



REPUBLIC OF KENYA

IN THE ENVIRONMENT AND LAND COURT AT KAJIADO

ELC CASE NO. 572 OF 2017

MUPEKORI PERE.....PLAINTIFF

VERSUS

SAMUEL GICHERU.....1ST DEFENDANT

ENDOLVINE INVESTMENT LTD.....2ND DEFENDANT

RULING

The application before court is the Plaintiff's Notice of Motion dated 27th March, 2017 brought pursuant to sections 1, 1A, 3, 3A of the Civil Procedure Act, Order 40 Rule 1, 2, & 3 of the Civil Procedure Rules and all the other enabling provisions of the law.

The application is based on the following grounds which in summary is that the Plaintiff is the legal and absolute proprietor of land reference number NGONG/NGONG/57649 hereinafter referred to as the 'suit land'. On 6th June, 2013 the Plaintiff entered into a lease agreement with the Defendants over the suit land where he allowed them to put up containers for commercial use, and the said lease was terminated on 1st June, 2015 but extended by mutual agreement for one and a half years. The Defendants are illegally occupying the suit premises despite the lapse of the Lease Agreement, have accrued rent arrears of Kshs. 700,000, and continued defaulting despite an extension of the lease. On 1st March, 2016 in a meeting at the Chief's office in Ongata Rongai it was agreed that the Plaintiff extends the lease for six (6) months, the Defendants would clear all the rent arrears and pay the subsequent rents but have failed to do so. In 2016 one TIMOTHY MWANGANGI filed a suit at the Business Premises Tribunal vide BPRT Cause No. 656 of 2016 claiming to have entered into a sub tenancy agreement with the Defendants and with the consent of the Plaintiff but the said suit was dismissed with costs.

The application is supported by the affidavit of MEPUKORI PERE the Plaintiff herein where he deposes that he entered into a lease agreement with the Defendants which has since expired but they have neglected refused/ or failed to neither vacate the suit land nor pay the rent arrears which now stands at Kshs. 700,000. He avers that there is no privity of contract between himself and the Defendants since the Tenancy/Lease agreement lapsed.

The application is opposed by the 1st Defendant who filed a replying affidavit sworn by SAMUEL GICHERU where he admits that they entered into a lease agreement with the Plaintiff dated 6th June, 2013 where they were to put containers for commercial use on the suit land. He deposes that at paragraph 2 of the Lease Agreement, the Plaintiff was to give him a grace period beginning 1st June, 2013 ending 31st June, 2013 to obtain change of user of the properties from agricultural land to commercial land and obtain third party consent but the Plaintiff failed to honour this, which led to his business suffering and continues to suffer despite constant reminders. He avers that the Plaintiff also failed to honour paragraph 6.2 of the Lease Agreement by failing to remove a Magnate Billboard and Container used by Police from

the suit land within 90 days of executing the agreement, and he had to get a court order to do so as it was affecting his business negatively. He admits that on 1st June, 2015 upon termination of the lease they agreed to extend it for six (6) months but denies defaulting in remitting rent and having arrears of Kshs. 700,000.

He states that the monthly rent is Kshs. 50,000 which they have paid upto March and what was due is Kshs. 150,000, to which they issued a cheque to the Plaintiff's advocates but was put on hold as they were consulting their client. He denies that Timothy Mwangangi and others filed a suit against the Plaintiff alone at the BPRT Cause No. 656 of 2016 but insists he was also sued as they were subtenants who feared being evicted yet they had business on the suit land and were up to date with their monthly payment of rents. He further deposes that the County Government of Kajiado has continued to harass his business and sub tenants thereon as the land is agricultural but not commercial and this is due to the Plaintiff's failure to implement paragraph 2 and 10 of the Lease Agreement. He insists the Plaintiff has come to court prematurely and not exhausted all avenues on how disputes arising from the said lease agreement are to be handled.

