



REPUBLIC OF KENYA

IN THE ENVIRONMENT AND LAND COURT OF KENYA

AT NAKURU

ELC NO. 101A OF 2018

C K PATEL LIMITED.....PLAINTIFF

VERSUS

MAYHARVEST LIMITED.....1ST DEFENDANT

MESHACK MORRISON LITONDO.....2ND DEFENDANT

PAULA TALARICO LITONDO.....3RD DEFENDANT

RULING

1.The Plaintiff initiated the present suit vide a plaint dated 28th February 2018 filed in Court on 1st March 2018 claiming against the defendants unpaid and outstanding rent in regard to premises leased to the defendants at West Side Mall, Nakuru Town on **L.R No.Nakuru Municipality Block 4/456**. The plaintiff prayed for judgment against the defendants as follows:-

- a. That Judgment be entered for the plaintiff against the defendants jointly and severally for the said sum of Kshs.3,597,475.20;
- b. Interest at the rate of 3% per month on the unpaid rent arrears until payment in full;
- c. Costs of the suit and interest plus VAT thereon;
- d. Mesne profit of the said premises from 5th July 2016 till 31st October 2017,
- e. Damages for breach of covenants.

2. The defendant filed a defence and counterclaim on 10th July 2019. The Defendants denied being in breach of their tenancy obligations and averred that if there was any breach it was occasioned by the plaintiffs act of frustrating the defendants in the conduct of their business. The defendants contended the plaintiffs employed “unbusiness” like methods to enforce payment of rent arrears by confiscating the defendants tools of trade and disposing the same unprocedurally to the defendants detriment. The defendants claimed general damages and an account of the proceeds of sale of their goods unprocedurally disposed off by the plaintiff in purported recovery of rent arrears.

3. The plaintiff replied to the defence and filed a defence to the counterclaim. The plaintiff reiterated the contents of the plaint and denied frustrating the defendants in their business in any manner. The plaintiffs asserted the defendants breached the terms of the lease and the Deed of Acknowledgment of Debt. The plaintiff averred that levy of distress on the defendants goods was lawfully executed and that the plaintiff duly adhered to the law in exercising its right of entry into the premises .

4. I have given the brief background to contextualize the plaintiff’s Notice of Motion dated 25th February 2020 filed on the same date and which is the subject of this ruling. The application is brought under Order 36 Rule 5 of the Civil Procedure Rules 2010 and Section 3A of the Civil Procedure Act, Cap 21 Laws of Kenya and seeks the following prayers:-

1. That the Honourable Court be pleased to enter summary judgment in favour of the plaintiff/applicant and as against the Defendants/Respondents joint and severally for the sum of Kenya shillings Three Million, five hundred and ninety seven thousand, four hundred and seventy five and twenty cents (Ksh.3,597,475.20/=)
2. That the defendants be condemned to shoulder the costs of this application and the entire suit, interest thereto on the claimed

amount plus damages as per the prayers under paragraph 14 of the plaint.

5. The application is grounded on the grounds set out on the body of the application and the affidavit sworn in support by Dilip Patel, a director of the plaintiff. The grounds in support of the application are as hereunder:-

(a) That the plaintiff/applicant's claim against the Defendant/respondent in the instant suit is a liquidated one.

(b) That the defendants/respondents has admitted owing to the plaintiff the sum of Kenya shillings four Million and Eight Six Thousand and Nineteen (Kshs4,086,019.00) out of the sum claimed in the plaint, vide "Deed of acknowledgment of debt, agreement to settle arrears and agreement for surrender of lease on default" dated 8th November 2017 .

(c) That the defendants/respondents are truly and justly indebted to the plaintiff in the sum claimed in the plaint

(d) That the defendant/respondent are indebted to the plaintiff and has no reasonable defence;

(e) That the defence is a mere blanket denial, a sham aimed at delaying judgment in this matter;

(f) That it is in the interest of justice that summary judgment be entered against the defendant in the sum of Kenya shillings Three million, five hundred and Ninety-seven thousand, four Hundred and Seventy-five and Twenty Cents (Kshs.3,597,475.20) which sum the defendants have expressly admitted owing to the plaintiff and he cannot have any reasonable Defence thereof.

6. The plaintiff's advocates Adams Amaiyo swore a supplementary affidavit on 9th July 2020 filed on 10th July 2020 to annex the appropriate lease agreement dated 18th March 2013 between the plaintiff and the 1st defendant. The 2nd and 3rd defendant's were guarantors of the lease. Though in the supporting affidavit sworn by Dilip Patel the lease was said to have been annexed as exhibit 'A' the advocates office had through error and /or inadvertence annexed a lease dated 12th November 2012 in favour of Nakumatt holdings Ltd. The Court is satisfied the error could only have been inadvertent and unintended and on that account accepts the supplementary affidavit as properly filed .

7. A Deed of Acknowledgement of debt, Agreement to settle arrears and Agreement for surrender of lease in the event of default dated 8th November 2017 made between the 1st defendant as the tenant and the plaintiff as the Landlord and executed by the 2nd and 3rd defendants as the guarantors of the 1st defendant was exhibited in the supporting affidavit by Dilip Patel as exhibit 'B'. Under the Deed, the Tenant acknowledged being indebted to the Landlord under the lease as at 30th June 2017 in the sum of Kshs4,086,019.10. The Tenant and the Guarantors under clause 3.2.2 of the Deed agreed to pay the rent arrears and the ongoing rent by installments as from 30th September 2017 and to clear all the rent arrears and ongoing rent by 30th November 2017. In the event of any default, the defendants were under clause 4 of the Deed to unconditionally surrender the lease and yield/vacant possession of the premises.

