



REPUBLIC OF KENYA
IN THE HIGH COURT OF KENYA AT NAIROBI
ENVIRONMENTAL AND LAND DIVISION
ELC CIVIL SUIT NO. 1222 OF 2013

KANGATTA PROPERTIES CO. LTD..... PLAINTIFF

VERSUS

CHARITY NJERI T/A WINACOM..... 1ST DEFENDANT

CROSSLINE SUPPLIES

JAMES MWANGI KAGURE T/A TRADING LTD2ND DEFENDANT

MOLOLINE NISSAN SACCO 3RD DEFENDANT

ABRAHAM ITABARI KARUTI T/A..... 4TH DEFENDANT

SUNCITY ELECTIRCALS & SALES

JOSEPH GITUTHU GITARA T/A GENTOL ELECTRICAL 5TH DEFENDANT

RULING

The Plaintiff by a Notice of Motion application filed simultaneously with the plaint herein on 27/3/2013 seeks interalia:-

1. That a mandatory order do issue compelling the Defendants/Respondents herein either by themselves, their agents, and/or servants to surrender and give vacant possession to the Plaintiff/Respondent the premises that each defendant/Respondent is occupying on **L.R. NO. 209/2275 (JKPLAZA)** forthwith.
2. That in default of the voluntary surrender the plaintiff/Applicant be at liberty to evict the defendants from the suit premises, **L.R. NO. 209/227 (J.K. PLAZA)** at the defendants expenses.

The Plaintiff's application is premised on the grounds set out on the body of the application and the supporting affidavit by **George Kihara Kangata**. The principle grounds include-

- a. **The defendant/respondents have been tenants on the suit premises pursuant to letter of offer given to them by the Plaintiff/Applicant for a term of five (5) years and one (1) month in February 2007.**
- b. **The tenancy period lapsed on 28th February 2013 and inspite of the fact that the defendants/respondents knew and had been notified that their leases would not be renewed**

- they have failed refused and/or neglected to give vacant possession of the suit premises.**
- c. **That the defendants/respondents no longer have the legitimacy to continue holding the suit premises after 28th February 2013 when the lease terms lapsed and are therefore trespassers and the interest of justice dictates that the orders sought be granted.**

The Defendants upon being served with the application filed through their Advocates **M/S Muriu, Mungai & Co. Advocates** a preliminary objection dated 3/4/2013 to have the plaintiff's application and the entire suit struck out on the following grounds:-

- i. **This Honourable court lacks jurisdiction to entertain the application and the entire suit.**
- ii. **The plaint and by extension the notice of motion application, are an abuse of the principle of independence statutory bodies.**
- iii. **That the plaintiff does not have locus standi to seek for any reliefs against the Defendants over the suit property.**

The parties at the court's directions filed written submissions to canvass the preliminary objection. The Defendants objectors filed their submissions on 28/1/2014 and the plaintiff filed their responding submissions on 25/2/2014. On the part of the defendants it was submitted that this court lacked the jurisdiction to deal with the matter as the relationship between the plaintiff and the Defendants was that of a controlled tenancy within the meaning of the landlord and Tenant (shops, Hotels and catering Establishments) Act Cap 301 of the Laws of Kenya. It was submitted on behalf of the Defendants that the relationship being that of a controlled tenancy under Cap 301 aforesated the provisions of the said Act ought to apply and the matter fell to be determined by the **Business Premises Rent Tribunal (BPRT)** set up under the provisions of the Landlord and Tenant Act. The Defendants submitted that they had on 25th February 2013 filed a reference to the Tribunal as provided under section 6 of the Act for consideration and thus argued it was inappropriate for the plaintiff to file the instant suit and contended the correct forum for the resolution of the matter ought to have been before the Tribunal.

The Defendants submitted that the letter of 28th February 2007 that offered the Defendants lease of 5 years and 1 month was intended to be a contract for the disposition of an interest in land and therefore ought to have complied with the provisions of section 3(3) of the Law of Contract Act Cap 23 Laws of Kenya that requires such contracts to be in writing and executed by all the parties to the contract and their signatures to be attested. As there was no compliance, it is argued by the Defendants that the Plaintiff cannot seek to enforce a contract which was not in accordance with the law. The Defendant argues that as the letter of 28th February 2007 did not meet the threshold as under section 3 (3) of the Law of Contract Act no lease for a term of 5 years and 1 month was created but rather a controlled tenancy came into being and consequently the provisions of the Landlord and Tenant Act, Cap 301 became applicable. The Defendants have referred the court to several authorities to buttress their submissions.

