



REPUBLIC OF KENYA

IN THE ENVIRONMENT AND LAND COURT AT ELDORET

ELC CASE NO.299 OF 2016

NOOR MOHAMMED FARAH..... PLAINTIFF

VERSUS

GLADYS NJERI.....1ST DEFENDANT

JACINTA WANJIRU NGUTI.....2ND DEFENDANT

JUDGMENT

By a plaint dated 24th October 2016 the plaintiff herein sued the defendants jointly and severally seeking for the following orders:

- a) An order of eviction against the defendant from Midwest Butchery situate on L.R NO. ELDORET MUNICIPALITY/BLOCK 7/278 Lincoln building.
- b) An order for compensation for loss of business in the sum of kshs. 112,000/- per week until the determination of the suit.
- c) Costs
- d) Interest at court rates

PLAINTIFF'S CASE

PW1 Noor Mohamed Farah adopted his statement and testified that he entered into a lease agreement dated 13TH June 2008 for a period of 15 years with **KARISHO NGUTI** who was the administrator the Estate of **EVANSON NGUTI KAMANDA** over that parcel of land known as **ELDORET MUNICIPALITY BLOCK 7/278**. It was his evidence that he was to trade under the name **MIDWEST BUTCHERY** situated at **LINCOLN HOTEL BUILDING**.

PW1 also stated that they entered into a memorandum of understanding (MOU) with the defendant whereby PW1 leased his premises known as **MIDWEST BUTCHERY** to the 1ST Defendant for a period of 2 years at a consideration which was agreed at Kshs. 800,000/— which was to be paid as follows:-

- a) Kshs. 500,000/— was paid upon execution of the MOU dated 9th September, 2014.
- b) The balance of Kshs. 300,000/— was to be paid on/or before 9th October; 2014.

It was PW1's evidence that the defendant was to operate the business for a year without interference from the PW1 and the PW1 was to refund to the KShS. 800,000/- at the expiry of two years and the defendant was to give vacant possession.

PW1 testified that he refunded Kshs 700,000/ as agreed to the defendant which amount the defendant acknowledged receipt and balance of Kshs. 100,000/= was to be paid on or before 31ST October 2016. He stated that he deposited the money with Gitonga Advocates but the defendant did not move out of the premises.

PW1 further testified that the defendant in disregard to the terms of the MOU proceeded to enter into an agreement with the 2nd defendant through her appointed agent on 20th January, 2015.

PW1 produced receipts of purchase of meat to show how much he was making while running the butchery and that he would make a profit of

Kshs 24,000/ He therefore urged the court to enter judgment in his favour as prayed in the plaint.

On cross examination by counsel for the defendant, PW1 stated that the owner of the suit plot is deceased but did not know when he passed on. He further stated that when he entered into the lease agreement the owner of the suit land was deceased. He confirmed that the administrator of the estate of the deceased Evanson Nguti Kamanda is the 2nd defendant and that the agent of the building are Metro Cosmo Valuers whom he did not enter into an agreement with.

PW1 also confirmed during cross examination that he had not sued the estate of Karisho whom he entered into a lease agreement with and further that the MOU was for Block 7/771 and the plot No was Block 7/278 which is a different plot. He also admitted that he does not have a bank statement or records to back the claim of how much he was making in the butchery business.

PW2 Abbas Jama Abdi testified and stated that he is a butcher and used to sell meat to PW1 at Midwest Butchery and issued him with receipts and invoices which he produced as exhibits.

On cross examination by counsel for the plaintiff he admitted that the receipts and invoices were never signed as required with an explanation that the receipts that were never signed were paid for in cash. The plaintiff therefore closed his case.

DEFENDANT'S CASE

The defendant filed an amended defence and counterclaim dated 26th July 2017 in response to the plaint seeking the following orders:

- a) A permanent injunction restraining the plaintiff by himself, his agents or otherwise from interfering with title Eldoret Municipality Block 7/278.
- b) The plaintiff be condemned to pay costs.

DW1 Gladys Njeri testified and stated that she used to sell fruit salad at the veranda where the plaintiff had a hotel but PW1 later leased the hotel to her in 2014. It was her testimony that she was to lease the space from 2014 to 2016 for a period of 2 years. She confirmed that PW1 was to refund her Kshs 800,000/ upon the expiry of the lease period and hand over the premises, but PW1 only refunded Kshs. 700,000/ leaving an unpaid balance of Kshs. 100,000/

DW1 further stated that PW1 had informed her that he had a 15-year lease from the landlord but never met Karisho who had entered into a lease agreement with PW1. That at the time DW1 entered into the agreement with PW 1 Karisho was deceased.

