



REPUBLIC OF KENYA

IN THE ENVIRONMENT AND LAND COURT AT NAIROBI

ELC CIVIL SUIT NO. 330 OF 2012

THOMAS MASEKI MAERA.....PLAINTIFF

VERSUS

KHIMJI PATEL.....DEFENDANT

JUDGMENT OF THE COURT

The Plaintiff instituted this suit against the Defendant by way of a Plaint dated 28th May 2012 whereby he averred to be the registered owner of the suit L.R. No. 209/20173. The Plaintiff stated that the Defendant was his tenant on the said property, until the tenancy was terminated through a notice dated 9/11/2011 served in November 2011.

The Plaintiff further stated that the reasons for issuing the Defendant with the notice, was so as to comply with the City Council of Nairobi directions to renovate the premises. It is the Plaintiffs averments that despite service of the notice to vacate, the Defendant has declined to vacate and is consequently trespassing on the property. The Plaintiff prays that the Court does enter judgment against the Defendant for an order of eviction from L.R. No. 209/20173, together with costs of the suit and interests thereon.

Despite service of the Plaint upon the Defendant, he failed to enter appearance and file a defence to the Plaint. There is an affidavit of service filed in court on 15/8/2012 and sworn on 14/8/2012 by Patrick Opuko, a process server, who deponed that he accompanied the Plaintiff to the premises who pointed out the Defendant to him. Further, that he introduced himself and served him the documents which he accepted but declined to acknowledge receipt of. At the lapse of the prescribed time within which to file a defence, the Plaintiff requested for judgment in default of defence. The request was granted on 2/10/2012, and the Plaintiff was directed to set the suit down for formal proof hearing.

The matter came up for formal proof on 31/7/2013 when the Plaintiff, PW1 testified that he has been the owner of the suit premises since 2009, and that the Defendant who was his tenant, once used to operate a shop thereon which he closed, and thereupon started to reside in the said premises. It was his evidence that the Defendant also stopped paying rent soon after he closed the shop.

The Plaintiff testified that he subsequently gave the Defendant notice to vacate the premises for reasons of non-payment of rent as well, as the need to renovate the building upon receiving notice to this effect from the City Council. The Plaintiff testified that when the Defendant declined to vacate, he filed a notice of termination giving the Defendant three months' notice to vacate at the Business Premises Rent Tribunal. The Plaintiff stated that the Defendant neither vacated, nor objected to the termination notice filed at the Business Premises Rent Tribunal.

The Plaintiff thus prays for an eviction order to enable him comply with the notice from the City Council of Nairobi as he cannot make repairs while the Defendant is still in occupation. The Plaintiff further prays

for possession of the said property.

The main issue before the court therefore is whether the orders of eviction can issue. The court in this regard notes that this suit is undefended despite the Plaintiff effecting service of a hearing notice dated 12/7/2013 notifying the Defendant of the formal proof hearing that had been scheduled for 18/7/2013. The Plaintiff's evidence therefore remains uncontroverted. The Plaintiff has in addition demonstrated ownership of the suit property by producing his certificate of title as his Exhibit 1. The Plaintiff also produced as his Exhibit 2 the notices from the City Council of Nairobi requiring him to carry out renovations, and in doing so, he has to ensure safety for the people and properties around the working area.

It is not disputed that the tenancy between the Plaintiff and Defendant was a controlled tenancy within the meaning of section 2(1) of the Landlord and Tenant (Shops, Hotels and Catering Establishments) Act (Cap 301), and according to section 4(2) of the said Act a landlord who wishes to terminate a controlled tenancy must give notice to the tenant in the prescribed form, and the notice shall take effect after two months of the receipt thereof.

The Plaintiff produced as his Exhibit 3 a notice to terminate the tenancy pursuant to section 4(2) of the Landlord and Tenant (Shops, Hotels and Catering Establishments) Act dated 9/11/2011 giving the Defendant 3 months to vacate the premises, and an affidavit of service of the said notice on the Defendant sworn on 16th December 2011 by Felix M. Munuve, a court process server. The said notice was not challenged by the Defendant by way of a reference, as confirmed by the letter dated 16th February 2012 from the Chairperson of the Business Premises Rent Tribunal which was addressed to the Plaintiff's Advocates and which was produced as the Plaintiff's Exhibit 5. The effect of the failure to file a reference by the Defendant is found in section 10 of the Landlord and Tenant (Shops, Hotels and Catering Establishments) Act which provides as follows:

“Where a landlord has served a notice under section 4 of this Act on a tenant, and the tenant fails to notify the landlord within the appropriate time of his unwillingness to comply with such notice or to refer the matter to a Tribunal, then, subject to section 6 of this Act, such notice shall have effect from the date therein specified to terminate the tenancy, or terminate or alter the terms and conditions, thereof or the rights or services enjoyed thereunder.”

I therefore find that the Plaintiff has proved his case on a balance of probabilities as he has shown that he has given the required notice and exhausted the procedure set out in the Landlord and Tenant (Shops, Hotels and Catering Establishments). I also find for this reason that the Plaintiff is thereby properly before this court for the eviction orders sought.

I accordingly enter judgment for the Plaintiff and make the following orders:

1. That the Defendant shall within 30 days of service upon him by the Plaintiff of the orders herein, vacate the premises known L.R. No. 209/20173. In default, eviction orders shall issue permitting the Plaintiff to evict the Defendant from the suit premises.
2. The Defendant shall pay the costs of this suit to the Plaintiff.

Dated, signed and delivered in open court at Nairobi this ____4th____ day of

____November____, 2013.

P. NYAMWEYA

JUDGE