



REPUBLIC OF KENYA

IN THE ENVIRONMENT AND LAND COURT

AT MOMBASA

ELC NO. 328 OF 2015

SAIFFUDIN ABDULLABHAI

HUSSEIN ABDULLABHAI

FAKHRUDDIN ABDULLABHAI

MUSTAFA ABDULLABHAI.....PLAINTIFFS

VERSUS

AHMED SURURU.....DEFENDANT

JUDGMENT

1. The Plaintiffs filed this suit against the Defendant in terms of the amended plaint dated and filed on 20.8.2015 seeking judgment for;
 - a. **An order of vacant possession and/or eviction against the Defendant from the Plaintiffs' Plot No. MOMBASA/BLOCK XVI/27.**
 - b. **A sum of Kshs.55,000/= in accrued rent arrears.**
 - c. **Mesne profits at the rate of Kshs.1000/= with effect from the 1st of August, 2015.**
 - d. **Costs of and incidental to this suit.**
 - e. **Interest on (b), (c) and (d) above at court rates from the date of filing this suit until payment thereof in full**
2. The Plaintiffs' claim is that at all material times the Defendant is a tenant occupying a portion of the Plaintiffs' property known as **MOMBASA/BLOCK XVI/27** and paying a monthly rental sum of Kshs1000/=. The Plaintiffs aver that on or about 8th June 2015, they issued a months' notice to the Defendant of the Plaintiffs intention to terminate the tenancy with effect from 31st July, 2015, but that the Defendant has refused and/or ignored to comply with the said notice and has not remitted and/or discharged the rental sum accruing from 1st January, 2011, hence the filing of the suit.
3. By an amended defence and counter-claim dated and filed on 10th April, 2017, the Defendant denied the Plaintiffs' claim. He averred, an the main, that he has paid up all rental sums owed to the Plaintiffs and is in no arrears and that he has been operating a large scale charcoal business on the suit premises for over 28 years for which he has earned goodwill and that it would be a detriment to him for the Plaintiffs to unilaterally and without any valid and legal reason evict him from the suit premises. The Defendant contends that he spent over Kshs.100,000/= in constructing and painting an iron sheet roofed structure which he uses as an office and store. The Defendant states that the business earns him almost Kshs.200,000/= per month. In his counter-claim the Defendant is seeking compensation in terms of goodwill earned over 28 years and that the structure, fixtures and fittings on the suit property be valued and he be compensated the same by the Plaintiffs. The Defendant also prays for costs of the counter-claim.
4. The 1st Plaintiff gave evidence at the hearing on behalf of the Plaintiffs. He adopted his witness statement dated 6th March, 2017 and filed on 8th March, 2017 which mainly reiterated the averments in the amended plaint. He produced the documents listed in the Plaintiffs' further list of documents filed on 5th May, 2017 as P exhibits 1 to 16. In cross-examination, the 1st Plaintiff admitted that the Defendant has been in occupation of the suit premises since 1989 and that it is the Plaintiff's father who leased out the premises to the Defendant. He stated that the agreed rent was Kshs.1000/= per month. That they have given the Defendant notice four times to vacate from the suit property, the last one

being the one dated 8th June, 2015. He further stated that the last receipt they issued to the Defendant was given on 9th January, 2011 and was for the period January to December 2010. He added that the Defendant was paying the rent annually and that they refused to accept the rent for 2011 because they wanted the Defendant to vacate from the plot. He denied that the Defendant has put up a structure on the plot as alleged and stated that the Defendant is operating from an open ground.

5. The Defendant called his son who holds a power of attorney dated 12th May, 2015 which was produced as D. exhibit 1. He adopted his witness statement dated 3rd April, 2017 and filed on 5th April, 2017. He stated that the Defendant has been a tenant in the suit property since 1989 selling timber, charcoal, fire hood and empty drums. He produced the single business permit as D exhibit 2 and the photographs showing the items on the suit plot as D exhibit 3. He testified that the Defendant paid rent of Kshs.12,000/= per year and that he earns between Kshs.100,000/= to Kshs.200,000/= per month from the business. In cross-examination, he stated that the photographs he produced show an open ground. He stated that the rent was Kshs.1,000/= per month but they found it easier to pay Kshs.12,000/= per year. He admitted that he had no record showing the income from the business.

