



REPUBLIC OF KENYA

IN THE ENVIRONMENT AND LAND COURT AT MACHAKOS

ELC CIVIL SUIT NO. 89 OF 2015

NZAMBA KITONGA.....PLAINTIFF

=VERSUS=

GEOFFREY MUTHUI MBIVYA.....DEFENDANT

RULING

1. Up to 31st December 2013, the Plaintiff and the Defendant were landlord and tenant respectively, in a tenancy relationship governed by the Landlord & Tenant (Shops, Hotels and Catering Establishments) Act, Chapter 301 of the Laws of Kenya (hereinafter referred to as “**the Act**”). Under the tenancy, the Defendant occupied a shop and a hotel in the Plaintiff’s building on Land Reference Number 4096/58 situated in Kitui Town [hereinafter referred to as “**the suit premises**”]. Rent for each of the two units was Kshs.30,000 per month. On 4/10/2013, the Plaintiff issued and served upon the Defendant a statutory notice of termination of tenancy in the prescribed form, stipulating that termination of tenancy would take effect on 01/01/2014. The Defendant did not challenge the notice of termination of tenancy through a reference in the Business Premises Rent Tribunal [hereinafter referred to as “**the Tribunal**”] within the statutory period prescribed in Sections 4 and 6 of the Act. The Defendant nonetheless continued to occupy the suit premises. This prompted the Plaintiff to commence the present suit through a Plaint dated 13/3/2015 and filed in court on 16/3/2015, seeking an eviction order and mesne profits against the Defendant.

2. Subsequently, on 27/3/2015, the Defendant obtained from the Tribunal conditional leave to file a reference out of time, challenging the notice of termination. The condition was that the Defendant would pay the Plaintiff costs of Kshs.15,000 prior to filing the reference. However, the Defendant proceeded to file the reference without first complying with the condition. This prompted the Plaintiff to move the Tribunal to strike out the reference. Through a Ruling by the Tribunal delivered on 10/7/2015, the Tribunal struck out the Defendant’s Reference.

3. On 09/10/2015, the Plaintiff filed in this suit the present Notice of Motion dated 9/10/2015 seeking the following orders;

- 1. That this application be certified as urgent, service thereof be dispensed with and it be heard expert in the first instance.**
- 2. That the defence filed herein be struck out with costs.**
- 3. That Judgment be entered for the plaintiff against the Defendant as prayed in the Plaint with costs**
- 4. That the Defendant be forthwith evicted from the suit premises known as L.R No. 4096/58**

Kitui Township

5. That other appropriate orders be made.

6. That the costs of this application be provided for

4. The Notice of Motion dated 9/10/2015 was filed under cover of a certificate of urgency of even date. Because of the urgency of the Application, and in view of the fact that there was no Environment & Land Court Judge at the Machakos Environment and Land Court, the Court File was transmitted to the Environment and Land Court at Nairobi for determination of the Application dated 9/10/2015. This Ruling relates to the said Notice of Motion by the Plaintiff dated 9/10/15.

5. The Applicant in his Affidavit attached to the Application contends that the Defendant's only purported defence is that he has a reference pending to be heard and determined at the Business Premises Rent Tribunal. He further contends that the said Reference at the Tribunal was struck out on 10/7/2015 and that the Defendant's Statement of Defence is bereft of any defence to the suit. He adds that the defence herein is scandalous, frivolous, vexatious and an abuse of the court process and is only meant to embarrass and/or delay the speedy trial of this suit so as to prolong the Defendant's illegal occupation of the suit premises. He further contends that the Defendant owes him mesne profits at the rate of Kshs.120,000 per month from 1/1/2015. The Applicant annexed to his affidavit copies of notice to terminate the tenancy, tribunal order granting the Defendant conditional leave to file a reference, tribunal order striking out the reference, and the ruling in which the reference was struck out.

6. In opposition to the Application, the Defendant swore a replying affidavit on 16/3/2016 in which he contends that he is still in occupation of the suit premises and he is duly paying his rent. He further contends that the present application is premature and serves to pre-empt Civil Appeal No. 338 of 2015 which he filed on 15/7/2015 challenging the order which struck out his Reference. He has attached two National Bank of Kenya Limited Cash Deposit Slips for Kshs.30,000 and Kshs.60,000 respectively in respect of monies deposited into the Bank Account of the Plaintiff on 21/8/2015 and 18/11/2015 respectively. He has also attached copies of Memorandum of Appeal in Nairobi HCCA No. 338/2015 and copy of the Tribunal Order striking out the Reference.

