



REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA AT NAKURU

CIVIL SUIT NO. 350 OF 2008

ALI MWINYIMVITA.....PLAINTIFF

VERSUS

STAR TRANSPORT CO. LTD.....DEFENDANT

JUDGMENT

Introduction

1. This case was heard by Hon. Mr. Justice (Prof.) J. B. Ojwang now, a Judge of the Supreme Court of Kenya.

2. It was concluded on 11th June, 2011 and thereafter mentioned on 25th July, 2011 before Lady Justice Okwengu (now of the Court of Appeal), when parties had filed their written submissions, and the file was intended to be sent to the Hon. Justice Ojwang for preparation of the Judgment and delivery on notice. It is alleged that court file went missing, and surfaced on 12th February, 2016 when counsel for the plaintiff complained of the delay in getting the judgment written.

3. After consulting the Hon. Judge, it was established that a Judge of the Supreme Court has no jurisdiction to deal with a matter in the High Court or other Superior Courts, except on appeal through the Court of Appeal. Counsel for the parties upon the mention of the case in open court on 4th March, 2016, agreed that a Judge of the High Court has necessary jurisdiction to take over and write a Judgment where a previous Judge has been elevated to the Supreme Court. The Judgment herein has consequently been prepared on the basis of the evidence taken, and submissions made before the Judge of the Supreme Court while he held office of a Judge of the High Court.

Pleadings

4. In a plaint dated 15th December, 2008 and filed on 18th December, 2008, the plaintiff Ali Mwinyimvita sued the defendant Star Transport Company Limited for vacant possession of the parcel of land known as Plot No. 1097/VI/MN and registered as No. CR 2401 (the suit premises). The plaintiff also sought arrears of rent of Kshs. 21,300/= for the period January, 1991 to September, 2008. The plaintiff also claimed mesne profits at the rate of Kshs. 20,000/= per month from 1st October, 2008 till payment in full, costs of the suit and any other relief the court may deem fit to grant.

5. In its defence dated 3rd February, 2009 and filed on 5th February, 2009, the defendant, while admitting that it entered into a lease of 20 years with the plaintiff over the suit premises, denies that the lease which expired on 30th September, 1998 was extended for a further term of 10 years and sought to put the plaintiff to strict proof thereof.

6. The defendant contended that upon the expiry of the 20 years lease period on 30th September, 1998, the lease was never extended, but that the parties continued with the tenancy under the same terms and conditions, and that the tenancy became a controlled tenancy under the provisions of the Landlord and Tenant (Shops, Hotels and Catering Establishments) Act, [Cap 301, Laws of Kenya], and that no notice of termination of tenancy under the said Act had been served upon the defendant, and consequently claimed that this court had no jurisdiction to try the suit and that the suit was frivolous, vexatious, embarrassing and/or otherwise an abuse of the courts process and/or, that it does not disclose any reasonable cause of action against the defendant, and that it should be struck out.

The Reply to Defence

7. In a Reply to Defence dated 9th February, 2009, and filed on 10th February, 2009, the plaintiff specifically denied that the lease was subject to the Landlord and Tenant (Shops, Hotels and Catering Establishments) Act, and that its provisions had no relevance to the suit herein. The plaintiff also reiterated his claim that the defendant was given notice to vacate upon the expiration of the 10 year period, and that the defendant had refused and/or neglected to vacate the suit land.

8. In a Reply to a Request for Particulars dated 19th May, 2008 and filed on 20th May, 2009, the plaintiff admitted in paragraph (b) that the lease was verbally renewed upon expiry of the first term of 20 years on 30th September, 1998.

9. The plaintiff also filed on 20th July, 2009 a statement of issues dated 15th July, 2009.

10. The defendant's written submissions dated 18th July, 2009, were filed on 19th July, 2009. The plaintiff's submissions dated 25th July, 2009 were filed on the same day.

The Evidence

11. The evidence adduced on behalf of both parties showed that the suit premises are used as a transport yard, garage and office by the defendant, and that part of it was leased (sub-let) by the defendant to a third party at the rate of Kshs. 300,000/= per month. It was also in evidence that the initial rent was Shs. 100/= per month, and the defendant consequently claimed that the suit premises were subject to the Business Premises Tribunal under the Landlord and Tenant (Shops, Hotels and Catering Establishments) Act aforesaid, and that this court has no jurisdiction to determine the suit. Arising from the above arguments the issues for determination may be framed as follows –

(1) Whether the suit premises fall under the provisions of the Landlord and Tenant (Shops, Hotels and Catering Establishments Act), and whether this court has jurisdiction to determine the suit.

