



REPUBLIC OF KENYA
IN THE HIGH COURT OF KENYA AT NAIROBI
(CIVIL DIVISION)
CIVIL CASE 211OF 2007
GARIBI LIMITED.....PLAINTIFF
VERSUS
OGILVY EAST AFRICA LTDDEFENDANT
JUDGEMENT

1. The plaintiff, **Garibi Limited**, by an amended plaint dated 24th June 2008 and filed in this Court on 27th June 2008 seeks the following orders:

- i. **Outstanding rent in the sum of Kshs 4,684,774.20.**
- ii. **General damages for breach of contract.**
- iii. **Interests on (i) and (ii) at court rates from date of filing suit**

till payment in full.

iv. **Costs of the suit.**

v. **Any other, further or consequential relief the Court deems fit**

and just to grant.

2. According to the plaint, the plaintiff and the defendant were at all material times Landlord and Tenant respectively in respect of LR No. 209/7121/1 – Nairobi for 5 years 3 months with effect from 1st January, 2002 at the quarterly rent of Kshs 600,000 plus 18% VAT which rent was to be increased at the rate of 10% over the amount payable in the preceding year per annum on 1st January, 2004, 1st January, 2005, 1st January 2006 and 1st January, 2007 plus service charge and VAT. It was pleaded that although there was no provision for earlier termination thereof, the defendant in or about the month of June, 2005 breached the terms of the said agreement by moving out of the suit premises, took with him the keys to the suit premises and refusing to pay the rents due and only returned the said keys on 4th July, 2005 through their advocates. Despite the plaintiff's attempt to find an alternative tenant the plaintiff was not able to do so until January 2007. As at the 1st December, it was pleaded the rents due was in the total sum of Kshs 4,684,774.20 which sum the plaintiff particularised in the plaint and claimed from the defendant.
3. In its defence the defendant denied all the allegations made by the plaintiff and averred that the Plaintiff had no locus standi to file the suit. It was further pleaded that if the lease existed between the plaintiff and the defendant the same was month-to-month and subject to fifteen days notice. It was further pleaded by the defendant during its period of occupation of the suit premises it made

renovations and rehabilitation in the sum of Kshs 10,000,000.00 and paid the rent deposit in the sum of Kshs 360,000.00 hence the plaintiff owed it Kshs 10,360,000/= and reserved its right to counterclaim against the plaintiff the said sum. According to the defendant the plaintiff's claim does not disclose any reasonable cause of action, is scandalous, frivolous and vexatious and ought to be struck out.

