



REPUBLIC OF KENYA
IN THE HIGH COURT OF KENYA AT NAIROBI
CIVIL CASE NO. 3685 OF 1992

K.K SHAH & OTHERS.....PLAINTIFF

VERSUS

HEINEMANN KENYA LTD.....DEFENDANT

J U D G M E N T

The plaintiffs are the registered proprietors of premises situate on L.R. 20/4360/17 Kijabe street Nairobi. the said premises, by agreements and leases, were rented to the defendants at agreed rents specified therein.

The term created by the said agreements and leases expired by effluxion of time on 31st August, 1991. The defendant, however, did not vacate the premises and the plaintiffs pleaded in the plaint that the defendant remained in occupation of the said premises as a trespasser.

As at the time of filing the plaint, it was pleaded that the monthly rental value of the said premises was kshs. 143,818/0. The payers sought in the plaint were:

- (a) vacant possession of the ground floor and basement premises situate on plot L.R.A 209/4360/17 Nairobi and the ejection of the defendant therefrom.
- (b) mesne profits at kshs. 143,818 per month form 1st day of September, 1991, until possession is delivered up
- (c) Interest at the rate 12% per annum on mesne profits.
- (d) costs of this suit together with interest thereon at court rates and value added tax thereon from the date of judgment until payment in full
- (e) such further or other relief as this Honourable court may deem fit and reasonable to grant.

The plaintiff filed an application for summary judgment. The court ordered the defendant to vacate the premises forthwith with leave to defend the claim for mesne profits only. A stay of execution of the order to vacate the premises, on an application by the defendant, was refused by the court.

The defendant however continued in occupation and paid out on account towards mesne profits. The plaintiff moved to execute the decree when it appeared that the defendant was not intent to persue the intention to appeal which was manifested by the filing of a notice of appeal. When the application to execute came up for hearing, an extension of about 2(two) months was granted to the defendant. That time rna out and the defendant applied to extend the time further. The application was granted despite

resistance by the plaintiff. The defendant gave up possession of the suit premises on 3rd July, 1995 by delivering the keys thereto to the plaintiffs advocate. I note that the extension granted by the court was up to 31st May, 1995.

As at the time this suit came up for hearing, prayer (a) of the plaint had been overtaken by events. Both counsel appear to be in agreement that the claim to be determined by the court is that of mesne profits.

There has been some suggestion that the defendant held over the premise while negotiating to purchase the same from the plaintiff. I am however unable to relate that to the agreement or lease between parties which terminates by effluxion of time. After 31st August, 1991 the defendant had no right to continue in occupation but elected to remain therein.

The facts and the law would support the submission that after the lapse of the agreement and/or lease, the defendant became a trespasser. I find support for this in the case of Clifton Securities Ltd -v- Huntley and Others (1948) 2 ALL ER 283 AT P. 284 where Denning J. had this to say: www.kenyalawreports.or.ke 4

“The claim in this action is for mesne profits from January 13 1947 which was the date up to while Heun Collins, J, had given mesne profits until the date the defendants quitted in July 1947. This is no doubt that in point of law the defendants were trespassers for that time, and that they can have no answer to this claim for mesne profits upto July, 15, 1947. At what rate are the mesne profits to be assessed? When the rent represents the fair value of the premises, mesne profits are assessed at the amount of the rent, but if the real value is higher than the rent, then the mesne profits must be assessed at the higher value.....”

It is true, the plaintiff seeks to recover money due and owing in terms of mesne profits. It is settled law that special damages must not only be specifically pleaded but must also be strictly proved. Under the civil procedure rules however, it is not a requirement that mesne profits should be set out with precision.

Order VII Rule 2(I) of the Civil procedure Rules states as follows: “2(I) where the plaintiff seeks the recovery of money, the plaintiff shall state the precise amount claimed, except where the plaintiff sues for mesne profits, or for an amount which will be found due to him on taking unsettled accounts between him and the defendant.”

I believe it for good reason that mesne profits should not be stated specifically in the pleadings. These are subject to fluctuation depending on the market forces. Indeed that is the import of the professional valuers called by both the plaintiffs and the defendant in this suit.

