



REPUBLIC OF KENYA

IN THE ENVIRONMENT AND LAND COURT

AT KERUGOYA

ELC CASE NO. 63 OF 2016

TOTAL KENYA LIMITED.....PLAINTIFF

VERSUS

KERUGOYA SERVICE STATION LTD.....1ST DEFENDANT

HIPPO AUCTIONEERS GENERAL MERCHANTS.....2ND DEFENDANT

RULING

Before me for hearing are two applications dated 11th March and 28th May 2019 respectively. The first application is by the plaintiff seeking the following orders:

(1) Spent.

1 A. That this Honourable Court be pleased to grant leave to the plaintiff/applicant to amend its plaint in terms of the annexed amended plaint.

1 B. That the amended plaint be deemed as duly filed upon payment of the requisite Court filing fees.

(2) That paragraph e of the consent letter dated 31st October 2017 and filed in Court on 1st November 2017 be set aside and/or varied and a new clause be inserted as follows:

“The lease between the plaintiff and the defendant over title No. KERUGOYA TOWN/219 is valid upto 30th June 2029 and the plaintiff will have uninterrupted and quiet possession”.

(3) That costs of this motion abide in the suit.

The defendants in the second application are seeking the following orders:

(1) That M/S Hippo General Merchants, Court Brokers and Court Bailiff be authorized to execute the eviction orders.

(2) That the Officer-in-charge of Kerugoya Police Station and the area District Officer be authorized to provide security to the Court bailiff at the time of the execution of the eviction order.

(3) That the plaintiff herein (Total Kenya Limited) be ordered to pay interest at Court rates on the amount deposited in Court Ksh. 11,319,634. Interest to run from 1st October 2016 till the date the money shall be released.

(4) Costs of this application be provided for.

The plaintiff and the defendants both filed supporting affidavits and grounds shown on the face of their respective applications. The two legal combatants also filed their respective replying affidavits in opposition to the two applications.

PLAINTIFF'S CASE

The plaintiff in her application dated 11th March 2019 sworn by her Legal Attorney stated that being the person having the conduct of this case, he was instructed by the plaintiff on or about October 2017 to draw and record a consent which he did and thereafter caused it to be filed on 1st November 2017 after it was signed by both parties. He stated that while he was drawing the consent letter and by an erroneous and honest mistake, he indicated that the expiry date of the variation of lease as 30th June 2019 at clause (e) of the said consent. He further stated that the said date of 30th June 2019 was indicated on the face of the lease (clause (b) which led him to mistakenly assume that it was the expiry date. The deponent also stated that it has since been brought to his attention by the plaintiff's Legal Manager one Mr. Boniface Abala that the correct expiry date is 30th June 2029 and not 30th June 2019 as clearly indicated at clause 5 of the variation of lease. He went further and stated that in all subsequent communications, pleadings and affidavits, both parties have acknowledged the said variation of lease and the terms therein which have even been performed and consummated by the parties with the plaintiff paying rent and the defendant receiving and/or acknowledging the same and when it became due and payable. The plaintiff gave instances when the variation of the lease was affirmed by the defendant as follows:

“(a) The variation of lease is duly signed by both parties and the expiry date of 30th June 2029 has not been in contention.

(b) In the subject consent letter dated 31st October 2017, the 1st defendant received rent under the said lease and acknowledged its validity upto the erroneously stated date of 30th June 2019 (see clause (e) of the lease).

(c) At paragraph 6 of its defence, the 1st defendant pleads as follows:

“Further in response, the 1st defendant wishes to state that in the last variation, the lease agreement contains a paragraph to the effect that the plaintiff wishes to extend the lease agreement for another 10 years from 1st July 2019 to 30th June 2029”. (See page 7 of ANT 1)

(d) At paragraph 15 of its further affidavit filed on 6th December 2018, the 1st defendant's director deponed:

“That for several years now since year 2005, it is the 4th variation since the mode of computation was changed and/or varied”. (See page 9 of ANT)

(e) At page 4 of its written submissions filed on 15th January 2019, the 1st defendant pleads:

“The request for the aforementioned document are founded in the 1st last at page 3 which was made on the 13th day of April 1993... “

The last variation which was done was the one dated 15th September 2014 pages 2 and 33 at the bottom.

(This was referring to the same variation of lease attached hereto”.

(See page 15 & 16 of ANT 1).

The deponent of the supporting affidavit stated that from the analysis given herein above, it is clear beyond any peradventure that the correct expiry date of the variation of lease is 30th June 2029 and that the date given of 30th June 2019 was a honest mistake on his part and which he takes full responsibility and argues this Honourable Court not to visit it upon his client the plaintiff herein.

