



REPUBLIC OF KENYA

IN THE ENVIRONMENT AND LAND COURT AT NAIROBI

NAIROBI ELC NO. 945 OF 2016

JOHN KAGECHU MUIRURI

T/A MUIRURI AUTO PARTS.....1ST PLAINTIFF

RICHARD KIMANI WAHINYA

T/A MARKHAN ENTERPRISES.....2ND PLAINTIFF

ROYAL TYRES LIMITED3RD PLAINTIFF

WAMBUA MUSAU KANYANGE

T/A KIKO AUTO TYRES 4TH PLAINTIFF

PETER KIOKO MAKAU T/A KIKO AUTO TYRES.....5TH PLAINTIFF

PETER AUTOMOBILE HOUSE LIMITED 6TH PLAINTIFF

VERSUS

KIHUMO PROPERTY DEVELOPERS (K) LTD DEFENDANT

RULING

Background

1. There are two applications for consideration in this Ruling. The first application is the Plaintiffs' Notice of Motion dated 26th July 2016 (*hereinafter referred to as the "plaintiffs' application"*) seeking an order to restrain the defendant from evicting the plaintiffs from the property known as LR No. 209/229/1 Race Course Road Nairobi (*hereinafter referred to as "the suit premises"*) pending the hearing and determination of the suit.

2. The second application is the defendant's Notice of Motion dated 28th September 2016 (*hereinafter the defendant's application*) seeking the following orders:

- a) *The plaint be struck out.*
- b) *Summary judgment be entered against the plaintiffs for an order of vacant possession as prayed in the defendant's counterclaim.*
- b) *That the plaintiffs be evicted forthwith from the suit property in the event that they don't deliver vacant possession.*
- d) *The OCS Kamukunji Police Station does assist in ensuring compliance.*

Plaintiffs' Application

3. The grounds in support of the plaintiff's application are detailed in an affidavit sworn by the 2nd plaintiff on 23rd July 2016 wherein the plaintiffs contend that at all material times, they were tenants in the suit premises as evidenced by a bundle of annexed leases. The plaintiffs stated that their leases commenced at different times in the years 1974, 1995, 1991, 1986, 2003 and 1974 for the 1st, 2nd, 3rd, 4th, 5th and

6th plaintiffs respectively. They further contended that in February 2011, the plaintiffs were granted 5 years 6 months leases commencing from 1st March 2011 to 31st August 2016 by Gee 6 (K) Ltd. The plaintiffs further stated that they continued to fulfill their obligations under the tenancies and that on diverse dates in the month of December 2015, they received a letter dated 14th December 2015 from the defendant notifying them to apply for renewal of their leases 3 months before their expiry.

4. The plaintiffs stated that they received a further letter dated 30th March 2016 from the defendant's advocates indicating that the defendant had no intention of renewing their leases after their expiry and demanding vacant possession of the suit premises. It is the plaintiffs' case that they have operated from the suit premises for decades and they have generated a lot of good will and that going by their past practice, they legitimately expected that their leases would be renewed in accordance with the defendant's promise in its letter dated 14th December 2015. The plaintiffs stated that on the strength of the letter dated 14/12/2015, they increased their stock and carried out marketing activities giving the suit premises as their business address, and that their eviction would expose them to loss on their investment and goodwill.

5. The defendant opposed the plaintiffs' application through a replying affidavit sworn by its director, James Njogu Njenga, on 26th August 2016. Mr Njenga averred that the defendant was the registered proprietor of the suit property which it acquired on 26th November 2012 and took over subsisting leases. The defendant stated that at the time of acquisition, it honoured subsisting leases by not interfering with the tenants' enjoyment of the leases but that it had no intentions of renewing the leases, as communicated in its annexed notices of 30th March 2016. It is the defendant's case that its notices aforesaid are lawful, regular and valid. Further, the defendant contends that it gave reasons for non-renewal and issued the notices in time to allow the plaintiffs sufficient time to look for alternative premises and yield up vacant possession as a matter of legal obligation.