On the issue of jurisdiction the Defendants have referred the court to the case of the **owners of Motor Vessel "Lilian S"-vs- Caltex Oil (K) Ltd C.A. NO. 50 of 1989 Mombasa (1989 KLR)** to support the proposition that whenever the question of jurisdiction is taken, the court must of necessity consider and determine as a preliminary issue whether it has jurisdiction to hear and determine the matter before it. Jurisdiction is everything and I agree with the decision in **owners of Motor Vessel "Lilian S" –vs- Caltex Oil (K) Ltd case (Supra)** that it is incumbent upon the court before whom the issue of jurisdiction is raised to determine the issue forthwith as it would be pointless to proceed with the proceedings if the court lacks jurisdiction as the same would be rendered a nullity once it is determined the court lacked jurisdiction. It is on this account that the court directed that the preliminary objection be determined first as the Defendants had raised the issue of jurisdiction as a preliminary issue.

The Defendants further submitted that as there was no contract of lease in terms of section 3 (3) of the Law of contract Act the court lacked the jurisdiction to entertain the matter. The Defendants in this regard placed reliance in the case of **Silverbird Kenya Limited – vs- Junction Limited and 3 others (2013) e KLR** where the court held that a letter of offer of assignment of lease that the plaintiff sought to rely on to enforce the terms of the assignment of lease, being unwritten and unsigned did not satisfy the mandatory requirements of section 3 (3) of the Law of Contract Act and thus there was no basis for the

foundation of the plaintiff's action against the Defendant's.

The Defendants in the present suit have further submitted that the relationship between the parties being that of landlord and Tenant the provisions of cap 301 Laws of Kenya ought to apply and thus the matter should have been referred to the Tribunal established under the Act. In this regard it was submitted by the Defendants that where a procedure for redress is established by statute that procedure should be strictly followed and failure to do so would constitute abuse of the court process. The Defendants referred the court to the court decisions in the cases of **Narok County Council –vs- Transmara County Council & Ano. (2000) e KLR, Speaker National Assembly –vs- Karume Nairobi Civil Appeal NO. 94 of 2005 and Kimani Wanyoike –vs- Electoral Commission & Ano. (1995) e KLR.**

Finally the Defendants submitted that as per the material and evidence availed one **Joseph Kangata Githuku** and not the plaintiff is the registered owner of **L.R. NO. 209/2275** commonly known as **J.K. Plaza** and thus not being the legal owner of the suit property, the plaintiff cannot be granted the reliefs sought as the plaintiff lacked locus standi.

The Plaintiff in the response submissions filed on 25/2/2014 conceded that the tenancy agreement that they rely on was established by the letters dated 28th February 2007 which established a tenancy for a period of 5 years and 1 month over the suit premises. The plaintiff submits that the defendants acknowledge vide letters annexed as **“GK 3(a-f)”** there was a lease running for that 5 years and 1 month from 1st March 2007. The plaintiff contends the LandLord and Tenant Act Cap 301 Laws of Kenya has no application to the instant matter since the tenancy was for a period of more than 5 years and refers the court to the definition of a controlled tenancy under the Act section 2 where it is defined as:-

“A tenancy of a shop hotel or catering establishment-

- a. **Which has not been reduced into writing OR.**
- b. **Which has been reduced into writing and which is for a period not exceeding five (5) years.**

It is in the context of the above that the plaintiff argues the tenancy was in writing and was for a period of more than 5 years and thus outside the ambit of a controlled tenancy under the Act. The plaintiff further submits that the law does not prescribe the format that the writing ought to take but argues that the law creates a non-controlled tenancy where the parties enter into an agreement in a written format of whatever nature for a period exceeding 5 years and further argues parties can create a tenancy relationship without necessarily having to execute a conventional “lease” document as in the present case.

