



REPUBLIC OF KENYA
IN THE ENVIRONMENT AND LAND COURT AT NAIROBI

ELC SUIT NO.648 OF 2017

YUSSUF HUSSEIN HAILE.....PLAINTIFF

VERSUS

NOOR SHARIF ABDULLAHI.....DEFENDANT

RULING

On 23rd November, 2011, the plaintiff and the defendant entered into a lease agreement under which the plaintiff leased to the defendant all that parcel of land known as L.R No. 36/II/228 situated as Eastleigh, Nairobi together with all developments thereon (hereinafter referred to as “the suit premises”) for a term of 6 years with effect from 1st January, 2012 and terminating on 31st December, 2017. It was a term of the lease that the defendant would pay rent to the plaintiff for the suit premises at the rate of Kshs.100,000/- per month to be increased after every two years at the rate to be agreed upon between the parties. It was also a term of the lease that the defendant would at all times during the tenancy keep the interior of the suit property in clean and good order and at the expiration or sooner determination of the tenancy, to surrender to the plaintiff the suit property in good order and condition with all locks, keys and fittings complete.

It was a further term of the lease that the defendant would replace, make good or repair and restore all the articles, fixtures and effects that shall be broken, lost, damaged or destroyed during the tenancy. It was a further term of the lease that the lease was renewable for a further term of 5 years and 3 months on terms to be agreed provided that the defendant gave to the plaintiff a written notice of his intention to renew the lease three (3) months before the expiry of the term of the lease and provided further that at the time of such notice there was no existing breach or non-observance of any of the covenants, conditions or provisions of the lease.

The plaintiff brought this suit against the defendant on 10th October, 2017, seeking a sum of Kshs. 1,820,000/- and a mandatory injunction compelling the defendant to vacate the suit property in default of which the defendant be evicted by the court bailiff. The plaintiff has averred that on 12th July, 2017, the defendant gave him a notice of his intention to renew the lease upon its expiry on 31st December, 2017 for a further term of 5 years and 3 months with effect from 1st January, 2018. The plaintiff averred that through his advocates on record, he notified the defendant that he will not renew the lease on the ground that the defendant was in breach of the terms of the said lease. The plaintiff has averred that the defendant has breached the lease agreement dated 23rd November, 2011 by refusing to pay the increased rent of Kshs. 10,000/- per month which became due after the expiry of the first two years of the lease and a further sum of Kshs. 20,000/- per month which became due at the commencement of the last two years of the lease. The plaintiff has averred that the defendant is liable to him for a total sum of Kshs. 1,820,000/- comprising of the cost of repairing the suit property and the outstanding rent arrears.

The plaintiff has averred that the defendant has threatened that he would not pay the said rent arrears and has also vowed not to vacate the suit property at the expiry of the term of the lease dated 23rd November, 2011. The plaintiff has averred that the defendant has no right to remain in occupation of the suit property at the expiry of the term of the current lease.

What is now before me is the plaintiff's application by way of Notice of Motion dated 9th October, 2017 brought under Order 40 rule 1, 2 and 3 and Order 51 of the Civil Procedure Rules and sections 1A, 1B and 3A of the Civil Procedure Act. In the application, the plaintiff has sought possession of the suit property from the defendant and an order that the defendant does deposit in court the sum of Kshs. 1,820,000/- which the plaintiff has claimed against him in the plaint. The application which is supported by the affidavit of the plaintiff has been brought on the grounds that the defendant is in breach of the terms of the lease agreement between him and the plaintiff and that the defendant is likely to leave the jurisdiction of the court at the expiry of the lease on 31st December, 2017 without paying the outstanding rent and cost for repairing the suit property. The plaintiff has contended that he has been unable to levy distress against the defendant because the defendant has sub-let the suit property to third parties. The plaintiff has contended that he stands to suffer irreparable loss and damage if the orders sought are not granted.

The application is opposed by the defendant through a replying affidavit sworn on 17th November, 2017. In his affidavit, the defendant has contended that in reliance on the plaintiff's undertaking to renew the lease over the suit premises, he spent approximately Kshs.5 million in improving the buildings on the suit premises and constructing new buildings thereon. The defendant has contended that the suit property is comprised of several detached buildings which he has sub-let to third parties as residential and business premises. The defendant has contended that the plaintiff has been visiting the suit property frequently and has been harassing and threatening the defendant's sub-tenants with eviction. The defendant has denied that he has breached the terms of the lease. The defendant has contended that he has paid rent on time and he is not in rent arrears as claimed by the plaintiff.

The defendant has contended that the plaintiff has purported to terminate his tenancy and has instructed the sub-tenants to pay rent directly to him. The defendant has contended that as a result of harassment by the plaintiff which included the disconnection of electricity to the suit premises, some of the sub-tenants have vacated the suit premises while others have refused to pay rent. The defendant has contended that due to the harsh business environment created by the plaintiff, the defendant has found it difficult to pay rent on time.