7. On going through the Court File, I have observed that on 13/4/2015, the Plaintiff's Advocate filed a request for Judgment dated 10/4/2015. Subsequently, on 27/4/2015 the Defendant filed a Statement of Defence bearing even date. The request for judgment did not specify the specific rule under which it was made. On 29/5/2015, the Deputy Registrar entered interlocutory judgment in favour of the Plaintiff subject to formal proof. Again it is not clear from the court record under which provision of the law the interlocutory judgment was entered. I will pronounce myself further on this issue because it has a bearing on the Application under consideration.

8. The Plaintiff's substantive claim is principally a claim for an eviction order and mesne profits. Mesne profits are damages payable to a land owner from a land occupier in wrongful possession of land. The procedural legal framework on default of appearance or defence by a duly served defendant is contained in Order 10 of the Civil Procedure Rules. The procedural steps to be taken by a Plaintiff against a defendant defaulting to enter appearance or file defence vary depending on the nature of claim and on the number of defendants involved.

9. The legal framework on interlocutory judgment is contained in Order 10 Rules 6 and 7 of the Civil Procedure Rules. Rule 6 and 7 cover claims for pecuniary damages only or for detention of goods with or without a claim for pecuniary (monetary) damages. The Plaintiff's claim is both for an eviction order and for mesne profits. In my view, this is clearly outside the scope of claims contemplated in Rules 6 and 7. Consequently, the entry of interlocutory judgment by the Deputy Registrar in respect of action for an eviction order and mesne profits was, in my view, made in error.

10. More importantly, the Court File contains a Memorandum of Appearance purportedly filed on 13/4/2015. The Request for Judgment was filed on the same date, 13/4/2015. The Defendant also filed a

Statement of Defence on 27/4/2015. Parties have since then proceeded on the basis that there is a statement of defence on record and there is no interlocutory judgment. Indeed, the Application under consideration seeks an order striking out that defence. Taking into account the foregoing, I would *suo motto* proceed to set aside the Deputy Registrar's Order entering interlocutory judgment against the Defendant because it was made in error. Having done so, I would proceed to consider the present Application.

11. The Application under consideration was brought under the provisions of Order 2 Rule 15(1)(b)(c) and (d) of the Civil Procedure Rules which provide as follows:-

“15(1) At any stage of the proceedings the court may order to be struck out or amended any pleadings on the ground that:-

(b) it is scandalous, frivolous or vexatious; or

(c) it may prejudice, embarrass or delay the fair trial of the action; or

(d) it is otherwise an abuse of the process of the court”

Under the repealed Civil Procedure Rules, a similar framework was contained in Order VI Rule 13.

12. The issue for determination in the present Application is whether the Defendant's statement of defence is devoid of any triable issue and hence liable to be struck out within the framework of Order 2 Rule 15(1) (b) (c) and (d) of the Civil Procedure Rules. The guiding principle on striking out pleadings within the above framework was laid down in the case of **D T Dobie & Company (Kenya) Ltd Vs Joseph Mbaria Muchina & Another in which Madan JA stated:**

“No suit ought to be summarily dismissed unless it appears so hopeless that it plainly and obviously discloses no reasonable cause of action, and is so weak as to be beyond redemption and incurable by amendment. If a suit shows a mere semblance of a cause of action, provided it can be injected with real live by amendments, it ought to be allowed to go forward for a court of justice ought not to act in darkness without the full facts of a case before it.”

13. In the more recent case of **Nuru Chemist Limited & Another Vs National Bank of Kenya (2008) eKLR**, the Court of Appeal, commenting on the framework in Order V1 Rule 13(1) which is replicated in Order 2 Rule 15(1) of our current Civil Procedure Rules observed as follows:

“An applicant who brings an application seeking an order to strike out a pleading on this ground must demonstrate to the court either that the pleading, in this case the defence, is scandalous, or it is frivolous or vexatious or that it may prejudice embarrass or delay the fair trial of the case”

14. Commenting on the same framework in **Yaya Towers Limited Vs Trade Bank Limited (in liquidation) (200) eKLR**, **Lakha JA** quoting verbatim the Court of Appeal in **Paola Muri Vs Gian Batista Muri & Another Civil Appeal No. 59 of 1999** observed as follows:

“the power to strike out was one which should be exercised only in plain cases.”