RESPONSE TO THE 1ST DEFENDANT'S NOTICE OF MOTION DATED 28/5/2019

The plaintiff in opposition to the 1st defendant's Notice of Motion dated 25/5/2019 filed grounds of opposition.

1ST DEFENDANT'S CASE

The 1st defendant in their application dated 28th May 2019 supported by the affidavit of Emmanuel Gichira Njamumo sworn the same date deponed that the plaintiff has been their tenant in Land Reference Number KERUGOYA/TOWN/219 which lease will be expiring by affluxion of time on 30th June 2019.

He stated that before the term of the lease expired, the 1st defendant through their advocates on record issued the plaintiff a notice advising them of their intention of non-extension of the lease period for a further term. In reply to that notice, the plaintiff through their counsel wrote a letter dated 29th March 2019 confirming they would not be complying with the terms of the said notice. He referred to a consent order dated and issued on 21st February 2018 which had settled the issue of unlawful extension of the lease. The 1st defendant contends that the consent order was obtained freely without any form of intimidation or coercion. The 1st defendant further stated that any continued wrongful occupation of the plaintiff in the suit premises after the expiry of the lease term will greatly prejudice their interest and deny them the use of the same and/or profits from the same. The 1st defendant deponed that the plaintiff grudgingly deposited the rent in Court on 7/2/2019 without authority which has denied them the use of the same and interest that would have accrued therefrom. They contend that it is proper

for this Honourable Court to order the plaintiff to pay interest on the monies deposited in Court and an order of eviction be issued.

1ST DEFENDANT'S RESPONSE TO THE PLAINTIFF'S APPLICATION DATED 11TH MARCH 2019

The 1st defendant through their advocate Mr. George Morara Gori filed a replying affidavit in opposition to the plaintiff's application dated 11th March 2011. In the said affidavit, the 1st defendant stated that the application is an afterthought, mischievous, an abuse of the Court process and intended to steal a match on the 1st defendant. The learned counsel stated that the application if allowed will be prejudicial to the 1st defendant since it will subsequently change the cause of action or a fundamental aspect thereof through the back door. Mr. Gori, counsel for the 1st defendant also contends that the applicant seeks to amend the plaint three years after the suit was filed without explanation being given for the inordinate delay which according to him will prejudice the 1st defendant.

ISSUES FOR DETERMINATION

The issues for determination are as follows:

- (1) Whether a consent order entered between parties can be set aside and/or varied?***
- (2) If the answer to paragraph (1) above is in the affirmative, whether the plaintiff has established the principles for the grant of the order?***
- (3) Who is liable to pay for the costs of the two applications?***

ANALYSIS AND DETERMINATION

I have considered the two applications by the plaintiff and the 1st defendant dated 11th March and 28th May 2019 respectively. I have also considered the materials attached thereto and the rival submissions and the applicable law. The plaintiff in his application dated 11th March 2019 is seeking orders *inter alia* for amendment of the plaint and setting aside and/or varying a consent letter dated 31st October 2017. The plaintiff also seeks to insert a new clause to the proposed amended plaint at paragraph 7 as follows:

“7. Over the years, the plaintiff and the 1st defendant entered into further leases and variation of leases over the suit property with the last variation having been entered into on the 15th of September 2014 which variation extended the lease term to 30th June 2029” (emphasis mine).

The second application which is by the 1st defendant is basically opposing the first application by the plaintiff and itself seeks to enforce the impugned consent order which it contends was obtained mutually voluntarily and without coercion. The 1st defendant in addition seeks an order of eviction against the plaintiff from the suit property L.R. No. KERUGOYA TOWN/219 on the basis that the lease agreement has ended by way of affluxion of time.

Whether a consent order can be set aside and/or varied?

It has been decided again and again that a consent order entered between parties may be set aside on grounds such as fraud, collusion or by an agreement contrary to the policy of the Court. A consent order may also be set aside where the same was given without sufficient material facts or in apprehension or ignorance of

such facts. The counsel for the plaintiff through the supporting affidavit stated that while he was drawing the consent letter in dispute herein, he indicated that the expiry date of the lease was 30th June 2019 as opposed to 30th June 2029 indicated in the variation of lease agreement dated 15th September 2014 which he annexed to the said affidavit. Mr. Alex Ngatia Thangei further deponed that the said letter and the dates in the said letter and the subsequent Court order is erroneous and an honest mistake which should not be visited on his client. The learned counsel attached numerous documents to his supporting affidavit including a variation of lease agreement dated 15th September 2014 where at paragraph 5 reads as follows:

“5. The lease period shall and is hereby increased for a further ten (10) years from the 1st July 2019 to 30th June 2029. This period shall be broken down into two equal five year periods for Lease Rent Review purposes. The lease rent for this period shall be mutually agreed by the parties (before the expiry of the current five year term) in accordance with prevailing market conditions at that time”.