The defendant has contended that he has suffered loss and damage as a result of the said acts by the plaintiff which amount to a breach of the lease. The defendant has contended that the suit property is in good condition and as such the sum of money which the plaintiff has claimed on account of repairs is not payable. The defendant has contended in the alternative that a joint inspection of the suit property has not been carried out to ascertain the repairs if any which is required. The defendant has contended that the said sum of money claimed by the plaintiff on account of repairs has no basis. The defendant has contended that having induced him to incur expenses in putting up several buildings on the suit premises with the promise that he will renew the lease, the plaintiff is estopped from renegeing on that promise and demanding possession of the suit premises at the expiry of the lease.

I have considered the plaintiff's application together with the affidavit filed in support thereof. I have also considered the defendant's affidavit in reply and the submissions which were made before me by the advocates for the parties. What I need to determine is whether the plaintiff is entitled to the prayers sought in the application. The plaintiff's application is principally brought under Order 40 rules 1,2 and 3 of the Civil Procedure Rules. Order 40 of the Civil Procedure Rules deals with injunctions. The plaintiff has not sought any injunctive relief in his application. The plaintiff did not explain in his submissions the relevance on the said provisions of the Civil Procedure Rules to his application. As I have stated at the beginning of this ruling, the plaintiff has sought possession of the suit property from the defendant and an order that the defendant deposits a sum of Kshs. 1,820,000/- in court pending the hearing and determination of this suit. The reliefs sought by the plaintiff in my view should have been brought under the provisions of Orders 36 and 39 of the Civil Procedure Rules which deals with summary judgment and

attachment before judgment. I am of the view that the plaintiff has not approached the court under Order 36 and 39 of the Civil Procedure Rules aforesaid due to the strict requirements under those rules. The plaintiff is essentially seeking summary judgment against the defendant for possession of the suit property and for the defendant to furnish security for the satisfaction of any decree which the court may pass against him in this suit in favour of the plaintiff.

These are not orders which the court can grant under sections, 1A, 1B and 3A of the Civil Procedure Act or Order 40 of the Civil Procedure Rules which the plaintiff has invoked. Before the court grants summary judgment, the applicant must satisfy the conditions set out in Order 36 rule 1 of the Civil Procedure Rules. A plaintiff can only seek summary judgment under Order 36 of the Civil Procedure Rules where a defendant has entered appearance. If what is sought is recovery of land, an application for summary judgment can only be brought by a landlord against a tenant whose term has expired or has been determined by a notice to quit or has been forfeited for non-payment of rent or for breach of a covenant or against a trespasser.

The plaintiff's application was filed together with the plaint before the defendant entered appearance. To that extent the application for summary judgment was irregular. It is not contested that the defendant's lease would expire on 31st December, 2017. The defendant's lease has therefore not expired. The plaintiff has also not claimed in the plaint that he has forfeited the defendant's lease for breach thereof. His claim in the plaint is no based on forfeiture. In any event, there is no evidence that the plaintiff complied with the provisions of section 75 of the Land Act, 2012 on forfeiture of leases. As I have stated above, the plaintiff's contention in the plaint is that the defendant has threatened not to vacate the suit property at the expiry of his lease. The court cannot grant summary judgment against a tenant whose lease has not expired on the basis of an apprehension on the part of the landlord that the tenant would not vacate the leased premises at the expiry of the lease.

The other limb of the application which seeks to compel the defendant to deposit a sum of Kshs. 1,820,000/- in court must also fail. First, there is no explanation from the plaintiff on how he has arrived at this sum of Kshs. 1,820,000/- which has been claimed in the plaint as rent arrears and repair costs. There is no evidence that the plaintiff and the defendant had agreed to increase the monthly rent by Kshs. 10,000/- after two years of the term of the lease and by Kshs.20,000/- after four years of the term of the lease. There is also no evidence that the sum of Kshs. 1,100,000/- which the plaintiff has claimed as approximate cost of repairing the suit property is based on any actual assessment of the repairs required to be undertaken on the suit premises. Again for the court to make an order for the defendant to deposit money in court sufficient to meet the plaintiff's claim against him, the plaintiff must demonstrate that the defendant has with intent to delay the plaintiff, or to avoid any process of the court or to obstruct or delay execution of any decree that may be passed against him; has absconded or left the jurisdiction of the court or is about to abscond or leave the local limits of the jurisdiction of the court or has disposed of or removed from the jurisdiction of the court his property or any part thereof or is about to leave Kenya under circumstances affording reasonable probability that the plaintiff will or may be obstructed or delayed in the execution of any decree that may be passed in his favour against the defendant in the suit. The plaintiff has not established any of these circumstances under which the orders sought against the defendant can be granted. I am in agreement with the defendant that the plaintiff's application is misconceived and is an abuse of the process of the court.

The upshot of the foregoing is that the Notice of Motion application dated 9th October, 2017 lacks merit. The same is hereby dismissed with costs to the defendant.

Delivered and Dated at Nairobi this 8th day of December 2017

S. OKONG'O

JUDGE

Ruling read in open court in presence of:

Mr. Amolo for the Plaintiff

Mr. Athuok and Mr. Mwangi for the Defendant

Catherine Court Assistant