REPUBLIC OF KENYA

High Court at Nakuru

Civil Case 277 of 2009

SHIRBROOK (K) LIMITED.....PLAINTIFF

VERSUS

NAKURU INDUSTRIES LIMITED.....1ST DEFENDANT

DIRECT O. SERVICES.....2ND DEFENDANT

JUDGMENT

Introduction

This is a sad but true story of a protege turned foe in this litigation. The plaintiff's principal officer, Amritlal Motichand Shah *(referred to by defence counsel as Amu Shah)*, was a former employee of the 1st Defendant, and held the position of Chief Finance Officer *(Accountant)*. It was common ground in the evidence of both Amu Shah and Raj Shah, *(the 1st Defendant's principal officer or Managing Director)* that the plaintiff herein was set up by the 1st Defendant and it was *(Mr. Lalji Nagpal Shah)* a member of the 1st Defendant's Company that assisted in the procurement of machinery for the manufacture of garments for the plaintiff herein. As part of that assistance the rent charged by the 1st Defendant was equally very low for premises which are said to be in excess of 6,500 sq. ft. The rent was initially shs 1,000/= per month, from the year 1974 to 1994, a period of 20 years.

According to Amu Shah, though the rental was revised by Raj Shah to sh 24,000/= per month from 1994 – 1998, Amu Shah testified that the rent was reversed to Ksh 12,000/= per month because of difficult economic circumstances, and which sum the plaintiff kept paying to the 1st Defendant, and upon the direction of the 1st Defendant's principal officer, to its Advocates Karanja Mbugua & Co. Advocates.

Dissatisfied with the very low rental the 1st Defendant sought and obtained a valuation of the premises for rental purposes **Chrisca Real Estates Ltd** in a Report dated 23.06.2010, returned a rental of Kshs 127,000/=p.m. for the premises said to be a godown of 769m2, (that is over 7,690 sq. ft.). The plaintiff having declined to accept earlier demands of rent increases from Ksh 24,000/=, 65,000/= and shs 85,000/= and having been distrained for rent, and come to court to lift the orders of distraint for rent, decided to take head-on its landlord in this court, and in this suit.

2. THE PLEADINGS

(a) The Plaint

In a Plaint dated 5.10.2010 and filed in court on 28.05.2010, Sirbrook (K) Ltd, *(the Plaintiff)*, claimed that it had a protected tenancy between it, and Nakuru Industries Ltd *(1st Defendant)* and it *(the Defendant)* had no legal authority to instruct Direct O Services *(the 2nd Defendant)* to levy distress for

rent against it without leave of the Business Premises Rent Tribunal *(established under Section 6 of the Landlord and Tenant Hotels, Shops and Catering Establishment)* Act, *(Cap. 301, Laws of Kenya)*. The Plaintiff similarly claimed that the 1st Defendant had no legal right to increase the rent and to claim any arrears thereof without the authority of the said Business Premises Rent Tribunal. For those reasons the plaintiff sought orders for -

(i) a permanent injunction restraining the Defendants from distraining for rent illegally or otherwise interfering with the plaintiff's quiet enjoyment of its tenancy over LR No. 11245, or the premises situate thereupon and tenanted to the Plaintiff by the 1st Defendant,

(ii) general damages for trespass,

(iii) the costs of the suit,

(iv) interest on (c) and (b) above at court rates.

(b) The Defence and Counter-claim

In their Defence and Counter-claim dated and filed on 1st July 2010, the Defendants contended inter alia that -

(I) the suit as filed herein in *mala fide*, frivolous and vexatious and amounts to a flagrant abuse of the due process of the court,

(II) that the suit herein is misleading for lack of disclosure of other existing suits before the lower court and the Business Premises Rent Tribunal,

(III) the proper forum to sanction the Defendant to levy distress for rent is the Business Premises Rent Tribunal, and not this court,

(IV) that the initial rent of sh 12,000/= p.m. was increased to Ksh 65,000/= p.m. but that the plaintiff, though acknowledging the said rent, continued to pay sh 12,000/= p.m. after 1998, and failed to sign the new Tenancy Agreement,

(V) that the sum of Kshs 12,000/= was accepted on a without prejudice basis,

(VI) that contrary to the Plaintiff's claims that it is not in arrears of rent, the plaintiff is in arrears in the sum of Kshs 8,070,000/= calculated @shs 65,000/= per month for the period December 1998 to 2009.

Consequently the Defendant counter-claimed against the Plaintiff arrears of Ksh 9,265,000/= comprising -

(i) Rent arrears prior to December 2009 sh 8,670,000/=

(ii) Rent in respect of the period January to July 2010 shs 595,000/=

Total sh 9,265,000/=

REPLY TO DEFENCE AND DEFENCE TO COUNTER-CLAIM

In its Reply to Defence and Defence to Counterclaim dated and filed on 6th July 2010, the Plaintiff denied the Defendant's claims and maintained that the rent was always agreed at Ksh 12,000/= for the entire period, and further denied the counter-claim in the sum of Ksh 9,265,000/= and prayed that the Defence and counter-claim be struck out with costs and judgment entered for the plaintiff as prayed in the plaint.

