



REPUBLIC OF KENYA



KENYA LAW
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**Wakf Commission of Kenya v Mohamed (Environment & Land Case
84 of 2016) [2017] KEELC 3873 (KLR) (15 June 2017) (Ruling)**

Wakf Commission of Kenya v Hassan Maridadi Mohamed [2017] eKLR

Neutral citation: [2017] KEELC 3873 (KLR)

REPUBLIC OF KENYA

IN THE ENVIRONMENT AND LAND COURT AT MOMBASA

ENVIRONMENT & LAND CASE 84 OF 2016

CK YANO, J

JUNE 15, 2017

BETWEEN

WAKF COMMISSION OF KENYA PLAINTIFF

AND

HASSAN MARIDADI MOHAMED RESPONDENT

RULING

1. By Notice of Motion dated 28th April 2016, made under Sections 1A, 1B, 3A and 63 (e) of the [Civil Procedure Act](#) and Order 2 Rule 15 (1), (b), (c) and (d), and Order 51 of the Civil Procedure Rules, the plaintiff seeks orders: -
 - 1.a That judgment be entered in favour of the plaintiff for vacant possession on plot No. Msa/block XXXVI/2 to be given within 30 days from the date of order, mesne profits and costs as prayed in the plaint.
 - b. And/or in the alternative judgment be entered for vacant possession of premises on plot No. Msa/block XXXVI/2 to be given within 30 days of order and matter proceeds for assessment of mesne profits and costs.
 2. In addition and/or in the alternative this Honourable Court do order the defence dated 20th February 2015 be struck out.
 3. Costs of this application be provided for.
2. The application is based on the grounds set out on the face of it and the supporting affidavit of Muhammad K. Shali, the secretary of the plaintiff sworn on 28th April 2016. It is deponed that the defendant had been a tenant of the plaintiff at the suit premises. That on 6th June 2014, the plaintiff, pursuant to the provisions of section 4 (2) of the Landlord and Tenant (Shops, Hotels and Catering



Establishments) Act, Cap 301 Laws of Kenya, gave a notice to the defendant terminating the tenancy with effect from 1st September 2014. It is the plaintiff's case that upon expiry of the Termination Notice, the defendant refused and/or declined to vacate from the suit premises and refused to pay mesne profits, hence the filing of this suit, and the present application. It is further the plaintiff's contention that the defendant's continued occupation of the suit premises is unlawful and amounts to trespass as he has no colour of right to continue with such occupation. That as a result of the defendant's unlawful and continued occupation, the plaintiff has been denied the right to use and draw any benefit from the suit premises and constitutes a gross affront to the plaintiff's constitutional right over property guaranteed under Article 40 of *the Constitution* of Kenya.

3. The application is opposed by the defendant who filed a Replying Affidavit sworn on 18th August 2016 and supplementary affidavit dated 24th February 2017. The defendant admits being a tenant on the suit premises but denies having been served with the Termination Notice dated 6th June 2014. The defendant further depones that he has been paying rent to the plaintiff. The defendant avers that he has filed a defence to the plaintiff's claim which raises triable issues.
4. Both parties filed written submissions in support of their respective positions. In their submissions, counsel for the applicant submitted that the defendant occupied the suit premises under a controlled tenancy under the Landlord and Tenant (Shops, Hotels and Catering Establishment) Act Cap 301 Laws of Kenya and its termination could only be as provided for under Section 4 (2) of the Act as the plaintiff did. It was submitted that the rationale for issuing the notice in the prescribed form is to offer the tenant an opportunity to invoke the jurisdiction of the Business Premises Rent Tribunal and controvert the reasons for termination by the landlord by filing a reference at the Tribunal. That the defendant, upon being served with the notice, did not file a reference as confirmed by the tribunal in writing, hence on the effective date, the tenancy stood as terminated and the defendant was required to hand over vacant possession. It was further submitted on behalf of the applicant that the issue as to whether or not the defendant received the termination notice or had knowledge of the same could only be determined by the Tribunal and not this court. The applicant's counsel further submitted that the defendant had no defence, the tenancy having been terminated. Counsel cited the case of *Sturt Transport Limited –vs- Dajachana Mining Company Limited (2016) Eklr* And *The Case Of Kingfisher Properties Limited –vs- Nandlal Jivraj Shah & 2 Others (2013) eKLR* to support their position.
5. On their part, counsel for the defendant submitted that all the parties have filed their pleadings and that the plaintiff instead of fixing the case for hearing filed this application. It was also submitted that the supporting affidavit was sworn by one who had not consent or authority to swear or file suit on behalf of the plaintiff, hence the same should be struck out. The defendant's counsel further submitted that the defence filed raises triable issues as the defendant had denied ever receiving the termination notice and no evidence of service given and that he has been paying rent.
6. I have considered all the issues raised in the application, the rival submissions and the case law cited by the parties. The principles which guide the courts in determining an application for summary judgment are well settled. In the case of *Gupta –vs- Continental Builders Ltd (1978) KLR 83*, the court of appeal stated that:-

“if no prima facie triable issue is put forward to the claim of the plaintiff, it is the duty of the court forthwith to enter summary judgment for it is as much against natural justice to shut out without proper cause a litigant from defending himself as it is to keep a plaintiff out of his dues in proper case. Prima facie triable issues ought to be allowed to go to trial, just as sham or bogus defence ought to be rejected preemptorily”.



7. The plaintiff has stated that the defendant's tenancy ended when the termination notice took effect on 1st September 2014. The defendant has denied receiving such notice. The termination notice was issued pursuant to the provisions of Sections 4 (2) of the Landlord and Tenant (Shops, Hotels and Catering Establishments) Act Cap 301 Laws of Kenya.

In my view, the defendant ought to have taken up the issue of the notice of termination with the Business Premises Rent Tribunal. The notice having been issued and there being no reference filed, the notice took effect and the plaintiff was entitled to file this suit for the prayers sought.

8. The defendant has submitted that his defence raises triable issues. The defendant was served with notice of termination of tenancy. He did not challenge the same. I am therefore unable to see any defence he would have to the claim for vacant possession given that he did not challenge the notice served.
9. The defendant has denied having failed to pay rent to the plaintiff. In his supplementary affidavit, the defendant has annexed receipt of Kshs.50,000.00 dated 19th January 2017 being payment of rent for the period August to December 2016. It is clear from that receipt that payment was being paid in arrears and not promptly and in time as alleged by the defendant. The defendant did not show proof that payment of rent was being made when due. The payment was made during the pendency of the application and the same was in arrears.
10. Having considered the plaintiff's pleading and the notice of motion dated 28th April 2016 and having also considered the defendant's defence and the written submissions, I find that the defendant's defence does not raise any triable issue which can go to full trial. The entire defence is a sham and I hereby order that the same be struck out.

The Notice of Motion dated 28th April 2016 is allowed and judgment be and is hereby entered in favour of the plaintiff in terms of prayer 1 (a) thereof. The plaintiff shall have costs of the suit and of this application.

DATED, SIGNED AND DELIVERED AT MOMBASA THIS 15TH DAY OF JUNE 2017.

C. YANO

JUDGE

.....for the applicant

.....for the respondent

