



REPUBLIC OF KENYA

IN THE ENVIRONMENT AND LAND COURT

AT NAIROBI

E.L.C. CASE NO. 287 OF 2005

PHOENIX PROPERTIES LIMITED.....PLAINTIFF

VERSUS

EQUIP AGENCIES LIMITED.....1ST DEFENDANT

INTERTRACTOR COMPANY LIMITED.....2ND DEFENDANT

PAPERMART (E.A.) LIMITED.....3RD DEFENDANT

COFFTEA MACHINERY SERVICES LIMITED.....4TH DEFENDANT

INTERMART MANUFACTURERS LIMITED.....5TH DEFENDANT

KIPKELION CORNER LIMITED.....6TH DEFENDANT

UNICORN LIMITED.....7TH DEFENDANT

JUDGEMENT

1. The Plaintiff seeks vacant possession of the premises comprised in L.R. No. 209/9722 (“the Suit Property”) and eviction of the Defendants from the suit premises. It also seeks Kshs. 23,699,000 plus interest at court rates together with mesne profits of Kshs. 900,000/= per month from 1/11/2004 until vacant possession of the Suit Property is handed over to the Plaintiff. The Plaintiff also seeks the costs of this suit.

2. The Plaintiff is the registered proprietor of L.R. No. 209/9722 being the premises comprised in grant registered as I.R. No. 37247/1. The Plaintiff agreed to lease to the Defendant these premises for a term of 6 years from 1/11/1998. The Defendant took possession of the Suit Property in November 1998. The tenancy was to expire on 31/10/2004 but the Defendant did not vacate the Suit Property or hand over possession to the Plaintiff. The Plaintiff claims that the Defendants owed it the sum of Kshs. 23,699,000/= being the rent arrears from May 2002 to October 2004.

3. The Defendants denied executing the lease. They averred in their defence that their continued occupation of the Suit Premises was pursuant to a verbal agreement with the Plaintiff. In the alternative, the Defendants pleaded that they were controlled tenants under the provisions of the Landlord, Tenant (Shops, Hotels and Catering Establishments) Act. The Defendants averred that the lease presented for registration by the Plaintiff was not the genuine one and that the Plaintiff had unilaterally altered some of its provisions.

4. Before this case could be heard there were other intervening proceedings over the Suit Property. The Defendants filed **E.L.C No. 836 of 2014– Equip Agencies Limited and Another v Phoenix Properties Limited** in which Nyamweya J. rendered a ruling that the issue of whether the Defendants were protected tenants was to be determined by the Business Premises Rent Tribunal (BPRT). Following this order issued on 19/12/2014, the Defendants filed **BPRT Case No. 104 of 2015 – Equip Agencies Limited v Phoenix Properties Limited**. The chairman, BPRT in his ruling delivered on 22/1/2016 found that the tribunal was satisfied that it did not have jurisdiction to determine the dispute between the Landlord and Tenants from 1/11/1998 up to 31/10/2000. The tribunal was also satisfied that no periodic lease had been created by the parties upon expiry of the lease.

5. Being dissatisfied with the tribunal’s findings the Defendants lodged **E.L.C. Appeal No. 5 of 2016 – Equip Agencies Limited v Phoenix Properties Limited** which is still pending before the court.

6. The Plaintiff's director, Kamaljeet Singh Matharu gave evidence. He confirmed that the Plaintiff is the owner of the Suit Property which it leased to the Defendant for 6 years from 1/11/1998. He produced copies of the correspondence exchanged between the parties on the lease. The letters dated 16th and 19th November 1998 were in relation to the preparation of the lease. The 1st Defendant's letter dated 9/3/1999 raised concerns about the effective date of the lease with the Plaintiff arguing that the lease period should have commenced from the date full possession was given to the Defendant.

7. The 1st Defendant's letter of 15/3/1999 reiterated that the lease period should have commenced on 1/3/1999 and not 1/11/1998. The letter stated that the Defendant would be forwarding a cheque for Kshs. 1.9 million in due course which would cover rent for four months from November 1998 to February 1999 at the rate of Kshs. 600,000/= per month and Kshs. 700,000/= as rent for March 1999 less the sum already paid of Kshs. 1.2 million. The letter proposed certain amendments to the lease which was to be prepared in the name of Equip Agencies Limited. Page 5 stated that rent would be payable as follows:

- i. Kshs. 700,000/= from 1/3/1999 to 28/2/2001
- ii. Kshs. 770,000/= from 1/3/2002 to 28/2/2003
- iii. Kshs. 847,000/= from 1/3/2003 to 28/2/2004
- iv. Kshs. 900,000/= from 1/3/2004 to 28/2/2005

The letter dated 17/3/1999 listed five other companies whose names were to appear as lessees of the Plaintiff's premises.

