REPUBLIC OF KENYA

ENVIRONMENT AND LAND COURT AT KISII

CASE NO. 1054 OF 2016

(FORMERLY HCC NO. 508 OF 2012)

BRIBAND SACCO LIMITED……..PLAINTIFF

VERSUS

ARVIND K. GANDABHAI & COMPANY…….....…...DEFENDANT

JUDGMENT

1. On 24th March 2017 the hearing of this suit was fixed for today, the 18th day of May 2017. The plaintiff and counsel are absent without any reason or at all. They were duly served on 18th April 2017 further to an affidavit of service sworn on 19th April 2017 by an authorized process server, Joshua Otieno Okeyo.

2. The suit was commenced by way of a plaint dated 7th November 2012 filed by Moracha counsel for the plaintiff. The plaintiff seeks the following orders:-

> **(a) A permanent injunction restraining the defendant by himself, his agents, employees, servants or any other person acting on the instructions of the defendant or any of them from terminating the lease, breaking in, distressing or in any way whatsoever from interfering with the plaintiff's quite occupation of the premises situate Room 8, 3rd Floor of Kisii Town/Block III/337 and 338, Magsons Plaza.**
>
> **(b) Costs of this suit together with interest thereon at such rate and for such period as this honourable court may deem fit to order.**
>
> **(c) Any other just and equitable relief as this honourable court may deem appropriate.**

3. The defendant represented by Oguttu Mboya & Co. Advocates denies the plaintiff's claim in a statement of defence and counter claim dated 15th November 2012. The reliefs sought in the counter claim are:

> **(a) Declaration that the Lease Agreement between the plaintiff and the defendant/counter-claimer has terminated and an order for vacant possession of the demised premises.**
>
> **(b) An order of eviction against the plaintiff, agents and/or servants from the demised premises, that is, Room number 3, 3rd floor, situate on LR No's Kisii Town/Block III/337 and 338, respectively, (hereinafter referred to as the suit premises).**

(c) Permanent injunction to restrain the plaintiff either by herself, agents, servants and/or agents from entering upon, trespassing onto and/or otherwise interfering with demised premises, that is, Room number 8, 3rd floor, Situate on LR No's Kisii Town/Block III/337 and 338, respectively, (hereinafter referred to as the suit premises).

(d) Costs of the cross suit be borne by the plaintiff.

(e) Such further and/or other relief as the honourable court may deem fit and expedient.

4. The plaintiff represented by Mr. Ochwangi counsel instructed by the plaintiff's counsel has applied for dismissal of the suit. He has asked the court to allow the defence and enter judgment in terms of the counter-claim for the defendant.

5. I consider the entire plaint, defence, counter-claim and application by the plaintiff's counsel. The issues for determination flow from the pleadings filed for the matter to be included in the judgment as judicially noted in **Pil Kenya –vs- Oppong [2009] KLR 442**.

6. The suit has not been heard. **Section 25 of the Civil Procedure Act (Cap 21 Laws of Kenya)** provides thus:-

"The court after the case has been heard, shall pronounce judgment…….. …….....

Provided that <u>it shall not be necessary for the court to hear the case before pronouncing judgment</u>……...

(i) …….....

(ii) In such circumstances as may be prescribed under Section 81(2)(f) (emphasis added)."

7. Order 7 Rules 3, 4, 5 and 7 Civil Procedure rules, 2010 are plenteous provisions in respect of defence and counter-claim. I take into account the nature of the pleadings and the instant application. I find the application full of merit.

8. *Afortiori*, I dismiss the suit. In lieu thereof, I enter judgment in terms of prayers (a) to (d) of the counter-claim dated 15th November 202 in favour of the defendant.

9. Costs shall be borne by the plaintiff in view of the proviso to Section 27 (1) **Civil Procedure Act (Cap 21 Laws of Kenya)** and the decision in **Samwel Kamau Macharia & Another –vs- Kenya Commercial Bank & 2 Others [2012] eKLR**.

G. M. A. ONGONDO

<u>JUDGE - MIGORI</u>

(SITTING AT KISII ELC SERVICE WEEK)

Judgment delivered, signed and dated in open court at Kisii this 18th day of May, 2017.

G. M. A. ONGONDO

<u>JUDGE - MIGORI</u>

(SITTING AT KISII ELC SERVICE WEEK)

In the presence of:

Mr. Ochwangi counsel for the defendant

N/A for the plaintiff

Ruth court assistant