



REPUBLIC OF KENYA

IN THE ENVIRONMENT AND LAND COURT OF KENYA

AT NAKURU

ELC NO. 77 OF 2014

KENOL KOBIL LIMITED.....PLAINTIFF

VERSUS

DAVID MUGO NDUMIA

JAMES MWANGI NDUMIA

JULIA NYAGUTHI NDUMIA & MARY NJAMBI NDUMIA

(Sued as the Administration and Legal Representatives of the

Estate of Danson Ndumia Murukia (Deceased).....1st Defendant

James Mwangi Ndumia.....2nd Defendant

David Mugo Ndumia.....3RD DEFENDNAT

RULING

(Application for injunction; principles to be applied; plaintiff being an oil company with a lease on premises to run a petrol station; owners seeking enhanced rent or vacant possession; original lease having expired but with option to renew; lessors being administrators of deceased owner; some having died when option to renew exercised; option to renew purportedly exercised when new administrators in place and property already vested pursuant to a confirmation of grant; whether option to renew could be sent to the original administrators; rent payable if option exercised; original lease having conflict; clause on option to renew held to override other clause; rent was to be agreed or referred to arbitration; no agreement on rent; no prima facie case established by plaintiff; application dismissed)

1. This suit was commenced on 21 March 2014 by way of plaint. The plaintiff is an oil company. The 1st defendants are the administrators of the estate of the late Danson Ndumia Murukia (deceased). The deceased owned the property L.R No. 6585/506 (the suit premises) situated in Nyahururu Town. The plaintiff had leased the suit premises vide a lease that was executed and registered on 4 October 2000 for a term of 13 years. The purpose was to enable the plaintiff operate the business of a petrol service station. In the lease, there is an option to renew for a further term of 10 years. It is pleaded that through a letter dated 30 October 2012, the plaintiff did invoke its option to renew the lease for the further term of 10 years and continued paying rent to the law firm that was acting for the defendants. It is averred by the plaintiff, that on 28 November 2013, the defendants wrote to the plaintiff demanding new lease terms

with an enhanced rent of Kshs. 1,167,900/= payable quarterly. The plaintiff however forwarded a cheque for Kshs. 150,852/= being what it considered to be the agreed rent. This cheque was returned by the defendants. On 3 February 2014, the defendants served a termination notice upon the plaintiff which was withdrawn but a new one dated 7 February 2014 was issued. The same was essentially terminating the lease between the plaintiff and defendants.

2. It is the plaintiff's position that the termination notice is a breach of the lease agreement and that the same was issued under the Landlord and Tenant (Shops, Hotels and Catering Establishments) Act, Cap 301, Laws of Kenya, yet the said statute is not applicable. The plaintiff has pleaded that it is apprehensive that the defendants may forcefully enter the suit premises and interfere with its business. The substantive prayers in the suit are for orders of permanent injunction to restrain the defendants from the suit premises ; a declaration that the plaintiff exercised its option to renew the lease; and an order of specific performance directing the defendants to execute a lease agreement for a term of 10 years with effect from 1 March 2013.

3. Together with the suit, the plaintiff filed an application for injunction under the provisions of Order 40 of the Civil Procedure Rules. It is that application which is the subject of this ruling. In the application, the plaintiff wants the defendants barred from evicting the plaintiff or interfering with its possession of the suit premises, pending the hearing and determination of this suit. The application is supported by the affidavit of Othmane Chaoui who is the plaintiff's marketing manager. He has inter alia exhibited the lease in issue and a schedule which he states was attached to the lease and which he deposed provided for the rents payable. According to him, the defendants cannot purport to terminate the lease as the plaintiff exercised its option to renew for a further period of 10 years from 1 March 2013. He has deposed that the quarterly rent payable is Kshs. 150,852/= and that the defendants have no right to demand an enhanced rent of Kshs. 1, 167,900/=.

4. The application is opposed through the replying affidavit of David Mugo Ndumia. He is one of the Legal Representatives of the estate of the late Danson Ndumia Murukia (deceased) and he has also been individually sued as the 2nd defendant. He has contested the rent schedule in the Lease agreement and has contended that it was never part of the lease. He has pointed out that it is only the lease which was signed and attested. He has further deposed that if the rent schedule is held to be an addendum to the lease, the same is not a binding document as it was never signed, attested and executed and has no legal effect. He has averred that the plaintiff did not notify them of its intention to renew the lease in the manner provided for in the lease agreement. It is stated that the notice was sent through registered mail to an address which belonged to one Jane Wairimu Ndumia in disregard to a Notice of Change of Administrators and instructions for rent to be paid to their advocates. He has averred that such notice ought at least to have been sent to their lawyer and that a notice was only sent to their advocates on 15 May 2013. He has stated that the lease agreement was terminated by way of effluxion of time on 1 March 2013 and in place a periodic tenancy was created.

