



REPUBLIC OF KENYA

IN THE ENVIRONMENT AND LAND COURT

AT NAIROBI

E.L.C. CASE NO. 596 OF 2012

WINNERS DELIGHT LIMITED.....PLAINTIFF

VERSUS

JAMES NDEGWA THUKU.....DEFENDANT

JUDGEMENT

1. The Plaintiff entered into a lease with the Defendant in respect of plot number 583 – Thome 5 situated along Thika Road in Nairobi, where the Defendant was running a bar business. The Plaintiff was to let these premises with a view to redeveloping and refurbishing the premises so that it could carry on the business of a bar, restaurant and hotel accommodation or lodgings. The lease was to run for 10 years from 1/6/2009. The agreement excluded the one storeyed building at the entrance to the premises where the Defendant was running a bar from the lease. The monthly rent payable was Kshs. 250,000/= and was to be paid on the fifth day of every month subject to review after five (5) years.
2. The Plaintiff was to pay the Defendant Kshs. 1,000,000.00 on execution of the agreement, which was equivalent to rent for the first four months of the lease period. The Plaintiff was to be given possession of the premises on the date the building plans were approved.
3. The Plaintiff brought this suit against the Defendant for breach of contract. In the Amended Plaint filed in court on 10/7/2013, the Plaintiff claims that the parties expressly agreed to postpone the date of commencement of the lease by six months after the delay in obtaining the required approvals for the building plans. The Plaintiff maintains that it performed its obligations under the lease and paid the Defendant the advance payment of Kshs. 1,000,000.00. The Plaintiff claims that when it commissioned its architects to design the building plans and submit them to the City Council of Nairobi for approval, it emerged that the Defendant did not have a title over the demised premises and that he had not secured change of user of the premises from residential to commercial purposes which would enable the Plaintiff to carry out the business venture as agreed.
4. The Plaintiff claims that it pursued the change of user at a cost of 100,000/= which was to be offset against the rent once the lease commenced. The change of user was granted eventually vide Director of City Planning dated 9/1/2012. The Plaintiff claims it also followed up with the relevant authorities as a result of which a certificate of title was issued to Defendant in mid-2011.
5. The Plaintiff's advocate wrote to the Defendant's advocate on 22/2/2012 seeking handing over of possession of the demised premises. The Defendant refused to hand over possession of the premises to the Plaintiff and instead went ahead to construct some structures on the suit premises in an effort to revive his old business which he had scaled down at the time he anticipated to hand over the premises to the Plaintiff.
6. The Plaintiff seeks an injunction to restrain the Defendant from constructing, occupying, carrying on business, transferring, leasing or otherwise alienating the property known as L.R. No. 13330/502; a mandatory injunction to compel the Defendant to hand over possession of the suit land to the Plaintiff; specific performance of the lease agreement dated 9/7/2009; general damages for breach of contract and costs of the suit.
7. In his defence filed in court 25/10/2013, the Defendant denied the Plaintiff's claim and contended that the Plaintiff conspired with its advocates and took advantage of the Defendant and got him to sign the lease agreement whose contents he did not understand. The Defendant denied that the sum of Kshs. 100,000/= that was to be paid for change of user was to be offset against the rent. The Defendant denied that he was required to hand over the suit premises. The Defendant averred that his restaurant business never stopped running. He urged the court to dismiss the Plaintiff's suit.
8. The Plaintiff's director gave evidence. He stated that he has been engaged in business ventures in the hotel and entertainment industry. He entered into negotiations with the Defendant with a view to putting up the intended business on the Defendant's land. They had discussions over the lease. The Plaintiff's lawyers drafted a different lease after raising issues on the draft prepared by the Defendant's advocate. The Plaintiff produced a copy of the business plan date March 2009 which gave the financial highlights projected for the initial five years. He produced a copy of the lease prepared by the Defendant's advocate, which was not registered. There were several meetings held between the

parties in attempt to resolve the issue. He annexed copies of the banker's cheque dated 26/6/2009, a copy of the lease and copies of the letters exchanged between the advocates in 2010 and 2011. The certificate of title over L.R. No. 13330/52 was issued in April 2010 in the Defendant's name.

9. The Plaintiff's advocate's letter of 22/2/2012 confirmed to the Defendant's advocate that the Plaintiff's building plans had finally been approved by the City Council of Nairobi after the Plaintiff's concerted efforts. The letter proposed to have possession handed over to the Plaintiff on 1/3/2012 to facilitate the construction of the envisaged structures. The letter stated that the Defendant would be required to remove all his possessions from the premises to facilitate a smooth hand over of the premises.

