



REPUBLIC OF KENYA

IN THE ENVIRONMENT AND LAND COURT

AT KISII

CASE NO. 120 OF 2017

DANIEL BOIT AREGE.....PLAINTIFF

VERSUS

ALFRED MOFFAT OMONDI MICHIRA.....DEFENDANT

R U L I N G

1. The plaintiff at all material times relevant to the present suit was a tenant of the defendant on land parcel **LR No. Kisii Municipality/Block III/184** where he was operating a hotel business. Through a plaint dated 23rd May 2017 filed in court on 25th May 2017, the plaintiff claims that the defendant on or about 13th May 2017 unlawfully closed the plaintiff's business premises on allegations of nonpayment of rent. The plaintiff avers he did not owe any rent to the defendant and had obtained an order from the business premises tribunal restraining the defendant from evicting him from the business premises. The plaintiff averred that the unlawful and irregular closure of the business by the defendant occasioned him a loss of kshs. 398,400/= being the value of the goods detained/attached by the defendant and continues to suffer loss and damage.

2. The plaintiff prays for judgment against the defendant for:

- (i) A declaration that the closure of the plaintiff's premises was wrongful, illegal, irregular and void abinitio.**
- (ii) Payment of the said kshs. 398,400/=.**
- (iii) Permanent injunction.**
- (iv) Mandatory injunction for the defendant to restore the plaintiff to the premises.**
- (v) Interest at 14% on (b) above from date of filing the suit.**

3. Simultaneously with the plaint the plaintiff filed a notice of motion seeking orders of mandatory injunction to be restored into the premises that he had rented from the defendant and in respect whereof the defendant had retaken possession. The application was supported on the grounds set out on the body of the application and the affidavit sworn in support thereof by the plaintiff. The plaintiff contends that his tenancy was a controlled tenancy within the meaning of the Landlord and Tenant (Shops, Hotels and Catering Establishments) Act, Cap 301 Laws of Kenya. The plaintiff stated that he had been a tenant of the defendant since 9th January 2012 and the lease was to expire on 29th February 2017 and the plaintiff was to get a renewal of the lease but instead the defendant on 13th May 2017 invaded the premises and closed the hotel business the plaintiff was carrying on notwithstanding the plaintiff had obtained an order from the Business Premises Tribunal restraining the defendant from evicting the plaintiff or effecting any rent increase pending the hearing of the BPRT Case No. 29 of 2017 which the plaintiff had filed. The plaintiff insisted that he did not owe the plaintiff any rent arrears to warrant being evicted from the rented premises.

4. The defendant filed a statement of defence and a replying affidavit in opposition to the application for injunction. The defendant stated in his defence that the plaintiff's tenancy was duly terminated with effect from 1st May 2017 after the plaintiff failed to oppose or challenge the defendant's notice to terminate the tenancy served upon the plaintiff on 6th March 2017. He averred that he lawfully took over the tenancy upon the termination of the plaintiff's tenancy. The defendant deponed that the plaintiff having failed to challenge the notice of termination by way of filing a reference before the Tribunal, the notice took effect on the effective date of 1st May 2017.

5. On 3rd August 2017 the parties appeared before me to take directions on the matter and both Mr. Nyatundo Advocate who appeared for the defendant and Ms. Mireri advocate who held brief for Mr. Ochoki advocate for the plaintiff confirmed they had reached a settlement by

consent. The following order was recorded by consent:-

“By consent of the parties the Regional Rent Inspector of the Business Premises Rent Tribunal to visit and inspect the subject premises with a view of determining the applicable rent. Once the applicable rent is determined the parties shall sign a lease agreement for a term of 5 years and 3 months within 30 days of the rent being determined.”

6. A report prepared by M/s Adomag & Associates Valuers & Estate Agents dated 20th August 2017 was filed in court on 29th August 2017. From the filed report it is evident that the valuers were instructed to undertake the valuation by the BPRT Regional Rent Inspector as per the letter addressed to the valuers dated 4th August 2017 attached to the report. The valuation report assessed the market rental value at kshs. 76,050/= covering the dining area, office/kitchen and the external shed.

