



REPUBLIC OF KENYA

IN THE ENVIRONMENT AND LAND COURT

AT MOMBASA

ELC NO. 202 OF 2018

ABDARAHMAN ADEN.....PLAINTIFF

VERSUS

NYALI INTERGRATED ACADEMY LTD.....DEFENDANT

RULING

1. The application for determination is the Notice of Motion dated 26th November, 2018 by the Plaintiff /applicant seeking to strike out the defendant's defence and to enter judgment in terms of the plaint, and in the alternative to strike out the defendant's defence as relates to the claim for vacant possession and judgment in respect thereof be entered for the plaintiff.

2. The application is premised on the grounds that the defendant's defence is frivolous and is otherwise an abuse of the court process; that it is in the interest of justice that judgment for vacant possession be entered in the manner prayed so as to obviate the prospect of the plaintiff being unduly kept from the seat of judgment and that the claim for vacant possession being severable, grant of judgment in respect thereof will not in any way prejudice the fair trial and disposal of the rest of the action relative to accrued mesne profits should the court find that there is a triable issue in relation thereto.

3. The application is supported by the affidavit of Abdarahman Aden, the Plaintiff sworn on 26th November 2018. The plaintiff who is the landlord of the defendant in respect of premises on LR. 9288 SEC 1 MN and 9289 SEC 1 MN under a lease dated 10th June, 2014 avers that the tenancy between them has been determined, the plaintiff having issued notice to the defendant to terminate the tenancy in accordance with clause 10 of the lease which provided inter alia, that either party may terminate the lease by giving the other six (6) months' notice or payment of rent in lieu of notice thereof. That all subsequent payments post the notice of termination were received as mesne profits and the defendant was notified to that effect.

4. The application is opposed by the defendant through a replying affidavit sworn by Mohamed Nur Abdullah on 28th February 2019 in which it is denied that the defence is frivolous, vexatious and an abuse of court process. It is the defendant's contention that the tenancy was not legally terminated, and that it still subsists. The defendant further contends that the defence filed raises serious legal issues.

5. The application was canvassed by way of written submission. The plaintiff filed submissions on 15th April 2019. Mr. Mwakisha learned counsel for the plaintiff submitted that if the tenancy is deemed to be one outside the purview of the Landlord & Tenant (Shops, Hotels & Catering Establishments) Act Cap 301, the appropriate 6 months' notice has been served, and that it would be no avail to the defendant that the notice appears to take the form of one issued under Cap 301. He further submitted that should the Act be said to apply, the notice served conforms to the prescriptions of provisos (i) and (ii) of Section 4 of the Act and especially that the notice must, in view of the lease agreement, be longer than the statutory two months' notice so as to conform to the notice period prescribed by the lease.

6. On the question whether the fact of the premises being used as a school should have a bearing on the applicability or otherwise of Cap 301, and concomitantly, what procedure would be applicable to terminate the tenancy, it was submitted that the relevant definition to explore would be that of a shop (as opposed to a hotel or catering establishment). That by Section 2 of the Act, a shop is defined as premises occupied wholly or mainly for the purposes of a retail or wholesale trade or business or 'for the purpose of rendering services for money or money's worth' Mr. Mwakisha submitted that a private school as run by the defendant would thus come within the broad definition of a shop as contemplated by the Act insofar as it offers or renders educational service for money or money's worth. That it is on the foregoing consideration that the suit herein was mounted, the pleadings being deliberate, that insofar as the tenancy was controverted, the appropriate notice had been issued; yet, were the position to be that the tenancy was not a controlled one, as the defendant contends, a six months' notice as required by the lease had been issued, and that it would be immaterial that the notice was made out as being issued under the Act, for no prejudice is suffered by the defendant merely because the notice includes within it reasons/grounds for termination as are contemplated under Section 7 of Cap 301.