6. According to the defendant, the 2nd plaintiff was a trespasser occupying its property illegally, his lease having expired by effluxion of time on 31st April 2016. The defendant further contends that the other plaintiffs' leases were due for expiry on 31st August 2016 when they were also expected to give vacant possession. The defendant averred that its rights as a proprietor were not liable to be defeated except as provided by law and that the plaintiffs' claim was not in the nature of overriding interests contemplated under **Section 28 of the Land Registration Act**. The defendant urged the court not to limit its proprietary rights unlawfully. The court was urged to decline the prayers sought by the plaintiffs as they would infringe on the defendant's right to own, use, occupy and enjoy its property. Lastly, the defendant stated that it was not privy to the alleged agreement between the 2nd plaintiff and Mrs Rose Musau purporting to transfer the 3rd plaintiff's shop to the 2nd plaintiff which agreement was contrary to the tenant's obligations under clause (f) of the lease.

Defendant's Application

7. The defendant's application is supported by the affidavit of James Njogu Njenga, the defendant's director, sworn on 28th September 2016. The defendant's case is that it is the registered proprietor of the suit premises where the plaintiffs were tenants from 1st March 2011 to 31st August 2016, save for the 2nd plaintiff whose tenancy was from 31st October 2010 to 30th April 2016. The defendant stated that on 30th March 2016, it informed the plaintiffs that it did not intend to renew their leases after their expiration. It contends that despite expiration of the plaintiffs' leases by effluxion of time on 31st April 2016 for the 2nd plaintiff and 31st August 2016 for the other plaintiffs, the plaintiffs had refused to give vacant possession of the suit property.

8. The defendant stated that the plaintiffs' continued occupation of the suit premises after determination of their leases was illegal and constituted trespass and was in addition, an affront to its proprietary rights under **Article 40 of the Constitution**. The defendant contended that this was a proper case for summary judgment since the plaintiffs had no legal, equitable or any other interest known in law over the suit premises.

9. The plaintiffs opposed the application through a replying affidavit sworn by the 2nd plaintiff on 21st November 2016 reiterating the facts as stated in his affidavit of 23rd July 2016. In addition, the plaintiffs contended that they had paid rent due to the defendant as evidenced by attached copies of bankers cheques.

Plaintiffs' Submissions

10. Parties filed written submissions addressing the two applications. In written submissions dated 7/12/2016, the plaintiffs argued that the defendant's letter of 14th December 2015 gave the plaintiffs legitimate expectation that their leases would be renewed and this led the plaintiffs to increase their stock and marketing strategies.

11. The plaintiffs submitted that their plaint discloses a good cause of action and that their claim of goodwill in the suit property raises triable issues. Counsel submitted that the plaintiffs had a reasonable case with high chances of success and that their claim could not be compensated by an award of damages. It was the plaintiffs' submission that the balance of convenience was in their favour. The plaintiffs further argued that the law on striking out pleadings was settled in the case of **D.T. DOBIE & COMPANY (KENYA) LTD V JOSEPH MBARIA MUCHINA & ANOTHER, (1980) eKLR**. Counsel for the plaintiffs referred the court to the case of **MOI UNIVERSITY V VISHVA BUILDERS LTD, CA NO. 296 OF 2004** as cited in **ISAAC AWUONDO V SURGHIPHARM LTD & ANOTHER, (2011) eKLR** where the Court of Appeal stated that the law is settled that if the defence raises one bonafide triable issue, the defendant must be given leave to defend. The plaintiffs argued that a defence that raises triable issues does not necessarily mean a defence that will eventually succeed.