It was DW1's evidence that in 2014 the Landlord and the agent Metro Comso Valuers asked them to present the documents that they had and informed PW1 to represent them which he never did prompting the Agents to give her a 5 year lease from 2015 to 2020. DW1 further stated that the plaintiff did not take any action after she got a lease form the Agent and the Landlord.

DW1 also testified that the plaintiff was in rent arrears as per a letter dated 4th July 2014 and that she is no longer in the premises as they were served with a letter to vacate of which she complied on 31st January 2020 as the landlord wanted to renovate the premises. It was further DW1's testimony that the plaintiff did not lose any business because at the time he gave DW1 the premises he was not doing well in the business. DW1 urged the court to dismiss the plaintiffs suit with costs as he has also not refunded Kshs. 100,000/ to DW1.

On re-examination DW1 stated that she was told to get a refund from the plaintiff as it was illegal for the plaintiff to charged goodwill.

DW2 Jecinter Wanjiru Nguti testified that he did not know the plaintiff but knew DW1 Galdy Njeri. She stated that the suit building is in the name of her late father Evanson Nguti Kamanda and that she is the administrator of the estate. It was further her evidence that the building is manage by Metro Cosmo Agency and has never seen an agreement between the plaintiff and Metro Cosmo Agency and that they never ask for goodwill in their premises.

DW2 also stated that Karisho Nguti is her younger brother and that there is no document to show that he was an administrator of the estate. She further stated that there are no tenants on the suit premises as they were ordered by the Tribunal to renovate the premises and remove all illegal structures. That was the close of the defence case.

On cross examination she admitted that she was an administrator together with Karisho who passed on and that he did not tell them that he had entered into an agreement with the plaintiff.

PLAINTIFF'S SUBMISSION

Counsel for the plaintiff listed the following issues for determination by the court:

- a) Whether the court has jurisdiction.
- b) Whether the Plaintiff is entitled to orders of eviction.
- c) Whether the Plaintiff is entitled to loss of business.

On the first issue as to whether the court has jurisdiction counsel submitted that the court has jurisdiction and cited the case of **Samuel Kamau Macharia & Another vs. Kenya Commercial Bank & 2 others Supreme Court Civil Appeal No. 2 of 2011** wherein the Supreme court stated 'A court's jurisdiction flows from either the constitution or legislation or both'.

Counsel further relied on the case of the **Motor vessel "Lillians" V Caltex Oil (Kenya) ltd (1989)KLR** where Justice Nyarangi held as follows:-

"1 think that it is reasonably plain that a question of jurisdiction ought to be raised at the earliest opportunity and the court seized of matter is then obliged to decide the issue right away on the material before it. Jurisdiction is everything without it, a court has no power to make one more step where a court has no jurisdiction there would be no basis for a continuation of proceedings pending other evidence. A court of law downs tools in respect of the opinion that it is the moment it holds the opinion that it is without jurisdiction"

Counsel also relied on the provisions of section 13(d) of the Environment and Land Court Act which gives the court jurisdiction to handle the matter. That the plaintiff was not receiving any rent therefore there was no landlord/tenant relationship.

On the issue as to whether the plaintiff is entitled to an eviction order, counsel submitted that the agreement that the plaintiff entered into was to the effect that she gives vacant possession upon expiry of the lease which the defendant never honoured. Counsel therefore submitted that the plaintiff is entitled to the orders of eviction as the plaintiff had refunded the amount as per the agreement save for Kshs. 100,000/which was deposited with an Advocate.

On the issue as to whether the plaintiff is entitled to loss of business, counsel submitted that the plaintiff is entitled to Kshs, 11200/ per week until determination of the suit. That the 1st defendant entered into a tenancy agreement with the 2nd defendant while the MOU with the plaintiff was still subsisting on 20th January 2015. Counsel therefore submitted that that the defendant was in breach of the MOU therefore liable to pay for the loss of business.

DEFENDANTS' SUBMISSIONS

Counsel for the defendant submitted that the plaintiff has not sought any reliefs against the 2nd defendant as the plaintiff did not amend the plaint after the enjoinder of the 2nd defendant.