7. Relying on the case of **Kivanga Estates Limited –v– National Bank of Kenya Limited (2017) eKLR; Continental Butchery Limited**

–v- **Nthiwa (1978)eKLR**; **Sadolins Paints Ltd –v- Wali Mohamed & Co (1972)EA 395**; and **Mohamed M. Hatimy –v- Lameck Oluoch in Civil Appeal 93 of 2018 (unreported)**, Mr. Mwakisha submitted that a careful application of the law and the uncontested terms of the lease show that none of the issues for determination call for testimony at trial. That the nature of tenancy and notice served affirms that the tenancy has, at all events, been duly determined. Mr. Mwakisha further relied on the case of **Woolf & Another –v- Macharia (197)EA 330** and submitted that notice was duly served by registered post. It was further submitted that as per Section 6 of Cap 301, a tenant to controlled premises once served with a termination notice ought to file a reference in absence of which Section 10 stipulates that the notice shall take effect. That as stated by the Court of Appeal in **Jitenda Kanabar & Others –v- Fish & Meats Ltd (1997) KLR**, there would no longer be a controlled tenancy to speak of, and the landlord is entitled to move the court for orders of vacant possession, hence the instant suit. That, if however the defendant contends, the tenancy is not a controlled one, then the 6 months’ notice served suffices for purposes of terminating the lease, and that judgment for possession should follow.

8. Regarding the issue that there have been rent payments past expiry of the notice, the plaintiff’s counsel submitted that any rentals rendered past expiry of notice was received on without prejudice basis as per the plaintiff’s counsel’s letter dated 27/7/2018. That if the purport of that contention regarding payment of rent was to allege waiver of the notice and the consequent creation of a periodic tenancy, that contention would be of no avail to the defendant. That the defendant has not denied receipt or knowledge of the said letter. Counsel submitted that it has been the position that the mere receipt of rent does not necessarily result in tenancy, but the Landlord’s intention is paramount. On this, counsel relied on the commentary in Hill & Redman’s Law of Landlord and Tenant, 15th Ed Pg 563 at para 416 cited by Hayanga, J in **Shiribhai Tayabali –v- Salim M. A Antar Mombasa HCCC 220/97** (unreported). The plaintiff’s counsel further submitted that the sanctity of the notice, and obligation to give possession, are not recognized by the parties as being capable of being affected by any improvements to the premises by the tenant, of whatever nature. This is because the lease provided that the tenant may carry out alterations and additions to suit its purpose, provided that the costs thereof shall be the sole responsibility of the tenant. That Clause 17 under the covenants recognizes the obligation to deliver up possession upon expiry of the lease or sooner determination. The plaintiff’s counsel urged the court to find that there is not a defence that calls for any evidence, and that the same is on the whole a frivolous pleading and is an abuse of the court process and ought to be struck out and judgment entered for vacant possession.

9. Mr. Omwenga, learned counsel for the defendant submitted that the defence raised herein is not intended to delay trial but raises bona fide legal issues that need to be determined at full trial. He relied on the case of **D. T. Dobie & Company (Kenya) Ltd –v- Muchina (1982)KLR I and Beinosi –v- Wyley 1973 (SA 721 (SCA) at page 734-Freiterated** and adopted in **Muchanga Investments Ltd –v- Safaris Unlimited (Africa) Ltd & 2 Others (2009)eKLR**. Counsel further cited the case of **Equatorial Commercial Bank Ltd –v- Jodam Engineering Works Limited & 2 Others (2014)eKLR** where the court stated that a statement of defence is said to raise reasonable defence if that defence raises a prima facie triable issue, and the case of **Olympic Escort International Co Ltd & 2 Others –v- Parminder Singh Sandhu & Another (2009)eKLR** where the Court of Appeal stated:

“It is trite that, a triable issue is not necessarily one that the defendant would ultimately succeed on. It need only be bona fide” The defendant’s counsel submitted the Tenancy agreement and the legality of the notice of termination issued on the principle of the tenancy agreement are all bona fide issues that need to be determined at trial hence striking out the defence and granting summary judgment will be denying the defendant an opportunity to be heard on his defence, and relied on the case of **Ecobank Kenya Limited –v- Bobbin Limited & 2 Others (2014) eKLR**. He further submitted that it is trite law that in an application to strike out suit/summary judgment, even one triable issue, if bona fide, would entitle the defendant to have unconditional leave to defend. He cited **Delphis Bank Limited –v- Caneland Limited (2014)eKLR** and **Margaret Njeri Mbugua –v- Kirk Mweya Nyaga (2016)eKLR**.