4. In support of its case, the plaintiff called **Moses Gathigi**, its administrator and commercial manager who testified as PW1. According to him, the plaintiff is the registered owner of the suit property and in support of this evidence he produced the title document as exhibit 1. In his evidence the defendant occupied the suit premises on 1st January, 2002 after having been given a letter to do so in December 2001 for a period of 5 years and 3 months. He also produced the letter of offer as exhibit 2. However, the defendant did not complete the period of the tenancy and sometimes in January 2005, they gave a notice to vacate the premises in April 2005. This was not acceded to by the plaintiff who was not agreeable to the said intention as there was no provision for termination before the end of the period. He also produced as exhibit 3 and 4 correspondences between the parties. Although the tenancy commenced as a quarterly tenancy, in the course thereof the defendant approached the plaintiff and requested to pay rent monthly which request was agreed to by the plaintiff. Although the defendant eventually vacated the premises in May 2005, they left their properties in the suit premises and on 4th July, 2005 they sent the plaintiff the keys with a covering letter. The plaintiff however continued charging them rents until December 2006. The witness produced as exhibit 5 statement of accounts in support of the plaintiff's claim. The witness stated that when the defendant went into the occupation they paid a deposit in the sum of Kshs 360,000/= which the plaintiff was still holding. The plaintiff continued holding the defendant as liable to pay the rents until January, 2007 when the plaintiff got another tenant. During this period the plaintiff tried to get another tenant even seeking the services of an agent and advertisement. In support of the fact that the plaintiff got a tenant in January, 2007 the witness produced as exhibit a letter of offer to that effect. He therefore claimed the rent arrears for the period amounting to Kshs 4,684,774.20 plus damages and costs and interests.
5. In cross examination by **Ms. Mungai**, PW1 admitted that he was not a director of the plaintiff company. When referred to the letter of offer and more particularly clause 7 thereof, he said that the said letter was the lease that was in place for 5 years and 3 months as he was not aware of the existence of a registered lease. Referred to the title he admitted that there was no indication therein of any registered lease. He reiterated that although initially rents were payable quarterly, it was later varied to monthly in the year 2003. According to him the lease was to terminate in March, year 2007. He said that according to the letter of termination by the defendant it was a three months notice. According to him, they started looking for a tenant immediately they got the notice to vacate in early 2005. According to him the first notice intimating the defendant's intention to vacate was in December, 2004 notifying the plaintiff of the intention to vacate in April, 2005. However, he said that the first letter showing that the plaintiff was looking for a tenant was in April, 2005 and they eventually got one in January, 2007. According to him, in issue is an office building. Referred to clause 7 of the letter of offer he said that he was unable to explain what it meant although he insisted that there was no provision for early termination.
6. In cross-examination by **Ms Sehmi**, the witness said that there was no other contract between the parties. In his view clause 7 of the letter of offer referred to the end of the lease which according to him was 5 years and 3 months.
7. At the close of the plaintiff' defendant opted not to call any evidence.
8. According to the plaintiff's submissions, the phrase in clause 7 the letter to the effect that "*At the end of the Lease (however terminated) the tenant...*" is not a termination clause as the clause talks of termination "at the end of the lease" and not earlier. According to the plaintiff in the absence of the Lease, the Letter of Offer operated as the binding contract between the parties and hence the same should be given its full meaning. Citing **City Council of Kampala vs. Mukibi [1967] EA 368** and **Vassanji Khimji vs. Abdulhussein Isail Hassam [1957] Civil Appeal No. 92 of 1957**, it was submitted that the tenancy agreement though not in statutory form was enforceable against the defendant as an agreement to grant a lease. Further under section 32 of the **Registration of Titles Act** an unregistered instrument is not prevented as operating as a contract hence the orders sought herein ought to be granted.
9. I have considered the pleadings and the evidence adduced in this case as well as the submissions.

In my view the following issues fall for determination in this suit:

1. **Whether there was an agreement between the parties herein.**
 2. **If there was an agreement what was the nature of the agreement.**
 3. **Whether the said agreement was validly terminated.**
 4. **What if any are the damages arising from the said termination.**
 5. **What order should be made with respect to costs.**
10. From the evidence on record which evidence was not controverted, there is no doubt that there was an agreement between the defendant and the plaintiff by which the plaintiff offered to let and the defendant accepted to lease the suit property at the quarterly rent of Kshs 600,000/- which was later converted by consent to a monthly tenancy. Accordingly, I find issue no. 1 in the affirmative.
11. With respect to the second issue it is clear from the evidence on record that the said agreement was neither translated into a formal lease nor registered. The consequences of the failure to register a lease whose term is for more than one year where the property is governed by the *Transfer of Property Act* as is the case in the present case were enumerated by the Court of Appeal (**Wambuzi, P, Mustafa JA & Platt, J** on 7th July, 1977) in **Rogan-Kamper vs. Lord Grosvenor (No. 2) [1977] KLR 123; [1989] KLR 367; [1976-80] 1 KLR 558.** In that case the Court recognised that an agreement for a lease is not a lease and therefore cannot be a basis for a suit for specific performance and cannot itself be regarded as a lease. It was further the Court's view that a contract for a lease is different from a lease and each has a different incidents attaching to it, and one cannot be substituted for the other. According to the Court, in terms of section 107 of the *Transfer of Property Act* as well as section 40 of the *Registration of Titles Act*, a valid lease of the subject premises for over one year can only be made by a registered instrument. Therefore, as no lease for five years and one month was created, no stipulations as to termination could be implied and therefore the rights of the parties were governed by the relationship which was created between them by possession of the suit premises and acceptance of rent, which is a monthly tenancy and as the parties agreed that the premises were a "shop" within the meaning of the *Landlord and Tenant (Shops, Hotels and Catering Establishments) Act* the procedure prescribed by that Act for terminating the tenancy had to be complied with. The Court held that as a lease of immovable property, from year to year, or for any term exceeding one year, or reserving a yearly rent, can only be made by a registered instrument, if the agreement operates as a present demise for more than a year and remains unregistered, it may operate as a lawful lease for one year and then by holding over, to operate as a monthly tenancy determinable on fifteen days' notice as provided in sections 116 and 106 of the *Transfer of Properties Act*.
12. However, in **Bachelor's Bakery Ltd vs. Westlands Securities Ltd [1982] KLR 366,** the same Court presided over by **Madan, Law & Potter, JJA** on 6th July, 1982, declined to follow the decision in *Grosvenor's Case* instead holding that the *Landlord and Tenant Act* being a special Act designed for the protection of tenants and which was later in the date than the *Transfer of Property Act*, to the extent that the *Landlord and Tenant Act* conflicts with the *Transfer of Property Act*, its provisions must prevail. Since the *Landlord and Tenant Act* does not have the effect of assuming jurisdiction over tenancies created by an agreement in writing by which the parties have contracted for a term exceeding five years, the written agreement for a term exceeding five years was a contract to the contrary within the meaning of the opening words of section 106 of the *Transfer of Property Act*, thus excluding the deeming provisions of that section as to the duration of certain leases in the absence of written contract. Such an agreement, the Court held is valid *inter partes* even in the absence of registration, although it gives no protection against the rights of third parties.
13. However later, in **W J Blakeman Ltd vs. Associated Hotel Management Services Ltd [1986] KLR 156,** the same Court presided over by **Madan, Nyarangi, JJA & Platt, AJA** held on 8th May, 2005 that where the lease was not registered, the Court of Appeal held that if the agreement to lease is one for a period of more than a year, then the lease must be registered and as the third lease was unregistered unregistered, it became void as it concerned a lease for a period of more than one year and in that event the defendant company was either holding over under section 116 of the *Transfer of Property Act* or held on a monthly tenancy because of possession and payment of rent under section 106 of the *Transfer of Property Act*. On the other hand the plaintiff company

