REPUBLIC OF KENYA

IN THE ENVIRONMENT AND LAND COURT AT NAKURU

CASE No. 121 OF 2018

ELGON HOUSE (2010) LTD.....PLAINTIFF

VERSUS

MEYA AGRI TRADERS LIMITED.....DEFENDANT

RULING

1. This ruling is in respect of the plaintiff's Notice of Motion dated 19th September 2018. The following orders are sought in the application:

> *1. That this Honourable Court be pleased to strike out the defendant's statement of defence dated 27th April, 2018.*
>
> *2. That this Honourable Court be pleased to enter summary judgment against the defendant/respondent in terms of the claim comprised in the plaint herein.*
>
> *3. That in the alternative this Honourable Court be pleased to order the defendant/respondent to deposit security for costs (computed at the rate of Kshs. 500,000.00/- per month from March 2013 until the determination of this application) to carter for the time the defendant has been in illegal occupancy of the plaintiff's premises.*
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> *4. That the defendant/Respondent do bear the cost of this application and of the suit.*

2. The application is supported by an affidavit sworn by Kirit Govindlal Shah, a director of the plaintiff company. He stated that the plaintiff was incorporated in the year 2010 and that prior to that date, the plaintiff's directors owned the property known as Nakuru Municipality Block 5/43 (the suit property) and the premises erected thereon. Upon incorporation of the plaintiff, the directors transferred proprietorship of the suit property to the plaintiff. The said directors leased the suit property to the defendant for a term of 5 years and 1 month from 1st February 2008 through a lease dated 7th February 2008. He added that the term of the lease expired on 28th February 2013 but was not renewed since the parties did not agree on terms of a new lease. That the plaintiff therefore received offers from potential tenants and accepted an offer from Chegeren Agencies (E.A) Ltd who agreed to lease the premises with effect from 1st March 2013 at KShs 500,000 per month plus V.A.T. He added that despite being notified through letter dated 26th February 2013 to vacate and hand over the premises on expiry of its lease, the defendant remains in the premises without a lease and without paying rent. That the defendant purported to deposit money in the plaintiff's bank account in March 2013 with a view to creating a tenancy but the plaintiff returned the money to the defendant.

3. The defendant responded to the application through a replying affidavit sworn by Daniel M. Ngunia, its Managing Director. He confirmed that indeed the defendant entered into the lease for a term of 5 years and 1 month from 1st February 2008 through a lease dated 7th February 2008 and that the term of the lease was to expire on 28th February 2013. He added that the parties went into negotiations with a view to renewing the lease and that since there was no communication that the defendant surrenders the premises, the defendant continued occupying the premises in the belief that negotiations would be successful. As part of the negotiations, the defendant received a letter dated 20th March 2012 from the plaintiff's advocates offering a new term of 5 years and 3 months at 215,000 per month plus V.A.T subject among other conditions to an increment of 20% every 2 years. He further stated that these terms were favourable to the defendant and he accepted them. In anticipation of regularization of the offer and preparation of a lease, defendant deposited a cheque of KShs 868,608 into the plaintiff's account on 26th March 2013. He added that the defendant is still willing and able to abide by the said terms.

4. The application was canvassed through written submissions. The applicant argued that since the defendant admits that the lease expired but remains in the premises without paying rent, its defence raises no triable issue and the application should be allowed. In response, the defendant argued that its defence raises triable issues regarding, *inter alia*, the plaintiff's failure to comply with **Order 4 Rule 1 (4)** of the **Civil Procedure Rule**s, whether a controlled tenancy exists and whether the applicant has *locus standi*. In further submissions, the applicant acknowledged that the only serious argument raised by the defendant is the issue of failure to comply with **Order 4 Rule 1 (4)** of the **Civil Procedure Rule**s. The applicant added that such a failure is no longer fatal since the courts have adopted a functionalist approach as opposed to a formalist one. Both parties cited several cases which I have taken note of.

5. I have carefully considered the application, the affidavits and the submissions. The application is brought under **Order 2 Rule 15 (1) (b) (c) and (d)** of the **Civil Procedure Rule**s which provides:

> ***(1) At any stage of the proceedings the court may order to be struck out or amended any pleading on the ground that—***
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> > ***(a) it discloses no reasonable cause of action or defence in law; or***
> >
> > ***(b) it is scandalous, frivolous or vexatious; or***
> >
> > ***(c) it may prejudice, embarrass or delay the fair trial of the action; or***
> >
> > ***(d) it is otherwise an abuse of the process of the court, and may order the suit to be stayed or dismissed or judgment to be entered accordingly, as the case may be.***

6. Additionally, the applicant also relies on **Order 36 Rule 1** of the **Civil Procedure Rule**s which provides:

> ***(1) In all suits where a plaintiff seeks judgment for—***
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> > ***(a) a liquidated demand with or without interest; or***
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> > ***(b) the recovery of land, with or without a claim for rent or mesne profits, by a landlord from a tenant whose term has expired or been determined by notice to quit or been forfeited for non-payment of rent or for breach of covenant, or against persons claiming under such tenant or against a trespasser, where the defendant has appeared but not filed a defence the plaintiff may apply for judgment for the amount claimed, or part thereof, and interest, or for recovery of the land and rent or mesne profits.***
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> ***(2) The application shall be 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.***
>
> ***(3) Sufficient notice of the application shall be given to the defendant which notice shall in no case be less than seven days.***

7. There is no dispute that the plaintiff and the defendant had landlord/tenant relationship and that the defendant is still in possession of the premises that were leased. A perusal of the plaint herein reveals that the plaintiff seeks judgment against the defendant for an eviction from the suit property and mesne profits. Thus, this suit fits the general description under **Order 36 Rule 1** of suits in which summary judgment can be sought.