10. The defendant’s counsel submitted that the nature of the enterprise and use of the premises by the defendant involved a school and that by dint of Section 2 of Cap 301 the characteristic of the tenancy disqualifies it from being a controlled one. Further, that the lease between the plaintiff and the defendant which is in writing reiterates that the sole use and purpose of the premises will be operating a school for a term of ten years. It is the defendant’s view that the lease executed by both parties and a written tenancy exceeding 5 years exclude it from being a controlled tenancy and that neither is the relationship between the plaintiff and the defendant governed by virtue of Section 2 of CAP 301. He relied on the case of **Dynamic Institute of Management & Accountancy (DIMA) Ltd –v- Apollo Insurance Company Ltd (2004) eKLR** and **Jubilee Insurance Company of Kenya Limited –v- Joseph Ndugu Karega t/a Leather Touch Foot Care Specialists (2014)eKLR**. It is the defendant’s submission that the notice of terminations issued under Cap 301 is irregular and defective and that the tenancy still subsists. Counsel further relied on the case of **Dubai Bank Limited –v- Insurance Company of East Africa Limited (2013)eKLR**; **DI Koisagat Tea Estate Ltd –v- Eritrea Orthodox Tewhdo Church Ltd (2015)eKLR**; and **Gusii Mwalimu Investment Company Ltd & 2 Others –v- Mwalimu Hotel Kisii Ltd (1995-1998) 2 EA 100**. The defendant’s counsel further submitted that the payments made and received after the notice of termination are received as rent and not mesne profits, arguing that the defendant cannot be termed as a trespasser. He relied on case of **Rajan Shah t/a Rajan S. Shah & Partners –v- Bipin P. Shah (2016) eKLR**. It is also the defendant’s contention that the plaintiff’s case is incurably defective for non-compliance with Order 3 of the Civil Procedure Rules as no witness statement has been filed. The defendant submitted that the application herein is incompetent, lacks merit and should be dismissed with costs.

11. I have considered the application; the affidavits in support and against, the rival submissions and the case law cited by the parties. The principles which guide the courts in determining an application for striking out pleadings are well settled. In the case of **D. T. Dobie & Company Kenya Ltd –v- Muchina (1982)KLR 1 Madan JA** stated:

“The power to strike out should be exercised only after the court has considered all the facts, but it must not embark on the merits of the case itself as this is solely reserved for the trial judge. On an application to strike out pleadings, no opinions should be expressed as this could prejudice the fair trial of the action and would restrict the freedom of the trial judge in disposing the case in the way he thinks it right.”

12. In the case of **Mohamed Mohamed Hatimy –v- Lameck Oluoch t/a Lamathe Hygenic Foods, Mombasa Civil Appeal No. 93 of 2018 (unreported)**, the Court of Appeal stated:

“In as much as the power to strike out pleadings by a court is discretionary, it should be exercised sparingly and only in the clearest of cases. This is because the consequences of striking out a pleading is that the court does not subject the parties’ dispute to a full hearing. It follows, therefore, that whenever a court is faced with the question of whether or not to strike out a pleading, it has to strike a balance between two competing rights; on one hand, a party’s right to have his/her case determined in a full trial and on the other, an opposing party’s right not to be unduly burdened with a suit which is otherwise a non-starter. This was appreciated by this court in Kivanga Estates Limited –v- National Bank of Kenya Limited (2017)eKLR.”

13. The overriding principle therefore to be considered in an application for striking out a pleading is whether it raises any triable issue. The facts giving rise to these proceedings were that the plaintiff had leased out his premises situated on LR. 9288 SEC 1 MN and LR 9289 SEC 1 MN to the defendant who ran a school for a term of 10 years effective 1/6/14. Of contention between the parties was the notice of termination issued by the plaintiff on 18th January 2018 giving the defendant notice terminating the tenancy with effect from 18th August 2018. The plaintiff contends that notwithstanding that the lease between the parties was for the period in excess of 5 years, the same contains within it a clause that conferred upon the landlord a liberal right to terminate the tenancy and that by virtue of Section 2 of Cap 301, the tenancy was rendered a controlled one within the meaning of the Act. That Clause 6 (1) of the Lease provided that in the event of either party thereto being desirous of terminating the tenancy, notice of such termination in writing would be sent by registered post to the address stipulated in the lease. The plaintiff’s case is that on 27/1/18 he caused to be sent to the defendant vide its postal address number 16488-80100, Mombasa the said notice dated 18/1/18 issued in accordance with the provisions of Section 4 of the Act terminating the defendant’s tenancy on 1/8/18. That the defendant was upon service of the notice required under Section 6 of the Act to notify the plaintiff in writing within 30 days as to whether it intend to comply with the tenancy notice and to thereafter file a reference with the Tribunal established under Cap 301. The Defendant failed to file any reference or to comply with other requirements under that section and that by reason thereof, Section 10 took effect and the tenancy stood terminated on 1/8/18. The plaintiff further contended that notwithstanding the provisions of the Act, the defendant were under the lease entitled to a six (6) months’ notice which notice was duly served upon it in accordance with the agreement.

