



IN THE COURT OF APPEAL

AT MALINDI

(CORAM: MAKHANDIA, OUKO & M'INOTI, J.J.A.)

CIVIL APPEAL NO. 68 OF 2015

BETWEEN

MEGA GARMENT LIMITEDAPPELLANT

AND

MISTRY JADVA PARBAT & CO. (EPZ) LIMITED.....RESPONDENT

(Being an appeal from the Ruling of the High Court of Kenya at Mombasa (Omollo,J.) dated 30th July, 2015

In

Land and Environment Case .No.206 of 2014)

JUDGMENT OF THE COURT

It is not in dispute that the appellant and the respondent entered into an agreement for lease, so called because it was not registered as required by **Section 107** of the Transfer of Property Act (repealed). The respondent is the registered owner of that parcel of land known as **L.R No. 655 Section V, Mainland North Mombasa** (“*the suit property*”) within the Export Processing Zone (EPZ) while the appellant carries on the business of manufacturing garments for export in the suit property.

By a letter dated 28th January, 2011, the respondent terminated the tenancy with effect from 1st April, 2011. Before the matter giving rise to this appeal was filed, the parties had been to the Business premises Rent Tribunal and also before the High Court with a judicial review application. Those proceedings are not relevant to the matter before us, save only to observe that on 17th June, 2011 the Chairperson of the Business Premises Rent Tribunal overruled the notice of preliminary objection and directed the hearing of the dispute to commence before the Tribunal. That decision was quashed by an order of *certiorari* by the High Court. The Court also prohibited the Tribunal from making any other or further order (s) in the case.

After these events the respondent instituted a plaint in the Environment and Land Court being case No. 68 of 2015 at Mombasa claiming the following as against the appellant:-

a. A declaration that the defendant’s continued occupation of the Suit Property, LR No. 655, Section V, Mainland North, Mombasa, is unlawful and amounts to trespass;

- b. Vacant possession of the suit property,
- c. Mesne profit in the sum Kshs.21,600,000.00 per annum with effect from 1st April, 2011 until vacant possession of the suit property.
- d. Interest on (c) above at court rate from the date of filing suit until payment in full;
- e. Costs of and incidental to the suit.

The following month, on 4th September, 2014 and before the appellant filed a defence, the respondent took out a motion on notice for summary judgment to obtain vacant possession of the suit property arguing that being the registered owner of the suit property and the appellant being a periodic tenant, it (the former) was entitled, after giving the requisite notice, to vacant possession; and that after issuing the aforesaid notice, the appellant's continued occupation of the suit property amounted to trespass.

Responding to the application the appellant deponed in an affidavit sworn by its director **Aditya A. Awtani** that indeed it had been served with a notice; that, however under **clauses 5 and 13 (f)** of the agreement for lease, it took possession of the suit property on 1st July, 2002 with reasonable expectation that it would get automatic extensions of the lease for at least three terms of 6 years and 6 months each, translating to 16 and a half years; that by the nature of its business the appellant depends on long term contracts for the supply of raw material and finished products, hence the long term lease; that it has been regular in the payment of rent; that a part from maintaining the suit property in the best condition possible, the appellant, pursuant to **clause 9** of the lease, made certain structural improvements to the suit property; that the authenticity of the valuation report for purposes of ascertaining the market rent was doubtful; and that in view of its statement of defence on record raising triable issues, it was only fair and just that the dispute be heard on merit.

The application together with this response were placed before **A. Omollo, J.**

The learned Judge, relying on the decision of this Court in **Katsuri Limited v Nyeri Wholesalers Limited** Civil Appeal No.248 of 2012 found that the appellant was a periodic tenant whose occupation of the suit property was terminated upon being served with a notice to give vacant possession. The learned Judge, however, in respect of the prayer of mesne profit and interest, found that these raised triable issues, such as the value of structural improvements to the suit property and the authenticity or veracity of the valuation report, which ought to be determined in a trial. Cognizant of the heavy machinery fixed in the suit property, the learned Judge allowed the appellant 60 days to voluntarily surrender the premises to the respondent and in default the latter would be at liberty to execute.