5. He has averred that rent was received on the periodic tenancy as they prepared to negotiate on a new lease agreement. They later stopped receiving cheques with the intention that a fresh lease be negotiated. He has deposed that negotiations were entered but that the same failed because of the conduct of the plaintiff's Managing Director a Mr. David Ohara who is said to have been rude, odious and abrasive. According to him, the only subsisting lease is a periodic tenancy which then falls under CAP 301. He has averred that they intend to sue for vacant possession and mesne profits at the Business Premises Rent Tribunal established by CAP 301 and they do not wish to levy distress. He has further stated that Clause 4 of the Lease agreement provided for arbitration in the event that the parties could not agree on rent. He has hinted that they intend to take over the premises or lease it out to other oil dealers.

6. When I first saw the application, I was of the considered view that the matter may be negotiated. I adjourned the application several times hoping that the parties would agree, even if only on an arbitrator. To my disappointment, no agreement was reached and the parties proceeded to ask me to make a ruling on the application for injunction based on their written submissions which I have considered.

7. The principles applicable in an application of this nature were laid down in the case of *Giella vs*

Cassman Brown (1973) EA 358. In the said suit, it was held that to succeed in an application for injunction, the applicant needs to demonstrate a prima facie case with a probability of success and also demonstrate that it stands to suffer irreparable loss unless the injunction is granted. If in doubt, the court will decide the application on a balance of convenience.

8. So as to determine whether or not a prima facie case has been established, it is inevitable that I make a preliminary assessment of the case presented by the applicant. This is only preliminary, and only aimed at determining the application for injunction. A different finding can of course be made after hearing the suit on merits.

9. It will be noted from my discourse above that the issue revolves around a lease that was executed by the parties on 8 August 2000. The execution of that lease is not disputed, save for a schedule on payment of rent. I have seen that the lease was executed by Jane Wairimu Ndumia and James Mwangi Ndumia as personal representatives of the estate of Danson Ndumia (deceased), as lessors and Kenya Oil Company Ltd (whom I presume is the same as the plaintiff or whom the plaintiff succeeded) as Lessee. The term noted is one of 13 years from 1 March 2000 with an option to renew for a further one term of 10 years. The lease itself provides for rent as follows :-

i. For the first Three (3) years of the term, to pay a monthly rent of Kenya Shillings Twenty Five Thousand (Kshs. 25,000.00) only, payable quarterly in advance.

ii. That upon expiry of the above Three (3) years of the terms (sic) , the monthly rent will be increased by 15% fifteen percentum for the subsequent Three (3) years and then subsequently an increase of 15% at the commencement of every Three (3) years for the balance of the term, and the said one term option of Ten (10) years (if exercised by the Lessee) the said rent shall be paid quarterly in advance (as per the attached SCHEDULE).

iii. The Lessee will upon registration of the Lease advance the Lessors a sum of Kenya Shillings One Million Two Hundred Thousand (Kshs. 1,200,000.00) only being advance rent and which will be armotised on monthly basis until the total amount is fully cleared after which Rent will be payable to the Lessors quarterly in advance as aforesaid and as soon as the advance mentioned above is fully paid.

10. I have looked at the contested schedule. All it does is to provide for specific amounts assuming a 15% increase in rent every three years. It includes rent payable assuming that the lease is renewed for a further term of 10 years and this rent is a continued increase of 15% from what would be last payable under the old term of 13 years.

11. The renewal clause is Clause 4 of the Agreement. It is drawn as follows :-

4. If the Lessee shall at the expiration of the Term hereby created be desirous of obtaining a further Lease of the Petrol Service Station and shall signify such desire by Notice in writing delivered to the Lessors Three (3) calendar months at least before the expiration of the term hereby created have duly performed and observed all covenants and conditions herein contained or implied and on its part to be performed and observed then the Lessors will on or before the expiration of the Term hereby created at the request and costs of the Lessee (optional) grant to the Lessee a Lease of the Petrol Service Station for One (1) further term of Ten (10) years and the option of Ten (10) years shall be exercised and/or commence at the expiration of the Term hereby created on same terms, conditions, covenants and provisions as present but Rent shall be mutually agreed by the parties hereto so that if such rent cannot be agreed between the parties hereto the said rent shall be determined by a single Arbitrator to be appointed by the Chairman for the time being of the Institute of Chartered Surveyors whose decision shall be final and biding (sic) to both parties.

12. I will come to the question of rent a little later. I first want to resolve the issue of whether or not the option to renew was exercised. There is of course contention as to whether or not the plaintiff exercised its option to renew. According to the plaintiff, it did exercise the option to renew. According to the

defendants, the option to renew was not exercised, or if it was, then it was not exercised in conformity with Clause 4 above.