The plaintiff referred the court to the case of **Bachelor's Bakery Ltd –vs- Westlands securities Ltd (Civil Appeal NO. 2 of 1978) (1982) eKLR** where the court considered what constitutes a controlled tenancy and stated as follows:-

“The Landlord and Tenant (shops, Hotels and catering Establishment) Act (Cap 301) is a special Act designed for the protection of tenants who have entered into a lease agreement not exceeding five years that has not been reduced in writing. The Act overrides any other written Law which is in conflict with its provisions. The agreement, having been reduced in writing and being for a period exceeding five years did not fall within the jurisdiction of the Act” to support its submission that as the tenancy agreement in the present case was for a period greater than 5 years the matter was outside the scope of the Landlord Tenant Act, Cap 301 Laws of Kenya.

On the submission that the Plaintiff had no locus standi to bring this suit the plaintiff submitted that the plaintiff is the registered owner of the suit premises the property having been transferred to the plaintiff vide a transfer registered on 28th October 2002. The plaintiff therefore has the locus standi to bring the instant suit against the defendants.

I have briefly outlined the rival submissions by the Defendants in support of their preliminary objection and the plaintiff's submissions in opposition thereto and the issues for determination are:

1. **Whether the agreement between the parties of tenancy/lease resulting from the plaintiff's letter of offer of 28th February 2007 required to be in writing pursuant to the provisions of section 3 (3) of the Law of Contract Act Cap 23 Laws of Kenya and if so whether the requirements as under the said Act were satisfied.**
2. **Whether the defendants are controlled tenants within the meaning of the Landlord and Tenant (shops, Hotels and catering Establishments)Act Cap 301 Laws of Kenya or not.**
3. **Whether this Honourable court has jurisdiction to hear and determine this matter and**
4. **Whether the plaintiff has the locus standi to institute this suit against the defendants.**

Both the plaintiff and the defendants agree that the plaintiff's letter to the defendants of 28th February 2007 offering the defendants a further term of 5 years 1 month from 1st March 2007 constituted the agreement between the parties. The issue is whether this constituted an agreement that could be enforced between the parties. What were the terms of this agreement? The letter of 28.2.2007 is worded thus-

Re: Lease Renewal on plot NO. 209/2275.

“Following various discussions and consultative meeting regarding the above matter, we offer you another term of 5 years and 1 month from March 2007 to 2011 with rent payable as follows:-

(i).....

(ii).....

(iii).....

NB other terms and condition remain the same”.

Signed

B.E.G. Kangatta

for Kangatta Properties.

It is contended by the Defendants that this purported agreement did not satisfy the conditions of section 3(3) of the Law of Contract Act requiring that the agreement be in writing and be signed by both parties to the agreement and the signatures be attested.

Section 3(3) of the Act provides:-

“No suit shall be brought upon a contract for the disposition of an interest in land unless:-

- a. **The contract which the suit is founded-**
 - i. **Is in writing,**
 - ii. **Is signed by all the parties thereto, and**
- b. **The signature of each party signing has been attested by a witness who is present when the contract was signed by such party” .**

The agreement referred to in the letter of 28th February 2007 is headlined **lease renewal** and the significance of this is that it denotes the transaction definitely related to a disposition of an interest in land being a lease for a term of 5 years and 1 month. Quite clearly in my view this was an agreement/contract that would require to have complied with section 3(3) of the Law of Contract Act if the Plaintiff were to be able to found an action on it. The effect of the Plaintiff's present suit is to require the court to enforce this contract. The court in that respect is obliged to look at the contract and if the court finds that the

contract is not in conformity with the law the court will decline to enforce the same.

Looking at the plaintiffs letter of 28th February, 2007 it is abundantly clear that the same cannot pass the test under section 3(3) of the Law of Contract Act and that alone would oust this court's jurisdiction to deal with the matter. The defendants did not endorse their acceptance of the offer terms on the said letter and nor was there any attestation of any of the parties signature as required. The letter makes reference to other terms and conditions to remain the same. **What were these condition?** The plaintiff in the affidavit in support of the application states there was no condition for renewal after the term of 5 years and 1 month. **Was this an express or implied term?.**

The essence of having the contract/agreement signed by all parties to the contract and their signatures attested in matters of a disposition of an interest in land is such that all terms are spelt out and the contract provides the reference point in case of any disputes. In the instant matter the parties did not sign any contract. The plaintiff referred the court to the **Bachelor's Bakery Ltd case (Supra)** but with respect this decision was made in 1982 long before the Law of Contract Act section 3 was amended to insert the current section 3(3) of the Act which took effect from June 2002 and thus the decision would be inapplicable today following the amendment of the Law of Contract Act Cap 23 Laws of Kenya.

