was his further evidence that after the letter of officer was signed, the engineers of the Defendant delivered a copy of a cheque for Ksh.250,000/- to his office to show that they had taken over the Plaintiff's property. It was cheque No. 000547 dated the 11th November, 2008 in favour of the Plaintiff.

It was his evidence that the Defendant then entered into the Plaintiff's land and excavated almost the whole land that they wanted to put up the booster **"12 by 12"** and that it was not until after 10 months from the date of the letter of offer that the Plaintiff received a letter from the Defendant dated 20th August, 2009 notifying it of the Defendant's decision to terminate the intended relationship, the reason being that, upon further review the site was found to be structurally unsound by their technical team.

In cross-examination, the witness admitted that the offer was conditional upon a positive technical survey by Econet and also that it was subject to Econet procuring necessary permits for operating and constructing the station. The witness also admitted that the Defendant had offered to refill the excavation but he refused to accept.

The Defendant did not call witnesses in support of its case but at the close of the Plaintiff's case, both parties filed written submissions.

It is trite law that submissions are not evidence and if a party is desirous of prosecuting or defending its case, it is imperative that such a party should call witnesses in support of their case as a party cannot prove its case by way of submissions.

After analyzing the evidence and the pleadings this court sets out the following issues for determination.

1) Was the Plaintiff the registered owner of plot No. Mavoko Municipal Council?

2) Was the offer to lease the suit premises conditional and was the Defendant entitled to terminate the offer if the conditions precedent were not met.

3) Whether the Plaintiff rejected the offer for restoration of its property and if so, if it's entitled to restoration of its property after rejecting the same.

4) Whether the Plaintiff's use of its property was restricted by the Defendant?

5) Whether the Plaintiff suffered any loss and/or the quantum thereof and if the Defendant is liable for that loss.

6) Who should bear the costs of the suit?

This court has considered the submissions filed herein by the parties, the pleadings and the evidence on record. The first issue for determination by the court is whether the Plaintiff is the registered owner of the suit premises. Among the exhibits produced by the Plaintiff, is a letter of allotment as evidence of ownership of the suit premises. The Defendant did not challenge the validity of the letter of offer.

On whether the offer to lease was conditional, paragraph 3 of the preamble to the letter of offer reads:-

"Upon completion of its technical review/engineering survey and confirmation from Econet Engineers that your property meets its needs, Econet is prepared to enter into a lease (the "Lease") with you for the use of the Premises (as defined below) substantially on the following terms for the purpose of construction of the station and erection of a telecommunication mast and maintenance of its telecommunication equipment to be located on the Premises."

Clause 2 of the letter of offer is also relevant and it reads: -

"Subject to Econet procuring all the necessary permits required for the construction and operation of

the Station on the premises, the lease will commence on 1st day of November, 2008 for an initial term of 10 (ten) years from 1st day of November, 2008."

The letter of offer itself is also specific that it is conditional upon the results of the technical team review, engineering survey being satisfactory to the Defendant.

From the aforegoing, it's obvious that the offer to lease was conditional as shown above. The Defendant in their letter dated 20th August, 2009 terminated the intended relationship between it and the Plaintiff for the main reason that the site was found to be structurally unsound by their technical team, which was in line with the terms of the letter of offer and was one of the conditions precedent before a lease agreement could be entered into by the parties.

As to whether the Plaintiff rejected the offer to have its property restored, the answer to this is very clear from the evidence on record. In fact the only witness who testified for the Plaintiff admitted in his evidence that the Defendant had offered to restore the plot into its original shape but he refused because he wanted the Plaintiff to be compensated before that could be done. In my view, the fact that this has not been done todate, does not disentitle the Plaintiff to that remedy.

The other issue is whether the Defendant restricted the Plaintiff's use of its property. From the pleadings and the evidence on record, it is not in dispute that the Defendant entered into the Plaintiff's land and excavated a portion of it for purposes of the technical survey. The said entry by the Defendant was within the terms agreed upon by the parties in the letter of offer and in any event, there was no other way of carrying out the technical survey than entering upon the said plot. By the said entry, the Defendant restricted its use and in terms of the letter of offer, the Plaintiff upon signing the same undertook not to offer the premises or dispose of the same to anyone else before it could receive a letter confirming the result of the technical review/engineering survey.

In my view, this therefore, meant that the Plaintiff was not at liberty to use the plot or dispose off the same before it could receive the confirmation aforesaid and to this extent, its use of that property was restricted.

It is worth noting that the Defendant was to issue the Plaintiff with a letter within 7 days of the letter of offer confirming the results of the technical review/engineering survey but this did not happen until 20th August, 2009 which was almost one year thereafter. Having issued that letter of confirmation long after its due date, the Defendant is estopped from alleging that it did not restrict the usage of the plot by the Plaintiff. If it did not issue the letter at all after the expiry of the 7 days, the position would have been different.

On the other hand, after the said confirmation, the Plaintiff became aware of the Defendant's position. The restriction was only upto the 20th August, 2009 and not any longer period thereafter and for that reason Plaintiff is entitled to the agreed rent of Ksh.250,000/- for that year that its land was restricted by the Defendant.

That brings me to the other issue of whether the Plaintiff suffered any loss and/or damage and if any, how much.

In its plaint, the Plaintiff has claimed a sum of Ksh. Two Million Five Hundred Thousand (Ksh.2,500,000/-) for loss of rent at Ksh.250,000/- per year for ten (10) years, the period which the lease was to cover. The lease agreement was never signed as the Plaintiff's land was found to be structurally unsound and therefore, this remedy cannot be available to it. In my view the most the Plaintiff is entitled is Kshs.250,000/- for that year its land was restricted before it received the letter of confirmation, because the Plaintiff was at liberty thereafter, to make the best use of its land.

The claim for general damages for loss of user since 2008, in my view, was not proved. No evidence was tendered by the Plaintiff in support of that claim, and as the court has stated hereinabove, the Plaintiff was

at liberty to utilize its plot from the date of receipt of the letter of confirmation dated the 20th August, 2009. In any event, the Plaintiff was also under duty to mitigate its losses. See the case of **African Highland produce Limited Vs John Kisoria (2001) eKLR.**

Accordingly, judgment is hereby entered for the Plaintiff against the Defendant as follows: -

1) A sum of Ksh. Two Hundred and Fifty Thousand (Ksh.250,000/-).

2) The Defendant is hereby ordered to restore the Plaintiff's property to its original state.

3) Costs of the case is awarded to the Plaintiff.

Dated, signed and delivered at Nairobi this 15th day of September, 2016

……..

L NJUGUNA

JUDGE

In the presence of

…..…….. *for the Plaintiff*

…..……. *for the Defendant*