(2) Whether the Lease dated 11th October, 1978 which expired in October, 1998 was extended for a further period of ten (10) years.

(3) Whether the plaintiff is entitled to mesne profits.

(4) Whether the suit herein is frivolous, vexatious, embarrassing or otherwise an abuse of the court

process.

(5) What are the orders as to costs.

12. Upon perusal of the pleadings and evidence on record, and the parties' counsel's written submissions, there is no dispute that a valid and enforceable Lease dated 11th October, 1978 for a term of 20 years at a monthly rent of Kshs. 100/= was signed between the plaintiff and the defendant. There is also no dispute that the said lease expired on 30th September, 1998. Though the defendant disputes it, there is no denying that the lease was extended for another period of ten (10) years.

13. The validity of the extension is to be found in the evidence of the plaintiff (PW1), in the exhibit marked PExb.2 under which the defendant agreed to pay rent of Kshs. 100/= for a period of *"miaka ishirini ama zaidi"* ("twenty years or more"). Counsel for the defendant acknowledges that the lease was extended (*"verbally renewed for a further 10 years"*). This acknowledgement in the submissions must have been as a result of further discussion as the extension is expressly denied in paragraph 5 of the defence. The only question then becomes, whether the lease held by the defendant was a controlled tenancy subject to the Landlord and Tenant (Shops, Hotels and Catering Establishments) Act.

14. Counsel for the defendant submitted that the lease held by the defendant for the period of 10 years subsequent to the expiry of initial period of 20 years was a controlled tenancy. With respect, I do not think so, and set out my reasons in the paragraph following.

15. The Landlord and Tenant (Shops, Hotels and Catering Establishments) Act defines in clear terms, what constitutes –

- (a) a "Catering" establishment;
- (b) a "Hotel", and
- (c) a "Shop"

16. "A catering establishment" means **"any premises on which is carried out the business of supplying food or drink for consumption or such premises, by persons other than those who reside and are boarded on such premises"**.

17. And a "hotel" means -

"any premises in which accommodation or accommodation and meals are supplied or are available for supply to five or more adult persons in exchange for money or other value consideration".

18. And a "shop" means –

"premises occupied wholly or mainly for purposes of a retail or wholesale trade or business or for the purpose of rendering services, for money or money's worth".

19. From the above definitions a tenancy of premises for the sole *"use as a transport yard, garage and office"* by the defendant cannot by any stretch of imagination be regarded as either a "catering establishment", a "hotel" or a "shop". By definition alone, the suit herein cannot be regarded as falling under the provisions of the Landlord and Tenant (Shops, Hotels and Catering Establishments) Act.

20. The position would not be different if reference were made to the definition of a controlled tenancy under Section 2 of the Landlord and Tenant (Shops, Hotels and Catering Establishments) Act which defines a controlled tenancy of a shop, hotel or catering establishment as a tenancy –

- (a) which has not been reduced into writing; or,
- (b) which has been reduced into writing or which –
 - (i) is of a period not exceeding five years;
 - (ii) contains a provision for termination, otherwise than for breach of covenant within five years from the commencement thereof; or
 - (iii) relates to premises of a class specified under sub-section (2) of this section.

21. The premises in this suit would still not qualify as a controlled tenancy by reference to the period, or termination thereof under the said Act, or as stated in paragraph 17 above. Consequently again, the provisions of the Landlord and Tenant, (Hotels, Shops and Catering Establishments) Act have no application thereto. Consequently further, the plaintiff had no reason to serve a termination notice under the said Act. The Business Premises Rent Tribunal established under Section 11 thereof has no jurisdiction over the suit premises. The suit herein is properly before this court which has the requisite jurisdiction. The contrary argument and submission therefore fails. That disposes the first issue, whether this court has the necessary jurisdiction to determine the suit. It also determines that the fourth issue, that this suit is neither frivolous, vexatious nor embarrassing as it raises triable issues whether that the plaintiff is entitled to rent arrears, mesne profits and costs of the suit.

22. The ultimate but not last issue for determination is whether the lease herein was extended from 1st October, 1998 upon expiration on 30th September, 1998. The defendant admits in submissions by counsel dated 18th July, 2011 and filed on 19th July, 2011 –

“the defendant had a lease of 20 years, which upon expiry was not renewed in writing. It was renewed verbally for a further 10 years...”