In the case of **Silverbird Kenya Ltd (Supra)** cited by the Defendants, I had occasion to consider what was somewhat a similar situation where the Landlord had offered the plaintiff an assignment of the lease held by another tenant but no formal assignment of lease was executed by the parties with the result that there was no compliance with section 3(3) of the Law of Contract Act. While striking out the plaintiff's suit I rendered myself as follows:-

“In the present case the Plaintiff's claim is based on the letter of 19th August 2009 that offered the plaintiff an assignment of the lease previously held by the former tenant. The Assignment of the lease never materialized such that at the commencement of the suit the plaintiff did not have a contract that satisfied the mandatory provisions of section 3(3) of the Law of Contract Act. In my view it matters not that the plaintiff had been let into possession of the premises if the Contract pursuant to which the plaintiff was granted possession was not validated in accordance with the law. The letter of 19th August 2009 in my view does not satisfy the requirement of section 3(3) of the Law of Contract Act to be the foundation of the Plaintiff's claim against the Defendants. Section 3(3) of the Law of Contract Act is indeed couched in mandatory terms and does infact divest the court of jurisdiction in instances where there is no compliance as in the instant case. In the circumstances and by reason of the Law of Contract Act, the plaintiff's suit must fail for being in contravention of section 3 (3) of the Law of Contract Act, Cap 23 Laws of Kenya”.

My said sentiments in that case would apply in the present case where the plaintiff seeks enforcement of a contract that clearly is in breach of the law. I would in the premises and in answer to the first issue hold that the agreement of tenancy between the parties ought to have complied with section 3(3) of the Law of Contract Act and there was no such compliance.

As regard issue NO.(2) having held that the agreement between the parties did not comply with section 3(3) of the Law of contract Act it follows that contract is unenforceable and in the premises the defendants would in my view be controlled tenants to whom the provisions of Cap 301 of the Laws of Kenya would be applicable. The plaintiff would therefore be obligated to deal with the defendants as controlled tenants in compliance with the Landlord and Tenant Act Cap 301 Laws of Kenya.

As regards issue NO.(3) this court would have no jurisdiction to hear and determine the matter and having held the defendants are controlled tenants it is the Tribunal established under Cap 301 which would have the jurisdiction to deal with the matter. The suit before this court is founded on an agreement between the parties that the law requires to be in writing and signed by both parties to the agreement and the signatures witnessed and/or attested. This was not done and section 3(3) of the Law of Contract Act expressly states no suit shall be founded on such a contract. To the extent that the plaintiff sought to base/found its case on such a contract this court cannot entertain it as the law expressly bars it to do so. The court simply has no jurisdiction to deal with the matter where it holds that the contract on which the

suit is founded is in breach of the law.

As regards issue NO.(4) on whether or not the plaintiff has Locus Standi the court finds that the plaintiff is the registered owner of the suit property and further notes that the letter of 28th February 2007 was written and signed for and on behalf of the plaintiff. Being the registered owner of the suit property the plaintiff had the Locus Standi to bring the instant suit against the defendants who are tenants in its property.

I have considered the pleadings and the Notice of Motion by the Plaintiff together with all the affidavits in support and opposition and I have carefully considered the preliminary objection taken by the defendants and the submissions made on behalf of the parties together with the authorities cited and I am satisfied the preliminary objection has merit. The preliminary objection principally was on a point of law whether or not the agreement relied upon by the plaintiff was in compliance with section 3(3) Law of the Contract Act Cap 23 and whether the same was applicable to the agreement and secondly whether this court has jurisdiction to hear and determine the suit. I have ruled both points in favour of the Defendants.

I accordingly uphold the preliminary objection by the Defendants and hereby order that the plaintiff's Notice of Motion dated 27th March 2013 be struck out. The suit by the plaintiff is equally ordered struck out.

The costs of the application and the struck out suit are awarded to the defendants.

Orders accordingly.

Ruling dated, signed and delivered at Nairobi this...30th ...day of...June...2014.

J.M. MUTUNGI

JUDGE

In presence of:

..... For the Plaintiff

..... For the Defendants