Defendant's Submissions

12. The defendant's counsel in submissions dated 15th March 2017 argued that an injunction is a discretionary remedy granted on the basis of evidence and sound legal principles within the framework in **Section 63 of the Civil Procedure Act** and **Order 40 Rule 1 of the Civil Procedure Rules**. Counsel stated that the grounds for granting an injunction were spelt out in the case of **GIELLA V CASSMAN BROWN, (1973) EA 358**. The defendant made reference to the definition of a *prima facie* case as set out in **MRAO V FIRST AMERICAN BANK OF KENYA & 2 OTHERS, (2003)KLR 125** and argued that it was undisputed that the plaintiffs were its tenants and that the plaintiffs' leases had expired by effluxion of time.

13. Counsel for the defendant further submitted that the plaintiffs had no rights in the suit premises and that even if there was a promise to renew the leases, which the defendant denied, the same did not entitle the plaintiffs to infringe on the rights of a registered proprietor. Counsel submitted that there was no evidence to show that the plaintiffs applied for a renewal of the lease based on the promise and that in any event, renewal did not lie as a right but was discretionally for both parties. Further, it was submitted that the notices not to renew were issued on 30th March 2016 which should be considered a reasonable notice to allow the plaintiffs time to look for alternative premises where to relocate their businesses.

14. With regard to the issue of good will, the defendant's counsel argued that the benefit and advantage of having a good name, reputation and connection would remain intact whether the plaintiffs remained on the suit premises or not. Counsel submitted that good will was not based on the location of the business but on the services offered and that a notice showing the change of business location would suffice. The defendant stated that it had no intention of commencing similar or competing businesses on the suit property but that it wanted to develop the suit properties.

15. Counsel submitted that the plaintiffs had no legal, equitable or any other interest in the suit property known to law. He added that the period the plaintiffs had occupied the suit premises was immaterial since it was within the plaintiffs' knowledge that they were to give vacant possession upon determination of their leases. The defendant submitted that the plaintiffs had in the circumstances not established a *prima facie* case to warrant their continued occupation of the suit premises to the detriment of a registered proprietor. Counsel stated that the defendant's right to use, occupy or enjoy the suit property could only be limited by law as provided by **Section 25 of the Land Registration Act**.

16. Counsel further submitted that the plaintiffs would not suffer irreparable damage since they had occupied a full term of the period negotiated and would still have their full stock to display on their new places of businesses after moving out. Counsel stated that the plaintiffs' continued illegal occupation of the suit premises would occasion the defendant great losses as it would be unable to develop the suit premises with the tenants in occupation. Further, counsel submitted that the defendant had not received any rent from the plaintiffs since expiration of the leases.

17. With regard to its application for summary judgment, the defendant submitted that its application was made under **Order 36 Rule 1 (1) (b) of the Civil Procedure Rules**. It was further submitted that summary judgment is issued in the clearest of cases. Counsel referred to the case of **JOB KILACH V NATION GROUP LTD & 2 OTHERS, (2015) eKLR** where a triable issue was defined as one which requires further interrogation by the court during a full trial. It was the defendant's further submission that the leases herein have expired and the defendant having communicated its intention not to renew the leases and having declined to receive money from the plaintiffs, there was no triable issue to be determined in this suit.

18. The court was referred to the case of **VELJI SHAMJI CONSTRUCTION V WESTMALL SUPERMARKET LTD, (2007) eKLR** where the court found that the plaintiff had a right to demand for vacant possession of its premises where the lease had expired by effluxion of time. Further reliance was placed on the case of **PROP INVEST LTD V AD SCREEN PRINT LTD, (2013) eKLR** where the court allowed an application for summary judgment in a case where the lease had expired by effluxion of time. Lastly, the defendant stated that it was unnecessarily dragged to court and Counsel urged the court to award costs to the defendant.

Determination

19. The key issue for determination in the plaintiffs' application is whether the plaintiffs have satisfied the criteria for grant of an interlocutory injunction.