Aggrieved, the appellant has lodged this appeal to set aside the learned Judge's findings and order arguing that:-

- i. There were several triable issues disclosed in the pleadings;
- ii. The learned Judge failed to make a determination on clause 5 of the lease to the effect that the said lease was still valid at the time summary judgment was entered;
- iii. The appellant's evidence that it has always faithfully paid the monthly rent was not challenged;
- iv. The learned Judge failed to apply the principle that so long as there was even one triable issue, summary judgment cannot issue;
- v. The learned Judge erroneously applied **order 36 Rule 1(1) (b)** of the Civil Procedure Rules in the face of a viable defence;
- vi. **section 21 (a)(c)** of the Export Processing Zone Act which provides that a leasehold be for a period of not less than 30 years ought to have been applied;

vii. The learned Judge erred in failing to find that the provisions of the Transfer of Property Act could not determine or change the nature of a lease between Export Processing Zone developer and operator;

viii. It was in error for the learned Judge to give the appellant 60 days to vacate the premises without hearing the parties on this question; and that in any case that period was unreasonable.

The final ground was contained in a document called **“notice that an issue touching on the jurisdiction of the trial court to grant summary judgment will be raised herein”**. This ground was explained in the supplementary submissions and by Mr. Nowrojee, S.C in his oral submissions before us to mean that the learned Judge being a judge of the Environment and Land Court erred in applying **Order 36 Rule 1(1)(b)** yet by dint of **Section 19(2)** of the Environment and Land Court Act the court is only bound by **“the procedure laid down by the Civil Procedure Act”**; that the Act does not provide for such procedure hence the court had no jurisdiction to grant an application for summary judgment: and that summary procedure in the nature of interlocutory judgment was never meant to apply to land disputes. We find this submission unclear and curious. Mr. Kabebe who appeared jointly with Mr. Nowrojee, S.C. for the appellant, for his part concluded that the appellant had triable issues which ought to have gone to trial.

Mr. Karega learned counsel for the respondent argued that the trial court had jurisdiction to enter summary judgment; that the lease having not been registered, the appellant was only a periodic tenant and that the tenancy could be terminated under **section 106** of the Transfer of Property Act, by giving the appellant 15 days’ notice.

Being a first appeal, this Court is enjoined to approach the dispute as if it is conducting a fresh hearing, save for the fact that such a hearing is based on the recorded evidence of witnesses who testified before the trial court. In particular, **rule 29(1) (a)** provides that, on first appeal the court has the power to re-appraise the evidence in order to draw its own independent inferences of fact. Sub-section (2) provides;

“(2) Subject as aforesaid, the appellate court shall have the same powers and shall perform as nearly as may be the same duties as are conferred and imposed by this Act on courts of original jurisdiction in respect of suits instituted therein.”

See also **Sumaria & Another v Allied Industries Ltd** [2007] 2 KLR 1 In the circumstances of this appeal we exercise caution in view of the decision we are bound to reach so as not to prejudice the trial of matter in the court below, bearing in mind that the suit was decided on a summary procedure.

In our estimation the two broad issues raised in this appeal are, first, whether the court below had jurisdiction to issue summary judgment and secondly and more importantly, whether the learned Judge properly exercised her discretion in granting, in part, the application for summary judgment.

We reiterate from the onset that a court’s jurisdiction flows from the Constitution or statute or both. See **Samuel Kamau Macharia & Another v Kenya Commercial Bank & 2 others**, S.C. Application No. 2 of 2011. **Article 162 (2)** of the Constitution creates two courts with the status of the High Court, namely the Environment and Land Court and the Employment & Labour Relations Court. Pursuant to **Article 162(2) (b)** Parliament enacted the Environment and Land Court Act, 2011, (the Act) with both original and appellate jurisdiction to hear and determine all disputes relating to the environment and the use and occupation of, and title to land. In exercise of that jurisdiction, the court, under **section 7** of the Act, has the **“power to make any order and grant any relief as the court deems fit and just”**

By **section 19 “the court is to be bound by the procedure laid down by the Civil Procedure Act.”** On the other hand **section 81(2) (f)** of the Civil Procedure Act provides that the Rules Committee may make rules and that:-

“(2) such rules may provide for all or any of the following matters namely:-

.....

