



REPUBLIC OF KENYA

IN THE ENVIRONMENT AND LAND COURT

AT NAIROBI

ELC CIVIL SUIT NO. 383 OF 2017

KTDA FARMERS COMPANY LIMITED.....PLAINTIFF

=VERSUS=

KEI MATT LIMITED.....DEFENDANT

R U L I N G

1. The plaintiff, KTDA Farmers Company Limited, is the proprietor of Land Reference Number 209/7035 (**the suit property**) on which stands a building known as KTDA Farmers Building (**the Building**). The suit property is situated on Moi Avenue, in the Central Business District of Nairobi City County. On 1/2/2012, the plaintiff leased shop space measuring approximately 10,717 square feet on the ground floor, mezzanine floor and basement of the building (**the suit premises**) for a term of six years from the 1st day of February 2012. The six year term expired by the effluxion of time on 31/1/2018. There is no evidence of renewal of the lease or any other form of tenancy effective from 1/2/2018.

2. Prior to the expiry of the lease, on 9/6/2017, the plaintiff instituted this suit through a plaint dated 8/6/2017, contending that the defendant had fallen into rent arrears totaling Kshs 19,341,406.50 as at 31/3/2017. The plaintiff sought the following orders against the defendant:-

(a) An order for forfeiture of the lease dated 1st February, 2012 entered into by the plaintiff and the defendant.

(b) An order directing the defendant to immediately vacate all that shop space No 5, 6, 7, 8, 9 and 10 on the Ground Floor, Mezzanine and Basement of the plaintiff's building situated on LR No 209/7035.

(c) An order directing the defendant to pay the plaintiff Kshs 19,341,406.50 being the outstanding rent arrears as at 31st March, 2017 as well as any arrears that may fall due thereafter.

(d) Interest on (c) above at 1.35% per month from the due date to the date of actual payment.

(e) Costs of this suit.

3. On 21/7/2017, the defendant entered appearance through the firm of Mohammed Muigai Advocates. The defendant has however not deemed it necessary to file a statement of defence to date.

4. Subsequently, on 14/2/2018, the plaintiff brought a Notice of Motion under certificate of urgency dated 13/2/2018 seeking the following orders:-

(a) This application be certified as urgent and service be dispensed with in the first instance.

(b) Pending the hearing and determination of the suit herein, an order of forfeiture of the six (6) year lease dated 1st February 2012 and which expired on 31st January 2018 between the plaintiff the defendant be issued by this honourable court.

(c) Pending the hearing and determination of the suit herein, an order do issue directing the defendant to vacate the premises the subject of the lease dated 1st February, 2012, and which expired on 31st January 2018 for all that shop space No 5,6,7,8,9 and 10 on the Ground Floor, Mezzanine & Basement of the plaintiff's building situated on LR NO 209/7035 and more particularly at Moi Avenue (the premises).

(d) The plaintiff/applicant be allowed the costs of this application.

5. The application is premised on the grounds set out in the motion and is supported by the affidavit of Joseph Karanja sworn on 13/2/2018. In summary, the plaintiff contends that: (i) the material lease expired on 31/1/2018 and there is no lawful tenancy relationship between the parties to this suit; (ii) the defendant has failed to file a defence to the suit herein despite the court directing it to do so; and (iii) the defendant has failed to honour its rent obligations under the expired lease and it continues to occupy the suit premises illegally.

6. The defendant opposes the application through grounds of opposition dated 2/3/2018 and filed in court on 7/3/2018 in which it contends thus:-

(a) The affidavit of 13th February, 2018 has been sworn by a stranger to the lease which was made between the plaintiff and the defendant. The said Joseph Karanja has no authority and has not adduced any authority to swear the said affidavit on behalf of the plaintiff.

(b) The application is misconceived and an abuse of the court process.

7. The application was canvassed through oral submissions in open court on 7/3/2018. Ms Mwika, counsel for the plaintiff/applicant, submitted that: (i) the lease pursuant to which the defendant occupied the suit premises expired on 31/1/2018; (ii) the defendant did not seek a renewal of the lease and its continued occupation of the suit premises is therefore illegal; (iii) the defendant is in breach of the expired lease in that it has failed to pay rent amounting to over Kshs 19 million as at the time of filing this suit; and (iv) the defendant has failed to file defence in this suit. Ms Bwika added that Order 1 rule 13 and Order 4 rule 1 (4) of the Civil Procedure Rules only require a plaintiff to file a verifying affidavit; it does not require the filing of written authority in form of a board resolution by a company. She relied on **R v Registrar General & 13 others (2013) eKLR** in contending that a resolution authorizing the filing of a suit can be filed before the suit is set down for hearing.

