



REPUBLIC OF KENYA
IN THE ENVIRONMENT AND LAND COURT
AT MALINDI
ELC CIVIL CASE NO. 231 OF 2013

MUNEEF MOHAMED OMAR

AND

FAHAD MANSUR HAJI T/A PENNYWISE SERVICE STATION.....PLAINTIFF

=VERSUS=

1. EMMANUEL CHARO TINGA

2. KENOL KOBIL KENYA LIMITED.....DEFENDANTS

R U L I N G

Introduction:

1. The two Applications before me are dated 3rd June 2014 and 16th June 2014 by the 2nd Defendant and the 1st Defendant respectively.
2. In the first Application, the 2nd Defendant is seeking for an order that the Plaintiffs' suit as against the 2nd Defendant be struck out for failing to disclose a reasonable cause of action against it.
3. In the second Application, the 1st Defendant is seeking for an order striking out the entire suit.

The Applicants' case:

4. According to the grounds on the 2nd Defendant's Application, it is a total stranger to an alleged relationship between the Plaintiff and the 1st Defendant and that the orders being sought in the Plaintiff cannot be granted against the 2nd Defendant and that the totality of the Plaintiff fails to disclose a single act attributed to the 2nd Defendant giving rise to the Plaintiff's right to claim any relief against it.
5. The 1st Defendant's Application on the other hand is premised on the ground that the Plaintiff has no claim against him because the termination of the lease agreement between them was done using the right channel by issuing notices as per the lease; that the Plaintiff acknowledged receipt of the notice and that the Plaintiff voluntarily removed its belongings from the petrol station upon the expiry of the notice.

6. In his Supporting Affidavit, the 1st Defendant deponed that he is the proprietor of plot number 879/2 Watamu; that he developed a petrol station on the said land which he personally ran and managed until 5th September 2008 and that on 5th September 2008, he entered into an operators lease agreement with the Plaintiff to run the same for 10 years.
7. According to the 1st Defendant, the operators lease agreement, terminable by either giving party giving the other party 30 days' written notice of which he did.

The Plaintiffs'/Respondents' case:

8. According to the 1st Plaintiff, the 1st Defendant has never at any one time prior to the illegal termination of the Lease ever complained with regard to irregular payment of rent or non adherence to any of the clauses of the Lease agreement.
9. According to the 1st Plaintiff, the 1st Defendant entered into a Lease Agreement with the 2nd Defendant during the pendency of the Lease and that the reason for the termination of the lease was because the 1st Defendant had leased the same to the 2nd Defendant.
10. It is the 1st Plaintiff's deposition that the inventory was carried out by the 1st Defendant without his knowledge on 11th December 2013 and that it was only pursuant to a court order of 4th March 2014 that the inventory was released to him.

Submissions:

11. In his submissions, the 1st Defendant's advocate submitted that although the Plaintiffs are seeking for an order of injunction, the event that the Plaintiffs are seeking to injunct has already taken place.
12. According to the 1st Defendant's advocate, the Plaintiffs have already moved out of the suit premises. Counsel submitted that the 1st Defendant had the right to terminate the agreement and the Plaintiffs are not entitled to damages for the termination.
13. While replying on the case of **Drummad Jackson Vs British Medical Association (1970) 2 WLR**, counsel submitted that the Plaintiff's do not have a cause of action because they were given notice and they moved out voluntarily.
14. The 2nd Defendant's Advocate submitted that the Plaintiffs' complaint from the Plaintiff is that there has been a breach of contract by the 1st Defendant; that the contract was between the Plaintiff and the 1st Defendant and that a third party can neither sue nor sued on a contract where it is not a party. Counsel relied on the cases of **DT Dobie & Company (K) Ltd Vs Machine (1982) KLR 1, Five Stars Agencies Ltd & 3 others Vs East African Portland Cement Company & 2 Others (2005) eKLR, Agricultural Finance Corporation Vs Lengetia Limited (1985) KLR 765 and Stanley Kirui Vs Westlands Pride Limited (2013) Eklr.**
15. The Plaintiffs'/Respondents counsel on the other hand submitted that the 1st Defendant breached the contract by issuing the notice of termination and that although the 2nd Defendant was not a party to the agreement, it interfered with Plaintiffs' right to quiet enjoyment of the suit premises by taking of the same.
16. The Respondents' counsel relied on the case of **Peter Ndungu Ngae Vs Ann Waithera Ndungu & 2 Others (2014) e KLR** which discussed in detail the tort of conversion.