6. Both parties filed written submissions. The Plaintiff submitted that the tenancy enjoyed by the Defendant was a periodic tenancy of month to month and therefore the notice of intention to terminate issued on 8th June, 2015 was proper and sufficient to terminate the tenancy. It was further submitted that the Defendant ought to honour his obligations as a tenant by being held liable to pay the accrued and admitted rent arrears of Kshs.55,000/= for the period ending on 31st July 2015 and to pay the accrued mesne profits accruing from 1st day of August 2015 at the rent of Kshs.1,000/= per month until vacant possession is delivered. It is the Plaintiffs' submissions that the Defendant has failed to show that he incurred any cost in building the temporary structure as claimed in the counter-claim. They further submitted that the Defendant has no legitimate claim for compensation for any costs incurred having erected structures on the demised suit property without the Plaintiffs' consent. It was also the Plaintiffs' submissions that the Defendant is not entitled to any goodwill since he did not furnish any documents showing the income earned from the business conducted on the suit property. The Plaintiffs relied on the case of **Johnson Mugwe Wanganga –v- Joseph Nyaga Karingi (2014) eKLR** where the court held;

“As regards the claim for goodwill, it is our considered view that goodwill is a claim for special damages which must be proved and particulars given.”

7. The Defendant submitted that the tenancy was a periodic tenancy and since the rent was paid annually the same was a yearly tenancy and could only be terminated by a notice whose length should not be less than a year as provided for under section 57 of the Land Act 2012. The Defendant submits that the one month notice issued by the Plaintiffs was less than the period required by law hence illegal and consequently had not terminative effect on the subsisting tenancy. On that score, the Defendant submits that the Plaintiffs are not entitled to vacant possession. It is further the Defendant's submission that he is entitled to compensation on the fixtures, structures and fittings installed on the suit property in the event the Plaintiffs are granted vacant possession. Further, that he is entitled to goodwill in the form of general damages as a just compensation for the loss occasioned to the Defendant should vacant possession be granted. The Defendant urged the court to dismiss the Plaintiffs' suit and allow the Defendant's counter-claim.

8. The parties filed separate list of issues. I propose to reorganize them and re-paraphrase them for ease of consideration.

1. Whether the notice to determinate the tenancy issued by the Plaintiffs was proper.

2. Whether the Defendant is in arrears of rent.

3. Are the Plaintiffs entitled to vacant possession?

4. Is the Defendant entitled to compensation for the structures on the suit property?

5. Whether the Defendant is entitled to goodwill as sought in the counter-claim?

6. What are the orders as to costs?

9. With regard to the first issue, there is no dispute that the parties herein were not bound by any written document in their tenancy relationship. Section 57 (1) (a) of the Land Act, 2012 provides as follows:

1. If any lease:

a. The term of the lease is not specified and no provision is made for the giving of notice to terminate the tenancy, the lease shall be deemed to be a periodic tenancy.

2. If the owner of land permits the exclusive occupation of the land or any part of it by any person at a rent but without any agreement in writing, that occupation shall be deemed to constitute a periodic tenancy.

3. The periodic tenancy contemplated in subsection (1) (a) shall be the period by reference to which the rent is payable.

4. A periodic tenancy may be terminated by either party giving notice to the other, the length of which shall be not less than the period of the tenancy and shall expire on one of the days on which rent is payable.

10. In this case, the Plaintiffs contend that the tenancy enjoyed by the Defendant was a periodic tenancy of month to month and to that extent the notice issued was more than sufficient to terminate the tenancy relationship. The Defendant on the other hand maintains that throughout

the subsistence of the tenancy he has been paying rent annually, hence the periodic tenancy was for year to year and could only be terminated by giving of a notice whose length should not be less than a year. The Plaintiffs produced receipts showing that the rent was Kshs.1,000/= per month, although the receipts were for Kshs.12,000/= being for the month of January to December of each respective year. On being cross-examined by the Plaintiffs' counsel, the Defendant's witness testified that they found it easy to pay Kshs.12,000/= per year instead of the monthly rent of Kshs.1,000/=. The payment of the sum of Kshs.12,000/= was therefore for the Defendant's own convenience and was not a condition of the tenancy. I will therefore answer the first issue in the affirmative.