- was in no better position since the agreement, which it entered into, was for a lease for a period of greater than a year and therefore required registration. However the personal covenants survived and to the extent that there was implied by law a monthly tenancy arising out of possession and payment of rent the oral agreement survived. In arriving at this finding the Court held that Section 105 of the ***Transfer of Property Act*** provides that a lease of immovable property is a transfer of a right to enjoy such property made for a certain time express or implied in consideration of a price and that periodic leases, which include tenancies from month to month, come within the section and they may be implied. It followed that the leases and agreement for lease in the said case continued as periodic leases at the time when the further agreement was made.
14. Therefore as the agreement between the parties in the instant suit was not registered, after the first year the agreement became void and what remained was an agreement to enter into a lease, in which event the relationship between the parties became a periodic tenancy terminable by one month's notice.
 15. Apart from that my interpretation of the phrase in clause 7 in the letter to the effect that "*At the end of the Lease (however terminated) the tenant...*" recognised that the tenancy could be terminated by other means other than by effluxion of time other than the said phrase would have been express that at the end of the tenancy period. Obviously a lease comes to an end on termination and the words "at the end of the lease" in my view does not necessarily mean at the end of the tenancy period especially when the words "however terminated" are inserted in between. Being a month to month tenancy, the same could be terminated by one month's notice.
 16. That then brings me to the issue whether the said agreement was validly terminated. It is not in doubt that the defendant gave the plaintiff more than one month's notice of termination of the agreement between the parties. As found hereinabove the defendant was only obliged to give the plaintiff one month's notice of termination. It follows that the notice which was given to the plaintiff was valid and effectual.
 17. That being my finding, it follows that no damages are payable by the defendant to the plaintiff taking into account the fact that it was admitted that at the time the defendant vacated the suit premises in May 2005, the defendant was up to date in the payment of the rents until April 2005. Since it was conceded that the defendant had paid a deposit for three months which would have covered the months of May, June and July, the fact that the defendant returned the keys to the premises in July, 2005 is in my view, inconsequential. It was not alleged that the failure by the defendant to return the keys before July 2005 in any way adversely affected the plaintiff's attempts to secure a tenant.
 18. In the result the plaintiff's suit fails and is dismissed with costs to the defendant.

Dated at Nairobi this 10th February, 2014

G V ODUNGA

JUDGE

Delivered in the absence of the parties.