8. The Court of Appeal distilled case law on summary judgment under **Order 36 Rule 1** in **Irene Wangui Gitonga v Samuel Ndungu Gitau [2018] eKLR** as follows:

> ***The parameters for the exercise of jurisdiction under this provision have been crystalized by a long line of case law enunciated by the Court. In ICDC versus Deber Enterprises Ltd [2006] IEA75, the Court stated-inter alia, as follows:-***
>
> ***"The purpose of the proceedings in an application for summary Judgment is to enable the plaintiff to obtain a quick Judgment where there is plainly no defence to the claim."***
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> ***In Kenindia Assurance Co. Ltd versus Commercial Bank of Africa & 2 others Nairobi CA No. 11 of 2000, the Court stated that the law on summary procedure is now well settled and that this is a procedure resorted to in the clearest of cases. In Dhanjal Investments Ltd versus Shabaha Investments Ltd Civil Appeal No. 232 of 1997 the Court went further and stated as follows on summary Judgment;***
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> ***"The law on summary Judgment procedures has been settled for many years now. It was held as early as in 1952 in the case of Kandanlal Restaurant versus Devshi & Company [1952] EACA77 and followed by the Court of Appeal for Eastern Africa in the case of Sonza Figuerido & Company Ltd Vs. Mooring Hotel Ltd [1929] E.A 424, that if the defendant shows a - bona-fide-triable issue, he must be allowed to defend without conditions….."***
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> ***As to what constitutes a triable issue, the Court in Kenya Trade Combine Ltd versus Shah Civil Appeal No. 193 of 1991, had this to say:***
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> ***"…… all a defendant is supposed to show is that a defence on record raises triable issues which ought to go for trial. We should hasten to add that in this respect a defence which raises triable issues does not mean a defence that must succeed. The defendant is at liberty to show, by whatever means he chooses whether by defence, oral evidence, affidavits or otherwise that his defence raises bonafide triable issues.***
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> ***Further in Dedan King'ang'i Thiongo versus Mbai Gatune Civil Appeal No. 292 of 2000 and Bangue Indosuez versus DJ Lowe & Co. Ltd Civil Appeal No. 79 of 2002, the Court was categorical that where bona-fide- triable issues have been disclosed, the Court has no discretion to exercise in regard to the defendant's right to defend the suit. Lastly, in D.T. Dobie & Co. Ltd versus Muchina & another [1982] KLR 1, it was stated inter alia, that a pleading which does not disclose any reasonable cause of***

action or defence ought to be dismissed. Likewise, no suit ought to be summarily dismissed unless, it appears so hopeless that it plainly and obviously discloses no reasonable cause of action, and is so weak as to be beyond redemption by way of an amendment.

9. In its statement of defence, the defendant does not dispute that the term of its lease lapsed on 28th February 2013 and that a new lease was not executed. The defendant further admits that it remains in the premises notwithstanding the expiry of the lease. The defendant further avers that there is a resultant implied tenancy in the nature of a controlled tenancy. There cannot be a tenancy when the lease expired and when the defendant is not paying any rent. The moment the term of the lease came to an end the defendant was required to hand vacant possession to the plaintiff. It cannot just hang onto the premises. Since there is no tenancy, there cannot possibly be a controlled tenancy. A controlled tenancy cannot be created just because the defendant has refused to vacate.

10. When faced with a somewhat similar situation in **Nandlal Jivraj Shah & 2 others (all trading as Jivaco Agencies v Kingfisher Properties Limited [2015] eKLR**, the court of Appeal stated:

Similarly, the proposition that a controlled tenancy continues to exist merely because the appellants are still in occupation of the premises is, with due respect to learned counsel, preposterous. No provision of law creates controlled tenancies by virtue of mere occupation of premises and with non-payment of rent no less! The fact that the respondent is yet to evict the appellants does not serve to resurrect a controlled tenancy which has already run its course and been terminated.