(f) Summary procedure-

(i)

(ii) in suits for the recovery of immovable property, with or without a claim for rent or mesne profits, by a landlord against a tenant whose term has expired or has been duly determined for nonpayment of rent, or against persons claiming under such tenant.”

The Rules Committee is therefore expressly authorized by Parliament through the enactment of this section to make rules to specifically deal with summary procedure for recovery of immovable property and claims for rent or *mesne* profit.

In accordance with this provision, **order 36 Rule 1(1) (b)** of the Civil Procedure Rules a summary procedure was formulated to achieve this and confirms, in the same language as **section 81(2)(f)** the court’s jurisdiction to enter summary judgment in those circumstances on application by the plaintiff.

The summary procedure contemplated by **section 81(2) (f)** and provided for under **order 26 Rule 1(1)(b)** specifically applies to land matters as it does to liquidated claims and there is a plethora of cases to support this as will be demonstrated later. Because the Environment and Land Court is a court with status of the High Court, and in view of the foregoing, it has the power, if it is satisfied on affidavit evidence, to grant summary judgment. Reference to **“procedure laid down by the Civil Procedure Act”** in **section 19** of the Act, with respect to learned senior counsel, does not exclude in our view, the procedure laid down by the rules made under the Civil Procedure Act. On the basis of the foregoing we find no merit on this ground and accordingly reject it.

We turn to consider the substantive question in this appeal, whether the learned Judge properly exercised her discretion in granting summary judgment. The suit property is located within the Export Processing Zone and was occupied under an agreement to lease by the appellant for the purpose of carrying on the business of manufacturing garments for export.

Section 22(1) (b) of the Export Processing Zones Act authorized the respondent as the developer to lease or sublet? the suit property and by **Section 22(2) (g)** it was required to register the lease. In addition to this the Transfer of Property Act (repealed) stipulated that:

“107. A lease of immovable property from year to year, or for any term exceeding one year, or reserving a yearly rent, can be made only by a registered instrument.

All other leases of immovable property may be made either by a registered instrument or by oral agreement accompanied by delivery of possession.”

It is a common factor, and we have already noted so earlier, that the lease of 15th March, 2002 was not registered, even though by **clause 10** it was to be prepared and the respondent was to meet the costs of stamp duty and registration. It was for a term of 5 years and 6 months with effect from 1st July, 2007 with an option to renew twice.

By a letter dated 28th January, 2011, the respondent gave the appellant 3 months’ notice terminating the tenancy for the reason that it (the appellant) was irregular in the payment of rent.

The notice required under section 106, in the absence of a written contract before termination of a tenancy, depends on whether the lease was of immovable property for agricultural or manufacturing purpose or for any other purpose. In the former case, such a lease would be deemed to be one from year to year and the notice for termination thereof being six months. In the latter case the notice was fifteen (15) days being a lease from month to month. According to the respondent the lease having not been registered the appellant was reduced to a periodic tenant, hence the notice issued was more than sufficient to terminate the lease.

The appellant for its part insisted that the provisions of the Transfer of Property Act cannot determine or change the nature of a lease between Export Processing Zone developer and operator and that it was in error for the court below to find that it was a periodic tenant.

Although the Transfer of Property Act does not define what a “*periodic tenancy*” means other statutes do. And borrowing from **section 3** of the **Registered Land Act** (repealed), the term means:-

“... a tenancy from year to year, half year to half year, quarter to quarter, month to month, week to week or the like”

Section 2 of the **Land Registration Act** defines a “*periodic lease*” in the same language to mean:-

“... a lease from year to year, half year to half year, quarter to quarter, month to month, week to week or the like”

The key word is “periodic” which can translate to weekly, monthly, quarter yearly half yearly, and yearly. Clearly the three months notice given by the respondent to the appellant to give vacant possession of the suit property is not covered under **section 106**. The premises were (are) being used for manufacturing garments for export hence the first part of **section 106** was applicable, namely, that being a lease from year, to year the requisite period of notice was six months.