Counsel submitted that the 1st defendant vacated the premises on 30th January 2020 without any complaint or reference to the Business Premises Rent Tribunal and that She never contested the termination notices but the other tenants did.

Mr. Kibii counsel for the defendant submitted that the final orders of eviction and loss of business have been overtaken by events and that all the tenants have vacated the premises and given the 2nd defendant vacant possession. Counsel cited the case of **Nairobi Civil Suit No. 422 of 2012** where the court held that:

'That suit property no longer exists because it was recently and completely demolished. There was no interim injunction sought to preserve the property pending disposal of the application. As the suit premises no longer exist, what would the order sought in the application preserve? Writing a ruling on the application would be an exercise in futility. The court has no the time to spend on that kind of exercise. I therefore decline to write a ruling upon the application which has clearly been overtaken events. I so direct'.

Counsel also cited the case of **Geoffrey Maina Kanjama v Sam Mureithi Murioki T/A Uncle Sam (2014) eKLR** where the court held that:

'Prayer (ii) seeks permanent restraining orders. Considering the principles set out above, I find that the application has been overtaken by events since the plaintiff is no longer possesses the suit premises. The application is accordingly dismissed with costs to the defendant'.

Mr. Kibii therefore urged the court to find that this matter is overtaken by events and the orders sought cannot be granted. He further submitted that the plaintiff did not provide any documents to prove that the person he entered into an agreement with, one Karisho Nguti, is the legal administrator of the estate of the late Evanson Nguti K K amanda. Further that the plaintiff admitted that the memorandum of understanding dated 9th September 2014 touches on a different property from the suit property.

Counsel for the defendant also submitted that 1st defendant entered into an agreement with the 2nd defendant on 20th January 2020 over the suit property due to breach of the said memorandum of understanding automatically terminated the alleged agreement dated 13th June 2008 therefore there was no contract between the plaintiff and the 1st defendant.

Further that the plaintiff, upon the new lease being granted to the 1st defendant on 23rd January, 2015 he ought to have taken the issue of termination of his tenancy to the Business Premises Rent Tribunal and as such unless the issue of termination of tenancy is first resolved the alleged loss of business cannot stand. Counsel relied on the case of **Mombasa Civil Appeal No.35 of 2015p NANDLAL JIVRAJ SHAH 2 OTHERS (ALL TRADING AS JIVACO AGENCIES V KINGFISHER PROPERTIES LIMITED [2015]eKLR** wherein the Court of Appeal in its determination pointed out that;

"In a nutshell, the challenge to the notice to terminate tenancy from whichever angle was not a matter for determination by the High

Court. Such a challenge could only have been mounted in the Tribunal."

Counsel submitted that the plaintiff ceased to have any interest in the suit property on 20th January 2015 when the premises was exclusively leased to the 1st defendant. Further that special damages must be proven and the plaintiff failed to prove that he made Kshs. 112,000/- weekly in sales. The receipts dated 23rd October 2008, 11th November 2008 and 8th September 2014 which are all unsigned whereas all the books of account have not stamp duty. Section 19 of the Stamp Duty Act provides for the non-admissibility of unstamped instruments of evidence.

Counsel cited the case of **Eldoret ELC Case No. 170 of 2012 – Danson Muniu Njeru v William Kiptarbei Korir & Others (2014) eKLR** and **Mombasa High Court Civil Suit No. 388 of 2000 – Glencore Grain Limited v TSS Grain Millers Ltd [2002] eKLR**. That the receipts produced do not tally with the alleged books of account and that the conflicting amounts could only be ascertained in a financial report which was not produced. Counsel therefore urged the court to dismiss the plaintiffs case with costs to the defendants.

ANALYSIS AND DETERMINATION

The issues for determination are as to whether the plaintiff is entitled to orders of eviction, whether the orders sought have been overtaken by events and whether he is entitled to compensation for loss of business.

On the issue as to whether the plaintiff is entitled to orders of eviction, the plaintiff was under a duty to prove that he entered into a valid agreement with the 1st defendant and that he had the authority from the owner of the demised premises to do so. The agreement with one Karisho who was purportedly an administrator of the estate of Evanson Nguti Kamande (deceased) has been disputed. It is also on record that the MOU that the plaintiff entered into with the 1st defendant was done after the death of Karisho.