7. The plaintiff on 23rd October 2017 though there was no order for a further valuation report furnished a copy of a valuation prepared by Damon Appraisers Ltd, Valuers & Estate Agents dated 24th August 2017 which indicated the fair market rent for the premises to be kshs.21,000/=. The two valuation reports were totally incompatible as there can be no relationship between a rental assessment of kshs. 76,050/= and kshs.21,000/= for the same premises. This prompted the court to invite the parties to make comments on the two reports which the parties duly filed.

8. I have reviewed the two valuation reports which clearly have glaring differences. The report by Adomag Valuers & Associates categorizes the lettable area thus:-

Dining area 550 sqft

Office/Kitchen 200 sqft

Extended shed 371 sqft

The report by Damon Appraisers shows the lettable area thus:

Dining room 589sqft

Store/Kitchen/Lobby 174sqft

Shed Nil

The comparables relied upon by Adomag Valuers & Associates were all within the same building while it is unclear how the comparables used in the Damon Appraisers report relate with the demised premises. The Damon Appraisers report observes that the subject plot is hidden and does not have frontage and direct access to the main road. From the Google map extract, the sketch plan (annexed to Adomag Valuers & Associates report) and the survey map attached to the Damon Appraisers report it is evident the plot is a corner plot and is served by two major roads. The report by Adomag Valuers & Associates notes that the shed was newly built and the hotel had been recently renovated. The Damon Appraisers report is silent about any recent renovations and/or construction of a shed.

9. The submissions/comments filed by the parties advocates canvass issues/matters that were not envisaged by the consent order made on 3rd August 2017. The consent order envisaged that the parties would agree on the applicable rent as determined by the Regional Rent Inspector of the Tribunal whereupon a formal lease for a term of 5 years and 3 months would be entered between the parties. The reference of the rent dispute to the Regional Rent Inspector of the Business Premises Rent Tribunal was so that he could assess the rent as an impartial arbiter. Adomag Valuers & Associates as pointed out earlier were appointed by the Regional Rent Inspector for BPRT to carry out the valuation of the premises in accordance with the consent order. It would appear the plaintiff did not agree with the valuation that was carried out by Adomag Valuers & Associates and he accordingly sought to procure his own valuation from Damon Appraisers. As per the consent order, the lease renewal was only subject to the new rent being determined and probably agreed. The rent payable was determined in terms of the consent order but the plaintiff does not agree with the rent as determined. If the parties cannot agree on the rent for the renewed lease, it means the lease cannot take effect.

10. The plaintiff concedes that the defendant closed the business premises and commenced making renovations meaning the plaintiff was effectively evicted from the premises. There is no basis upon which the court can order the plaintiff to be restored in the demised premises as it is clear from the consent order that the parties intended to enter into a new lease upon the determination of the rent as per the consent order. The lease they intended to enter into was one for a term of 5 years and 3 months which would fall outside the jurisdiction of the Business Premises Rent Tribunal established under the Landlord and Tenant Act, Cap 301 Laws of Kenya.

11. In the premises therefore, the orders of injunction sought by the plaintiff/applicant in the Notice of Motion dated 23rd May 2017 cannot be granted. The consent order more or less superceded the application. By the consent the parties agreed on how to resolve their dispute in regard to the tenancy. However, the consent did not address the issue of damages pleaded in the plaint and that would remain an issue for determination at the trial if the parties cannot reach agreement.

12. For the foregoing reasons, I decline to grant any injunction in the terms sought by the plaintiff and order the Notice of Motion dated 23rd May 2017 dismissed. The costs of the application shall be in the cause.

13. Orders accordingly.

RULING DATED, SIGNED and DELIVERED at KISII this 29TH DAY of JUNE, 2018.

J. M. MUTUNGI

JUDGE

In the Presence of:

Dahukire for Ochwangi for the plaintiff

Ms. Kebungo for Nyatundo for the defendant

Ruth Court Assistant

J. M. MUTUNGI

JUDGE