



IN THE ENVIRONMENTAL AND LAND COURT AT NAIROBI

ELC CIVIL SUIT NO. 216 OF 2014

PREMIER BAG & CORDAGE LIMITEDPLAINTIFF

VERSUS

PAUL GICOBI MARUIDEFENDANT

RULING

The Plaintiffs' Application

The Plaintiff has filed an application dated 18th March 2014 by way of a Notice of Motion, seeking the following orders:-

1. That summary judgment be entered in favour of the Plaintiff against the Defendant for delivery up of vacant possession of all that premises situate in Land Reference Number 255/3, and comprising of a retail shop, a hotel, a butchery and a petrol pump (commonly referred to as "Premier Bag Shopping Complex")
2. That summary judgment be entered in favour of the Plaintiff against the Defendant in the sum of Kshs 3,493,462.34/- being an amount owed to the Plaintiff by the Defendant as at 1st February 2014 with interest thereon at court rates.
3. That summary judgment be entered in favour of the Plaintiff against the Defendant in such sum of money calculated at the rate of Kshs 94,317.28 per month from the 1st day of March 2014 being mesne profits for the suit premises occupied by the Defendant as a trespasser.

The grounds for the application are listed on the face of the application, and are detailed in a supporting affidavit and supplementary affidavit sworn by Ibrahim Abdalla on 18th March 2014 and on 28th July 2014 respectively. The Plaintiff has stated that it is the registered owner of all that parcel of land known as Land Reference Number 255/3 situate along Thika Road together with improvements comprising of a retail shop, a hotel, a butchery and a petrol pump (hereinafter referred to as "the suit property"), which was leased out to the Defendant in January 2003. The Plaintiff has annexed as evidence a title deed to the suit issued in its name and has also exhibited a lease entered into with the Defendant dated 22nd January 2003.

According to the Plaintiff, the lease was for a period of 10 years from 1st January 2003 to 31st January 2013 at an initial monthly rent of Kshs 40,000/-, which was subject to a 10% annual escalation. It is the Plaintiff's case that the Defendant only paid the reserved rent at the initial stages, then defaulted on his payment obligation prompting the Plaintiff to issue several demand letters. The Plaintiff has annexed copies of demand letters dated 10th January 2008, 16th November 2011, 27th March 2011 and 22nd January 2014, and averred that the Defendant has ignored the demand in respect to rent arrears and mesne profits. The Plaintiff contended that the Defendant is currently an illegal trespasser in the suit premises

with no defence to its claim against him.

The Plaintiff further stated that after the letter of offer and the lease were forwarded to the Defendant, he only returned to the Plaintiff's advocate the letter of offer and retained the lease. It is the Plaintiff's averment that the law does not allow the Defendant to deny the existence of a tenancy agreement between him and the Plaintiff on grounds that no formal lease exists between them, having refused to return the lease to the Plaintiff's advocates. Further, the Plaintiff stated that the Defendant could not deny the lease as prior to defaulting in his obligations, the Defendant paid rent and annual escalations in accordance with the terms of the lease.

While stating that a statement of account for the period between 1st January 2011 and 1st February 2014 is comprehensive as to the amount of rent and mesne profits arrears due as at 1st February 2014, the Plaintiff has contended that the Defendant's averments to the contrary constitute bare denials. Lastly, the Plaintiff averred that the issues framed in the replying affidavit do not constitute triable issues considering its claim.

The Defendants' Response

The application is opposed by the Defendant who filed grounds of objection dated 3rd July 2013, wherein he contended that there was no written lease between the parties, and that their relationship is governed by the Landlord and Tenant (Shops, Hotels and Catering Establishments) Act . It was also contended that the Plaintiff had not given a valid notice to terminate the tenancy and further, that the dispute herein should have been lodged at the Business Premises Tribunal. Further, that the Plaintiff had purported to rely on 'without prejudice' correspondence between parties.

The Defendant also filed a replying affidavit sworn on 18th July 2014 where he stated that the deponent of the Plaintiff's supporting affidavit had not shown that he was an agent of the Plaintiff and further, that there was no proof of a resolution executed by the Plaintiff's directors. While admitting that he was a tenant of the Plaintiff since 2003, the Defendant averred that there was no formal lease agreement between the parties who only executed a letter of offer which was on a without prejudice basis.