23. I have already held that the tenancy for the suit premises was not a controlled tenancy subject to the Landlord and Tenant (Shops, Hotels and Catering Establishments) Act. The title to the suit premises was under the Registration of Titles Act, (Cap 281, Laws of Kenya – repealed). The substantive law under that Act is the Transfer of Property Act, 1882 of India (Group 8 Acts). Chapter V – Of Leases of Immovable Property. SS. 105 – 117 (TPA) govern the grant of leases under the Act.

24. Section 106 of the TPA prescribes the duration for the various types of leases for immovable property. A lease for agricultural or manufacturing purposes is deemed to be a lease from year to year terminable, on the part of either lessor or lessee, by six months notice; expiring with the end of the year of the tenancy, and a lease of immovable property for any other purpose shall be deemed to be a lease from month to month terminable on the part of either lessor or lessee, by fifteen days' notice expiring with the end of a month of tenancy.

25. Section 107 of the TPA prescribes that a lease of immovable property from year to year, or for any term exceeding over year, or reserving a yearly rent, can be made only by a registered instrument. However, all other leases of immovable property maybe made either by a registered instrument or by oral agreement accompanied by possession. The validity of the 20 years term of lease is not disputed.

It is also expressly admitted by the defendant that the lease was extended verbally for ten (10) years from 1st October, 1999 to 30th September, 2008 and it was coupled by possession. The law is that upon expiry of a lease, and in the absence of any express terms of renewal, the tenancy shall continue to operate under the terms of the old lease, including the rental, in this case of Kshs. 100/= per month.

26. In this case, though the defendant remained in possession, it not only failed to pay the rent of Kshs. 100/= for the period January 1991 to September 2008 (that is a period of 93 months), but the defendant also sub-let the suit premises to Rongai Transporters a third party, without the plaintiff's consent, at a rate of Kshs. 300,000/= per month. Hence the plaintiff claims not merely, rent arrears of Kshs. 21,300/= for the period the defendant did not pay the rent, but also **mesne profits** for the period 1st October, 2008 at Kshs. 20,000/= till payment in full.

27. Black's Law Dictionary 8th Edition defines "mesne" profits as –

"... profits of an estate received by a tenant in wrongful possession between two dates."

28. There was no denial that the defendant though in possession has not paid the rent in question, and continues in occupation without any payment, hence the plaintiff also seeks vacant possession of the suit premises. The defendant has offered no explanation for the continued occupation of the plaintiff's premises.

29. It is clear to me from the evidence, and submissions of both counsel that there is no plausible explanation why the defendant excused itself from payment of arrears of rent, a paltry sum of Kshs. 21,300/=. I therefore grant the plaintiff that prayer.

30. The plaintiff also claimed mesne profits from 1st October, 2008 to-date at the rate of Kshs. 20,000/= till the defendant grants vacant possession. The plaintiff's counsel sought in his submissions **mesne profits** at the rate of Kshs. 300,000/= per month. Submissions are not equivalent to an amendment of pleadings. The plaintiff did not seek to amend his plaint, and cannot do so by way of submissions. A party is bound by his pleadings. I therefore grant the plaintiff an order for **mesne profits** at the rate of Kshs. 20,000/= from 1st October, 2008 till the defendant vacates and grants vacant possession to the plaintiff.

31. Finally, in the absence of any reason or reasonable reason for doing so, I find and hold that the continued possession and occupation of the suit premises by the defendant is unlawful, and I grant the plaintiff the prayer for vacant possession, and I order the defendant to grant the plaintiff possession of the suit premises within thirty (30) days of the date hereof.

32. I also grant the plaintiff costs of the suit herein on the principle that costs follow the event.

33. In the unlikely event of the defendant's failure and/or neglect and/or refusal to voluntarily grant vacant possession of the premises, I direct the OCPD of the area next to the suit premises, to supervise the taking over by the plaintiff of the suit premises, any time upon the expiration of the said thirty (30) days from the date hereof.

34. The plaintiff shall have interest on the arrears of interest, and mesne profits from the date of filing suit until payment in full.

35. There shall be orders accordingly.

Dated, Signed and Delivered in Mombasa this 11th day of March, 2016.

M. J. ANYARA EMUKULE, MBS

JUDGE

In the presence of:

No Appearance for Plaintiff

Mr. Balala for Defendant

Mr. Silas Kaunda Court Assistant



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