It is further on record that the agreement that the 1st defendant entered into for renewal of lease with the 2nd defendant and signed by Metro Cosmo as an agent in 2015 essentially terminated the previous one entered into in 2014. I notice that there is a discrepancy as to which premises were being leased as per the MOU dated 9th September 2014 by the 1st defendant. The MOU refers to Eldoret Municipality Block 7/771 and not the suit land Block 7/278. This discrepancy has not been explained by the plaintiff and hence no contractual relationship was established. Even if the court was to find that there was a contractual relationship between the plaintiff and the 1st defendant, the plaintiff was to refund Kshs. 800,000/ upon expiry of the terms of the MOU but the plaintiff refunded Kshs. 700,000/ to the 1st defendant leaving a balance of Kshs. 100,000/ therefore breaching the terms of the MOU.

In the case of **Alton Homes Limited another v Davis Nathan Chelgoi 2 others [2018]eKLR** the court held that:

‘As the Court has found and held earlier, the basis of the transaction in issue herein were the agreements dated 27th February 2007, wherein the 1st Plaintiff paid a deposit of Kshs.3,200,000/= towards the purchase of the suit property and the balance was to be paid in 90 days upon the 1st Defendant fulfilling certain obligations by the completion date. Since the 1st Defendant had not delivered a title deed in favour of the 1st Plaintiff by May 2007, the Court cannot hold and find that the 1st Plaintiff was in breach of the agreement dated 27th May 2007. However, the 1st Defendant had not obtained the original title deed for the suit property. It is obvious that the 1st Defendant did not fulfill the conditions that he was supposed to fulfill by the completion date as stipulated by Clause 5A of the said sale agreement. Therefore, the 1st Defendant was in breach of this agreement.’

The memorandum of understanding is already erroneous in terms of the subject land of the agreement. That notwithstanding, if indeed they were all part and parcel of the suit property, the plaintiff still breached the terms of the understanding in failing to refund the Kshs. 100,000/-. The plaintiff stated that he had deposited the money in an Advocates office known as Gitonga. The question is, on whose instruction did he deposit the money to this advocates' office, was this the 1st defendant's advocate, when he realized that the 1st defendant did not take the money, why did he not pick it and give it to the 1st defendant as per the MOU. Was the 1st instalment paid to the 1st defendant paid via this mode of payment?

I find that the plaintiff had no proprietary rights over the suit property as there is no document that creates an obligation for the 1st defendant to pay him rent or vacate the property. He breached the terms of the sub lease and the 1st defendant rightly entered into an agreement with the 2nd defendant. Further, he was in rent arrears on the original lease and therefore lost his proprietary rights to sub lease.

On the issue as to whether the orders sought have been overtaken by events, the plaintiff started on a wrong footing from the onset. First he entered into an MOU which has the wrong parcel number with one of the administrators who did not disclose to the other family members that he had entered into a lease agreement with the plaintiff. The plaintiff was later given an opportunity to sanitize his relationship with the administrators of the estate of Evanson Nguti Kamanda but did not take it up thereby leaving no option for the 2nd defendant to enter into a binding agreement with the 1st defendant.

It is on record that the tenants including the 1st defendant received a notice to vacate the premises for the same to be renovated and they complied with the order of the Tribunal on 30th January 2020. Courts do not make orders in vain. The matter of eviction has been overtaken by events. If the court were to issue an order of eviction, how will it be implemented and yet the 1st defendant has vacated the demised premises.

On the last issue as to whether the plaintiff is entitled to compensation for loss of business, compensation for loss of business is in essence special damages which must be specifically pleaded and proved. The plaintiff produced invoices and receipts that did not tally with the amount pleaded as loss of business. Some of the receipts and invoices were never signed and did not show that they were for beef for the plaintiff's butchery. plaintiff failed to produce any proof that indeed he was making a profit of Kshs. 112,000/- and in the premises he is not entitled to compensation for loss of business.

The plaintiff is therefore not entitled to the compensation for loss of business that he seeks. Further, he should refund the balance of the refund owed as he has failed to prove that he paid off the balance as per the memorandum of understanding.

Having said that I find that the plaintiff has failed to prove his case to the required standard and is therefore dismissed with costs.

DATED and DELIVERED at ELDORET this 7TH DAY OF JULY, 2020

M. A. ODENY

JUDGE