The Plaintiff MEPUKORI PERE filed a supplementary affidavit where he deposes that the replying affidavit is defective. He insists there exists no lease agreement between the Defendants and himself as it lapsed and there was no need to obtain change of user as alluded to by the 1st Defendant. He avers that his failure to obtain a change of user from agricultural to commercial land did not hinder the Defendants from doing business effectively, is irrelevant in the current proceeding and they did not sue him for breach of the Lease Agreement in 2013 when the lease was subsisting. He states that the Defendants have suffered no prejudice at all as they have continued carrying on business and receiving rent from the sub tenants, and the issue of Magnate Ventures Billboard was taken care of. He reiterates that the Defendants are in rent arrears of Kshs. 500,000 and not Kshs. 150,000 as they claim. He avers that instead of clearing the rent arrears the Defendants have trickily written a Cheque of Kshs. 150,000 in order to entice him to accept it which will in essence make them implied Tenants. He further reiterates that the suit at the business premises tribunal was due to incitement by the Defendants but the same was dismissed. Further, that in 2016 the Kajiado County Government visited the suit land and found out the land was agricultural as opposed to commercial and sent him a letter to direct the tenants to vacate the suit land. He insists there is no valid lease between them hence no need to go for arbitration.

Both parties filed their written submissions and on 13th July, 2017 but only the Plaintiff highlighted theirs. I have considered the parties submissions.

Analysis and Determination

Upon perusal of the notice of motion dated 27th March 2017 including the supporting, replying and supplementary affidavits plus the annexures thereon, the following are the issues for determination:

- Whether there is any form of lease agreement between the Plaintiff and Defendants.
- Whether the Defendants have defaulted in rent repayments.
- Whether the 1st Defendants affidavit is defective and ought to be struck out.
- Whether the Plaintiff is entitled to the orders of mandatory injunction sought.

On the first issue as to whether there exists any form of lease agreement between the Plaintiff and Defendants, it is trite law that contracts can either be express or implied. Express when there is a written agreement while implied when the owner of a premise continues to receive consideration for the demised premises even if there is no written agreement. In the current situation, I note that the Plaintiff entered into a lease agreement with the Defendants on 6th June, 2013 over the suit land which lease was terminated on 1st June, 2015 but extended by mutual agreement for one and a half years. It is the Plaintiff's contention that despite extending the said lease for a further six months, the Defendant defaulted in remitting monthly rent. Further that even after agreeing on 1st March, 2016 at a meeting at the Chief's office in Ongata Rongai for Plaintiff to extend the lease again for six (6) months, Defendants to clear the rent arrears and pay the subsequent rents, the Defendant has failed to do so. The Defendant on the other hand insists he only has arrears of Kshs. 150,000 which he issued a cheque to the Plaintiff's

advocates but was declined. The Court notes however that a copy of the said cheque was not annexed in the replying affidavit. The Plaintiff in his supplementary affidavit insists the Defendants have rent arrears of kshs. 500,000. Section 60 of the Land Act provides as follows:

'(1) If a lessee remains in possession of land without the consent of the lessor after the lease has been terminated or the term of the lease has expired, all the obligations of the lessee under the lease continue in force until such time as the lessee ceases to be in possession of the land.

(2) A lessor who accepts rent in respect of any period after the lease has been terminated or the term of the lease has expired, shall not, by reason of that fact, be deemed to have consented to the lessee remaining in possession of the land, or as having given up on any of the rights or remedies of the lessor against the lessee for breach of a covenant or condition of the lease, and if the lessor continues to accept rent from a tenant who remains in possession for two months, after the termination of the lease, a periodic lease from month to month shall be deemed to have come into force.'

In relying on these provisions I find that currently there is no subsisting lease between the Plaintiff and the Defendants and even if the Plaintiff would accept rent from the Defendants, it does not deem the Plaintiff to have consented to the Defendants remaining in the suit land. In so far as the Defendants are still within the suit premises, they admit they have rent arrears and it is evident there is even no periodic lease from month to month which can be deemed to have arisen between them.

On the question of the sub lessee's rights within the suit land, Section 63 (2) of the Land Act is explicit on the rights and responsibilities of the sub lessee and stipulates as follows:

(2) A sublease to which this section applies shall not operate as an assignment of the head lease to the sub lessee, unless a contrary intention appears from the sublease or from the circumstances surrounding the granting of the sublease.

(3) If the term of the sublease to which this section applies is to expire after the expiry of the term of the head-lease—

(a) the term of the sublease shall be reduced, to expire one day earlier than the term of the head lease, but without prejudice to any remedies that the sublessee may have in respect of that reduction; or

(b) if the term of the head lease is extended or renewed beyond the term for which the sublease was created, the sublease shall expire at the end of that original term, whichever time is the earlier.

In relying on these provisions I find that the sub lessee's lease terminated when the original lease agreement between the Plaintiff and the Defendants had expired on 1st June, 2015.

