



**I&M Realty Limited v Superlife Kenya Limited & 2 others (Civil Case E278 of 2023)
[2024] KEHC 9729 (KLR) (Commercial and Tax) (30 July 2024) (Judgment)**

Neutral citation: [2024] KEHC 9729 (KLR)

**REPUBLIC OF KENYA
IN THE HIGH COURT AT NAIROBI (MILIMANI COMMERCIAL COURTS)
COMMERCIAL AND TAX
CIVIL CASE E278 OF 2023
AA VISRAM, J
JULY 30, 2024**

BETWEEN

I&M REALTY LIMITED PLAINTIFF

AND

SUPERLIFE KENYA LIMITED 1ST DEFENDANT

HELLEMS BWIRE WAFULA 2ND DEFENDANT

SYLVIA JEBET CHESANGA 3RD DEFENDANT

JUDGMENT

1. Through a plaint dated 15th January, 2023, the Plaintiff seeks judgment against the 1st, 2nd and 3rd Defendants jointly and severally for:-
 - a) A declaration that the Defendants have breached the terms of the Lease Agreement;
 - b) Kshs. 10,743,283.03/= rent arrears and service charge outstanding as at September, 2022;
 - c) Kshs. 1,269,537.69/= being interest on (b) above pursuant to Clause 4.18 of the Lease Agreement;
 - d) An award of Kshs. 21,568,362.20/= as damages for breach of contract being rent for the remainder of the lease period;
 - e) In the alternative to prayer (d) above, a declaration that the Defendants are liable to pay damages for breach of the lease agreement being loss of the rental income from September, 2022 to the date of obtaining another tenant;



- f) Upon grant of order (e) above, an order directing the deputy registrar to compute the damages payable thereof;
 - g) Interest on (b) & (c) above at the rate of 15% per annum from September, 2022 until payment in full;
 - h) Kshs. 1,369,349.36/= being the legal costs;
 - i) In the alternative to prayer (h) above an order directing The Deputy Registrar to assess the legal costs payable and a declaration that the Defendants are liable for the costs so assessed; and
 - j) Costs of this suit.
2. Despite service of the plaint and summons, the Defendants neither entered appearance nor filed defences. A default judgment was entered against them on 15th September, 2023, and the matter was referred to this Court for formal proof hearing.

Background

3. The Plaintiff leased out the 12th Floor of I & M Tower ('the premises') measuring 4,728 square feet to the 1st Defendant for a term of six years from 1st October, 2020. The parties entered into a lease agreement which stipulated that the rent commencement date would be 1st December, 2020, and that the reserved rent would be chargeable as follows:-
- a) For the first year of the term the annual rent of Kshs. 4,538,880.00/= plus VAT;
 - b) For the second year of the term the annual rent of Kshs. 4,765,824.00/= plus VAT;
 - c) For the third year of the term the annual rent of Kshs. 5,004,115.20/= plus VAT;
 - d) For the fourth year of the term the annual rent of Kshs. 5,254,321.00/= plus VAT;
 - e) For the fifth year of the term the annual rent of Kshs. 5,517,037.00/= plus VAT; and
 - f) For the sixth year of the term the annual rent of Kshs. 5,792,889.00/= plus VAT.
4. Under Clause 3 of the Lease Agreement, the reserved annual rent was payable in equal quarterly payments in advance beginning the first day of December, March, June and September in every year. Service charge was payable by the 1st Defendant every financial period in advance which sum was fixed at an initial provisional charge of Kenya Shillings Thirty-Five (Kshs. 35.00/=) per square feet plus VAT per month and which was subject to the computations by the Plaintiff evidencing the periodical expenditures for each financial period. Under Clause 4.18, 15% annual interest would be added as to the rent arrears not paid within 30 days of becoming due.
5. The 1st Defendant failed to pay rent and service charge. As of September 2022, it was in arrears of Kshs. 10,743,283.03/=. The Plaintiff issued the Defendants with notices terminating the lease agreement and requiring them to vacate the premises according to Clause 7 of the Lease Agreement. Despite several demands and notices of intention to sue, the Defendants failed, neglected or refused to pay the outstanding amount.

Evidence

6. When the matter came up for hearing on 9th October, 2023, there was no appearance by the Defendants. The Plaintiff called its property manager, Ketan Gandhi, as PW1. He adopted his witness statement dated 15th January, 2022, as his evidence. He also produced the list and bundle of documents



