



REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA

AT MOMBASA

Civil Case 785 of 1993

INDIANA BEACH APARTMENTS.....PLAINTIFF

-Versus-

PORTIA MANAGEMENT SERVICES LTD.....DEFENDANT

J U D G M E N T

INDIANA BEACH APARTMENTS LTD. (IBA) are in the business of hiring out Beach Cottages and Apartments to tourists and locals in this country. They have 45 of them along the Mombasa/Maiindi Road at Bamburi. Some are one-bedroom while others are two-bedrooms.

On 1.2.1990 they were approached by M/S PORTIA MANAGEMENT SERVICES LTD (PORTIA) for provision of Accommodation for their Staff Members. Portia is a limited company incorporated in the United Kingdom with its offices at the Port City of Liverpool, England. They were at the time contracted by the Kenya Ports Authority (KPA) to provide consultancy services for the latter's container Terminal and they brought seven of their staff members to Kenya for that purpose. KPA could not provide housing for them and therefore advised them to seek alternative housing, hence the contact with IBA.

By a written agreement executed and relied on by both parties, and dated 1.2.1990, IBA agreed to let and Portia agreed to rent one two-bedroom Apartment and three one-bedroom Apartments at Shs. 20,000 per month and Shs. 15,000 per month, per Apartment respectively. The lease was to run for a period of one year from 1.2.90 to 31.1.91 and the rent was payable quarterly in advance. Due to the nature of the contract entered into between Portia and KPA it was envisaged that Portia's staff members may have to leave Kenya due to emergency or transfer and may not occupy the premises for the entire period of one year. A special clause was therefore included and written out by hand before execution of the main Agreement as follows:

"5A In cases of emergency or transfer of, staff the tenant may terminate this agreement by giving one month notice to the landlord."

Seven of Portia's staff members arrived into the country and took possession of more than the 4 Apartments reserved under the written agreement. Two of them John Joseph Knowles and Joseph Mitchel arrived on 2.2.90 and occupied rooms 120 and 119 respectively. These were the one-

bedroom Apartments for Shs.15,000 per month rental. But they only stayed there until 1.3.1990 when they checked out and left the country. The remaining 5 staff members, who are neither identified nor shown which Apartments they occupied under the written agreement, left by the 14th June 1990.

It is IBA's contention that Portia withdrew their staff from the premises without Notice and in breach of the agreement. As a result IBA suffered a loss of Shs. 537,000/=. They demanded this sum and in default of payment came to court on 10.12.93 and filed this suit. In a statement of defence dated 25.2.94, Portia denied the claim and contended that they complied with the agreement to the letter and gave requisite Notices. They were strangers to the claim and they dubbed the suit as malicious scandalous frivolous, vexatious, and an abuse of the court process. They threatened to have the suit struck out on those grounds but there is no evidence that they did

Instead both counsel for the parties dispensed with summons for Directions and filed agreed issues for determination upon hearing of the matter for one day. The agreed issues are these;

(1) Did the defendant give one month's notice to the plaintiff before vacating the premises let in accordance with the agreement referred to in paragraphs 3 & 4 of the plaint and if so how, where, and when"

2) Did the plaintiff suffer loss and damage in the sum of Kshs. 293,500/= by way of loss of rent"

(3) Did the defendant pay rent to the plaintiff Kshs.243,500 before vacating the premises described in paragraphs 3 of the plaint"

(4) Is the defendant liable to the plaintiff"

(5) What is the order as to costs"

IBA called only one witness who testified before Oguk J. on 22.9.95. Oguk J. left this station thereafter and I took up the hearing under Order 17 Rule 10 Civil Procedure Rules. Portia also called one witness who testified before me on 9.4.97. All the proceedings were typed out and submissions completed on both sides by 17.7.97. I will answer the issues framed in the light of the pleadings and the evidence.

The first issue is most crucial for the plaintiffs. For it is on the basis that Portia removed their staff from the rented premises without notice that IBA claims the loss pleaded in this suit. The contention in the pleading is that there was no notice at all given by Portia before vacating, hence IBA's entitlement to payment of all rents accruing for the remaining portion of the lease period

The oral evidence on this pleading and issue is rather intriguing. For I do not see how a party who contends that there were no notices given at all would be the one to tender evidence of such notices. This is what Mr. James Makundi, (James) (P.W.I) the only witness for IBA appears to have done. He may perhaps be excused because he was not there when the Agreement was entered into or when the tenants left, and this suit was filed long before he joined IBA. He had only been with the IBA as an Accountant for 5 months before he testified on 22.9.1995. That means he joined them in May or April 1995 - more than 5 years after the cause of action arose.

James relied on documents he said he found in the offices when he joined IBA. From these documents he surmised that there were people who owed them money.