THE WITNESS STATEMENTS AND EVIDENCE

In his Witness Statement dated 10th May 2010, and filed on 12th May 2010, the Defendant's Managing Director, Raj Shah maintained the Defendant's counter-claim in the sum of Ksh 9,265,000/= as well as claims for V.A.T. @ 16% and again, the Plaintiff in its undated Witness Written Statement filed in court on 16th May 2011, the plaintiff's Managing Director, (Amu Shah) maintained the rent was agreed at shs 12,000/= for the entire period 1996 to-date, and that the Defendant had never taken procedural steps or given statutory notice to increase the rent, and were shocked by the proclamation to levy distress for rent in sum of Ksh 8,004,000/= alleged by the Defendant to be owed to it by the Plaintiff. The Plaintiff' contended that the action was motivated by malice, as they had never declined to pay the agreed rent to the Defendant, and maintained that its prayers in the plaint be granted, and the Defendant's counter-claim be dismissed with costs.

ISSUES

In addition to the Witness Statements and the oral evidence by the respective parties Managing Directors as touched both in the Witness Written Statements and oral evidence as briefly reiterated in the introduction to this judgment, Counsel for the Plaintiff and Defendant both filed written submissions together with authorities.

Whereas counsel for the plaintiff raised no less than eight (8) issues for determination, the principal issue to be determined is the nature of, and whether the tenancy, the subject of this litigation, was a controlled tenancy. Other relevant issues consequential thereto will fall into place once that primary issue is determined.

In making that determination I shall consider the parties pleadings, submissions, and only Tenancy Agreement duly signed between the Defendant and Plaintiff, and draw conclusions thereon in light of the law, and in particular the Landlord and Tenants (Shops, Hotels and Catering Establishments) Act, and the Registered Land Act, (Cap. 300, Laws of Kenya).

OF WHETHER THE TENANCY WAS CONTROLLED

The incidents of a controlled tenancy are described in the Landlord and Tenant (Shops, Hotels and Catering Establishments) Act, (Cap. 301, Laws of Kenya) and under Section 2 thereof, a **controlled tenancy** means -

"a tenancy of a shop, hotel or catering establishment -

(a) which has not been reduced into writing; or

(b) which has been reduced into writing -

(I) is for a period not exceeding five years,

(II) contains provisions for termination, otherwise than for breach of covenant, within five years from commencement thereof.

The relationship of landlord and tenant between the Plaintiff and the Defendant goes back to the year 1974 when the Plaintiff enjoyed preferential treatment by the Defendant from that year to the year 1994 by paying rent of no more shs 1,000/= p.m. That is a period of 20 years. From the year 1994 to 31st December 1998, the parties entered into a Tenancy Agreement dated 10th January 1994 under which the Defendant leased and the Plaintiff accepted a lease for a period of five years (from 1.01.1994 to 31.12.1998) reserving and paying therefor the rent reserved under Clause 2 of the Tenancy Agreement as follows -

(1) 1994 - Shs 19,000/=

(2) 1995 - Shs 20,000/=

(3) 1996 Shs 24,000/=

(4) 1997 Shs 24,000/=

(5) 1998 Shs 24,000/=

The rent was payable 4 months in advance on the 1st day of the month. Clause 4 of the Tenancy Agreement permitted the agreement to be renewed for a similar period of five years at a rent which was not indicated, but could not be less than the rent payable during the last year of the expired tenancy.

The Plaintiff no doubt breached these arrangements, it neither sought renewal of the lease, nor negotiated a new rent. From the year 1999, to-date the plaintiff insisted on payment of the sum of Ksh 12,000/=p.m. which sum the Defendant also continued to accept until it directed the Plaintiff to pay the said sum to the Defendant's Advocates, who continued to receive the rent on a *"without prejudice basis"*.

OPINION

I am afraid those words *("without prejudice basis")* did not help the Defendant upon expiry of the Tenancy Agreement on 31st December 1998, the tenancy became a controlled. It had not been reduced into writing. Counsel for the Defendant admits as much in paragraph 20 of his written submissions -

20. "while the Tenancy in question may be controlled, the justice of the matter demands that orders made in terms of the prayers in the counter-claim with a consequence that this court do direct a true and fair valuation to be made in respect of the premises and that the plaintiff be directed to pay market rent as prayed in the counter-claim."

The tenancy having been controlled by operation of law from 1999, the only way the Defendant could secure an economic rental was to enter into a formal Lease or Tenancy Agreement with the Plaintiff, or in default of such agreement, approach the Businesses Premises Rent Tribunal in terms of Section 4(2) of the parent Act of that Tribunal -

"4(1)

(2) a landlord who wishes to terminate a controlled tenancy, or to alter, to the detriment of the tenant, any term or conditions in, or right or service enjoyed by the tenant under such tenancy, shall give notice in that behalf to the tenant in the prescribed form."

