



REPUBLIC OF KENYA

IN THE ENVIRONMENT AND LAND COURT AT NAIROBI

ELC NO. 362 OF 2014

HELLEN JEROTICH CHEPKWONY..... PLAINTIFF

VERSUS

CROWN BUS SERVICES..... DEFENDANT

RULING

Order 36 Rule 1(1) (b) of the Civil Procedure Rules provides as follows:-

“In all suits where a plaintiff seeks judgment for the recovery of land, with or without a claim for rent or mesne profits, by a landlord from a tenant whose term has expired or been determined by notice to quit or been forfeited for non-payment of rent or for breach of covenant, or against persons claiming under such tenant or against a trespasser, where the Defendant has appeared but not filed a defence the Plaintiff may apply for judgment for the amount claimed, or part thereof, and interest, or for recovery of the land and rent or mesne profits (emphasis mine).”

In the case of Taylor Vs. Bolus (1981) KLR 536, it was held that;

“It is an established principle of law that where the Plaintiff’s claim is undoubted and clear and the defence is only a sham or a spurious one, the court would grant summary judgment as prayed and where the Defendant demonstrates a fairly arguable case or show triable issue, summary judgment would not issue and he must be given leave to defend.”

In the case of Zola vs. Ralli Bros. Ltd. (1969) E. A. 691, the court stated as follows at page 694;

“Order XXXV (now order 36) is intended to enable the Plaintiff with a liquidated claim, to which there is clearly no good defence to obtain a quick and summary judgment without being unnecessarily kept from what is due to him by the delaying tactics of the Defendant. If the judge to whom the application is made considers that there is any reasonable ground of defence to the claim the plaintiff is not entitled to summary judgment. ”

The Plaintiff brought this suit against the Defendant on 25th March 2014 seeking vacant possession of L.R No. 209/13280, a mandatory injunction compelling the Defendant to demolish and remove all the illegal structures constructed on L.R. No. 209/13280 (hereinafter referred to as “the suit property”) and mesne profits. The Plaintiff averred that she is and was at all material times the registered owner of the suit property. The Plaintiff averred that in the year 2012, she visited the suit property and found the Defendant operating a garage/go-down thereon and upon inquiry was told that the suit property was leased to the Defendant by one, Mohamed Nur Ahmed for a term of 2 years commencing on 1st September, 2011 and terminating on 3rd September 2013. The Plaintiff averred that she was a stranger to

the said Mohamed Nur Ahmed and had never given him a power of attorney or appointed him as her agent in relation to the suit property. The Plaintiff averred that upon being confronted, the Defendant lodged a complaint against the Plaintiff at the Business Premises Rent Tribunal (“the tribunal”) and sought an order restraining the Plaintiff from taking possession of the suit property. The Defendant’s complaint was dismissed by the tribunal on 12th June, 2013 for want of jurisdiction and the Defendant preferred an appeal to this court which is still pending. The Plaintiff averred that the lease between the Defendant and Mohamed Nur Ahmed which was the basis of its complaint before the tribunal and in the appeal preferred to this court expired on 3rd September 2013 and despite that expiry, the Defendant has remained in occupation of the suit property. The Plaintiff averred that the Defendant’s appeal to this court from the said decision of the tribunal is spent and that in any event, the existence of the said appeal cannot extend the expired lease or grant the Defendant a new lease over the suit property. The Plaintiff averred that the Defendant had constructed go-downs and other structures on the suit property without her consent which have negatively impacted on the value of the suit property and the removal of which will entail substantial costs. It is on account of the foregoing that the Plaintiff brought this suit seeking the reliefs which I have set out above.

The Defendant entered appearance on 27th May, 2014 and filed a statement of defence on 20th June, 2014. In its defence, the Defendant admitted that the Plaintiff is the owner of the suit property. The Defendant contended however that the Plaintiff had authorized one, Mohamed Nur Ahmed, deceased (hereinafter referred to as “the deceased”) to act on her behalf in respect of the suit property. The Defendant averred that in November 2011, the deceased indicated to the Defendant that the Plaintiff was desirous of leasing to the Defendant the suit property and that the deceased had full instructions to undertake the transaction on behalf of the Plaintiff. The Defendant averred that it concluded a lease agreement with the deceased which was subsequently ratified by the Plaintiff. The Defendant averred that she lodged a complaint against the Plaintiff at the tribunal to stop the Plaintiff from interfering with its quiet possession of the suit property. The Defendant averred that the matters which have been raised in this suit are the same ones which have been raised in its appeal pending before this court from the decision of the tribunal. The Defendant averred that if the said appeal is determined in its favour, the Plaintiff’s claim herein would be rendered nugatory. The Defendant admitted that its lease with the deceased expired on 3rd September 2013. The Defendant contended that it had remained in occupation of the suit property and that the Plaintiff has been receiving rent from it. The Defendant averred that it is a periodic tenant in the suit property. The Defendant averred that the Plaintiff ought to follow the due process in terminating its periodic tenancy. The Defendant averred that it had constructed go-downs and other permanent structures on the suit property with the consent and on representations made by the Plaintiff and that it would suffer irreparably if the reliefs sought by the Plaintiff are granted.

The Plaintiff filed a reply to defence on 2nd July, 2014 in which she joined issue with the Defendant on its defence save for what it had admitted. The Plaintiff reiterated that the appeal pending before this court by the Defendant is spent the lease agreement on which it was based having expired. The Plaintiff denied that she had or through her agents received rent from the Defendant in respect of the suit property.

