REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA AT NAIROBI
CIVIL CASE NO. 2287 OF 1995

R & K. INVESTMENT.....PLAINTIFF

-versus-

EVANSON GITAU.....DEFENDANT

J U D G M E N T

The plaintiff is a limited liability company and the owner of premises known as plot NO. 36/111/1112 Eastleigh, Nairobi. It leased the said premises to the defendant for a period of 5(five) years and 3(three) months at a monthly rent of Kshs. 8,500/- from the month of December 1991 to march, 1996. (going by the pleadings). During the hearing however evidence was to be led and conceded by both parties that the expiry date was 31st March, 1997.

The present suit was filed before the expiry of the tenancy which was reduced into writing. The expiry by efluxion of time was after the present suit had been set down for hearing.

It is the plaintiff's case that the defendant was in breach of the terms of the lease dated 19th December, 1991 particulars of which were pleaded. Clause 15 of the said lease provided inter alia:

> "That the demised premises shall be used for the purpose of carrying on the business of butchery only and the tenant shall not cause any trouble or annoyance to any other tenant (s) in the adjoining shops."

This lease was produced in evidence as Exhibit I. The plaintiff set out the particulars of breach in paragraph 5 of the plaint. These are

(a) That the defendant prevented TOB COHEN a tenant in the leased property namely L.R. 36/111/1112 from constructing a partition wall.

(b) That after the said TOB COHEN had constructed part of the wall the defendant destroyed it.

(c) That the defendant uses charcoal to roast meat. This produces a lot of smoke to the annoyance of other tenants.

(d) That the defendant has spoiled the wall of the leased property.

(e) That the defendant does not generally co-operate with other tenants and has become a nuisance to other tenants and to the landlord

It is further pleaded that the said lease clause 23 thereof provides: ".....the tenancy may be

terminated by either party giving a THREE months notice in writing." The plaintiff says such a notice was served on 6th March, 1995 but the defendant did not vacate the leased premises despite breaches aforesaid.

The orders sought are:

(a) A declaration that the defendant is in breach of the lease between him and the plaintiff dated 19th December, 1991.

(b) That the defendant vacate and deliver up vacant possession of the shop occupied by him as a butchery on the title Number 36/111/1112 Eastleigh to the plaintiff

(c) Costs of this suit.

(d) General Damages

(e) Such further or other relief as this Honourable Court may deem fit to grant.

The defendant denied any breach on his part but said the tenancy was controlled and subject to the provisions of Landlord and Tenant (shops Hotels and catering establishments) Act Cap 301 laws of Kenya. Under the said Act, he pleaded, the notice given by the plaintiff for him to vacate was invalid. He also accused the plaintiff of fraudulently changing the clauses of the lease after the same had been signed by the defendant.

Both sides called one witness to testify in support of the pleadings. Both learned counsel have also made their submissions which I have on record.

The matters herein have been subject to litigation both in the Business Premises Rent Tribunal and in this court. The Business premises Rent Tribunal dismissed the reference for want of jurisdiction and the High Court declined to grant an injunction as the defendant had not satisfied the conditions for granting the same. In both cases the defendant did not appeal. I am not sitting on appeal from the ruling of the Tribunal neither am I in a position to review the order of Aluoch J. The position is that the defendant never challenged the decisions of those two competent courts.

Further to the foregoing, I find no room for holding that the tenancy was a controlled one going by the term created by the lease, the date from which the defendant started to pay the rent and the common stand that the expiry date thereof was 31st March, 1997. The parties herein expressly contracted outside the provisions of Cap. 301 aforesaid.

The court is bound to decide this matter on the basis of the pleadings, the lease and evidence adduced by the parties. The defendant has admitted that the relationship between him and the landlord was not cordial. there has been some allegation that the lease was altered to the disadvantage of the defendant but with respect, other than the allegations of fraud, no evidence whatsoever was adduced to incriminate the plaintiff or the lawyers who drew the lease. In the absence of such evidence I find that he demised premises are as set out in the lease.

There was a dispute between the defendant and one of the tenants who wished to take up premises in the same building. The plaintiff has produced a lease between Tobs Limited and the plaintiff which however never took place as the defendant is said to have stood in the way of Tobs Limited.

This the defendant denied, but with the same breath admitted having received a letter from the lawyers for Tobs Limited complaining that he (the defendant) had threatened the workers of that company. He confirmed that Tobs Limited had filed an application in court (H.C.C.C. MISC. APPN. NO. 629 of 1994) seeking to restrain him from interfering with the peaceful occupation of Tobs Limited in the premises leased to it by the plaintiff. Indeed at one stage the defendant filed contempt proceedings against one Tob Conen.

The plaintiff was not bound to prove all allegations of breach as set out in the pleadings. the encounter between the defendant and Tobs Limited was enough, in my judgment, to adversely compromise the position of the defendant and the plaintiff. As proof is on a balance of probabilities, I find that that standard was achieved.

Several other matters came up during the trial which are remote from the pleadings and I have elected not to address them.

Following the breach aforesaid, the plaintiff gave the defendant a notice under clause 23 of the lease. The notice was dated 6th March, 1995. There was no compliance hence this suit was filed. While the suit was pending for hearing with a date taken, the lease between the plaintiff and defendant expired. I have noted the submission advanced by the learned counsel for the defendant that the plaintiff was then bound to amend the plaint. With respect, I do not think that was necessary. Firstly, it is common ground that the lease expired by efluxion of time. Secondly, the parties have allowed, in their respective positions in the trial, some evidence to be adduced to that effect. Thirdly, the end result would be the same whether or not the plaint was amended.

At the expiry of the lease the defendant refused to vacate and did not instruct his bankers to cancel the standing order remitting the rent to the plaintiff. At the first opportunity the plaintiff returned the money meant for rent after the expiry of the lease. The defendant does not know if more returns were effected.

The position is that, the defendant did not heed the notice of 5th March, 1995 neither did he vacate the premises after the lease expired. His holding over has no basis in law and the plaintiff is entitled to an order for vacant possession. See C.A. No 160 of 1995 Gusii Mwalimu Investments Company Ltd -v- Mwalimu Hotel Limited.

If by any chance the plaintiff did not return the defendant's money after the expiration of the lease just as it continued to receive rent upto 31st March, 1997, even after serving the notice to terminate the tenancy, it cannot be said that the plaintiff compromised or waived the expiry of the lease. If anything, that would be to the credit of the plaintiff in trying to mitigate its loss occasioned by the defendants' failure to give up possession of the demised premises.

Whatever the case, after 31st march, 1997 there was not any relationship between the parties herein capable of being supported by any principle of law or even equity. What the defendant did by holding over was to postpone an obvious eventuality, that is, the giving up of the premises to the plaintiff.

The defendant pleaded a counterclaim against the plaintiff. In his evidence he talked of loss of a hood and profits. He however fell short of proving the same.

Further, having failed to prove any fraud in relation to the alleged alteration of clause 15 of the lease, he cannot be entitled to any damages for breach of contract.

In the end the plaintiff's suit must succeeds. The defendant shall deliver vacant possession of the leased premises within 7 days of service of the order. In the event of non-compliance, the plaintiff shall be at liberty to enlist the services of the court bailiff to effect the eviction.

While the defendant's counterclaim stands dismissed with costs the plaintiff shall have the costs of this suit.

Orders accordingly.

Dated and delivered at Nairobi this 17th of July, 1998

A. MBOGHOLI MSAGHA

JUDGE