Analysis and findings:

17. The Defendants are seeking to strike out the Plaintiffs' suit for not disclosing a reasonable cause of action.
18. In the case of **D.T.Dobie & Co. Ltd Vs Muchina & Another (1982) KLR1**, the court held as follows:

“No suit ought to be summarily dismissed unless it appears so helpless that it plainly and obviously discloses no cause of action and is so weak as to be beyond redemption and incurable by amendment.”

19. In the case of **Drummond Jackson Vs BMA (1970) 1 WLR 688** at page 696, Lord Person stated that a cause of action is an act on the part of the Defendant which gives the Plaintiff his cause of complaint.
20. So what is the complaint in this matter.
21. According to the Plaintiff, the Plaintiffs and the 1st Defendant entered into a lease agreement on 15th October 2008. The object of the lease was for the Plaintiffs to carry on business as a service station trading in petroleum products.
22. The Plaintiffs averred that on 4th December 2013, without any justification, the Defendant forcefully ejected them from the suit premises.
23. Due to the said ejection, the Plaintiffs have averred that they are entitled to general damages for breach of Lease and loss of goodwill and for a declaration that the termination notice is illegal.
24. The Plaintiffs are also praying for an order of permanent injunction restraining the Defendants from interfering with the running of the petrol station until the expiry of the Lease.
25. The order for a permanent injunction cannot issue because the Plaintiffs have admitted that they were ejected from the suit premises on 4th December 2013.
26. According to clause 2 of the Lease Agreement dated 15th September 2008, the leasing of the 1st Defendant's land was to commence on 5th September 2008 for a term of ten years and was to continue in force until terminated by either party giving to the other a written notice of 30 days "at any time".
27. Clause 13 of the Lease Agreement provides for circumstances under which the 1st Defendant was to terminate the lease agreement without giving the 30 days notice.
28. The Plaintiffs have not denied that on 1st November 2013, they were served with a notice of termination of the lease agreement by the 1st Defendant's advocate.
29. The reasons that the 1st Defendant gave for terminating the lease was because the assets that form the subject matter of the agreement no longer vested in him.
30. On 15th November 2013, the Plaintiffs' advocate responded to the notice of termination as follows:

"That your alleged Termination Notice is illegal and does not fall within the ambit of clause 17(c) of the Lease Agreement."

31. I have perused the provisions of clause 17(c) of the agreement. That clause is not relevant to the issues at hand. The clause simply gives the 1st Defendant the right to alter or amend the terms of the agreement by giving the Plaintiffs a notice of 30 days and if the Plaintiffs are not agreeable with the proposed amendments, they were supposed to give up the petrol station within 30 days. Clause 2 of the Agreement is clear that either party could terminate the Lease Agreement by giving a written notice of 30 days. Such notice could be given at any time and without reasons.
32. Having signed the agreement, the Plaintiffs cannot claim that the notice that was issued was unlawful when the agreement is clear that either party could terminate the Lease Agreement at any time. The only requirement was the giving of a 30 day's notice.
33. It is trite law that courts cannot re-write contracts for parties, neither can they imply terms that were not part of the contract. In the case of **Rufale Vs Umon Manufacturing Co. (Ramsboltom) (1918) L.R 1KB 592, Scrutton L.J.** held as follows:

"The first thing is to see what the parties have expressed in the contract and then an implied term is not to be added because the court thinks it would have been reasonable to have inserted it in the contract."

34. In the case of **Attorney General of Belize et al Vs Belize Telecom Ltd & Another (2009), 1WLR 1980 at page 1993, citing Lord Person in Trollope Colls Ltd Vs North West Metropolitan Regional Hospital Board (1973) 1 WLR 601 at 609**, held as follows:

"The court does not make a contract for the parties. The court will not even improve the contract which the parties have made for themselves. If the

express terms are perfectly clear and from ambiguity, there is no choice to be made between different meanings. The clear terms must be applied even if the court thinks some other terms could have been more suitable.”

35. In view of the clear provisions of clause 2 of the Lease Agreement, the Plaintiffs cannot claim that the notice that was issued to them was unlawful considering that the 1st Defendant was not under any obligation to give reasons for the termination of the Agreement.
36. Consequently, the issue of damages for breach of contract or for unlawful termination of the contract cannot arise.
37. The Plaintiffs have not complained that they lost any of their properties to the Defendants. Indeed, the Plaintiffs have not sued for the tort of conversion as against the Defendants.
38. In the circumstances, I find and hold that the Plaintiffs' suit does not disclose a cause of action as against the Defendants.
39. For those reasons, I allow the Defendants' Applications dated 3rd June, 2014 and 16th June 2014 and strike out the suit with costs.

Dated and delivered in Malindi this 15th day of May, 2015.

O. A. Angote

Judge