10. The Plaintiff obtained approval of the National Environment Management Authority on 5/7/2012. The licence was valid for 24 months. The Defendant instructed his new advocate to respond to the Plaintiff's letter. The new advocate sought a copy of the lease from the Plaintiff's advocate. The Plaintiff's advocate responded on 29/3/2012 blaming the Defendant for the delay in getting the Plaintiff's building plans approved. The Plaintiff also produced a copy of a petty cash voucher dated 28/9/2010 for Kshs. 100,000/= indicated to be for demolition labour, transport of materials, repairs among others.

11. The Defendant gave evidence. It was his evidence that the Plaintiff demolished his premises and that the Plaintiff wanted the whole plot yet he was supposed to occupy part of the plot. He denied that the Plaintiff's director processed his title over the premises. He stated that the Plaintiff's furniture had been on his plot since 2009 yet he does not pay rent. He stated that he had a bar with about five lodgings on the suit land which the Plaintiff was to have renovated and improved under the agreement. He was adamant that his title was processed by his wife with the assistance of Mr. Kaburu advocate.

12. The Defendant's wife also gave evidence. She admitted that the Defendant received Kshs. 1,000,000.00 and Kshs. 100,000/= for the demolition of the columns of the eight rooms on the demised premises. She stated that the Plaintiff's director demolished part of the wall. She advised the Defendant not to go on with the lease based on information she got that the Plaintiff's director was not a good person. She also stated that Dr. Nyamu, the Plaintiff's director went quiet and refused to take their calls for quite a while.

13. She confirmed that the Plaintiff's director went to the premises to collect his items but she told him that he must wait until the court case ends. She stated that her husband has had medical problems since 2003. She confirmed that the Plaintiff's items are still held in the Defendant's premises. She stated that the Plaintiff was to lease half of the plot and build on it and was to pay rent after six months which he never did. He did not build on the Suit premises.

14. The issue for determination is whether the court should issue the orders sought by the Plaintiff. Parties filed submissions. The Plaintiffs sought damages in the sum of Kshs. 439,463,000.00 in its submissions based on the proposed investment it was to have undertaken on the Defendant's premises and the expected business turnover from the business venture.

15. There is a contention as to what part of the premises was to be let to the Defendant under the agreement. The Defendant maintains that the Plaintiff was only letting part of the plot while the Plaintiff claims it was to let the whole plot. Clause 1 c of the lease stated that the one storeyed building at the entrance to the premises where the Defendant was running a bar did not form part of the agreement. On taking possession, the Plaintiff was to demolish and refurbish the existing structures on the premises except the bar under the lease.

16. The lessor's covenants at clause 7 of the lease did not include obtaining a title or change of user of the premises as the Plaintiff contends. The lessee was to perform the requirements of the City Council by-laws in respect of the conduct and management of the business. This would include the change of user and obtaining all the necessary approvals.

17. The agreement gave a grace period of six months at clause 5 which was to enable the Plaintiff obtain the approvals and consents for the construction and complete construction. Upon expiry of that period, the Plaintiff was to pay rent even if he had not completed the construction. It is not in dispute that the Plaintiff did not construct or put up the structures contemplated by the lease. Apart from the sum of Kshs. 1,000,000.00 the Plaintiff paid on 26/6/2009 as a deposit to cover four month's rent, the Plaintiff did not pay any other rent for the demised premises.

18. The Defendant admitted that the Plaintiff's goods have been in the Defendant's premises since 2009. The Plaintiff demolished some walls on the Defendant's premises from which the Defendant claimed he used to derive some income since they were used as lodgings. The Defendant contended that he had lost income from the rooms where the Plaintiff's items are kept.

19. The lease agreement the Defendant entered into with the Plaintiff was for a term of ten years with the option for renewal. At the expiration or determination of the lease, the lessee was to yield up the premises to the lessor with all the developments undertaken thereon in good and tenantable repair under the terms of the lease.

20. The Defendant is the registered proprietor of the suit premises and enjoys rights over his property. The lease between the Plaintiff and the Defendant was never registered. The Plaintiff failed to show that it performed its obligations under the agreement.

21. The Plaintiff has not established a case for the grant of an injunction to restrain the Defendant from dealing with his property. It has also failed to prove that a mandatory injunction should be issued to compel the Defendant to hand over possession of the Suit premises to the Plaintiff.

22. The Plaintiff's suit is dismissed. The Defendant is directed to refund the Plaintiff the sum of Kshs. 1,000,000.00 within 30 days of the date of this judgement. The Defendant is directed to allow the Plaintiff access to the suit premises to remove its goods from the Defendant's premises. Each party will bear its own costs.

Dated and delivered at Nairobi this 15th day of October 2018.

K. BOR

JUDGE

In the presence of: -

Mr. Mwaniki holding brief for Mr. Macharia for the Plaintiff

Mr. Mbichire holding brief for Mr. Ogetto for the Defendant

Mr. J. Okumu- Court Assistant