20. Before granting an interlocutory injunction, the court must be satisfied that the conditions for grant of interlocutory injunction as spelt out in **GIELLA V CASSMAN BROWN & CO. LTD., (1973) E.A. 358** have been satisfied. In this regard, the applicants must establish a *prima facie* case with a probability of success and demonstrate that they will suffer irreparable injury which cannot be compensated by an award of damages. If the court is in doubt, the application is to be determined on a balance of convenience. In the case of **NGURUMAN LIMITED V JAN BONDE NIELSEN & 2 OTHERS, NAIROBI CA NO. 77 OF 2012**, the Court of Appeal stated that the three conditions are to be treated as separate, distinct and logical hurdles which the applicant must surmount sequentially. See **KENYA COMMERCIAL FINANCE CO. LTD V AFRAHA EDUCATION SOCIETY, (2001) VOL. 1 EA 86**.

21. It is not disputed that the defendant is the registered proprietor of the suit property. It is also not disputed that the plaintiffs were lessees of the defendant. Thirdly, it is not disputed that the plaintiffs' leases have expired. The plaintiffs' case is that they have generated a lot of good will, having been tenants in the suit premises for decades, and that based on the defendant's letter dated 14th December 2015, they had legitimate expectation that their leases would be renewed.

22. The 1st and 2nd plaintiffs' leases were dated 20th February 2011 and 30th September 2010 respectively while the 3rd, 4th and 5th plaintiffs' leases are dated 26th February 2011. All the leases were for a period of 5 years and 6 months commencing on 1st March 2011 to 31st August 2016 save the 2nd plaintiff's lease whose commencement date is 1st November 2010 and expiry date is 31st April 2016. The leases expressly provided that their renewal would be at the sole discretion of the lessor under terms to be mutually agreed by the parties.

23. Through a letter dated 14th December 2015, the defendant informed the plaintiffs of the expiry dates of their leases and indicated that under the terms of the leases, the plaintiffs were required to apply for renewal three months before the expiry failure to which they would be presumed as not intending to continue occupying the premises. This letter merely notified the plaintiffs of the expiry date of their leases and spelt out what they were to present for consideration by the defendant. It did not in any way constitute a renewal of the leases. There is no evidence that the plaintiffs responded to this letter. Even if the plaintiffs had expressed their intention to seek renewal of the leases, the defendant still retained the sole discretion to either grant or refuse renewal of the lease[s].

24. Against the above background, it is clear that the plaintiffs have not demonstrated that they have a right to occupy the suit premises beyond the terms of their leases. Similarly, they have not demonstrated they were entitled to renewal of the leases. Consequently, in my

view, a *prima facie* case has not been established. This being so, I need not delve into the 2nd and 3rd limbs of the *Giella V Cassman* principle. The upshot of this finding is that the plaintiffs' application dated 26th July 2016 lacks merit and is declined.

25. I now turn to the application by the defendant seeking the striking out of the plaint and entry of summary judgment. The key issue for determination in the defendant's application dated 28/9/2016 is whether the defendant has satisfied the criteria for grant of an order striking out pleadings and entry of summary judgment within the framework of **Order 2 Rule 15 and Order 36 Rule 1 of the Civil Procedure Rules**.

26. The guiding principle on striking out pleadings was laid down by the Court of Appeal in the case of **DT DOBIE & CO [K] LTD V JOSEPH MBARIA MUCHINA & ANOTHER** in which Madan JA stated as follows:

“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 life 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.”

27. In the more recent case of **NURU CHEMIST LIMITED & ANOTHER V NATIONAL BANK OF KENYA**, (2008) eKLR, the Court of Appeal, commenting on the framework in **Order VI 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.”

28. Commenting on the same framework in **YAYA TOWERS LIMITED V TRADE BANK LIMITED (IN LIQUIDATION)**, (2000) eKLR, Lakha, JA quoting verbatim the Court of Appeal in **PAOLA MURI V GIAN BATISTA MURI & ANOTHER**, CA No. 59 of 1999 observed as follows:

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

29. The principles governing the exercise of the court's discretion in considering an application for summary judgment are well settled. The Court of Appeal in **JOB KILACH V NATION MEDIA GROUP LTD & 2 OTHERS**, (2015) eKLR set out the following guiding criteria:

“Before the grant of summary judgment, the court must satisfy itself that there are no triable issues raised by the defendant, either in his statement of defence or in the affidavit in opposition to the application for summary judgment or in any other manner. What then is a defence that raises no bona fide triable issue? A bona fide triable issue is any matter raised by the defendant that would require further interrogation by the court during a full trial. The Black's Law Dictionary defines the term “triable” as, “subject or liable to judicial examination and trial”. It therefore does not need to be an issue that would succeed, but just one that warrants further interrogation by the Court.”