What is now before me is the Plaintiff’s application for summary judgment which was brought by way of Notice of Motion dated 10th September, 2014 under Order 36 Rule 1(1) (B) of the Civil Procedure Rules, 2010 and Sections 1A, 1B and 3A of the Civil Procedure Act. In the application, the Plaintiff has sought an order for vacant possession of the suit property and an order compelling the Defendant to demolish and remove all the illegal structures that it has erected on the suit property within such a time as the court may prescribe failure to which the Plaintiff to be at liberty to undertake the demolitions and removals at the Defendant’s cost. The Plaintiff has also sought the assistance of the Police to oversee the execution of the orders if granted. The application which was supported by a thirty (30) paragraph affidavit sworn by the Plaintiff on 10th September 2014 was brought on the grounds that the defence put forward by the Defendant to the Plaintiff’s claim raises no triable issue. The Plaintiff has contended that the Defendant has no defence to the Plaintiff’s claim for possession of the suit property.

The application was opposed by the Defendant through grounds of opposition dated 26th June, 2015. The Defendant contended that the Plaintiff’s application is incompetent the same having been filed after the

Defendant had filed its defence contrary to Order 36 Rule 1(1) (b) of the Civil Procedure Rules. The Defendant contended further that the Defendant's statement of defence raises several triable issues which should go to trial. The Defendant pointed out that it had raised the issue of the jurisdiction of the court to entertain the suit while the appeal which it has filed against the tribunal's decision in which the issues similar to the ones before this court have been raised is pending hearing. The Defendant contended that it had also raised the issue that he is a periodic tenant in the suit property. The Defendant contended that the application is fatally defective, misconceived and grave abuse of the process of the court.

The Plaintiff's application was argued by way of written submissions. The Plaintiff filed her submissions on 14th July, 2015 and further submissions on 29th September 2015. The Defendant filed submissions in reply on 8th September 2015. What is before me is an application for summary judgment. I have at the begging of this ruling set out the principles which guide this court in exercising its discretion on applications of this nature. The law is that summary judgment would be entered only in clear cases where the court is convinced that the Defendant has no defence to the Plaintiff's claim which should go to trial. In the case of Five Continents Ltd. vs. Mpata Investments Limited (2003) KLR 443, the court stated that if the Defendant shows a bonafide triable issue, he must be allowed to defend unconditionally and that in an application for summary judgment even one triable issue, if bona fide would entitle the Defendant to have unconditional leave to defend. The court stated further that in application for summary judgment all that the Defendant is supposed to show is that a defence on record raises triable issues which ought to go to trial but not that it raises a defence which must succeed.

I have considered the Plaintiff's application together with the submissions by the Plaintiff's advocates. I have also considered the grounds of opposition filed by the Defendant. There are two issues which arise for determination in the application before me. The first is whether the Plaintiff's application is competent and the second is whether the plaintiff has made out a case for summary judgment. On the first issue, the Defendant has contended that the Plaintiff's application does not lie because the same was filed after the Defendant had filed its statement of defence. I have at the begging of this ruling reproduced the provisions of order 36 Rule 1 (1) (b) of the Civil Procedure Rules under which the Plaintiff's application had been brought. Unlike in the old Civil Procedure Rules, under the Civil Procedure Rules 2010, an application for summary judgment can only be brought after the Defendant has entered appearance but before filing defence. Order 36 Rule 1 (1) (b) of the Civil Procedure Rules is clear on this issue and there is no room for argument. I have looked at the decision of Ringera J. (as he then was) in the case of Standard Chartered Bank Kenya Limited vs. Ahamji Karsan Arjan, Nairobi HCCC No. 1511 of 2000 which was cited by the Plaintiff in support of her submission that an application for summary judgment can be filed even after defence has been filed. I have noted that the decision was made on 4th May, 2001 under the old Civil Procedure Rules. As was rightly pointed out by Ringera J, as at that time, there was no procedural law to the effect that once a defence is filed an application for summary judgment cannot be made. The Civil Procedure Rules 2010 now expressly provides that an application for summary judgment should be made before a defence is filed. It is not in dispute that the Plaintiff's application for summary judgment herein was filed while there was a defence on record. In the circumstances, the application offended the provisions of Order 36 Rule 1 (1) (b) of the Civil Procedure Rules. I am therefore in agreement with the Defendant that the application is not properly before the court. That determination would have been sufficient to put the Plaintiff's application to rest. However, so as not to be accused of determining the application on a mere technicality, I wish to consider the application on merit. Since the Defendant had already filed a statement of defence, the onus was upon the Plaintiff to show that the defence on record raises no triable issues. The dispute between the parties is over the suit property which is registered in the name of the Plaintiff but in the possession of the Defendant. The Plaintiff wants possession of the property while the Defendant has declined to surrender the same. What I need to determine is whether the Defendant has given a bonafide reason why it has declined to vacate the suit property. The Defendant has contended that it entered the suit property in the year 2011 pursuant to a lease agreement which it entered into with the deceased, Mohamed Nur Ahmed on 1st September, 2011. The Defendant has contended that the deceased entered into the said agreement on behalf of the Plaintiff. The name of the Plaintiff is expressly mentioned in the said lease agreement. The Defendant has contended that upon taking possession of the suit property, it constructed go-downs thereon and other permanent structures with the consent of the Plaintiff. The Defendant has contended that although the lease agreement it entered into with the deceased lapsed on 3rd September, 2013, it remained in occupation

