REPUBLIC OF KENYA

Mawji v Kaderdina Majee Essak Ltd

High Court, at Mombasa

10/6/1992

Wambilyangah J

Civil Case No. 788 of 1990

10/6/1992**Wambilyangah J** delivered the following Ruling.

This is the defendant's application brought under Order IXA rule 10 seeking that the exparte judgment, decree and all subsequent orders obtained in the main suit be set aside and that the defendant be granted leave to file its defence.

Mr. Kasmani advanced two basic arguments in support of the application, viz;

> (i) That the judgment was irregularly obtained as no formal proof of the claim was done after interlocutory judgment had been given to the plaintiff. He argued that the plaintiff's claim in the plaint was not a liquidated claim, and the holding of a formal proof after the entry of an interlocutory judgment was therefore an imperative requirement and the failure to hold such a formal proof renders the judgment an irregular one which, ipso, facto should be set aside.

> (ii) That in the event that the court finds that he ex-parte judgment was regularly obtained, the court can invoke the wide discretion bestowed upon it by Rule 10 of the Order IXA and set it aside.

The defendant's counsel, Mr. Suchak opposed the application.

The first question which I must answer is whether plaintiff's claim was or was not a liquidated one.

"Liquidated demand" is defined in Stroud's Judicial Dictionary 3rd Edition at p. 1160 as "including liquidated damages." And "a claim for short delivery of goods sold is a liquidated demand." With regard the definition of the words "Liquidated damages" I find them well explained in a passage in Law of Contract by Chesire and Fifoot 4th Edition at p. 510 which reads:

> "First it may be a genuine pre-estimate of the loss that will be caused to one party if a contract is broken by the other. In this case it is called liquidated damages, and it constitutes the amount no more and no less, that the plaintiff is entitled to recover in the event of breach without being required to prove actual damage. Liquidated damages mean that it shall be taken as the sum which the parties have by a contract assessed as the damage to be paid whatever may be the actual damage."

According to paragraph 13/1/1 at p. 110 Rules of the Supreme Court, a final judgment can be entered against the defendant who has not entered appearance or filed defence after the time for so doing has expired when the writ is indorsed for a liquidated demand. But when the writ is for unliquidated damages the plaintiff can only be given an interlocutory judgment.

I am thus compelled to examine the plaint in the present case. There is no dispute that plaintiff's claim against the defendant is based on a sub-lease dated 11th March 1988 in respect of a Godown erected on the land Mombasa/Block 1/Parcel/30. The lease was for a term of 5 years commencing on 1st October 1987 at a monthly rent which was payable six months in advance. One of the terms was that for the first 2 ½ years of the duration of the lease the monthly rent was Shs.20,000/= but payable six months in advance. And for the next remaining period of 2 ½ years the monthly rent was to be:-

> "Negotiated between the plaintiff and the defendant and agreed upon between them 3 months in advance before 1st April 1990, provided. However, that in the event of default between the Plaintiff to negotiating and/or agreeing upon the monthly rental to be payable by the defendant for the de missed premises as aforesaid, such monthly rental as is determined by a valuer to be to be appointed by both the parties to the suit and in the event of failure by the parties to appoint such valuer such other valuer as may be appointed by the Chairman of the Mombasa Law Society whose decision on quantum of monthly rental to be paid by the defendant for the demised premises shall be final and binding upon the parties hereto provided however that the quantum of any such monthly to be determined by the Valuer appointed by the Chairman of the Mombasa Law Society for the demised premises in no circumstances shall be less than Kshs.20,000/= per month."

It is not disputed that the plaintiff vacated the demised premises on the 1st of April 1990. It is thus plaint that she had been in the tenancy for only 2 ½ years. The remaining period of the term of the lease was also 2 ½ years. In paragraph 7 of the plaint it is averred that the plaintiff was unable to relet the demised premises during period of 1st April 1990 to 30th September 1990 and she suffered a loss of rental income amounting to Shs.120,000/=. She prays that this sum be paid to her by the defendant.

In paragraph 9 of the plaint the plaintiff further claims against the defendant the sum of Shs.156,000/= being the difference between rent payable by that defendant under the sublease and rent paid by the new tenant from 1st October 1990 to 30th September 1992 (at a rate of Shs.6,500/= per month). It is calculated as follows:-

> "Rent payable by the defendant for the same period of 24 months should have been 480,000/= and the rent which could be received from the new tenant for the same period would be Shs.(13,500 x 24) = 324,000/=."

As regards the second period of 2½ years of the unexpired term the stipulated categorically that the aspect of it which was to be negotiated or revised was only the one relating to the monthly rent which the defendant was to pay. It was also expressly stated in the lease that even if the parties had to submit their disagreement to be resolved by a valuer, the ultimate rent to be paid would not be less than shs.20,000/=.

In paragraph 6 of the affidavit sworn on 2nd of April 1991 by Abdulhamid Mohammed Hussein in his capacity as a director of the defendant it is averred:

> "The understanding reached between the parties was that the lease was to be for a term of 2 years and 6 month with option to leases to renew it for a further 2 years and 6 months."

This averment is clearly different from what expressly stated in the lease itself as regards the aspect that was to be negotiated about: it concerned only the amount of rent which was to be paid for the 2½ years but which, at all events, was not to be less than Shs.20,000/= per month. I am satisfied that the plaintiff was entitled to recover from the defendant monthly rent of Shs.20,000/= for second period of 2½ years until those contemplated negotiations or arbitration by a valuer, the rent of Shs.20,000/= was to be paid as already fixed.

In this regard it is important to stress that this lease document should be construed as the complete and exclusive expression of the agreement which was intended to bind the 2 parties. In such circumstances neither party can be allowed to adduce evidence to show that his or her intention was mis-stated in the document or that an essential featured of the transaction was omitted.

In Law of Contract by Chesire & Fifoot 4th Edition at p.99 I read the following principle on this point:-

> "It is firmly established as a rule of law that that part of evidence can not be admitted to add to, vary or contradict a deed or any other written instrument. Accordingly it had been held that… parol evidence will not be admitted to prove that some particular term, which had been omitted (by design or otherwise) from a written instrument constituting a valid or operative contract between the parties."

In my considered view therefore the claim in the paragraphs 8 and 9 of the plaint are in the nature of a liquidated demand. And as the defendant failed to enter appearance within the required time, and as also, the proposed defence seeks to introduce parol evidence so as to diametrically contradict the lease signed by both parties, I hold that the judgment entered for the plaintiff for a total of shs.276,000/= with interest and costs was regularly entered and it is a final one. I dismiss the defendants application in that regard.

In paragraph 10 and 11 of the plaint it was averred that during the period when the defendant had been in occupation of the demised premises it had caused the premises to go to waste and to dilapidation which had necessitated repairs worth Shs.175,000/= to be carried out. I must accept Mr. Kasmani's contention that the plaintiff should have proceeded to formally prove the allegations hat the defendant had culpably caused the waste or dilapidation of the godown.She would also have had to establish that she incurred the alleged expenses in those alleged repairs. Mere allegations in the plaint could not at all have constituted proof. I therefore accept Mr. Kasmani's submission that these were special damages which are exceptional in their character and which had to be claimed especially and be proved strictly. The law could not presume that the alleged waste or dilapidation had taken place in the first place. Even if there had been some dilapidation it had to be proved to be ascribed to the defendant's acts or omissions. It may very well have resulted from wear and tear of a building subjected to natural elements.

For those reasons I set aside judgment in respect of the claim in paragraphs 10 and 11 of the plaint.

And as the defendant's application has partly succeeded I order that each party will bear its costs of the application.