Among those documents was the Agreement dated 1.2.1990 which provided for a one month, notice to be given by the tenants if they wished to vacate. He produced this as Exhibit 1. Among those documents also was a letter dated 1.3.1990 written by the defendants (Portia) giving notice that M/S J. Mitchel and J. Knowles would vacate their rooms that same day. He produced the letter as Exhibit 2. James contended that this was not a proper notice. But this is 'not the same thing as saying there was no notice given at all as stated in the plaint. There was a Notice given but it was not in accordance with the agreement signed between the parties. It was an invalid notice and on that score Portia would be liable to pay one months rent in lieu of notices according to James

"Each of them were supposed to pay Shs. 15,000, for each of the two apartments. Had there been a valid notice they would have paid a total sum of Shs. 30,000/=."

But they only paid up to the time of departure on 1.3.90. No payment was therefore made in lieu of notice.

The other 5 staff members of Portia were left in the premises.

James testified however, that before they left the premises, a letter was written by Portia giving notice of such action. I will quote him verbatim:

"Before the said tenants moved out, we received a letter.... I do have a copy of the letter with me here dated 10th May 1990. This is the said letter Exhibit 4. The said letter gave us one month notice of their intention to remove all their staff. They duly removed all the staff by the 13th and 14th June 1990 as per the letter "our complaint is that we were not given notice in case of Mr. John Joseph Knowles and his colleague Joseph Mitchel."

Upon such admission, I see no contentious issue that notice was either not served at all or not served in accordance with the agreement pleaded.

Miss Okumu for IBA submitted firstly, that there was no evidence as to how these notices were delivered to the plaintiffs a submission I find with respect, fatuous. It was the plaintiffs who were producing the notices in evidence and there cannot be any contention that they did not receive the Notices. Secondly, she submitted that even if the notices were given they did not specify the "Case of emergency or transfer" that necessitated the defendants to remove their staff members. The short answer is that there was no requirement in the agreement for such disclosure. The focus of the clause as I see it was to make it clear that the tenancy agreement could be terminated before the expiry of the one year period so that the landlord cannot claim to have been taken by surprise. That privilege was the tenants, not the landlords.

In answer to the first issue, I am satisfied that two written notices were given to the plaintiffs. The notices were dated 1.3.1990 and 10th May 1990. The latter was a valid notice under the tenancy agreement while the former was invalid.

The second and third issues may be considered together. The two figures of special damages pleaded at Shs. 293,500 and 243,500 amount to the figure prayed for in the plaint Shs. 537,000/=. The onus is on the plaintiffs to prove strictly that they are entitled to such damages. The proof is once again through the one witness called by the plaintiffs, James. And once again I find his evidence perplexing. It is pleaded in the suit that the said amount was in respect of the loss incurred in unpaid rent for the remaining period of tenancy after the defendants left without notice. But the evidence from James is this:

"As a consequence of the defendant cancelling the tenancy without proper notice we incurred loss of income we were generating from those rooms. We suffered a loss of Shs.293,500/= I do not really have the documents to show how this figure was arrived at, but this is the amount we found in the books when I came there.

I now wish to say that by the time the 5 remaining tenants were leaving they incurred some money for the period they stayed in the Hotel . This amounts to Shs.1293,500. This was upto 30,6.1990 less the payments they had made. We duly invoiced the defendants."

He then proceeded to refer to some invoices showing some figures of Shs. 243,500 and another figure of Shs. 350,000 for the period 1st May 1990 to 31st June 1991. He also referred to some statement which showed a figure of Shs. 293,500 and stated

"As far as I am concerned I am claiming a total sum of Shs. 293,500/= from the defendants the whole year."

The documents referred to by that witness were only marked for identification and the witness undertook to produce the company book copies of the invoices. In the end none of the invoices or statement or company books were produced in evidence and they are not on record. That renders the evidence of James on that aspect of the matter worthless. To compound matters James admitted in cross examination that there never was any demand Notice addressed to the defendants for any outstanding dues and no such notice was produced in evidence. Nor was there evidence of service of any invoices or statements showing any amounts unpaid by the defendants.

In the absence of any Accounts kept by the plaintiffs in respect of this tenancy I find on those two issues that the sum of Shs. 537,000/= claimed in the plaint has not been proved on a balance of probability.

I have made a finding on the first issue however that the first notice was invalid and attracted payment of rent in lieu of Notice. That amounts to Shs. 30,000/= which I find is due and owing to the plaintiffs.

At all events there is no evidence that the plaintiffs did not rent out the Apartments to other tenants after the defendants departure in March and June 1990. They were under a duty to mitigate their losses if any but there is no evidence on this. In my judgment the plaintiffs are not entitled to the amount they claim in the plaint save for Shs. 30,000/= of it.

The fourth issue is subsumed in the first, second and third issues and has been answered accordingly.

I agree with Mr. Gikandi for the defendants that the plaintiffs suit should be and is hereby dismissed with costs to the defendants, save for a sum of Shs. 30,000/= for which judgment shall be entered for the plaintiff's with interest thereon and costs at court rates.

Dated at Mombasa this 25th day of September. 1997

P.N. Waki

JUDGE



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