



REPUBLIC OF KENYA

IN THE ENVIRONMENTAL AND LAND COURT AT NAIROBI

ELC SUIT NO. 811 OF 2014

MARGARET WAMBOI KINUTHIA.....PLAINTIFF

VERSUS

PATRICK MBURU ND'UNG'U.....1ST DEFENDANT

WANJAU WANGOMBE MBUTHIA.....2ND DEFENDANT

RULING

The Application

The application before the Court for determination is a Notice of Motion filed by the Plaintiff dated 26th August 2014 seeking the following orders:

1. That the 1st and 2nd Defendants' written Statement of Defence filed herein be struck out;
2. That in the result, judgment be entered in favour of the Plaintiff as prayed in the Complaint, and
3. That costs of the suit and of this application be awarded to the Plaintiff.

The grounds for the application are that the Statement of Defence of the 1st and 2nd Defendants is likely to delay, embarrass or prejudice the speedy trial of this suit; contains mere general details of the Plaintiff's case without raising a reasonable case or at all which cannot amount to a defence in law; is frivolous, vexatious and is intended to prejudice the fair and trial of this suit; is totally without merit and the same amount to an abuse of the process of this Court; and was filed outside the prescribed timelines.

The Plaintiff in a supporting affidavit sworn on 26th August 2014 stated that

the cause of action herein arose from a tenancy agreement entered with the Defendant on 13th March, 2009, whereby she agreed to lease to the Defendants premises erected on Land Reference Number 111345/1. Further, that it was agreed in the tenancy agreement that:-

- i. The 1st and 2nd Defendant would make timely payment of my rent of Kenya Shillings Forty Thousand (Kshs.40,000/=) per month, subject to a ten per centum (10%) per annum increase, on or before the 5th day of every month starting 1st April 2009.
- ii. If the said rent remained unpaid for fifteen (15) days or more from the date due the tenancy agreement would be automatically terminated and the landlady would have the right to re-enter the premises the premises and take possession with or without notice.

- iii. The 1st and 2nd Defendants would not use the suit premises for any other purpose other than domestic accommodation and
- iv. The tenancy term was for five (5) years, from 1st April 2009 to 31st March, 2014.

The Plaintiff stated that the 1st and 2nd Defendants were in breach of the Tenancy agreement by causing damage to the property on the premises; failing to maintain the hygiene standards of the premises, using the premises as a bar instead of domestic accommodation; and erecting structures thereon without her consent. Further, that the 1st and 2nd Defendants have been in continuous breach of the tenancy agreement even after entering into a Memorandum of Understanding with the Plaintiff to maintain and observe the terms of the tenancy agreement, and have refused to pay rent. The Plaintiff claimed that the Defendants are indebted to the Plaintiff for the sum Kshs.170,368/= being rent arrears with interest as of June, 2014.

The Plaintiff further averred that pursuant to the tenancy agreement, she elected to terminate the tenancy due to the Defendants' persistent breach by issuing them with notice requiring them to deliver vacant possession of suit premises by 31st March, 2014. However, that the Defendants have failed to heed the notice and have continued to stay in the premises since the termination of the said Agreement. The Plaintiff believes that the 1st and 2nd Defendants have no tenable defence to her Complaint, and that it is only just that judgment be entered in her favour as prayed in the plaint.

The Response

The Defendants opposed the Plaintiff's application in a replying affidavit sworn on 27th September 2014 by the 2nd Defendant, wherein he stated that he has never been in rent arrears for the period covered by the lease between 1st April and 31st March 2014. Further, that the Plaintiff was running the business of a bar and restaurant at the suit premises namely LR. No. 1345/1 prior to leasing out the same to the Defendant, and that she charged goodwill for the same. The deponent also stated that the Defendants undertook renovations on the demised premises in order to keep it habitable, presentable and secure with the Plaintiff's full knowledge and consent.

It was the Defendants' claim that the Plaintiff's desire was to increase the rent upon renewal of the lease beyond the 10% increment agreed upon, to take advantage of the renovations that they had carried out. Further that the Plaintiff did not disclose that part of the premises were on a road reserve which the Government repossessed and demolished structures that were constructed thereon including washrooms, a kitchen, butcheries, sheds and fences in the reserve.

The deponent also stated that he had filed an application in this suit seeking leave to amend his defence to include a counterclaim for the refund of substantive amounts of money, and that his defence has triable issues and is not an abuse of the process of the court.

The Issues and Determination.