13. The position of the plaintiff is that it did exercise the option to renew, through the letter dated 30 October 2012. If this letter is to be accepted then it would indeed fall within the 3 months at least before expiration of the first term which was to be spent on 1 March 2013. The letter does state that it is a notice invoking the provisions of Clause 3 (d) of the Lease and is an exercise of the option to renew. I note however that there is no clause 3 (d) in the lease. It is said that this letter was sent by registered post to the administrators of the late Danson Ndumia using P.O Box 772 Nyahururu. I do note that Clause 6 of the Lease agreement does provide that any notice requiring to be served shall be sufficiently served upon the Lessors if delivered personally or sent to their address in Nyahururu. The address provided is P.O Box 772 Nyahururu.

14. However, and this is significant, before this letter was sent, there were developments on the administration of the Estate of the deceased. It seems as if sometimes in the year 2010, one administrator, James Mwangi Ndumia died. The plaintiff was notified of this vide a letter dated 12 October 2010 written by M/s Gitonga, Kinyanjui & Company Advocates who acted for the administrators. On 26 January 2011, the said firm did write to the plaintiff stating that they have applied to enjoin three other administrators. On 30 June 2011, the advocates for the administrators did write to the plaintiff that the estate of the deceased is now being administered by four persons namely James Mwangi Ndumia, David Mugo Ndumia, Julia Nyaguthii Ndumia, and Mary Njambi Ndumia. A copy of the grant dated 5 April 2011 was sent to the plaintiff. The same shows their address to be P.O Box 26128-00100 Nairobi. It will be observed at this juncture that the four were all new administrators and none had executed the lease herein. On 20 July 2011, the grant of letters of administration was confirmed. The suit premises was vested upon James Mwangi Ndumia and David Mugo Ndumia, the 2nd and 3rd defendants, in equal shares of 50% each.

15. My own assessment, at least at this stage of the proceedings, is that the administration of the property had so metamorphosed, so that it could not be said that a letter addressed to the persons in the original lease, through the address provided in the said lease, could be termed as good notice. At the point in time that the letter was sent, the persons who signed the lease were no longer administrators. Indeed at that point in time, the property had already vested upon the 2nd and 3rd defendants. I have my doubts as to whether the option to renew the lease was properly exercised.

16. Assuming that the option to renew was properly exercised, there is of course the contention by the defendants, that the rent payable could not be a continued 15% increase of the original rent. I have looked at the Lease. I think there is a conflict between the provisions of rent provided in the first part of the lease, with those provided in Clause 4 of the Lease, both of which I have already set out above. On one hand the first part seems to provide for payment according to the Schedule which is a continued 15% increase, whereas Clause 4 seems to provide for an agreement on new terms of rent, and if no agreement is reached, then the same to be referred to an arbitrator for him to fix the rent.

17. My own view, subject to being convinced otherwise at the hearing, is that the parties intended clause 4 of the agreement to be the substantive clause on renewal of the lease and I would at this point in time give the same more weight. I do not think the provisions of Clause 4 would have been so elegantly drawn if the intention of the parties was to continue paying rent at the continued increase of 15%. Indeed, if that was their intention, then there would have been no purpose in having the provisions of Clause 4 on agreement to new rent or reference to an arbitrator.

18. From my discussion above, I have problems with the manner in which the option to renew the lease was exercised and I have problems with the contention of the plaintiff that rent was to continue at 15%. In essence, I am not convinced that the plaintiff has tabled before me a prima facie case with a probability of success. I therefore proceed to dismiss the plaintiff's application for injunction with costs.

19. Before I sign off, I feel that it is necessary to make one or two point obiter. First, I feel compelled to reiterate my disappointment that the parties herein had to let me decide this application. If all parties were

flexible, the matter could easily have been negotiated, or a mediator or arbitrator, appointed. I think it is time we got out of the notion that everything must be decided by court. Secondly, my own advice to the plaintiff, is that if it wants to continue utilizing the premises, then it is better of commencing negotiations with the 2nd and 3rd defendants on the terms of a new lease with new terms of payment.

20. Orders accordingly.

Dated, signed and delivered in open court at Nakuru this 5th day of May, 2016.

MUNYAO SILA

JUDGE

ENVIRONMENT & LAND COURT AT NAKURU

In presence of: -

Mr. Musyoka instructed by M/s Muriu Mungai & Co. Advocates for the plaintiff/applicant.

Mr Akech instructed by M/s Gitonga, Kinyajui & Co. Advocates for the defendants/ respondents .

Court Assistant Janet

MUNYAO SILA

JUDGE

ENVIRONMENT & LAND COURT AT NAKURU