



REPUBLIC OF KENYA
IN THE HIGH COURT OF KENYA

AT MOMBASA

ELC NO. 293 OF 2013

HEDWIG – HRT MITTERLERLEHNER ULRICH.....PLAINTIFF

-VERSUS-

JEMDROCL SPIN.....DEFENDANT

RULING

1. The defendant/applicant filed his notice of motion application on 26th April 2015. The application is brought under Order 36 Rule 1 and Order 51 rule 1 of the Civil Procedure Rules and Section 3 A of the Civil Procedure Act. The orders sought are ;
 1. **Judgement for the counter-claim be entered against the plaintiff for the defendant in the sum of Euros 11,460 together with interest thereon at Court rate**
 2. **Costs of the application be provided for**
 3. **Such further or other orders be made which this honourable Court may deem fit to grant.**
2. The application is supported by the grounds on its face and the affidavit of Janny Theodora Jennings. The defendant/applicant leased the suit premises to the plaintiff/Respondent at an annual rent of Euros 1500. The applicant deposes that the respondent paid only Euros 3540 leaving an outstanding balance of Euros 11,460. The applicant deposes that there is no defence to the counter claim.
3. The application is opposed by the plaintiff/respondent. He deposed that he has faithfully paid rents to the defendant and later deposited rentals in a bank account provided by the applicant. He deposed that he has been in the premises for years and the defendant has never complained about rent and this complaint was raised only at the expiry of the lease when he wanted to purchase this property. The respondent deposes that this claim is only meant to frustrate his desires to buy the property as agreed. He annexed valuation reports for the property at the commencement and expiration of the lease. He asked for the dismissal of the application.
4. The parties have filed their rival submissions which I have had occasion to read and consider. Before this application was filed, the plaintiff had filed an application dated 12.9.2014 which application was allowed by consent. The consent allowed the plaintiff to file a reply to defence and defence to counter-claim within 14 days from date of filing the consent. The consent was filed on 22.4.2015 and a defence to counter-claim filed on 25th May 2015.
5. The present application was filed on 28.4.2015 which was before the lapse of 14 days given to the plaintiff to file a defence to the counter-claim. The application itself is premised under Order 36

which provides thus ;

“1 (1) In all suits where a plaintiff seeks judgement for

a) liquidated claim with or without interest – where the defendant has appeared but not filed a defence, the plaintiff may apply for judgement for the amount claimed or part thereof and interest..”

6. My interpretation of the order is that the proviso is available where there is no defence filed. When the application was filed, the defendant/applicant had consented for extension of time for filing of a defence. Subsequently a defence was filed although out of the time provided. The issue of late filing was not raised in the submissions therefore the defence is assumed to be properly on record. On this limb, I find the application was prematurely filed.
7. Looked at in a different way, the applicant admits the Respondent has been in the premises for 10 years. According to him, only Euros 3450 was paid during the 10 years. He took no action to recover the outstanding rent until the respondent brought this suit against him. The respondent on his part avers that he has always paid rent and there is no arrears. He submitted that this suit should proceed to full trial. The applicant submitted that the respondent did not annex documents to prove payment of the rents.
8. The equitable doctrine of equity does not aid the indolent but the vigilant finds relevance here. The applicant has waited for 10 years to lay claim of what he is entitled which he claims is unpaid. He does this after the suit is filed to short circuit the plaintiff suit. He does not specify the arrears is for which period. I find he has been indolent and therefore should be ready to go through the full hearing. This will give all the parties an opportunity to present their claims.
9. In the result, I find the notice of motion dated 26.4.2015 lacking in merit and dismiss it with costs to the plaintiff/respondent.

Ruling dated and delivered in Mombasa this 12th day of February 2016.

A. OMOLLO

JUDGE