The valuations presented on behalf of the plaintiff by pw2 and pw3 upon which mesne profits have been pegged have come under heavy criticism by the learned counsel for the defendant. The thrust of the defence case in respect of those reports is that, they have not taken into consideration the leases and outgoings paid during the subsistence of the tenancy, they have ignored the age of the suit premises, they have not used or mentioned any comparables in the report and whatever comparables they have mentioned in evidence be said to compare well as these are modern premises with equally modern facilities.

The defendant called a valuer to counter the evidence of Pw2 and Pw3 . This defence witness is Dw7. His report is different from that of his professional colleagues.

His calculations are older and lower than those used by his colleagues. He has maintained comparables in his report and his annual increments of rents in terms of percentage are lower.

Both learned counsel have made their submissions which I have on record. This is a case that cannot be decided in isolation from the economic consideration addressed by the valuers who gave evidence herein. In the end it is not a case of which report is preferable to the other but rather what economic

considerations have best been addressed.

The owner of property who lets the same out expects some returns and these returns appreciate as time goes by. They are determined by market conditions which have not been static. Indeed all the valuers are agreed that that is the position. Pw2 Pw3 and Dw2 are of the view that the minimum increase in rent each year is in the region of between 10% and 15%. That is not unreasonable. In this regard, the report by pw2 is most instructive. His assessment is reasonable and with respect, I accept the same.

There was added the unimproved site value rate which was apportionable. according to the terms of the expired lease, the defendant was paying 2/3rds of the total unimproved site value rate. This payment cannot be separated from the mesne profits and needed not be specifically pleaded.

It is true that the defendant may have issued cheques totalling kshs. 2,520,000/-. It is conceded however that only cheques amounting to kshs. www.kenyalawreports.or.ke 7 1,960,000/- were banked. It cannot be argued that the unrepresented cheques should also be taken as having been paid.

Pw1 produced ext.3 which the learned counsel calls a piece of paper. He also says that the contents therein are self-made tabulations. With respect the summary dismissal of that exhibit is in total disregard of the other exhibits produced and in particular the valuation reports. The witness (PW1) did not pluck those figures from the air. They are supported by the evidence of the valuers and in particular pw2.

On my part I accept the calculations as set out in ext3 and find that the defendant is indebted to the plaintiff in the sum of kshs. 5,473,873.50. The plaintiffs claimed interest at court rates. A party is bound by own pleadings. There was no amendment sought. submissions cannot constitute pleadings. I am aware of the discretion under section 26 of the civil procedure act. The defendant was liable to pay mesne profits from 1st September, 1991. I consider it fair and just to order that interest be paid thereon from the said date until payment in full.

An issue has arisen as to the costs payable to the valuers. These costs will have to be agreed and if not there they shall be included in the bill of costs. The costs of the suit shall follow the event.

And so in the end there shall be judgment for the plaintiffs against the defendant in the sum of kshs. 5,473,873.50 plus costs and interest at court rates.

Orders accordingly.

Dated and delivered at Nairobi this 23rd day of July, 1999.

A. MBOGHOLI MSAGHA

JUDGE

Mr Parekh for the plaintiff

Mr Eboso for the defendant

MR EBOSO

I apply for certified copies of the proceedings and judgment. I also wish to apply for leave to appeal. I also apply for photocopies of the judgment delivered today. Lastly I apply for a stay of execution pending appeal. sgd

MBOGHOLI MSAGHA

JUDGE

23/7/99

MR PAREKH

First three items I have no objection stay of execution. I very strongly object. This is a money decree. Defendant is not entitled to stay unless a very good ground is shown. Plaintiffs are men of substance they own a building. If for any reason the judgment is set aside on appeal they will be able to repay plaintiff has been kept out of his money for a long time. they must have the fruits of the benefit of the decree. Stay should be refused.

sgd

MBOGHOLI MSAGHA

JUDGE

23/7/99

MR EBOSO

We are willing to comply with any conditions including reasonable security for payment eg. bank guarantee and we are also ready to provide security for interest. sgd

Mboghli Msagha

Judge

RULING

Certified copies of proceedings and judgment to be supplied. Leave to appeal if needed is granted. Counsel may obtain photocopies of the judgment just delivered. As for the stay, I have considered what both counsel have had to say. First, there is no decree as of now capable of being executed secondly that being the case the more is premature. Thirdly, a formal application should be filed.

Accordingly say is refused.

sgd

MBOGHOLI MSAGHA

JUDGE