The Defendant has stated that he had been religiously paying rent to the Plaintiff, but that in the last three years, he had serious financial challenges which made him to be occasionally in arrears of payment. It is contended by the Defendant that the statement presented by the Plaintiff was erroneous as it contains electricity and water bills which he had been settling separately, in addition to VAT levied on unspecified sales. It is the Defendant's case that this is not a good case for summary judgment as it raises triable issues which cannot be resolved by way of an affidavit and therefore, that he should be given a chance to defend the suit.

The Submissions

Parties were directed to file written submissions, and the Plaintiff in submissions dated 28th July 2014 reiterated the facts of the case as pleaded and argued that the requirements of Order 36 Rule 1(1)(a) and (b) of the Civil Procedure Rules have been met. It was submitted that the claim for rent arrears and mesne profits was liquidated and that the amount was being demanded with interest at court rates. Further, Counsel for the Plaintiff submitted that the Defendant's tenancy expired on 31st January 2013, and that he had refused to surrender possession of the property.

Counsel submitted that the Defendant's contention that there was no formal lease, and that the relationship between the parties was in essence a controlled tenancy over which the court had no jurisdiction was untenable. It was argued the definition of a controlled tenancy under section 2(1) of the Landlord and Tenant (Shops, Hotels and Catering Establishments) Act had no mention of a lease and only referred to the length of a tenancy and conditions for termination within 5 years of the tenancy other than for breach of covenant.

Counsel averred that in this case, the letter of offer provided for a lease of a period of 10 years, and did not contain a provision for termination within 5 years of the tenancy other than for breach of covenant. It was argued that since the tenancy expired for effluxion of time on 31st January 2013, the relationship of the parties came to an end upon expiry of the tenancy.

While submitting that the Defendant's contention that he was not served with a valid notice to terminate the tenancy had no legal basis, the Plaintiff argued that his claim fell under Order 36 Rule 1(1)(b) of the Civil Procedure Rules as the tenant's term has expired and there was no requirement for notice since there was no relationship between the parties. Counsel referred the court to the case of **Prop Invest Ltd v Ad Screen Print Ltd, Nairobi ELC No. 272 of 2012** where the court found that no formal notice to leave the premises was required upon expiry of a lease by effluxion of time.

In respect to the contention that the Plaintiff had placed reliance on a letter written on a "without prejudice" basis, Counsel submitted that although the letter dated 22nd January 2003 was marked 'without prejudice', the privilege was lifted once the offer was accepted and acted upon by the tenant. For this submission, the Plaintiff relied on the case of **Tomlim v Standard Telephones and Cables Ltd, (1969)3 All ER 204** where the court held that if terms proposed on a "without prejudice" letter are accepted, a complete contract is established and the letter although written without prejudice operates to alter the old state of things to establish a new one.

In further submission, Counsel averred that the challenge to Mr. Ibrahim Abdallah's capacity to swear affidavits in this case lacked legal basis, since a board of director's resolution under seal where Mr. Abdallah had attended the meeting by invitation in his capacity as the Plaintiff's estate manager had been filed with the Plaintiff. Counsel referred the court to Order 4 Rule 1(4) of the Civil Procedure Rules which requires that where the Plaintiff is a corporation, the verifying affidavit be sworn by an officer of the company duly authorized under the seal of the company to do so. It was also submitted that there was no legal requirement under Order 4 Rule 1 of the Civil Procedure Rules to show that the person who signed the resolution were directors of the Plaintiff.

The Plaintiff further submitted that the Defendant contradicted himself by averring that he paid rent religiously and at the same time admitting that he had serious financial challenges. Counsel for the Plaintiff stated that the Defendant had not provided proof of payments made which were not captured in the statement of account. Further, it was argued that the Defendant had failed to prove that he had paid water and electricity separately thereby leaving the Plaintiff's claim uncontroverted.