8. Mr Angwenyi, counsel for the defendant, argued that the present application was brought by a stranger because Mr Joseph Karanja who swore the supporting affidavit is not an officer of the plaintiff company. He relied on Section 37 of the Companies Act. Mr Angwenyi contended that under the management agreement between the plaintiff and KTDA Management Services Company Limited, to initiate a suit, the manager needed to obtain a resolution of the board of directors. He urged the court to dismiss the application because the supporting affidavit was sworn by a stranger.

9. I have considered the grounds set out in the application, the supporting affidavit, the grounds of opposition and respective counsel's rival submissions. I have also considered the relevant legal framework and the prevailing jurisprudence on the key issues in the application.

10. Before I outline the key questions which fall for determination in the present application, I wish to note for the record that, the plaintiff's suit is undefended. I say so because, the defendant filed a memorandum of appearance on 21/7/2017. Under Order 7 rule 1 of the Civil Procedure Rules, the defendant was obligated to file a statement of defence within **14 days**. It did not file the defence and neither has it bothered to seek leave of the court to file and serve a defence out of time.

11. Secondly, the grounds of opposition filed by the defendant on 7/3/2018 challenge the capacity of Joseph Karanja to swear the affidavit in support of the application. The grounds do not challenge the validity of the suit filed in court on 9/6/2017. Thirdly, the evidence presented by the plaintiff in support of the present application is uncontroverted.

12. Three (3) key questions fall for determination in the present application. The first question is whether the present application is incompetent for want of a compliant supporting affidavit. The second question is whether an order of forfeiture of the six year lease would lie in view of the fact that the subject lease expired on 31/1/2018 and no request for renewal was made. The third question is whether the defendant has satisfied the criteria for the issuance of a mandatory injunctive order requiring the defendant to vacate the suit premises at this interlocutory stage.

13. The first question is whether the present application is incompetent for want of a compliant supporting affidavit. The present application was expressed to be brought under Articles 40 and 48 of the Constitution of Kenya 2010; Sections 3 and 13 of the Environment and Land Court Act, 2011; Section 73 (2) (b) of the Land Act, 2012; Section 1A, 1B, 3 and 3A of the Civil Procedure Act; Order 40 rules 1 and 2 and Order 51 rule 1 of the Civil Procedure Rules 2010. The affidavit in support of the application was sworn by one Joseph Karanja who described himself as the Property Manager of KTDA Management Services Company Limited (the Management Company). The management company is said to be the company managing the assets of the plaintiff company. The defendant contends that Joseph Karanja is a stranger to the material lease, and in the absence of any authorization by the plaintiff company through a board resolution authorizing him to swear the affidavit, the present application is a nullity.

14. My understanding of an affidavit is that, it is a written declaration or statement of facts made on oath. When presented in a suit to support a party's case, it is treated as evidence and the deponent is treated as a witness. Affidavits are regulated by, *inter alia*, the legal framework in the Oaths & Statutory Declarations Act (Cap 15), Part V of the Evidence Act (Cap 80) and Order 19 of the Civil Procedure Rules. The general admissibility rule is that in civil proceedings, where direct evidence of a fact would be admissible, any statement made by a person in a *document* and tending to establish that fact shall, on production of the original document, be admissible as evidence of that fact if the maker of the statement had personal knowledge of the matters dealt with by the statement. In the present suit, the deponent of the supporting affidavit has deposed thus:

1. I am the Property Manager of KTDA Management Services Company Limited, the Managing Agent of the assets of the plaintiff herein. I have been authorized by the Board of Directors to make this affidavit.

2. I am conversant with the facts of the matter in dispute and therefore competent to make this affidavit.

15. I have carefully scrutinized the supporting affidavit. I have not come across any material which would render the affidavit inadmissible.

On the face of the affidavit, it is clear that Mr Karanja swore the supporting affidavit in his capacity as a witness in that he is the property manager of the management company managing the suit premises and he has personal knowledge of the matters in dispute.

16. Mr Angwenyi urged the court to invoke Section 37 of the Companies Act and reject the present application on the ground that the supporting affidavit was sworn by a stranger. I have looked at the framework in Section 37 of the Companies Act No 17 of 2015. The framework deals with execution of documents by companies. I have not found any provision which would render an affidavit by a witness inadmissible. As noted earlier, the grounds filed in opposition to the application did not challenge the validity of this suit. They only challenged the affidavit sworn by Joseph Karanja in support of the present application.