15. I have carefully considered the Application, the Defendant's Replying Affidavit, the parties rival submissions, the legal framework on striking out pleadings and the guiding jurisprudential principles on striking out pleadings. I have also carefully examined the Plaintiff's Plaint and evaluated the tenor and import of the Defendant's statement of defence. The Plaintiff contends that the statutory tenancy of the Defendant was terminated through a statutory notice served on the Defendant on 4/10/2013. The Plaintiff further contends that the subsequent Reference which the Defendant was allowed to file out of time to challenge the statutory notice was subsequently struck out hence the statutory notice took effect. On his part, the Defendant at paragraph 7 of the Defence states as follows:-

“7 The defendant in answer to paragraph 9 of the plaint states that the court is now ceased [sic] of the matter when a reference is pending in the tribunal for hearing and determination and thus these proceedings are misconceived and the same ought to be dismissed with costs.”

The Defendant further states at Paragraph 9 as follows:

“9 The defendant denies in toto the contents of paragraph 11 of the Plaint in so far as it states that his tenancy has been terminated when there is a pending reference for determination.”

16. Looking at the defence in its totality, it is clear that the fulcrum of the Defendant’s case is that the Tribunal is seized of the present dispute and that the contention by the Plaintiff that the tenancy was terminated is untenable because the termination notice was challenged through a reference currently pending hearing and determination at the Tribunal. That, in my view, would raise a proper triable issue if indeed the Reference still subsisted at the Tribunal.

17. In their respective affidavits and submissions in respect of the present Application, both parties agree that the Reference in the Tribunal was struck out on 10/7/2015. I pause to ask: the reference upon which the defendant’s defence was predicated having been struck out, what defence remains of the statement of defence dated 27/4/2015? In my view, the Reference at the BPRT having been struck out, the Defendant’s statement of defence is bereft of any defence, became a sham and has effectively been rendered scandalous, frivolous and vexatious and only serves to delay disposal of this suit. To the extent that the Statement of Defence on record maintains that the Reference still subsists even after it was struck out by the Tribunal, it does in my view, amount to an abuse of the process of the court.

18. I would add that under the framework of the Landlord & Tenant (Shops, Hotels and Catering Establishments) Act, a tenant aggrieved by a notice of termination of tenancy is obligated to challenge the notice within the statutory period provided under the law. In default of that, the tenant becomes a trespasser on the premises. In my view, the filing of the Reference in the present dispute only served to suspend the notice of termination for the period the Reference subsisted. Parties reverted to their original status the moment the Reference was struck out. In this regard, the tenant reverted back to the status of a trespasser when the Reference was struck out. This position is informed by the Court of Appeal decision in **Reuben Muli Musyoki T/A Konza Merchants Vs Wayua Mutisya & Another (2004) eKLR**.

19. Besides seeking an order striking out the defence herein, the Plaintiff also seeks judgment as prayed in the Plaint. Among the prayers made in the Plaint is a prayer for mesne profits at the rate of Kshs.120,000 per month from 1/1/2015 until vacant possession of the suit is obtained by the Plaintiff. The Court of Appeal in **Kenya Hotel Properties Ltd Vs Willesden Investments Limited (2009) eKLR**, defined mesne profits as “a claim for damages for trespass to land.” In my view, damages in the nature of mesne profits require assessment at a formal proof hearing session of the court. Consequently, it would be irregular to grant final orders in respect of mesne profits at this stage. The prayer for mesne profits ought therefore to go for assessment.

20. The upshot of my determination is that the Plaintiff’s Notice of Motion dated 9/10/2015 is allowed in the following terms:

(a) The Defendant’s Statement of Defence in this suit is hereby struck out.

(b) The Defendant shall vacate the suit premises within 30 days from the date of this Ruling and in default he shall be evicted.

(c) This File shall be returned to Machakos Environment and Land Court and the Matter shall be set down for assessment of mesne profits at Machakos Environment and Land Court.

(d) The Plaintiff shall have costs of the suit in any event.

Dated, signed and delivered at Nairobi on this 18th day of May 2017.

B M EBOSO

J U D G E

In the presence of:-

Mutemi - Advocate for the Plaintiff

Kithinj i- Advocate for the Defendant

Kevin - Court clerk