



**Abdullabhai & 4 others v Surur (Environment & Land Case
328 of 2015) [2017] KEELC 3865 (KLR) (2 March 2017) (Ruling)**

Saifuddin Abdullabbai & 4 others v Ahmed Surur [2017] eKLR

Neutral citation: [2017] KEELC 3865 (KLR)

**REPUBLIC OF KENYA
IN THE ENVIRONMENT AND LAND COURT AT MOMBASA
ENVIRONMENT & LAND CASE 328 OF 2015**

CK YANO, J

MARCH 2, 2017

BETWEEN

**SAIFUDDIN ABDULLABHAI 1ST PLAINTIFF
HUSSEISN ABDULLABHAI 2ND PLAINTIFF
HASSAN ABDULLABHAI 3RD PLAINTIFF
FAKHRUDDIN ABDULLABHAI 4TH PLAINTIFF
MUSSTAFF ADBULLABHIA 5TH PLAINTIFF**

AND

AHMED SURUR DEFENDANT

RULING

1. The Plaintiffs have filed Suit against the Defendant in terms of the amended plaint dated and filed on 20th August 2015. The Plaintiffs' claim is based on the facts that 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 Kshs.1,000. The Plaintiffs aver that on or about 8th June 2015, they issued a month's 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 form 1st January 2011 to 31st July, 2015, totaling Kshs.55,000, hence the filing of the Suit.
2. The Defendant filed his defence dated and filed on 1st September, 2015 whereby in paragraph 3 thereof he denies being a tenant on the Suit premises though in paragraphs 5 and 6 he avers that he has paid up all rental sums owed to the Plaintiffs and he is in no arrears. The Defendant further avers that he has for a long time been operating charcoal business on the Suit premises and has earned goodwill



on the business and that it would be of great detriment to him for the Plaintiff to unilaterally and without any valid and legal reason evict him from the Suit premises. The Defendant further contends that the alleged notice issued to him by the Plaintiffs is defective and has no legal effect. Otherwise, the Defendant denied each and every allegation made in the amended plaint.

3. From the pleadings it is apparent that both the Plaintiffs and the Defendant are in agreement that there have been previous proceedings between them over the same cause of action at the Business Premises Rent Tribunal. However, what is not clear is the fate of those previous proceedings as none of the partes brought it to the attention of the court
4. The Plaintiffs have now taken out a notice of motion dated 20th August, 2015 under Order 36 Rules (1), (2) and (3) of the Civil Procedure Rules and seeks for Summary Judgment to be entered for the Plaintiffs against the Defendant for orders:
 - a. That Summary Judgment be entered for the Plaintiffs as against the Defendant for vacant possession of the portion of the Plot No. Mombasa/block XVI/27 under the possession of the Defendant following terminated tenancy:
 - b. That Summary Judgment be entered for the Plaintiffs as against the Defendant for the sum of Kshs.55,000 being ground rent arrears plus costs for this Suit and interest thereon as prayed in the amended plaint filed herein.
 - c. Costs of this Application be provided for.
5. The Application is based on the grounds:
 - i. That on 8th June 2015, the Plaintiffs issued a calendar month notice to the Defendant terminating the tenancy over the Suit Premises with effect from 31st July 2015;
 - ii. That the Defendant is truly indebted to the Plaintiffs for the sum of Kshs.55,000 in respect accrued rent arrears from 1st January 2011 to 31st July 2015;
 - iii. That the defence tendered on the part of the Defendant is a mere sham intended to delay the court of justice and unnecessarily delay or keep the Plaintiffs from getting what is justly due to them; and
 - iv. That the Defendant has absolutely no conceivable defence to the Plaintiff's claim.

The Plaintiffs have reiterated the above facts in the affidavit in support of the Application.

6. The Defendant has opposed the Application and filed a Replying Affidavit sworn by one Ali Ahmed Sarror Halib on 9th October, 2015 in which he has deponed, inter alia, that there are triable issues that need to be addressed during a full trial. He has stated that he is a tenant and has occupied the Suit Premises for the past 27 years running a charcoal business which business he alleges has gained him goodwill at the Suit Premises over the said period. The Defendant avers that he has over the said period built various structures on the Suit Premises at his own costs in order to run the charcoal business, and that he has always duly paid rent. However, in paragraph 10 of the said Replying Affidavit, the Respondent avers that he did attempt to pay the Applicants the rent but the Applicants refused to accept payment as they were bound and determined to forcefully evict him from the Suit Premises, thus creating the existence of rent arrears as a reason to evict him from the Suit Premises. The Defendants further states that the Plaintiffs are unsure as to how much rent arrears is due. This is because, according to the Defendant, the Plaintiffs first demanded the sum of Kshs.43,000 and later demanded Kshs.55,000. As far as the Defendant is concerned, this is a triable issue that warrants a full trial. The Defendant further avers that he stands to be prejudiced if this Suit is determined summarily



as his business which is his sole source of livelihood is at stake as a result of the Plaintiffs unilateral decision to terminate the duly subsisting tenancy without any reasonable and legal grounds to do so. It is the Defendants contention that, in the interest of justice the Suit should proceed to full trial for the Court to decide on the merits of the case.

