REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA AT MOMBASA

CIVIL CASE NO 649 OF 1991

AGRICULTURAL

DEVELOPMENT CORPORATION.....PLAINTIFF

VERSUS

CONTAINER FREIGHTERS CO LTD.....RESPONDENT

RULING

This application for summary judgment is brought by way of a notice of motion under order 35 rules 1, 2 and 3 of the Civil Procedure Rules. It seeks an order that summary judgment be entered for the plaintiff, Agricultural Development Corporation, as prayed in the plaint and that the costs of the application be provided for. The application is supported by the affidavit of one Yasmin Abdulkarim Ali, who was the then advocate for the plaintiff when the application was filed. The application was filed on 30th October, 1991 and since then M/S Onyancha, Bw'omote Congo & Company, Advocates of Nairobi have taken over the conduct of the plaintiff's case from Mrs Ali. Mr Congo argued the application before me. No other affidavit apart from that sworn by Mrs Ali was filed on behalf of the plaintiff. The defendant, Container Freight Co Ltd, opposes the application. The defendant's advocate, Mr Wanyonyi Wafula Chebukati, has in turn sworn a replying affidavit on behalf of the defendant and in support of the defendant's ground of opposition so that neither the plaintiffs nor the defendants authorised representatives such as their secretaries, managing directors etc, have sworn any affidavit in support of their respective claims. Instead, their advocates took it upon themselves to swear affidavits on their behalf. Order 35 rule 1(2) of the Civil Procedure Rules provides:-

> "The application shall be made by motion supported by an affidavit either of the plaintiff or of some other person who can swear positively to the facts verifying the cause of action and any amount claimed."

It is clear to me from the provisions of this rule that the affidavit in support of the motion ought to be sworn either by the plaintiff or "some other person who can swear positively to the facts verifying the cause of action and any amount claimed."

I do not think an advocate for the plaintiff would normally have personal knowledge of the mattes in dispute. Advocates normally act on instructions and I doubt if most of them would be ready to swear as to the truth or otherwise of such instructions. The growing practice of advocates swearing affidavits on behalf of their clients must cease forthwith and in an appropriate case this Court will not hesitate to strike out such affidavits, particularly if an objection is raised. In the present application, no objection was, or could have been raised as both advocates are equally guilty. I note further that it was Mrs Ali who allegedly sent on behalf of the plaintiff the notice terminating the tenancy between the parties so that Mrs Ali could be treated as being personally aware of at least some of the allegations in dispute. I shall say no

more on this point.

The plaintiff is the registered owner of premises known as Mombasa/Block 1/31. On the 21st October, 1988, the plaintiff, by a written agreement, leased those premises to the defendant for a period of three years from the 1st May, 1988, and at a monthly rental of Shs 20,560/-. The parties appear to agree that the lease was covered by the provisions of the Landlord and Tenant (Shops, Hotels and Catering Establishments) Act, cap 301, the Act hereinafter, though the defendant in its defence and counter claim avers in paragraph 6 thereof that –

> "Notwithstanding what is stated in paragraph 5 above, the defendant shall aver at the hearing of this suit that the suit premises do not fall within the statutory or ordinary definition of premises under the Landlord and Tenant (Shops, Hotels and Catering Establishments) Act, chapter 301 of the Laws of Kenya. And if any proceedings exist pursuant to the provisions of the said chapter 301 of the Laws of Kenya then the same are null and void and inconsistent with written law."

Despite this categorical denial of the applicability of the Act, the defendant asserts in its "Grounds of Opposition" that:-

> "1. The application for summary judgment should not be allowed as there are triable issues in the matter to be heard at the Business Premises Rent (sic) Tribunal.
>
> 2. The plaintiff's application should await the finality of the proceedings at the said Business Premises Rent Tribunal."

In paragraph 3 of the replying affidavit Mr Wanyonyi swears on behalf of the defendant that:-

> "That, the defendant hereof (sic) has filed an application for reference to be filed out of time and the said application has not been heard and determined. Annexed hereto and marked 'WWC1'is a copy of the said application."