As to whether the Defendants have defaulted in rent repayments. It is the Defendants' admission that they have rent arrears of Kshs 150,000 while the Plaintiff claims they owe Kshs. 500,000. In so far as the Defendants have defaulted in rent repayment, the exact amount is an issue that can only be determined at a full hearing.

On the issue as to whether the 1st Defendant's replying affidavit is defective, it is the court's finding that the Plaintiff's seek to rely on technicalities. According to section 19(1) of the Environment and Land Court Act it is clear that in any proceedings to which this Act applies, the Court shall act expeditiously, without undue regard to technicalities of procedure and shall not be strictly bound by rules of evidence. Further article 159 (2) (d) of the Constitution stipulates that ' in exercising judicial authority, the courts and tribunals shall be guided by the following principles(d) justice shall be administered without undue regard to procedural technicalities.

This position is affirmed in the case of Republic Vs. District Land Registrar, Uasin Gishu & Anor (2014) eKLR where Justice Ochieng held that .. **to my mind, Justice is not dependent on Rules of Technical procedures. Justice is about doing the right thing. Pursuant to article 159 (2) (d)in exercising Judicial Authority, the courts ' in exercising judicial authority, the courts and tribunals shall be guided by the following principles(d) justice shall be administered without undue regard to procedural technicalities. '**

As to whether the Plaintiff is entitled to the orders of mandatory injunction sought. An applicant seeking mandatory injunction must prove that it is a clear case that the Court will be assured that the same will succeed after the trial. In the case of **Kenya Breweries Limited vs. Washington Okeyo (2002) EA 109** the Court of Appeal stated that, '**a mandatory injunction can be granted on an interlocutory application as well as at the hearing, but in the absence of special circumstances, it will not normally, be granted. However, if the case is clear and one which the court thinks it ought to be decided at once, or if the act done is simple and summary one which can be easily remedied, or if the defendant attempted to steal a march on the plaintiff, a mandatory injunction will be granted on an interlocutory application.'**

The mandatory injunction sought by the Plaintiff to compel the 1st and 2nd Defendants, their agents, servants and/or persons representing them to surrender and/or hand over vacant possession of the suit premises, can only be granted in special circumstances where the Court thinks it ought to be decided at once, and after full trial, it will be evident that the injunction was properly granted. I find there is no subsisting lease between the Plaintiff and the Defendants. Further the presence of the sub lessee's on the suit land extinguished on 1st June, 2015 when the lease between Plaintiff and Defendants terminated as clearly stipulated within section 63 (2) of the Land Act. Even though the Defendants insist it was the Plaintiff's failure to remove the Magnate Billboard and change suit land from Agricultural to Commercial User which affected their business. I note that the Defendants were well aware of the Plaintiff's failure to change user and remove billboard during the subsistence of the Lease Agreement but never instituted a legal process to compel him to do so. Further on the claims by the Defendant that the Plaintiff should have referred the dispute to arbitration first before coming to court. I find that since there is no express contractual obligation between them stating so, this is immaterial. The Defendant in his submission has relied on the case of **JAMES HEATHER HAYES Vs AFRICA MEDICAL RESEARCH INSTITUTE (AMREF) Industrial Court Case No. 626 of 2013** where it was stated that .. '**it is not the duty of the court to redraw the agreement by parties, the court can only come to facilitate an interpretation and implementation of this contract and no more..'**

In relying on this case, I find that it is indeed not my duty as a Court to redraft the agreement between the Plaintiff and the Defendants which had already terminated, but to interpret as to whether there are contractual obligations arising from their relationship. I find that since there is no subsisting lease either express or implied between the Plaintiff and the Defendants, and with the Defendants having defaulted in paying rent, the Plaintiff is indeed entitled to the mandatory injunctive orders sought. I note that the suit land houses business premises therein with sub lessee's, It would be just to give the lessee's thereon a grace period to move out, I find the Plaintiff's motion dated 27th March, 2017 is merited but will decline to grant the orders as sought but revise it as follows:

' I hereby direct that the 1st and 2nd Defendants, their agents, servants and/or persons representing them do surrender and/or hand over vacant possession of the suit land being land reference no. NGONG/NGONG/57649 situated at Magadi Road, Ongata Rongai within the next three (3) months from the date hereof, pending the hearing and determination of this suit.

The costs of this application be borne by the Defendants.

Dated signed and delivered in open court at Kajiado this 5th day of October, 2017.

CHRISTINE OCHIENG

JUDGE

REPRESENTATION

Sekento for plaintiff

No appearance for defendant

Court Assistant Mpoye