REPUBLIC OF KENYA

IN THE COURT OF APPEAL

AT NYERI

(CORAM: VISRAM, KOOME & OTIENO-ODEK, JJ.A.)

CIVIL APPEAL NO. 248 OF 2012

KASTURI LIMITED……. APPELLANT

AND

NYERI WHOLESALERS LIMITED ..... RESPONDENT

(Appeal against the Ruling of the High Court of Kenya at Nyeri

(Sergon, J.) dated 23rd April, 2010

in

HCCC No. 109 of 2009)

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JUDGMENT OF THE COURT

1. On or about 2nd April, 2004, the appellant entered into a lease agreement to rent part of the respondent's premises known as ***Nyeri Municipality/Block III/*66**, to operate as a shop and residence. Two other lease agreements for the same space and bearing the same date of 2nd April, 2004, were executed by the parties albeit with different sums indicated as monthly rental sum. In each of these lease agreements, the tenancy was to expire on 15th April, 2009. The appellant took possession of the demised premises and claims that two of lease agreements were a forgery. Prior to expiry of the lease, the respondent gave a notice in writing that the lease shall not be renewed.
2. By a plaint dated 3rd July, 2009, the appellant sought a declaration that the notice to vacate dated 19th January, 2009, issued by the respondent be deemed to be of no effect. The respondent filed a defence and counterclaim to the suit.
3. The gist of the respondent's defence is that the lease granted to the appellant was for a term of 5 years with effect from 15th May, 2004, and it expired on 14th April, 2009, by effluxion of time. The respondent acknowledged issuing to the appellant a notice to vacate dated 19th January, 2009. In its counterclaim, the respondent *inter alia* prayed for an order of vacant possession of the premises and in default the appellant to be forcefully evicted from the premises.
4. The respondent took out a Notice of Motion dated 14th January, 2010, pursuant to ***Order XXXV rules, 1, 2, 5*** and **8** of the ***Civil Procedure Act*** seeking summary judgment and an order for vacant

possession and eviction of the appellant from the demised premises. The respondent submitted that there was nothing to go for trial in relation to the demised premises because a notice had been given to the appellant that the lease shall not be renewed and the tenancy term had expired on 14th April, 2009.

5. The learned judge delivered a ruling dated 23rd April 2009 and entered summary judgment in favour of the respondent; an order for vacant possession and or forceful eviction of the appellant from the demised premises was issued. Aggrieved by the ruling, the appellant lodged the present appeal to this Court.
6. The appellant's grounds of appeal:

i. ***the learned judge erred in law in entering a partial summary judgment and issuing a partial decree,***

ii. ***that the central triable issue in the various leases between the parties is forgery and summary judgment ought not to have been entered based on affidavit evidence until the issue of forgery and the amount of rent payable was determined in a full trial.***

7. The firm of Messrs Gori & Ombongi Advocates represented the appellant while learned counsel Mr. Geoffrey Mahinda appeared for the respondent in this appeal.
8. Counsel for the appellant elaborated on the grounds of appeal with emphasis that the learned judge erred in entering summary judgment and issuing a partial decree for vacant possession of the suit premises. It was submitted that the judge ought to have waited for hearing of the main suit and determine all issues between the parties; that the respondent has been attempting to unlawfully enrich itself through altering the amount due as monthly rent for the premises and forging many unlawful leases; that there are three lease agreements between the parties each dated 2nd April, 2004; that in the first lease, the monthly rent is given as Ksh. 40,000/= which the appellant is faithfully paying; that in the second lease titled supplementary lease the monthly rent is indicated Ksh. 60,000/= while a further lease indicates the monthly rent as Ksh. 100,000/=. The appellant submitted that each of the subsequent leases are a forgery and never purported to cancel the previous lease; that the learned judge erred in entering summary judgment when the correct lease between the parties and the correct monthly rent had not been determined in a full trial; that summary judgment should have been put on hold until the main suit was heard and determined to enable the judge make an informed decision.
9. Counsel for the respondent opposed the appeal; he submitted that tenancy between the parties expired on 14th April, 2009; that the appellant entered the demised premises based on a lease whose term had expired; that a notice dated 19th January, 2009, had been given to the appellant indicating that the lease shall not be renewed; that the judge did not err in entering summary judgment as the appellant had no defence to the counterclaim; that the parties had a reason for signing and executing three lease agreements all dated 2nd April 2004; that the appellant does not contest and challenge the first lease in which the rental sum is given as Ksh. 40,000/= per month; that under the first lease, the tenancy expired on 14th April 2009 and the appellant has no defence or triable issue to refuse to give vacant possession of the premises; that the learned judge did not err in entering summary judgment as the respondent's counterclaim was in two parts; the first part sought vacant possession and the second part is for determination of what amount of monthly rent is payable for the rented premises. Counsel for the respondent cited the case of ***Nairobi Golf Hotels (K) Limited – v- Lalji Bhimji Sanghani Builders & Contractors, Civil Appeal No. 5 of 1996*** in support of his submissions.
10. This is an interlocutory appeal and we have considered the rival submissions by counsel and examined the record of appeal. Being a first appeal, it is our duty to analyze and re-assess the evidence on record and reach our own conclusions. (See ***Selle -vs- Associated Motor Boat Co., [1968] EA 123***). Both counsel confirmed to this Court that the hearing of the main suit is on-going before the High Court. The only issue for determination before us is whether the learned judge erred in entering summary judgment and issuing orders for vacant possession of the demised premises.
11. Summary judgment in favour of the respondent was entered under the provisions of ***Order XXXV***

of the ***Civil Procedure Rules***. In an application for summary judgment under ***Order XXXV rule 1***, it is the duty of the defendant/respondent to demonstrate that he should have leave to defend the suit; the duty is limited to showing that there is a *prima facie* existence of bona fide triable issues or that there is an arguable case. On the other hand, the person applying for summary judgment under ***Order XXXV*** has the duty to show that the defence is a sham. In the case of ***Continental Butchery Ltd- v- Samson Musila Nthiwa, Civil Appeal No. 35 of 1977***, this Court stated:

> ***"With a view to eliminate delays in the administration of justice which would keep litigants out of their just dues or enjoyment of their property the court is empowered in an appropriate suit to enter judgment for the claim of the plaintiff under the summary procedure provided by Order 35 subject to there being no triable issue which would entitle the defendant leave to defend. If a bona fide triable issue is raised the defendant must be given unconditional leave to defend but not so in a case in which the court feels justified in thinking that the defence raised is a sham".***

12. In the instant case, the appellant was put in possession of the rented premises by the respondent. The tenancy is stated to be five years; notice was given to the appellant that the lease shall not be renewed; the appellant on his part acknowledges and admits existence of the tenancy agreement between the parties; the duration of the tenancy as five years is not disputed; the receipt of notice of non-renewal of the lease is also not disputed. A tenant who has been put into possession cannot challenge the title of the landlord (See ***E.H. Lewis & Son. – v- Morelli, (1948) 2 All ER 1021***). Upon the grant of a lease or tenancy, both the landlord and tenant are in general estopped from denying the validity of the transaction. In the instant case, neither the landlord nor the tenant is permitted to assert that the tenancy which they created is invalid. It is also trite law that a lease cannot be extended by implication where an express notice for non-renewal has been given.
13. The appellant submitted that upon expiry of the lease on 14th April, 2009, a tenancy at will arose. In law, a tenancy at will arises whenever a tenant with the consent of the landlord, occupies *qua* tenant on the terms that either party can determine the tenancy at will. In the present case, there is no consent on the part of the respondent who is the landlord. A tenant cannot become a tenant at will by refusing to vacate the demised premises when an express notice of non-renewal has been given. From the facts of this case, we find that the appellant is neither a tenant at will nor a tenant at sufferance. A tenancy at sufferance arises where a tenant, having entered upon the land under a valid tenancy, holds over without the landlord's assent or dissent. (See ***Remon – v- City of London Real Property Co. Ltd., (1921) 1 KB 49, 58***). In the present case, the appellant is holding over the demised premises without the landlords assent and with the respondent's dissent and as such, the appellant is not a tenant by sufferance. By holding over the demised premises, the appellant is obligated to pay compensation for use and occupation of the premises and is liable to eviction.
14. We have examined the pleadings to determine if the appellant has any *bona fide* defence to the respondent's counterclaim for vacant possession of the premises. The tenancy agreement between the parties expired on 14th April, 2009, and the respondent expressly intimated that the lease shall not be renewed. The lease between the parties came to an end by effluxion of time and the appellant has no bona fide defence to the claim for vacant possession of the premises. The dispute between the parties on the amount of rent payable is not a bona fide defence to a claim for vacant possession. The dispute on rent payable is distinct from the claim *in rem* for vacant possession of the demised premises. The counterclaim for vacant possession is an action *in rem* while the claim for mesne profits and rent due and payable is an action *in persona* against the appellant. The two claims in the counterclaim are distinct and separate and we find that the learned judge did not err in holding that the appellant did not have a bona fide defence for the action *in rem*. We note that the learned judge did not enter summary judgment for *mesne profit* or rent due and the respondent did not apply for summary judgment for *mesne profits* or rent payable. It is our considered view that summary judgment could not properly be entered for the claim for *mesne profit* and rent payable because these are disputed liquidated claims.
15. On the counterclaim for vacant possession of the premises, we cite with concurrence the dicta by Lord Halisbury in ***Jacob – v- Booths Distillery Co. 85 LTR at 262***, where he stated that "*there are some things too plain for argument*". In the present case, it is plain that the tenancy agreement

between the parties expired on 14th April, 2009, and has never been renewed; it is also plain that the appellant received a notice for non-renewal of the tenancy. We concur with the learned judge that the appellant has no triable issue in the counterclaim for vacant possession. It is the duty of the courts to ensure that no individual is prevented from taking possession and or enjoying their property. A tenant cannot impose or force him/herself/itself on a landlord. In the instant case, when the lease between the parties expired, it was incumbent upon the appellant to give vacant possession. The respondent legitimately exercised its right to seek summary judgment and an order for vacant possession and or forcible eviction of the appellant. We have no doubt that in entering summary judgment against the appellant, the learned judge acted properly and cannot be faulted.

15. This appeal has no merit and is hereby dismissed with costs to the respondent.

Dated and delivered at Nyeri this 30th day of July, 2014.

ALNASHIR VISRAM

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JUDGE OF APPEAL

MARTHA KOOME

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JUDGE OF APPEAL

OTIENO-ODEK

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JUDGE OF APPEAL

I certify that this is a

true copy of the original.

DEPUTY REGISTRAR