It was further submitted that under order 36 Rule 1(1) and (b) of the Civil Procedure Rules, the court has discretion to grant the orders sought in the application. Counsel contended that the grounds of opposition and replying affidavit filed by the Defendant had failed to respond to the Plaintiff's claim for vacant possession, rent arrears and mesne profits. Reliance was placed on the case of **Fairacres Development Ltd v Margaret Apondi Olotch t/a M. A Kiosk, Nairobi HCCC No. 124 of 200** and **Melas v New Carlton Ltd, (1977) KLR 47** where applications for summary judgment were allowed as well as the case of **Dima Ltd v Apollo Insurance Co. Ltd, HCCA No. 18 of 2000**.

Lastly, the Plaintiff submitted that the rent arrears continue to build up since the Defendant continues to occupy the suit premises as an illegal trespasser, and the court was referred to the case of **Kenya Hotel Properties Ltd v Willesden Investments Ltd, (2009) eKLR** where the court stated that trespass was the basis on which mesne profits were awarded.

The Defendant filed submissions dated 8th September 2014, wherein he argued that the tenancy between the parties had never been reduced into writing. The Defendant's Counsel contended that the letter of offer dated 22nd July 2003 which amounted to a disposition under section 3(3) of the Law of Contract Act, was not properly executed in accordance with the said section. It was argued that the letter of offer was not attested by any witness and did not meet the mandatory provisions of the law of contract and therefore, that no suit could be founded upon it. It was also contended that the letter of offer did not have a corporate seal and does not bind the Corporation, and the court was referred to the case of **Queens Pharmaceutical Ltd v Ruppharms Ltd, (2002)1 KLR 372** where the court held that a document meant

to bind a limited liability company must have the company's seal or its stamp.

Further, the Defendant submitted that the Plaintiff had not shown that Ibrahim Abdallah had capacity to represent and bind the company at the time of making the offer letter since no document, appointment letter or pay slip had been tendered to prove the same.

It was submitted that the relationship between the Plaintiff and the Defendant is that of a controlled tenancy within the meaning of the Landlord and Tenants (Shops, Hotels and Catering Establishments) Act. The Defendant submitted that the provisions of the said Act apply to this matter which ought to be determined by the Business Premises Rent Tribunal set under the provisions of the said Act. Counsel argued that since no proper lease agreement was signed, a controlled tenancy came into being and the provisions of the Landlord and Tenants (Shops, Hotels and Catering Establishments) Act became applicable.

In further submission, Counsel stated that a formal notice to the Defendant to quit the premises was not issued in contravention of section 4(6) of the Landlord and Tenants (Shops, Hotels and Catering Establishments) Act. While arguing that the letter of offer made on 'without prejudice' basis is inadmissible pursuant to section 23 of the Evidence Act, Counsel submitted that no binding agreement was ever reached and therefore, that the exception to the admissibility of without prejudice communication did not apply. Reliance was placed on the case of **Ronnie Rogers Malumbe v Erasto Muga, Nairobi HCCA No. 660 of 2002.**

It was also submitted that the Plaintiff's application was not merited as it sought delivery of possession, whereas Order 36 of the Civil Procedure Rules allows for recovery of land and not possession. Counsel contended that mesne profits cannot be granted by way of summary judgment since evidence needs to be adduced in prove of the same and the court was referred to the case of **Bundai Coffee Hulling Factory Ltd v Eria M. Babumba, (1963) EA 613.** The Defendant sought to distinguish the case of **Prop Invest Ltd v Ad Screen Print Ltd, Nairobi ELC No. 272 of 2012** cited by the Plaintiff by submitting that the court was in that case was dealing with a tenancy where there was a formal lease, unlike in the present case where it is presumptuous to suggest that the tenancy had expired.

While arguing that the 'without prejudice' privilege can only be lifted upon the court taking evidence and interrogating the full intentions of the parties. Counsel submitted that this case raises various triable issues which can only be resolved in a full trial and was therefore not suitable for summary judgment. Lastly, it was submitted that summary judgment should only be entered in clear and unequivocal circumstances.