So that in the defence and counter-claim, the defendant pleads that the Business Premises Tribunal has no jurisdiction to deal with the dispute between it and the plaintiff while for the purposes of resisting the plaintiff's application for summary judgment the defendant contends that the Tribunal has jurisdiction and "there are triable issues in the matter to be heard" before the Tribunal. What, however, is clear at this stage is that there is as yet no reference to the Tribunal. What appears to be pending before the Tribunal is an application by way of notice of motion under sections 6(1) and 9(3) of the Act for leave to file a reference to the Tribunal out of time. It would not be right or appropriate for me to give any opinion on the merits or otherwise of the application before the Tribunal. That is a matter for the Tribunal itself to decide. I however notice that that application is dated the 16th July, 1992, and was filed exactly one year after the present suit was filed, and nearly nine months after the application for summary judgment was filed.

What is the plaintiff's basis for its application for summary judgment? The agreement for a lease is admitted by both sides, though as I have pointed out, the defendant is equivocal as to whether or not the Act applies. The plaintiff is proceeding on the basis that the Act applies. On that basis, on the 26th November, 1988 the plaintiff, through its then advocates, served on the defendant a notice of termination of the tenancy. The notice says on its heading (Exh YAA 2) that it was served pursuant to section 4 (2) of the Act and was terminating the tenancy with effect from the 1st February, 1989. The reason for the termination was given as –

> "That you are irregular in the payment of your rent as and when the same becomes due and at present you are in arrears of rent in the sum of Shs 328,960/- for the months of August 1989 to December 89, and January to November, at Shs 20,560/- per month."

The notice further required the defendant to notify the plaintiff in writing within 30 days from the date of receipt of the notice whether or not it (defendant) agreed to comply with the notice from that date namely

the 1st February, 1989. The defendant does not dispute the receipt of this notice. The plaintiff states in its supporting affidavit that the defendant did not notify it in writing as required that it would not comply with the notice and it is clear that the defendant did not make any reference to the Tribunal. If the defendant had made any reference to the Tribunal, there would be no need for its notice of motion to the Tribunal to be granted leave to file a reference out of time. Under section 6(1) of the Act, the defendant, having received the tenancy notice was obliged to notify the plaintiff that it was not going to comply with the notice and then to make a referene to the Tribunal before the 1st February, 1989. The defendant did neither and the plaintiff subsequently took the position that in accordance with the provisions of section 10 of the Act, the notice took effect and the tenancy agreement between them was terminated on the 1st February, 1989. So on the 16th July, 1991, the plaintiff filed the present action claiming rent arrears in the sum of Shs 493,440/-, mesne profits and vacant possession. The rent arrears was said to be for the period August to December, 1989 (Shs 102,800/-), January to December, 1990 (Shs 246,720/-) and January to July, 1991 (Shs 143,920/-). The prayer for vacant possession was abandoned because it was alleged that the plaintiff obtained possession in July, 1992. Mr Congo asked me that if I grant to the plaintiff its prayers, then I should also grant mesne profits from the date when the suit was filed up to the time the plaintiff obtained possession. I do not think I would be entitled to grant mesne profits in that fashion without the plaintiff proceeding to formal proof.

Under order 35 rule 2 a defendant is entitled to show either by affidavit, or oral evidence, or otherwise, that he should have leave to defend the suit. The burden is on a defendant to show that he should have leave to defend and a defendant can do so by showing that there is or there are triable issue(s) – see for example *Leonard Kimeu Mwanthi v F M Imanane and S K Mwithimu*, [1982 – 88] 1 KAR 28. Now, the plaintiff has pleaded that the tenancy between them was a controlled one and fell under the provisions of the Act. The defendant's contention on this aspect of the matter is equivocal, on the one hand pleading in the defence that the Act does not apply, while on the other hand pleading in the present proceedings that there are triable issues in the case to be heard by the Tribunal. I do not think either of these two positions can be of any avail to the defendant. If the Tribunal has no jurisdiction over the matter as it is pleaded in the defence, then the only other Court open to the plaintiff is this Court and the claim having been made in this Court, the defendant must satisfy me on a balance of probabilities that it should have leave to defend. On the other hand, if the Tribunal has jurisdiction, which appears to be the position taken in the grounds of objection and the supporting affidavit, then the only feasible course open to the defendant is to satisfy me that there is in fact a reference before the Tribunal and that I should stay these proceedings under section 6 of the Civil Procedure Act to enable the parties pursue their dispute before the Tribunal. That was the position taken in *Leonard's* case (*supra*). The defendant could not have applied to me to stay these proceedings because when this suit was filed, there was no reference at all before the Tribunal; indeed, there is still no reference before the Tribunal. A stay under section 6 can only be granted in a suit or proceeding where-

> "the matter in issue is also directly and substantially in issue in a previously instituted suit or proceedings……."