17. In light of the foregoing, the court is satisfied that Joseph Karanja, as the property manager in charge of the suit premises, is a competent witness to swear an affidavit in support of the present motion. The motion is therefore compliant and properly before the court.

18. The second question is whether an order of forfeiture of the six year lease would lie in view of the fact that the lease expired on 31/1/2018 and there was no renewal of the lease. Forfeiture is one of the modes through which a lease is determined. The other modes include; expiry of the term of the lease, notice of termination, surrender, merger, enlargement, disclaimer, frustration, and termination of the lease on ground of breach of the terms of the lease. Forfeiture entails the re-taking of the leased premises by the lessor through peaceable re-entry and seizure of possession by the lessor during the subsistence of the lease. It operates to prematurely bring an existing lease to an end.

19. From the evidence presented in the present suit, the material lease expired by the effluxion of time on 31/1/2018. There is no evidence of any other form of tenancy subsisting at the moment. In my view, the resultant legal ramification is that the defendant is a trespasser on the suit premises. Secondly, the common law remedy of forfeiture is not available to the plaintiff in the absence of a subsisting lease. Forfeiture as a remedy was available to the plaintiff during the subsistence of the now expired lease.

20. The last question is whether the applicant has satisfied the criteria for grant of a mandatory order requiring the defendant to vacate the suit premises at this interlocutory stage. This relief constitutes a mandatory injunctive order. The principle upon which the jurisdiction to grant a mandatory injunctive order is exercised was spelt out by **Mustil LJ** in the case of **Locabail International Finance Ltd v Agroexport (1986) 1 All ER 901** thus:

“The matter before the court is not only an application for interlocutory injunction, but is an application for a mandatory injunction which, if granted, would amount to the grant of a major part of the relief claimed in the action. Such an application should be approached with caution and the relief granted only in a clear case.”

21. In the present suit, the lease pursuant to which the defendant occupied the suit premises expired on 31/1/2018 and there is no evidence of any other form of tenancy between the parties. I have observed in the preceding paragraphs that the defendant is, in the circumstances, a trespasser on the suit property. Secondly, as at the time of filing this suit, the defendant owed the plaintiff rent arrears of Kshs 19,341,406 as at 31/3/2017. There is no evidence of payment of the above rental debt. Similarly, there is no evidence of any payment made to cater for the last 12 months running from 31/3/2017 to date. The monthly rent in the last two years of the lease was Kshs 1,037,405.60. If indeed there has been no remittance between 31/3/2017 and now, the defendant would be owing the plaintiff an additional sum of over Kshs 10,000,000 for the period between March 2017 and January 2018 plus mesne profits for the period starting 1/2/2018. Thirdly, the defendant filed a memorandum of appearance on 21/7/2017 and has not bothered to file a defence to the suit herein. The end result is that this suit is undefended. Lastly, although the defendant was afforded the opportunity to respond to the present application by way of a replying affidavit, it elected not to challenge the plaintiff’s evidence. The end result is that the evidence presented by the plaintiff in the present interlocutory proceedings is uncontroverted. I am therefore satisfied that the totality of the facts of this case and the uncontroverted plea and evidence by the plaintiff constitute special circumstances and a clear case warranting the court’s exercise of the rare jurisdiction to grant a mandatory injunctive order at this interlocutory stage.

22. In light of the foregoing, the court is satisfied that the clear circumstances of this case warrant the issuance of a mandatory order requiring the defendant to vacate the suit premises forthwith. To do otherwise would be an affront to the statute and to the principles of equity.

23. The upshot of the above findings is that the notice of motion dated 13/2/2018 succeeds and is granted in terms of prayer 3. The defendant shall vacate the suit premises within 30 days from today. In default, the plaintiff shall be at liberty to evict the defendant. The Police Commander in Charge of Nairobi City County shall ensure law and order are maintained during the eviction. Because the defendant elected not to file a defence, the rest of the plaintiff’s claim shall proceed to hearing (formal proof) as an undefended cause.

DATED SIGNED AND DELIVERED AT NAIROBI ON THIS 20TH DAY OF MARCH 2018.

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B M EBOSO

JUDGE

In the presence of:-

Ms Leyla instructed by the firm of TripleOKLaw Advocates LLP for the Plaintiff.

Mr Angwenyi instructed by the firm of Mohammed Muigai Advocates for the Defendant

Ms Halima Abdi - Court Clerk