The Defendant did not give any such notice, and instead proceeded to the Business Premises Rent Tribunal for orders of distress for rent, which were followed with application by the plaintiff to have those orders stayed or vacated.

The suit land, NAKURU MINICIPALITY BLOCK 1126/35 is registered under the Registered Land Act, *(Cap. 300, Laws of Kenya)*, and was at all time material to the suit herein subject to the said Act.

In so far as leases are concerned, the relevant provisions are SS 46(1)(b) and 52 of the said Act. Section 46 (1)(b) provides -

"S. 46(1) Subject to any written law governing agricultural tenancies -

(a) -

(b) where the proprietor of land permits exclusive occupation of the land or any part thereof by any other person at a rent but without any agreement in writing, that occupation shall be deemed a

periodic tenancy.

(c) the periodic tenancy created by this sub-section shall be the period of reference to which the rent is payable, and the tenancy may be determined by either party giving to the other notice, the length of which shall, subject to any other written law, be no less than the period of th tenancy and shall expire on one of the days on which rent is payable.

(2) No periodic tenancy shall be capable of registration but it shall be deemed to be a right to obtain an interest for the purposes of Section 131 (cautions).

And Section 52 says -

"52. (1) where a person having lawfully entered into occupation of any land as lessee, continues to occupy land with the consent of the lessor after the termination of the lease he shall, subject to any written law governing agricultural tenancies and in the absence of any evidence to the contrary, be deemed to be a tenant holding the land on a periodic tenancy on the same conditions as those of the lease, so far as those conditions are appropriate to a periodic tenancy.

(2) For the purposes of this section, the acceptance of rent in respect of any period after the determination of the lease shall, if the former tenant is still in occupation and subject to any agreement to the contrary, be taken as evidence of consent to the continued occupation of the land."

The other written law referred to in these sections is the Landlord and Tenant (Shops, Hotels and Catering Establishment) Act *(Cap. 301, Laws of Kenya)*, SS4(1) (b) and 6 to which I have already made reference.

Although the holding over by the plaintiff of the premises after the determination of the tenancy of 1994 – 1998, created a periodic tenancy, being business premises, the holding over was subject to that Act, and it was a controlled tenancy by operation of law. Under both the Registered Land Act, and the Landlord and Tenant (Shops, Hotels and Catering Establishments) Act, the Plaintiff was bound to pay the rent payable in the manner prescribed under the expired lease.

Unless there were undisclosed reasons for the plaintiff's insistence of the rent agreed between the principal officers of the plaintiff and the Defendant as being Ksh 12,000/= per month for the post 1998 period to-date, there is no indication in the mass of correspondence that the Tenancy Agreement of 10th January 1994 was altered in any way in respect of the monthly rental. It is trite law that a written contract can only be amended in similar manner that is, in writing. The only exception is custom and usage of the particular trade. That is certainly not the position here. The last rental payable for the period December 1 – 31st 1998 was shs 24,000 per month.

Being a controlled Tenancy any alteration of the terms of the holding over were subject to the jurisdiction of the Business Premises Rent Tribunal, and the Defendant could not unilaterally increase the rent from 24,000/= to shs 55,000/= or Ksh 65,000/= or Ksh 85,000/=.

However being a tenant holding over under the expired Tenancy Agreement of 10th January 1994, the Plaintiff was under both a legal and contractual obligation to pay the same rent for the holding over period at the rate at which it was liable to pay in terms of the expired lease. The Plaintiff's obligation was to pay shs 24,000/= per month, for the year 1998. The rental payable from 1.01.1999, was therefore shs 24,000/= per month, from then to the current time, a period in my calculation of 173 months *(1.10.1999 to 31.05.2013)* works out at 173 x 24,000 = Shs 4,152,000/=. I therefore hold and find the plaintiff liable to the Defendant in the sum of Ksh 4,152,000/= less the sums which the plaintiff has paid *(if any)*.

Lastly, the Defendant has to take appropriate steps in order to regain and obtain an economic or market rate of rent for its premises. These steps and findings herein -

(I) the tenancy between the Defendant and the plaintiff is a controlled tenancy,

(II) there be appointed forthwith a valuer acceptable to both the plaintiff and the Defendant, to carry out a valuation of the premises occupied by the plaintiff for the purposes of establishing a fair market rental. In default of such appointment within 60 days, such valuer be appointed by the chairperson of the Rift Valley Law Society at the instance of either party, and such valuer to render his report within 30 days of appointment.

(III) There be a formal lease between the Plaintiff and Defendant at a rental recommended by the valuer or as thereafter agreed by the parties hereto in writing.

(IV) In default of such agreement within 120 days from the date hereof the plaintiff do vacate and hand over the suit premises to the Defendants within 45 days of such default.

For those reasons, there will be an order of injunction for 120 days against the Defendant from taking any other action save as stated above. The Plaintiff's claim for a permanent injunction, general damages and costs of the suit are dismissed with costs to the Defendant. The Defendants counter-claim is therefore allowed to that extent.

Dated, signed and delivered at Nakuru this 12th day of April, 2013

M. J. ANYARA EMUKULE

JUDGE