8. The Plaintiff also produced a copy of the lease 24/12/2000 which was registered at the Lands office. It stated that the tenants were to hold the premises for a term of 6 years from 1/11/1998. The rent was to be paid as follows:

- i. Kshs. 700,000/= from 1/11/1998 to 31/10/2000
- ii. Kshs. 770,000/= from 1/11/2000 to 31/10/2002
- iii. Kshs. 847,000/= from 1/11/2002 to 31/10/2003
- iv. Kshs. 900,000/= from 1/11/2003 to 31/10/2004

9. Under the lease, the tenants agreed with the landlord to pay the rent reserved at the times and in the manner specified without any deductions. Clause 8(a) stipulated that the landlord would at the written request of the tenant made 6 months before the expiry of the lease and if there would be no breach or non-observance of the covenants to be performed by the tenant, grant the tenant a further term of 6 years at a rent to be agreed between the parties three months before the expiration date. The clause stated that the rent would be higher than what was payable during the last months of the lease.

10. The Defendants defaulted in paying rent to the Plaintiff in May 2002 following which the Plaintiff instructed Kiriyu Auctioneers to levy distress for rent of Kshs. 22,496,000/=. The auctioneers proclaimed the Defendants' goods on 5/7/2004 and sold them at an auction on 1/9/2004. The auctioneers realised Kshs. 2,820,000/= from the auction. The Plaintiff maintains that it has duly accounted for the sale proceeds in computing the sum due from the Defendants.

11. The Defendants filed **HCCC No. 1227 of 2003** seeking a permanent injunction to restrain the sale of its goods which had been attached by auctioneers instructed by the Plaintiff. The court issued a temporary injunction on 27/11/2003 stopping the sale of the attached goods. After hearing the application for injunction, Aluoch J. held on 1/7/2004 that there was no dispute on the rent owing. The court also discharged the injunction issued on 27/11/2003.

12. The Defendants also filed contempt proceedings in **HCCC No. 1227 of 2003** which resulted in the filing of **Civil Appeal No. 267 of 2004** which was consolidated with **Civil Appeals Numbers 268 and 269 of 2004 – Akber Abdullah Kassam Esmail v. Equip Agencies Limited and 4 Others**. The Court of Appeal invalidated the ex parte orders that had been issued to the Defendants. The court found that the alleged contemnors had been found to be in contempt without a hearing.

13. The Defendant's director, Divyesh Kumar Indubhai Patel gave evidence. He conceded that the Defendants entered into a tenancy agreement in 1998 to let the Plaintiff's premises for 6 years. The tenancy commenced on 1/11/ 1998 and they took possession and started paying rent. He produced a copy of the lease which is similar to the one produced by the Plaintiff. He averred that the Defendants continued to occupy the suit premises after the expiry of the tenancy based on verbal agreements between the parties. He denied that the agreement between the parties was a lease arguing that it was a tenancy. He stated that even though there had been no renewal of the tenancy, the Defendants were controlled tenants under the Landlords Tenants (Shops, Hotels and Catering Establishments) Act.

14. The Defendant's director produced a copy of the order made by Onyancha J. on 12/5/2014 which restrained the Plaintiff from levying distress on the disputed rent or evicting the Defendants. He also produced a copy of the order issued on 4/2/2015 by Nyamweya J. which restrained the Plaintiff from levying distress on the disputed rent from 2004 up to the date of that order on condition that the Defendant paid a monthly rent of Kshs. 150,000/= on the first day of each month from 1/1/2015. The second condition was that the Defendant in this case would file and prosecute a reference at the Business Premises and Rent Tribunal to determine the status of their tenancy and the rent due within a year of the ruling. It was his evidence that the two cheques for Kshs. 150,000/= which the Defendants forwarded to the Plaintiff as rent for January and February 2015 were returned to the Defendants.