The said variation of lease agreement is signed by the parties and witnessed by an advocate. The said counsel attached a copy of the 1st defendant's defence which affirms the expiry of the lease agreement on 30th June 2029 and not 30th June 2019. Paragraph 6 of the said defence reads as follows:

“6. The 1st defendant admits the contents of paragraph 7 of the plaint in so far as there was an initial lease dated 13th April 1993 and a series of lease variations which the plaintiff entered into with unauthorized person (carrying themselves to be directors of the 1st defendant Company. Further in response, the 1st defendant wishes to state that in the last variation, the lease agreement contains a paragraph to the effect that the plaintiff wish to extend the lease agreement for another 10 years from 1st July 2019 to 30th June 2029”.

Again, the learned counsel also referred to a further replying affidavit in support of a Notice of Motion dated 12th October 2018 at paragraph 15 thereof stated as follows:

“15. That for several years now since year 2005, it is the 4th variation since the mode of computation was changed and/or varied and no records have been availed for scrutiny despite various and numerous requests. The plaintiffs have purposely withheld the said variation of lease agreement since it had been tabulated on how the rent was to be increased after every five years (see from page 29 to page37)”.

The last reference made by the learned counsel are submissions filed by the firm of Gori, Ombongi & Company Advocates in support of the said application dated 12th October 2018 at page 4 where it was submitted as follows:

“The request for the aforementioned document are founded in the 1st lease at page 3 which was made on the 13th day of April 1993 (we attach and highlight on the said lease for Court’s quick and ease of reference)

.....

The last variation which was done was the one dated 15th September 2014 pages 2 and 33 at the bottom”.

The last variation of the lease agreement between the plaintiff and the 1st defendant is not strange as the same has been confirmed of its existence even by the 1st defendant himself who has mentioned the same numerous times. I am satisfied by the explanation given by Mr. Alex Ngatia Thangei, counsel for the plaintiff that the expiry of the lease between the plaintiff and the 1st defendant in respect of the suit property L.R. No. KERUGOYA TOWN/219 as being 30th June 2019 instead of 30th June 2029 was erroneous and an honest mistake on his part.

2. Whether the principles for setting aside and/or varying a consent order has been established?

The principles for setting aside and/or varying a consent order are as follows:

- (1) Where the consent was obtained fraudulently.***
- (2) In collusion between affected parties.***
- (3) Where an agreement is contrary to the policy of the Court.***
- (4) Where the consent on insufficient material facts.***
- (5) Where the consent is based on misapprehension or ignorance of material facts and***
- (6) Any other sufficient reason.***

The plaintiff through their counsel on record has given reasons which in my view are sufficient grounds for setting aside the impugned consent order.

3. Who is liable to pay the costs?

Having established that the consent letter dated 31st October 2017 was obtained through an honest mistake, I therefore find and hold that the application by the plaintiff dated 11th March 2019 succeeds and the 1st defendant’s Notice of Motion dated 28th May 2019 fails. Consequently, the orders that comments for this Court to issue are as follows:

- (1) The plaintiff be and is hereby granted leave to amend and file the plaint herein.***
- (2) The plaint to be amended in terms of the draft amended plaint annexed to the application dated 11th March 2019 within 7 days from today.***
- (3) The consent letter dated 31st October 2017 and filed in Court on 1st November 2017 to be set aside and/or varied and substituted/replaced with a new clause inserted as follows:***

“The lease between the plaintiff and the defendant over Title No. KERUGOYA TOWN/219 is valid upto 30th June 2029 and the plaintiff will have un-interrupted and quiet possession.

- (4) Each party shall bear his own costs of the two applications***

READ, DELIVERED and SIGNED in open Court at Kerugoya this 4th day of October, 2019.

E.C. CHERONO

ELC JUDGE

4TH OCTOBER, 2019

In the presence of:

1. Mr. Thangei for Plaintiff – present
2. Mr. Ombugei holding brief for Gori for Defendant – present
3. Mr. Wachira – Court clerk – present
4. Ms Makworo for the Interested party – present