8. The plaintiff asserts that the defendants did not honour the terms of the Deed of acknowledgment of debt and that as at the time of filing suit the defendants were indebted to the plaintiff as at 31st January 2018 in the sum of Kshs.3,597,265.20 after applying a sum of Kshs.675,210/= held as security deposit. The plaintiff asserts the claim against the defendants is the said sum of Kshs3,597,265.20 which the defendants duly acknowledged under the Deed and avers the defendants cannot have any defence to the claim and contends that the defence is but a mere denial and is unsustainable.

9. The defendants did not file a response to the application by the plaintiff. A hearing notice together with the supplementary affidavit were served on the defendants advocates on 15th July 2020 as per the affidavit of service sworn on 23rd July 2020. On 27th July 2020 when the plaintiff's Notice of Motion was listed for hearing , there was no attendance on the part of the defendants and the application proceeded for hearing ex parte and was unopposed as no response had been filed by the defendants.

10. There is no denial that the 1st defendant was a Tenant of the plaintiff at the West Side Mall **L.R No.Nakuru Municipality Block 4/456** on the terms of the Lease dated 18th March 2013. The 2nd and 3rd Defendants guaranteed the 1st defendant's performance of the terms of the lease. There is further no dispute that the 1st defendant ran into arrears in rent payment which culminated in the 1st defendant and the plaintiff executing a Deed dated 8th November 2017 whereby the 1st defendant acknowledged indebtedness and agreed to settle the rent arrears in terms of the Deed. Again the 2nd and 3rd defendants executed the Deed as the guarantors of the 1st defendant. The acknowledgment of the debt under the Deed was unequivocal and so was the agreement to pay the rent arrears and the rent accruing. The plaintiff has contended that the defendants did not pay the outstanding rent arrears and the accruing rent as they undertook to do under the Deed of Acknowledgment of the Debt. The defendants defence goes as far as denying there was a lease yet there was a duly registered lease as per exhibit 'A' annexed through the supplementary affidavit. The defendants though not expressly denying the Deed of Acknowledgment of Debt alleges that it was the plaintiff who frustrated the defendants efforts to transact business which would have enabled them to meet their obligations under the Deed.

11. I have evaluated the defendants statement of defence and I am satisfied that the same constitutes mere denials and there is no demonstration that the debt that the defendants had duly acknowledged to pay under the Deed was paid. The Deed of Acknowledgment provided clearly when and how the debt was to be paid under clause 3.2 and under clause 4 what was to happen in the event of default. In the event of default the Tenancy was to terminate and the Tenant was obliged to vacate the Demised premises.

12. The defence and counter claim filed by the defendants clearly was not in conformity with Order 7 Rule 5 which provides what documents must accompany the defence and counterclaim. Order 7 Rule 5 provides as follows:-

5. The defence and counterclaim filed under rule 1 and 2 shall be accompanied by :-

(a) an affidavit under Order 4 Rule 1 (2) where there is a counterclaim;

(b) a list of witnesses to be called at the trial;

(c) Written statements to be relied on at the trial;

(d) Copies of documents to be relied on at the trial

Provided that statements under sub-rule (c) may with leave of the Court be furnished at least fifteen days prior to the trial conference under order 11.

13. Under Order 4 Rule 1 (2) a verifying affidavit must be filed with the plaint. It provides as follows:-

(2) The plaint shall be accompanied by an affidavit sworn by the plaintiff verifying the correctness of the averments contained in rule 1 (1) (f).

14. A counterclaim being in the nature of a separate suit is for all intents and purposes a plaint and hence the application of Order 4 Rule 1 (2) where a defendant files a counter claim . In the present suit there was no verifying affidavit accompanying the counterclaim and that rendered the counterclaim incompetent. On 11th November 2019 the Court granted the defendants leave of 30 days to comply with Order 11 of the Civil Procedure Rules but up to the date the plaintiff filed the present application, the defendants had not complied. The defendants defence and the counterclaim on record remains incompetent for failure to comply with Order 7 Rule 5. That notwithstanding, I am not persuaded the defendants have any defence or answer to the plaintiff's liquidated claim of Kshs3,597,475/20. I however find no basis to award any general damages (Mesne profits) that the plaintiff prays for. The rent arrears claimed are worked out upto 31st January 2018. Equally I find no basis for the claim of interest at 3 % per month as claimed by the plaintiff.

15. The net result is that I find and hold that the defendants have no plausible defence to the plaintiff's claim and I accordingly enter summary judgment in favour of the plaintiff in the sum of Kshs3,597,475.20 together with interest at Court rates from the date of filing the suit. The counterclaim by the defendants is dismissed for being incompetent. The costs of the suit and the counterclaim are awarded to the plaintiff.

16. Orders accordingly.

Ruling dated signed and delivered virtually on this 1st day of October 2020.

J M MUTUNGI

JUDGE