30. Similarly, pronouncing itself on the same legal framework, the Court of Appeal outlined the following guiding approach in **BALDEV RAJ AGGARWAL & 2 OTHERS V KAMAL KISHORE AGGARWAL**, (1988) eKLR:

“Order 35 is intended to enable a plaintiff with a liquidated claim, to which there is clearly no defence, to obtain a quick and summary judgment without being unnecessarily kept from what is due to him by delaying tactics of the defendant. If the judge 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. This court will resist with as much fortitude as it can command any attempt to weaken the effect of Order 35. At the same time, we shall remain vigilant to ensure that no defendant with a reasonable or arguable defence who comes to court is deprived of an opportunity to put it forward. It is in our view more unjust to shut out a defendant with a good defence than to require a plaintiff to wait a little longer and prove his claim against such a defendant on the merits. In the clearest cases and in the interest of justice this court will not hesitate to apply Order 35 with its full rigour.”

31. In considering whether an application satisfies the above criteria and the statutory framework spelt out under **Order 2 Rule 15 and Order 36 of the Civil Procedure Rules**, the court would of necessity look at the pleadings and the evidential materials placed before it. In the present suit, defence to the defendant's counterclaim was filed on 24/11/2016, about 56 days after the defendant had filed the present application. From the pleadings and affidavits sworn by the 2nd plaintiff, the plaintiffs' case is predicated upon goodwill allegedly created through conduct of their businesses on the suit premises for decades. It is also pegged on what the plaintiffs have termed as the legitimate expectation that their leases would be renewed. It is however not contested that the leases have lapsed by the effluxion of time. It is also not contested that the leases expressly provided that the defendant had the sole discretion to renew the leases. In the present case, the defendant elected not to renew the leases and proceeded to communicate its decision to that effect to the plaintiffs. In my view, in the absence of renewals, the plaintiffs whose leases have expired have no right to remain in the suit premises. The plaintiffs expectation that the leases ought to be renewed even without any formal request from them has no basis.

32. From the foregoing, it is plainly clear that in the absence of renewals of the leases, the plaintiffs have no legal or equitable interest in the suit premises to warrant their continued occupation of the premises. Their continued occupation of the suit premises is without any legal, equitable or contractual basis. Consequently, I find that no triable issues have been raised by the plaintiffs in their pleadings and affidavits. The defendant is therefore entitled to the prayers sought in the application dated 28th September 2016.

Disposal

33. In summary, I make the following orders in disposing the Plaintiffs' Notice of Motion dated 26/7/2016 and the Defendant's Notice of Motion dated 28/9/2016:

a) The Plaintiffs' Notice of Motion Application dated 26/7/2016 is dismissed for lack of merit.

b) The Defendant's Notice of Motion Application dated 28/9/2016 is allowed in terms of Prayers [b], [c], [d] and [e] save that the plaintiffs shall have thirty [30] days from today within which to vacate the suit premises. In default, eviction shall ensue, to be supervised by the Officer Commanding the Police Division within which the suit premises are situated.

c) The rest of the defendant's counterclaim shall be set down for assessment of mesne profits.

d) The defendant shall have costs of the suit, to follow assessment of mesne profits.

Dated, signed and delivered at Nairobi on this 29th day of November, 2017.

B M EBOSO

JUDGE

In the presence of:

N/A: for the Plaintiffs

Suna h/b for Mong'eri: Advocate for the Defendant

Halima Abdi: Court Assistant