11. The other issue raised by the defendant is that the plaintiff failed to comply with **Order 4 Rule 1 (4)** of the **Civil Procedure Rule**s. The plaintiff herein is a limited liability company or a corporation. **Order 4 rule 1 (2)** of the **Civil Procedure Rules** requires that every plaint be accompanied by a verifying affidavit. In the case of a corporation, **rule 1 (4)** thereof provides:

Where the plaintiff is a corporation, the verifying affidavit shall be sworn by an officer of the company duly authorized under the seal of the company to do so. [Emphasis supplied]

12. The plaintiff has readily conceded that it did not comply with **Order 4 Rule 1 (4)** but hastened to add that such a failure is no longer fatal. I agree with the plaintiff on this. Failure to comply with **Order 4 Rule 1 (4)** is a curable defect. It is also important to note that the said provisions were intended to protect the plaintiff corporation by ensuring that no unauthorised suits are filed on its behalf. It would thus be illogical and unjust to allow a defendant to use the provision as a technicality to frustrate otherwise valid proceedings. The Court of Appeal recently stated as much in **Spire Bank Limited v Land Registrar & 2 others [2019] eKLR**:

It is essential to appreciate that the intention behind order 4 rule 1 (4) was to safeguard the corporate entity by ensuring that only an authorized officer could institute proceedings on its behalf. This was to address the mischief of unauthorized persons instituting proceedings on behalf of corporations, and obtaining fraudulent or unwarranted orders from the court. … With this in mind, we dare say that the provision was not intended to be utilized as a procedural technicality to strike out suits, particularly where no evidence was produced to demonstrate that the officer was unauthorized.

13. I have carefully perused the defendant's defence herein. It must now be apparent that I find no triable issue raised in it. Even the issue of **Order 4 Rule 1 (4)**, once cured, would not afford the defendant any bona fide triable issue. Should I in the circumstances, for that reason alone, keep the litigation herein pending? I don't think so. This court has a duty both under **section 3** of the **Environment and Land Court Act** and **Article 159 (2) (d)** of the **Constitution** to craft such orders as would ensure that substantive justice prevails and that judicial time is better utilized. While dealing with a similar situation in **Coast Development Authority v Adam Kazungu Mzamba & 49 others [2016] eKLR**, the Court of Appeal stated:

… Article 159 (2) (d) demands that justice shall be administered without undue regard to technicalities. In Salat v. IEBC & 7 Others, Petition No. 23 of 2014, the Supreme Court reiterated that the above constitutional provision accords precedence to substance, over form and in Lamanken Aramat v. Harun Maitamei Lempaka, Petition No 5 of 2014 the same Court observed that a court dealing with a question of procedure, where jurisdiction is not expressly limited in scope, may exercise discretion to ensure that any procedural failing that lends itself to cure under Article 159, is indeed cured. The Court concluded thus:

"The Court's authority under Article 159 of the Constitution remains unfettered, especially where procedural technicalities pose an impediment to the administration of justice."

As regards the overriding objective, the ELC Act provides that its principle objective is to enable the court to facilitate the just, expeditious, proportionate and accessible resolution of disputes and enjoins the court to discharge its functions so as to give effect to the overriding objective. …

14. I am satisfied that the plaintiff has made a case for summary judgment. Among the prayers sought in the plaint is mesne profits at KShs 500,000 per month from March 2013 until eviction. As a victim of wrongful occupation of its land by the defendant, the plaintiff is entitled to mesne profits. The plaintiff has sought to justify its plea for mesne profits at KShs 500,000 per month on the basis that it received and accepted an offer from Chegeren Agencies (E.A) Ltd who agreed to lease the premises with effect from 1st March 2013 at KShs 500,000 per month. I am however unable to verify whether that offer was really made. On the other hand, the defendant has stated that it received a letter dated 20th March 2012 from the plaintiff's advocates offering a new term of 5 years and 3 months at KShs 215,000 per month plus V.A.T subject among other conditions to an increment of 20% every 2 years and that it accepted the said offer. I therefore find the figure of KShs 215,000 per month subject to an increment of 20% every 2 years as a better aid in assessing mesne profits considering that the defendant's rent in the expired lease was KShs 130,000 per month with effect from 1st February 2008 with an increment of 20% every 2 years.

15. In view of the foregoing, I make the following orders:

(a) The plaintiff to file and serve a verifying affidavit that complies with Order 4 Rule 1 (4) of the Civil Procedure Rules within 14 (fourteen) days from the date of delivery of this ruling. In default, Notice of Motion dated 19th September 2018 shall stand dismissed with costs to the defendant.

(b) Upon the plaintiff complying with (a) above, summary judgment shall be entered for the plaintiff as follows:

i) The defendant be evicted from Nakuru Municipality Block 5/43.

ii) Mesne profits at KShs 215,000 per month from 1st March 2013 plus an increment of 20% every 2 years until vacant possession is delivered to the plaintiff or until the defendant is evicted.

iii) Costs of Notice of Motion dated 19th September 2018 and costs of the suit plus interest thereon.

16. I will give a mention date upon delivery of this ruling to confirm whether (a) or (b) above will have taken effect.

17. It is so ordered.

Dated, signed and delivered in open court at Nakuru this 18th day of December 2019.

D. O. OHUNGO

JUDGE

In the presence of:

Mr Akango for the plaintiff/applicant

Ms Kinuthia for the defendant/respondent

Court Assistants: Beatrice & Lotkomoi