



REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA

AT MOMBASA

ELC CIVIL SUIT NO. 206 OF 2014

MISTRY JADVA PARBAT & CO. (EPZ) LIMITEDPLAINTIFF/APPLICANT

VERSUS

**MEGA GARMENTS INDUSTRIES KENYA (EPZ)
LIMITED....DEFENDANT/RESPONDENT**

RULING

1. The plaintiff has moved the Court under order 36 rule 1(1) (b) and order 51 rule 1 of the Civil Procedure Rules and Section 13(7) and 19(2) of the Environment and Land Court Act 2011 asking the Court to enter summary Judgment against the defendant/respondent for vacant possession of all that land known as land reference number MN/V/655. He also prayed for costs of the application.
2. The application is based on the grounds on the face of it inter-alia that the defendant has no title to all that land reference No. MN/V/655 and is therefore trespassing thereon and has no reasonable or just defence to the claim. It is also supported by the affidavit of Paresh Varsani. In the affidavit it is deposed that the defendant is a periodic tenant whose lease determined and has been served by notice to terminate the tenancy. The defendant unsuccessfully challenged this notice to terminate his tenancy hence his remaining in possession of the premises amounts to trespass.
3. The application is opposed by the defendant who filed a replying affidavit sworn by its director Aditya A. Awtani. The respondent deposes that he is relying on the provisions of clause 5 and 13(f) of the lease as when it took possession on 1st July, 2002, they had reasonable expectation to get an automatic extension for at least 3 terms of 5 years and 6 months each. The respondent admits being served with the notice on 28th January, 2011 to vacate the premises on 1st April, 2011 on the basis of irregularity of payment of rent which averment the defendant denied. The respondent has referred the Court to the excerpts of the notice in its replying affidavit which revealed that there was no other written agreement drawn between the parties.
4. In regard to the alleged rent of Ksh. 1.8 million claimed by the applicant, the respondent deposes that they have been in possession since 2002 and clause 9 allowed her to make structural alterations to the suit property on consent of the plaintiff. The items quoted in the valuation report include structures put up by the defendant at its cost. The respondent also doubts the authenticity of the report as being in occupation, it was not consulted for inspection of the premises by the valuer and that the valuation was an after-thought. The defendant denies being in rent arrears or breaching the tenancy. The defendant deposes further that due to the nature of its business, it required a long term lease and further it has invested millions of shillings on infrastructure and

machinery and there are hundreds of employees who depend on the defendant for their livelihoods. It urged this court to disallow the application and order the suit to proceed to full hearing for the issues involved to be determined on merits.

5. In the case of *ICDC Vs Daber Enterprises Ltd. (2000) /EA 75*, the Court of Appeal stated that the purpose of summary judgment is to enable a plaintiff to obtain quick judgment where there is plainly no defence to the claim. The Court of Appeal went further to hold in the case of *Kenya Trade Combine Ltd. Vs Shah C.A. No. 193 of 1999* that;

“all a defendant has to show is that a defence on record raises triable issues which ought to go to full trial. The Court went further to say, we should hasten to add that in this respect a defence which raises triable issues does not mean a defence that must succeed”.

6. This application is premised under Order 36 rule 1(1) (b) which provides;

In all suits where a plaintiff seeks judgement for (b) “The recovery of land with or without a claim for rent or mesne profits by a landlord from a tenant whose term has expired or been determined by notice to quite ...

Where the defendant has appeared but not filed a defence the plaintiff may apply for Judgment or recovery of the land and rent for mesue profits”.

This motion was filed before a defence was filed. In the claim contained in the plaint, the applicant has made 5 prayers inter alia;

(b) Vacant possession and

(c) Mesne Profits at Ksh. 21,600, 000/= per annum with effect from 1st April, 2011 until vacant.

Under paragraph 18 of the plaint, the applicant has highlighted how the figure of the mesne profits is arrived at by virtue of pleading that the prevailing market rent for the premises is Ksh. 1,800,000 per month, which the applicant would have earned had the respondent moved out at end of the notice period.

7. In the submissions filed by Counsel for the applicant, the applicant has stated that they are seeking for summary Judgment in terms of prayer (b) only which seeks for vacant possession. He has submitted in detail why it should be granted. In page 3 of the said submission it reads;

“We submit that this is a case of recovery of land with a claim for rent or mesne profits, by a landlord from a tenant whose term has been determined by quit notice”.

In terms of the claim for vacant possession, it is open from the documents presented that since the lease was not renewed, the defendant became a periodic tenant. The question is whether the applicant merits the orders sought.

8. In the case of *Katsuri Limited Vs Nyeri Wholesalers Limited (2014) eKLR* cited by the applicant, the Court of Appeal quoting *E.H. Lewis and Son Vs Morelli (1948) 2ALL ER 1021* where the Court found that a tenant who has been put in possession cannot challenge the title of the landlord. In the case of *Kasturi Supra*, the court of Appeal held,

“that that a tenant has no triable issue in the counter-claim for vacant possession. It is the duty of the courts to ensure that no individual is prevented from taking possession or enjoying their property. A tenant cannot impose or force himself on a landlord”.

In this instant, the defendant submits that the provisions governing their operations are the EPZ

Act, Cap 517 of the Laws of Kenya. Further that the agreement of lease gave the respondent an option to renew the lease. The defendant submits that, **“there was a meeting of minds between the defendant and the plaintiff that the defendant required a long term lease”** in recognition of the provisions of section 21 (a) – (c) of the EPZ Act . Were the submissions of the defendant on long term lease as is envisaged in the EPZ Act to be true then the defendant had no business signing a lease of Five (5) years. This Court can only rely on a document placed before it and not attempt to interpret what was in the minds of the parties. The provisions of EPZ as regards the period of the lease would apply if it was specified by the parties in which case the applicant would be in breach for early termination. In essence I am satisfied the prayer for vacant possession is merited.

9. On the remaining part of the suit, the defendant contests the rent being claimed is based on the valuation report made by the applicant and which report included improvements made by the respondent. According to the lease agreement which put the respondent into possession of the suit premises and which is annexed as MJ-2 in the supporting affidavit, the monthly rent was provided at Ksh. 6.75 per square foot x 75 000 square feet that was leased translating to Kshs. 506,250/= per month. The rent due per month then becomes in dispute as the amount being claimed by the applicant had not been applied before the filing of this suit which in my view is a triable issue. The defendant shall not be condemned to pay the new rent as mesne profits without giving it an opportunity to present its case whether it is being charged on account of the constructions put up by the respondent. Further clause 13(f) referred to by the defendant made provisions in the manner in which the rent was to be increased if the lease was to be renewed i.e. at 10% which is not anywhere close to what the applicant has claimed. The prayer for mesne profits and costs shall proceed to full trial.
10. In conclusion, the application is allowed with costs. However since the respondent has deposed to heavy machinery fixed in the premises with permission from the plaintiff, this court allows him 60 days to voluntarily surrender the premises to the applicant. In default, the applicant is at liberty to execute.

Ruling dated, delivered and signed at Mombasa this 30th day of July, 2015.

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A. OMOLLO

JUDGE

In the presence of:-

Learned Counsel for the Plaintiff

Learned Counsel for the Defendant

Court Assistant Jescah