7. Both parties filed submissions in support of their rival positions. Learned Counsel for the Applicants submitted that the Defence has not raised any bona fide triable issue and consists of mere denials. He cited the case of Industrial polymers (Africa) Ltd –vs- Cables and Plastics Ltd (2009) eKLR in which Kimaru, J quoted the principles that guide the Court in determining whether or not to allow an Application for Summary Judgment that were enunciated by the Court of Appeal in the case of Industrial and Commercial Development Corporation –vs- Daber Enterprises Ltd (2001) 1EA 75, where at page 76, the Court held:

“The purpose of the proceedings in an Application for Summary Judgment is to enable a Plaintiff to obtain a quick Judgment where there is plainly no defence to the claim”

The Applicants’ Counsel also cited the case of Peter Mwangi Mbuthia –vs- Samow Edin Osman (2014)eKLR where the Court of Appeal upheld a High Court decision allowing an Application for Summary Judgment for delivery of a vacant possession of immovable property, and the case of Kasturi Limited –v- Nyeri Wholesalers Ltd (2014)eKLR in which the Court was of the view that an Application for Summary Judgment under Order XXXV Rule 1 (now Order 36 Rule 1), it is the duty of the Defendant/Respondent to demonstrate that he should have leave to defend the Suit by showing that there is a prima facie existence of bona fide triable issues or that there is an arguable case, while on the other hand, the person applying for Summary Judgment has the duty to show that the defence is a sham.

8. On his part, learned Counsel for the Respondent submitted that the purported termination of the tenancy by the applicants is illegitimate. It was the Respondent’s contention that the receipts for rent annexed to the affidavit in support of the Application reveal that the rent was paid on an annual basis and received as such. Relying on the provisions of Section 57 of the Land Act, learned Counsel submitted that because the rent was payable on an annual basis, it followed that the Defendant was in a periodic tenancy of year to year. He submitted that the one month notice issued to the respondent by the Applicants was legally improper and forms triable issues which ought to be interrogated in a full trial. In addition, it was submitted on behalf of the respondent that the difference in the amounts for rent arrears payable raises triable issue. The respondent’s Counsel cited the case of Isaac Awuondo –v- Surgipharm Ltd and Another (2011) eKLR, in which the Court of Appeal stated that a defence which raises triable issues does not necessary mean a defence that will eventually succeed.
9. The principles of law that need to be satisfied before the granting of an Application for Summary Judgment under Order 36 Rules (1) and (2) [previously Order XXXV Rules (1) and (2)] have been well elaborated by the Court of Appeal in the cases already referred to hereinabove as well as in many other decided cases.

In the case of Kasturi Ltd -v- Nyeri Wholesalers Ltd, the Court of Appeal stated that it is the duty of the Defendant/Respondent to demonstrate that he should have leave to defend the Suit and that the duty is limited to showing that there is prima facie existence of bona fide triable issues or that there is an arguable case. On the other hand, the person applying for Summary Judgment has the duty to show that the defence is a sham.



In the case of Continental Butchery Ltd –v- Samson Musila Nthiwa, Civil Appeal No.35 of 1997, the Court of Appeal stated :

“With a view to eliminate delays in the administration of justice which would keep litigants out of their just dues or enjoyment of their property , the court is empowered in and appropriate Suit to enter Judgment for the claim of the Plaintiff under Summary procedure provided by Order 35 subject to there being no triable issue which would entitle the Defendant leave to defend, if a bona fide triable issue is raised the Defendant must be given unconditional leave to defend but not so in a case in which the court feels satisfied in thinking that the defence is a sham. ”

10. The main issue in this Application is to determine whether the Plaintiffs’ have met the threshold of granting Summary Judgment as outlined above. In the present case, there is no dispute that the Defendant is a tenant occupying a portion of the Plaintiff’s property and is paying rent of Kshs.1,000 per month. There is however, a contention on the mode of payment. Whereas the Applicants have stated that the Defendant was paying the rent monthly, the Defendant on the other hand maintains that he has been paying the rent on an annual basis. The Defendant has relied on the receipts annexed to the applicant’s affidavit in support of the Notice of Motion to support his argument. There are three receipts and each is for the sum of Kshs.12,000 being the rent for the months of January to December for the years 2007, 2008 and 2010. It is the applicant’s contention that on 8th June, 2015 they issued a one month’s notice to the Defendant of their intention to terminate the tenancy over the Suit premises by 31st July 2015.

On his part, the Defendant, in his defence has not only denied the issuance of the said notice, but has also faulted the notice for being defective and of no legal effect. The respondent’s counsel cited the provisions of Section 57 of the Land Act to support his argument,.

11. It is apparent from the pleading and documents by both the Plaintiffs and the Defendants that there was no written lease agreement over the Suit Property. Section 57 (2) of the Land Act provided that:

“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.”

Section 57(4) of the Land Act provides how a periodic tenancy may be terminated. The one month notice allegedly issued by the Plaintiff’s to the Defendant has been contested. The Defendant had denied being issue with the notice. The manner in which the rent was being paid is also in dispute.

Whereas the Plaintiffs aver the Defendant was paying the rent monthly, the Defendant on the other hand is insisting that he was paying the same annually. The Defendant has also raised concerns about the amount of rent arrears payable.

12. In view of the foregoing, I find that the defence herein does raise bona fide triable issues and it is not a sham.

Consequently, the Plaintiffs’ Application for Summary Judgment is dismissed. The Defendant is the one who has occasioned the filing of this Suit and by extension this Application. He is still in occupation of the Suit Premises but there is no evidence that he has been paying rent. For that reason, there shall be no order for costs regarding this Application.

It is so ordered.

DELIVERED, SIGNED AND DATED AT MOMBASA THIS 2ND MARCH, 2017.



C. YANO
JUDGE