The Issues and Determination

I have read and carefully considered the pleadings, evidence and submissions made by the respective parties to this application. The issue for determination is whether the Plaintiff has demonstrated that this is a proper case for summary judgment as provided by Order 36(1) of the Civil Procedure Rules which stipulates that:-

(1) In all suits where a plaintiff seeks judgment for:-

(a) a liquidated demand with or without interest; or

(b) the recovery of land, with or without a claim for rent or *mesne* determined by notice to quit or been forfeited for non-payment of rent or for breach of covenant, or against persons claiming under such tenant or against a trespasser,

apply for judgment for the amount claimed, or part thereof, and interest, or for recovery of the land and rent or *mesne*

Under Order 36 Rule 2, the Defendant may show either by affidavit or oral evidence or otherwise that he should have leave to defend the suit. In the case of **Giciem Construction Company v Amalgamated**

Trades & Services (1983) KLR 156, the Court of Appeal held, *inter alia*, as follows:-

"The general principle applicable to applications for summary judgment is that where the defendant shows that he has a fair case for defence or reasonable grounds for setting up a defence or even fair probability that he has a bona fide defence he ought to have leave to defend. Leave to defend must be given unless it is clear that there is no real substantial question to be tried."

In **Zola Limited and Another v Ralli Brothers Limited and Another (1969) EA 691** it was held, *inter alia*, that the court should not grant an application for summary judgment where there is a reasonable ground of defence. In addition, in **Gupta v Continental Builders Ltd, (1978) KLR 83**, it was held that where no *prima facie* triable issue is put forward for the plaintiff's claim, it is the duty of the court to forthwith enter summary judgment because it is equally against natural justice to keep a plaintiff out of his dues in a proper case.

Although the Plaintiff's case appears to fall in the ambit of Order 36 Rule 1 of the Civil Procedure Rules, this Court has to make a determination whether the Defendant has raised any triable issues to enable the court grant him leave to defend the suit. The Defendant has argued that he is a protected tenant within the meaning of section 2 of the Landlord and Tenant (Shops, Hotels and Catering Establishments) Act and has challenged the jurisdiction of the court by contending that the dispute herein should have been lodged at the Business Premises Tribunal.

This averment has been resisted by the Plaintiff who has denied that the Defendant was a protected tenant and has sought to rely on a letter of offer dated 22nd January 2003 to prove that the relationship of between the parties was governed by a formal lease. The letter of offer has been highly contested by the Defendant on grounds that it was exchanged on a without prejudice basis and is inadmissible.

In my view, these are triable issue which ought to go for trial. I am guided by the holding in the case of **Industrial & Commercial Development Corporation v Daber Enterprises Ltd, (2000) 1 EA 75**, where it was stated that for summary judgment to be entered, the matter must be plain and obvious and where it is not plain and obvious, a party to a civil litigation is not to be deprived of his right to have his case tried by a proper trial. Likewise, in **Momanyi v Hatimy & Another, (2003) KLR 545**, it was held that if triable issues have been raised, the court has no discretion but to grant the Defendant unconditional leave to defend.

I am also of the view that that the prayer sought for rent arrears and mesne profits is not a liquidated demand within the meaning of Order 36 Rule 1(a) of the Civil Procedure Rules. The Court of Appeal in **Gurbaksh Singh & Sons Limited vs Njiri Emporium Ltd, (1985) KLR 695** held that a sum does not become liquidated just because it is claimed, but only if it is agreed or the events on which it is based reveal that it can be calculated independently of the sum claimed. If the ascertainment of the sum claimed requires investigation beyond mere calculation, then the sum is not a debt or liquidated demand, but constitutes damages at large.

In the present suit the sums of Kshs.3,493,462.34 and Kshs 94,317.28 claimed in prayer (b) and (c) of the Plaintiff dated 26th February 2014 are claimed as special damages whose particulars are given in paragraphs 5 and 6 of the said Plaintiff, and which will require to be proved, particularly given that the existence of a lease and its terms is contested by the Defendant. The sums claimed do not therefore qualify as a liquidated demand.

The prayers in the Plaintiff's Notice of Motion dated 18th March 2014 are therefore declined for the reasons given in the foregoing, and the Plaintiff shall meet the costs of the said Notice of Motion.

The Defendant is accordingly granted leave to file and serve his Defence within 15 days of the date of this ruling.

Orders accordingly.

Dated, signed and delivered in open court at Nairobi this ____16th____ day of ____October____, 2014.

P. NYAMWEYA

JUDGE