Accordingly, it can be of no avail to this defendant to claim as it does in the ground of objection that –

> "Summary judgment should not be allowed as there are triable issues in the matter to be heard at the Business Premises Rent Tribunal"

and

> "the plaintiff's application should await the finality of the proceedings at the said Business Premises Rent Tribunal."

I said early that the proceedings in the Tribunal were filed exactly one year after the suit had been filed and only after the application for summary judgment. Mr Congo contended that the proceedings before the Tribunal are merely a ploy to delay the evil day. I tend to agree. In my view, the defendant has not really shown any triable issue or issues in the matter. If the defendant had been paying rent regularly, or if it thought it was not bound to pay rent because the plaintiff was in breach of the tenancy agreement, it is

very unlikely that the defendant would have allowed the tenancy notice issued by plaintiff to go unchallenged. The defendant, however, allowed the notice to go unchallenged with the result that the tenancy between the parties was terminated on the 1st February, 1989. The reason given for the notice was failure to pay rent and the rent arrears then due were specifically shown therein. Matters continued in that state until when this suit was filed and by then the rent arrears claimed had risen to Shs 493,440/-. The defendant's answer to the plaintiff's claim is that the rent was not due as the plaintiff was itself in breach of the agreement for lease. The defendant counter claimed for a total of Shs 101,320/- against the plaintiff. A similar position arose in the case of *Elizabeth Edmea Camile v Amin Mohamed E A Merali and another* [1966] EA 411. There the plaintiffs claimed from the defendant the sum of Shs 25,000/- as arrears of rent and applied for summary judgment under order 35 of the Civil Procedure Rules. The defendant filed two affidavits with the object of obtaining leave to defend and made allegations that the lease had been obtained by fraud and that she had a claim for damages for disrepair against the plaintiffs. The present defendant's counter claim is in respect of alleged costs of repair carried out by him. The two cases are peculiarly similar. The trial Judge in the *Elizabeth* case refused the defendant leave to defend, entered judgment as prayed but subject to the proviso that if the defendant deposited the sum of Shs 25,000/- in Court within 21 days, the money would not be paid out to the plaintiff until determination of any proceedings which the defendant may take whether in the suit or by a separate action for damages. On appeal to the then Court for Eastern Africa, it was held by Newbold, P and Duffus, AG V-P that the allegation that the premises were defective and that there was a reasonable claim for damages raised a triable issue; as to a claim for damages, however this did not provide a defence by way of equitable set-off to the claim for rent; it provided a basis for a counter claim or for a separate action. Duffus and Spry, JJ A also held that by reading order 8 and order 35 together the existence of a set-off or counter claim is sufficient to entitle a party to defend within the meaning of order 35 rule 2, but (per Duffus, JA), the Court has a discretion to enter judgment on the claim under order 12 rule 6 and would then give unconditional leave to raise the counter claim. Finally, it was held by a majority of the Court (Newbold, P and Duffus, JA) that the judge was entitled to enter judgment in favour of the plaintiffs, but erred in ordering the defendant to provide a deposit of a sum of Shs 25,000/-; the defendant was given liberty to file a counter claim and the execution of the judgment was stayed pending the determination of the counter claim.

My understanding of this decision is that a reasonable or valid counter-claim constitutes a triable issue, but that alone is no sufficient defence to a plaintiff's claim. Where appropriate, judgment can always be entered for the plaintiff, and at the same time a stay of the same is ordered to enable the defendant pursue the counter-claim. I think the principles in the *Elizabeth* case ought to be applied to the facts of the present case though no two cases could ever be exactly similar. The defendant's averment is that rent was not payable under certain conditions and that the plaintiff did not satisfy those conditions. The defendant then counter claims for alleged repairs he carried out. I have come to the conclusion that I should enter judgment for the plaintiff in the sum of Shs 493,440/- with interest and costs thereon as prayed in the plaint. I however, order a stay of execution of the said judgment until the defendant's counter-claim shall have been heard and determined by the Court. I award the costs of the present application to the plaintiff. These shall be my orders in the application.

Dated and delivered at Mombasa this 9th day of September 1992.

R.S.C OMOLO

JUDGE