11. As regards the second issue, the Defendant's evidence is that the Plaintiffs have refused to receive rent since 2010. There is however evidence that rent was paid up to December 2010. There is no evidence that rent has been paid by the Defendant since January 2011. In the circumstances, the Plaintiffs are entitled to accrued rent arrears in the sum of Kshs.55,000/= for the period running from 1st January 2011 to 31st July, 2015 and thereafter mesne profits at the rate of Kshs.1,000/= per month with effect from 1st August 2015 until the date the Defendant hands over vacant possession of the demised suit plot to the Plaintiffs. Section 60 of the Land Act is clear that **"if a lessee remains in possession of land without the consent of the lessor after the lease has been terminated or the term of the lease has expired, all obligations of the lessee under the lease continue in force until such time as the lessee ceases to be in possession of the land."** In so far as the Defendant is still within the suit premises, he shall be liable to continue paying rent at the rate of Kshs.1,000/= per month until that date that he hands over vacant possession of the demised premises to the Plaintiffs.

12. The third issue is whether the Plaintiffs are entitled to vacant possession. Having found that the notice to terminate was proper, it follows that the answer to the third issue is in the affirmative. It is plain that the Defendant received a notice of termination of the tenancy. The Defendant should thus give vacant possession. I am guided by the decision in Kasturi Limited -v- Nyeri Wholesalers Limited (2014) eKLR where the Court of Appeal pronounced itself inter alia thus;

"It is the duty of the courts to ensure that no individual is prevented from taking possession and or enjoying their property. A tenant cannot impose or force him/herself/itself on a landlord."

In the instant case, when the lease between the parties was terminated by the notice issued by the Plaintiffs to the Defendant, it was incumbent upon the Defendant to give vacant possession.

13. The fourth issue is whether the Defendant is entitled to compensation for the structures on the suit property. The photographs produced by the Defendant as exhibits show that the rented premises is an open space with temporary iron sheet structures. Indeed, the receipts produced by the Plaintiffs which were issued to the Defendant show that what was leased out was an open yard. Whatever structures the Defendant put up was for his own use and benefit. There was no indication that any consent was sought from and/or obtained from the landlord permitting the Defendant to put up such structures on the demised suit premises. Moreover, there was no evidence that the Defendant incurred the sum of Kshs.100,000/= in constructing and painting the alleged structure. Even if the Defendant incurred the alleged sum, he went on a frolic of his own and he ought to be held liable and accountable for expenses incurred while on his own frolic. The same cannot be refundable from the Plaintiffs.

14. As regards the issue whether the Defendant is entitled to be paid for the loss of goodwill earned for over 28 if vacant possession is granted, the Defendant has submitted that the same is payable in the form of general damages as a just compensation for the loss occasioned on him should vacant possession be issued by the court. Whereas in the defence and counter-claim, the Defendant claims that his business earned him about Kshs.200,000/= per month, the Defendant's witness while testifying stated that the said business earned between Kshs.100,000/= and Kshs.200,000/=. In the Defendant's submissions, the Defendant's counsel has quoted a figure of about Kshs.300,000/= per month. In the case of Johnson Mugure Wanganga -v- Joseph Nyaga Karingi (2014) eKLR, the Court of Appeal held as follows:

"As regards the claim for goodwill, it is our considered view that goodwill is a claim for special damages which must be proved and particulars given. In the instant case, there are no particulars of the goodwill pleaded in the plaint and the Honourable Judge erred in not indicating how the sum of Kshs.542,820/= was arrived at representing lost goodwill. We are also of the considered view that damages for loss of goodwill is remote in respect of landlord tenant relationship and it was not proved as between the appellant and the Respondent, who owned the goodwill in respect of the demised premises."

Going by the above decision of the court of Appeal, it is clear that goodwill is a claim for special damages which must be proved and particulars given. The same cannot be awarded as general damages as submitted by the Defendant's counsel. The Defendant did not furnish the court with any evidence of income from the business run on the suit premises. Moreover, the court of Appeal in the above case held that damages for loss of goodwill is remote in respect of landlord tenant relationship. I am therefore not satisfied that the Defendant has established his entitlement to the claim for goodwill. In my considered view, the same has not been proved and is not payable.

15. As for costs, the Plaintiffs' claim has succeeded in it's entirety. That being so, it is my judgment that the most appropriate order to make on costs is that the Plaintiffs are entitled to costs of the suit.

16. The upshot of all these is that the Plaintiff's suit is allowed as prayed and Defendant's counter-claim is dismissed with costs.

DATED, DELIVERED and SIGNED at MOMBASA this 24th day of September, 2018

C. YANO

JUDGE