14. In their defence, the defendant averred that it has spent a substantial amount of money building classrooms and all other related facilities on the suit property with the consent of the plaintiff and hence its tenancy cannot be interfered with unnecessarily. The defendant denied that the tenancy is a controlled tenancy under Cap 301 and that even if the notice was sent then it was of no legal consequence.

15. I have perused the lease dated 10th June 2014 executed by the plaintiff and the defendant. The tenancy was for a term of ten (10) years. Clause 6 thereof stipulated that the tenant may carry out alterations or additions to the premises to suit its purpose at its own costs and subject to prior written consent of the landlord having been obtained. Clause 17 stipulated that the tenant will at the expiration or sooner determination of the lease term yield up the premises to the landlord with the fixtures and fittings thereto, including the fixtures and fittings installed by the tenant. Clause 10 of the lease agreement clearly stipulated that either party may terminate the lease by giving the other six (6) months’ notice or payment of rent in lieu of notice.

16. The defendant submitted that the tenancy agreement and the legality of the notice of termination issued are all bona fide issues that need to be determined at trial. According to the defendant, the tenancy was not controlled. If that be the case, I agree with the plaintiff’s submission that if the tenancy is deemed to be one outside the purview of Cap 301, the appropriate six (6) months’ notice was served as per the lease agreement and it would be of no avail to the defendant that the notice appears to take the form of one issued under Cap 301. What is of importance, in my view, is that the notice was issued as agreed by the parties in the lease agreement. It would be immaterial that the said notice is made out as being issued under the Act, for no prejudice is suffered by the defendant merely because the notice includes within it reasons/grounds for termination as are contemplated under Section 7 of Cap 301. Even if Cap 301 was applicable, there is no dispute that the defendant never filed a reference as required upon receipt of the termination notice.

17. The other issue raised by the defendant in the defence is that the defendant has spent a substantial amount of money building classrooms and all other related facilities on the suit property. A perusal of the lease agreement reveals that the defendant was at liberty to carry out at its own costs alternations or additions to the premises to suit its purpose. However, the lease agreement is also clear that at the expiration or sooner determination of the lease, the defendant was to yield up the premises to the plaintiff with the fixtures and fittings thereto (including the fixtures and fittings installed by the defendant). I cannot see that as an issue fit for trial.

18. From the material before me, I find that on termination, my analysis of the nature of tenancy and notice served affirms that the tenancy has been duly terminated. The notice was duly served upon the defendant when it was sent by registered post to the address notified on the lease. Accordingly, I find that the defendant’s defence with respect to the prayer for vacant possession is frivolous since there is no reason to justify its continued possession in light of the expiry of the notice of termination period. In my considered view, the defence filed does not raise any triable issue worth a trial. In **Dephis Bank Limited –v- Caneland Limited (supra)**, the Court of Appeal stated:

“Where there is no plausible defence and it is plain that the defence is a sham or cannot be sustained, it would be pointless to put the parties through a trial that would inflate costs to the disadvantage of the debtor and delay delivery of justice to the prejudice of the claimant.”

19. Being guided by the above decision, I do find that the Notice of Motion dated 26th November 2018 by the Plaintiff is merited. The same is allowed and the defendant’s defence is struck out and judgment entered in terms of the Plaintiff. Costs of the application are awarded to the plaintiff.

DATED, SIGNED and DELIVERED at MOMBASA this 6th day of November 2019.

C.K. YANO

JUDGE

IN THE PRESENCE OF:

Mwawasa holding brief for Omwenga for Defendant

No appearance for plaintiff

Yumna Court Assistant

C.K. YANO

JUDGE