15. The Defendant's director maintained that the Defendants did not owe the Plaintiff any money. Rather, that it was the Plaintiff who owed the Defendants the sum of Kshs. 129,026,793/= in respect of the goods collected and sold by the Plaintiff's agent. The Defendant's director did not tender evidence to support the claim. The Defendants could have filed a counterclaim for this sum.

16. When the Plaintiff closed its case on 1/3/2018, Mr. Njenga Advocate for the Defendant applied for an adjournment to file a supplementary list of documents and also sought leave to call an additional witness. The court granted the Defendants leave to file and serve a supplementary list of documents together with an additional witness statement within 14 days of 1/3/2018. The court directed that the case would be heard further on 2/5/2018. On 2/5/2018 the Defendants' Advocate Ms. Mwangi informed the court that their supplementary bundle of documents was ready and that Mr. Njenga had spoken to Mr. Ouma and served the documents on him.

17. Mr. Ouma objected to the production of the documents stating that they should have been filed by 15/3/2018. He stated that their firm received a letter and documents which had not been filed on 27/4/2018 at 4.50 p.m. He pointed out that some pages were not clear and that the Plaintiff was not able to authenticate the sources of the documents the Defendants wished to produce. Mr. Ouma denied speaking to Mr. Njenga Advocate. The court expunged the Defendant's documents filed on 2/5/2015 from the record. The hearing proceeded.

18. The Defendants filed the application dated 30/5/2018 seeking to review and set aside the order expunging the Defendants' documents and to reopen the case. The application was heard on 11/6/2018. The court delivered its ruling on the same date and dismissed the Defendants' application with costs to the Plaintiff. The court directed the Defendants to file and serve their written submissions within 21 days. The Defendants did not file their submissions. The Plaintiff filed its submissions. Only the Plaintiff's counsel attended court on 9/7/2018 to highlight the submissions.

19. The issues for determination are: -

- a. Was there a lease agreement between the Defendants and the Plaintiff?
- b. Did the parties agree to extend the tenancy?
- c. Did the Plaintiff unilaterally alter the terms of the lease?
- d. Were the Defendants' goods attached and sold?**
- e. If they were sold, was it in contempt of court orders?
- f. Are the Defendants indebted to the Plaintiff as claimed in the plaint?

20. The court has considered the matter. It is not in dispute that the Plaintiff entered into a lease agreement with the Defendants for the Suit Property for a term of 6 years from 1/11/1998 and that the Defendants took possession of the Suit Property in November 1998. There is no evidence that the Defendants applied to extend the lease pursuant to Clause 8(a) of the lease. One of the conditions for the extension was that the tenants should not have been in breach of the covenants they were required to perform under the agreement. The Defendants were in breach of the requirement to pay rent in the manner prescribed. The court finds that there was no agreement between the parties to extend the lease.

21. The Defendants did not lead any evidence to show that the Plaintiff altered the terms of the lease. The lease produced by the Defendants' witness is similar to the one relied on by the Plaintiff. It is not in dispute that the Defendants goods were attached and sold. The Plaintiff maintains that in computing the amounts due from the Defendants, it gave credit for the sale proceeds realised. The court agrees with the Plaintiff that the issue of whether the Defendants goods attached were sold in contempt of a court order was dealt with by the Court of Appeal. The Defendants did not pursue this matter after the Court of Appeal made its orders.

22. The Defendants admitted that the two cheques for Kshs. 150,000/= each being rent for January and February 2015 which it forwarded pursuant to the court order were returned by the Plaintiff. The Plaintiff's evidence that the Defendants have been in occupation of the Plaintiff's premises from May 2002 to date without paying rent is uncontroverted. Under the lease, the rent payable in 2004 was Kshs. 900,000/= per month. This is the additional sum that the Plaintiff seeks from 1/11/2004 until the outstanding rent is paid in full. The Plaintiff is entitled to the sum it claims as mesne profits.

23. The court finds that the Plaintiff has proved its case on a balance of probabilities. Prayers (i), (ii) and (iii) of the Plaint dated 4/5/2005 are allowed. The Plaintiff will have the costs of the suit to be borne by the Defendants jointly and severally together with interest at court rates.

Dated and delivered at Nairobi this 30th day of August 2018.

K. BOR

JUDGE

In the presence of: -

Ms. Opakas holding brief for Mr. Ouma for the Plaintiff

Mr. Njenga for the Defendants

Mr. V. Owuor- Court Assistant