The Plaintiff's application was canvassed by way of written submissions. The Plaintiff's Advocate filed submissions dated 26th November 2014, while the submissions filed by the Defendants' Advocates are dated 2nd December 2014. I have carefully considered the pleadings filed herein, and submissions made by the Plaintiff and Defendants. The issue for determination is whether the Defence filed herein by the Defendants should be struck out on account of the grounds stated by the Plaintiff.

The Plaintiff has submitted in this regard that the 1st and 2nd Defendant's Defence is not properly before this court as it did not comply with the requirements of Order 7 Rules 1 and 5 of the Civil Procedure Rules, which require a defence to be filed within 14 days and to be accompanied by the witness statements and documents the Defendant seeks to rely upon during trial. The Plaintiff relied on the decisions in **Francis Githinji Karobia vs Stephen Kageni Gitau (2014) e KLR** and **Golbo Constructions Co Ltd. vs National Water Conservation & Pipeline Corporation (2014) e KLR** in this regard. The Plaintiff argued that in the present case the Defence was filed on 14th August 2014, 24

days after the Defendants filed their memorandum of Appearance on 21st July 2014.

The Plaintiff further submitted that none of the issues raised by the Plaintiff in the Plaint are contested by the Defendants in their Defence, which contains bare denials. The Plaintiff relied on Order 2 Rule 11 to urge that a traverse in a pleading should contain denials of specific pleadings raised by the other party. Further, that the Defence does not raise any issue worthy of being tried and does not raise a serious defence. The Plaintiff's Advocate cited various judicial decisions in support of the above arguments.

The Defendants on their part submitted that the construction and interpretation of the tenancy agreement and memorandum of understanding entered into by the parties, the question of whether the tenancy had been converted into a periodic tenancy upon acceptance of rent after expiry of the lease and the jurisdiction of this Court were triable issues raised in their defence, and the Court should therefore proceed to trial. Further, that the non-compliance with Order 3 Rule 2 and Order 7 Rule 5 of the Civil Procedure Rules can be cured during compliance with Order 11 of the Civil Procedure Rules. The Defendant relied on the decisions in **Indicative Solutions Ltd vs Feba Radio (Kenya) Ltd, (2012) e KLR** and **Gurbaksh Singh & Sons Ltd vs Njiri Emporium Ltd (1985) KLR 695**.

The Notice of Motion by the Plaintiff is brought pursuant to the provisions of Order 2 Rule 15 (1) of the Civil Procedure Rule, which provides as follows:

“At any stage of the proceedings the court may order to be struck out or amended any pleading on the ground that—

(a) it discloses no reasonable cause of action or defence in law; or

(b) it is scandalous, frivolous or vexatious; or

(c) it may prejudice, embarrass or delay the fair trial of the action; or

(d) it is otherwise an abuse of the process of the court,

and may order the suit to be stayed or dismissed or judgment to be entered accordingly, as the case may be. “

it is settled law that the power of the court to strike out pleadings should be used sparingly and cautiously, as it is exercised without the court being fully informed on the merits of the case through discovery and oral evidence. this was stated in *d.t. dobie & company (kenya) ltd. v. muchina* [1982] klr 1 at p. 9 by madan, J.A.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 amendment, 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.”

The overriding principle to be considered in an application for striking out of a pleading is whether it raises any triable issues. In the present suit, it is not disputed that the Defence was filed on 14th August 2014 beyond the 14 days and without accompanying witness statement and documents as provided by Order 7 Rules 1 and 5 of the Civil Procedure Rules. However, these are defects that can be cured by way of application for the necessary leave for extension of time and filing of the required documents, and the Court is granted discretion to grant such leave under the provisions of the Order 7 Rule1 and 5, and Order 50 Rule 6 of the Civil Procedure Rules,

As regards whether the Defence raises triable issues, it is my opinion that on its face it does so. While the Defendants may have made bare denials to specific pleadings by the Plaintiff made in paragraphs 4, 5 and 6 of her Plaint on termination of the tenancy agreement and the issuance of a notice to vacate, they have raised a triable issue as to payment of rent under the said tenancy agreement which they claim they did,

particularly given that one of the prayers sought in the Plaint is a sum of money alleged to be due and owing from the Defendants. This issue will therefore require further evidence to adduced before this suit can be determined. In addition the avenue of amendment is available to the Defendants to inject more life and particularity to their Defence if necessary.

The upshot of the foregoing is that the prayers in the Plaintiff's Notice of Motion dated 26th August 2014 are denied. The costs of the said Notice of Motion shall be in the cause.

Orders accordingly.

Dated, signed and delivered in open court at Nairobi this 4th day of February, 2015.

P. NYAMWEYA

JUDGE