The time-honoured decision of this Court in **Bachelor’s Bakery Ltd v Westlands Securities Ltd (1982) KLR 366** which has been followed in a long line of subsequent decisions elucidates the status of an unregistered lease. It reiterates and confirms the firmly settled law, first, that a lease for immovable property for a term exceeding one year can only be made by a registered instrument; that a document merely creating a right to obtain another document, like the one in this dispute, does not require to be registered to be enforceable; that such an agreement is valid *inter partes* even in the absence of registration, but gives no protection against the rights of third parties. That exposition of the law hold true in this case.

From these facts we reiterate the question, whether the learned Judge judicially exercised her discretion in entering summary judgment in favour of the respondent. The exercise of a discretion by a Judge in the courts below is seldom interfered with on appeal. Only when the appellate court finds that the court below applied wrong principles as a result of which it arrived at a wrong conclusion will it disturb the finding. See **Mbogo & Another v Shah (1968) EA 93**.

A court will enter summary judgment under **Order 36 rule 1(1) (b)** where a plaintiff seeks judgment for:-

“(a)

(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 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 where the defendant has appeared but not filed a defence the plaintiff may apply for judgment for the amount claimed, or part thereof, and interest, or for recovery of the land and rent or mesne profits.”

As a cardinal rule of procedure and law a court in considering the merit of the application is not conducting a mini-trial on the affidavit evidence. The procedure is not intended to be exercised by a minute and protracted examination of documents and facts of the case in order to see whether the defendant would be granted leave to defend. It has repeatedly been stated that in an application for summary judgment even one triable issue, if *bona fide*, would entitle the defendant to have unconditional leave to defend. See **Kundanlal Restaurant v Devshi & Co. (1952) 19 EA.C.A. 77**. Conversely it is a matter of public policy now enshrined in **Article 159(2) (b)** of the Constitution that justice shall not be delayed. So that unmeritorious claims or defences are not entertained at the expense of judicial time and expense of valuable judicial time and expense to the parties. In other words summary judgment will only

be granted where no genuine issue of material fact that would warrant a trial exists. The burden of establishing that no genuine issue exists is on the plaintiff.

A summary judgment, in terms of **order 36 rule 1(1) (b)** can only be sought after the defendant has entered appearance but before he has filed a statement of defence. The application can be brought only where the plaintiff's claim in the suit relates to recovery of land, whether brought together with a claim for rent or mesne profit, where the tenant's term has expired or been determined by notice to quit or been forfeited for non-payment of rent or for breach of covenant or where the claim is against a trespasser. Since the defendant will not have filed a statement of defence, the decision of the court will be based, more often than not, on affidavit evidence of one party only, although the rule allows for oral evidence limited to the question whether leave to defend ought to be granted. That is why great caution is required in deciding the question whether the defendant's case raises triable issues or not, in order to be certain that, by its decision, no party is shut out.

In the matter the subject of this appeal, it is not in dispute that the parties executed an agreement for lease whose terms they intended to bind them pending the preparation of a lease by **Aboo & Company Advocates** that would subsequently be registered. On the basis of that agreement the appellant took possession, paying rent to the respondent. It was a term of the agreement that the leased area covering approximately 75,000 square feet would attract rent at the rate of Kshs.6.75 per square foot per month payable monthly in advance. The termination notice of 28th January, 2011 explained that the respondent was **"very irregular in the payment of rent"**. This, however, was not the reason or ground upon which the plaint was brought. The respondent averred in the plaint that, since the appellant was a periodic tenant, the lease was terminable by one (1) months' notice and that the appellant's continued occupation of the suit property was denying the respondent rent from a prospective tenant. As a matter of fact no claim was made for unpaid rent.

By **section 106**, we have already found, the demised premises being used for manufacturing purposes, the lease created in the absence of a registered instrument, was a periodic lease terminable by six months' notice. The above three conditions for summary judgment under **order 36 rule 1(1) (b)** aforesaid were not met. The learned Judge therefore improperly exercised her discretion, which warrants our interference with her decision.

The appeal succeeds and is hereby allowed with costs. The ruling rendered on 30th July 2015 and all consequential orders thereon are set aside.

Dated and delivered at Mombasa this 26th day of February, 2016

ASIKE-MAKHANDIA

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JUDGE OF APPEAL

W. OUKO

.....

JUDGE OF APPEAL

K. M'INOTI

.....

JUDGE OF APPEAL

I certify that this is a

true copy of the original.

DEPUTY REGISTRAR