- of even date, marked as Plaintiff's Exhibits 1-4. He mentioned that to date, the Plaintiff has not gotten another tenant and that the lease is still in place. He urged the Court to grant the prayers sought.
7. The Plaintiff filed written submissions dated 26th October, 2023. It argued that the 1st Defendant breached the lease agreement by failing to pay rent and service charge as and when they fell due. It also argued that having guaranteed the 1st Defendant's strict compliance with the lease agreement under Clause 8, the 2nd and 3rd Defendants are jointly and severally liable for the breach. It thus submitted that it is entitled to Kshs. 10,743,283.03/= rent arrears and service charge outstanding as of September 2022, as the statement of account was sufficient proof.
 8. The Plaintiff also relied on Clause 4.8 to argue that it is entitled to Kshs. 1,269,537.69/=, being 15% interest on the outstanding sum. It also relied on a detailed statement showing the computation of interest.
 9. The Plaintiff relied on the Court of Appeal decision in *Pius Kimaiyo Langat v Co-operative Bank of Kenya Ltd* (Civil Appeal No. 48 of 2015) [2017] eKLR to support the proposition that Courts do not re-write contracts for the parties but give effect to them because parties are bound by their contracts, unless coercion, fraud or undue influence are pleaded and proved.
 10. The Plaintiff asserted that it is also entitled to Kshs. 21,568,362.20/= as damages for breach of contract being rent for the remainder of the lease period. It submitted that the lease agreement provided that the term was six years from 1st October, 2020, and that the lease did not provide for termination by either party. It relied on the Court of Appeal decision in *Kenya Commercial Bank Limited v Popatial Madhavji & Another* (Civil Appeal No. 215 of 2013) [2019] eKLR to argue that it was entitled to rent for the remainder of the term, as the Defendants were not allowed to terminate the lease. It asserted that it was constrained to exercise its right to re-entry to prevent further accrual of rent, and to allow it to mitigate its losses. It however maintained that it had not gotten a tenant and the premises remained vacant.
 11. The Plaintiff prayed in the alternative for damages for breach of the lease agreement being loss of rental income from September 2022, to the date of obtaining another tenant. Relying on Section 71(5) of the *Land Act*, the Plaintiff submitted that even in instances where the tenant vacates with the approval of the landlord before lapse of the term of the lease, the tenant would be obligated to pay rent for a period of one year from the date of vacation.
 12. The Plaintiff also relied on Section 26(1) of the *Civil Procedure Act* to submit that the Court has the discretion to award interest from September 2022, before the suit was instituted.
 13. As regards the prayer for legal costs of Kshs. 1,369,349.36/=, the Plaintiff relied on Clause 4.13, to the effect that the Defendants are under an obligation to pay the Plaintiff on an indemnity basis costs, fees, charges, disbursements and expenses incurred by the Plaintiff in relation to or incidental to the recovery or attempted recovery of arrears of rent or other sums due from the Plaintiff, and such costs are inclusive of any legal fees so incurred calculated as per the *Advocates Remuneration (Amendment) Order*, 2014.
 14. Finally, the Plaintiff urged the Court to award it the costs of the suit. It relied on Section 27 of the *Civil Procedure Act* and the Court of Appeal decision in *Jasbir Sing Rai & 3 Others v Tarchan Sing Rai & 4 others* (Civil Appli. Nai 307 of 2003 (154/2003 UR) [2014] eKLR to the effect that costs follow the event.



Analysis and Determination

15. I have considered the pleadings, the evidence, the submissions and the authorities cited. The issues for determination are whether the Plaintiff has proved its case on a balance of probabilities and whether it is entitled to the prayers sought.
16. Section 107 of the *Evidence Act* provides as follows:-
- “ 107 Burden of Proof
- (1) Whoever desires any court to give judgment as to any legal right or liability dependent on the existence of facts which he asserts must prove that those facts exist.
- (2) When a person is bound to prove the existence of any fact it is said that the burden of proof lies on that person.”
17. Even though the Plaintiff’s claim is undefended, it is the mandate of this Court to establish that the Plaintiff has proved its case to the required standard. The underlying principle is that the evidence must be sufficient even without rebuttal. If not, the claim ought to be dismissed.
18. In the Court of Appeal decision in *Daniel Toroitich Arap Moi v Mwangi Stephen Muriithi & Another* (Civil Appeal No. 240 of 2011) [2014] eKLR, it was observed:-
- “It is a firmly settled procedure that even where a Defendant has not denied the claim by filing a defence or an affidavit or even where the Defendant did not appear, formal proof proceedings are conducted. The claimant lays on the table evidence of facts contended against the Defendant. And the trial court has a duty to examine that evidence to satisfy itself that indeed the claim has been proved. If the evidence falls short of the required standard of proof, the claim is and must be dismissed. The standard of proof in a civil case, on a balance of probabilities, does not change even in the absence of rebuttal by the other side.” See also *Mary Njeri Ngahu v James Kanui Njoera & another* [2019] eKLR.
19. This is a suit for recovery of rent arrears. The first issue is whether the Defendants breached the lease agreement. The Plaintiff produced a lease agreement executed by the parties on 17th January, 2022, showing that the 1st Defendant agreed to lease its premises for six years from 1st October, 2020.
20. The salient terms of the lease agreement were that under Clause 3 of the Lease Agreement, the reserved annual rent was payable in equal quarterly payments in advance, beginning the first day of December, March, June and September in every year. Service charge was payable by the 1st Defendant every financial period in advance which sum was fixed at an initial provisional charge of Kenya Shillings Thirty-Five (Kshs. 35.00/=) per square feet plus VAT per month and which was subject to the computations by the Plaintiff evidencing the periodical expenditures for each financial period. Under Clause 4.18, 15% annual interest would be added as to the rent arrears not paid within 30 days of becoming due.
21. The Plaintiff submitted that the Defendants breached the lease agreement by failing to pay rent and service charge as and when they fell due. The Plaintiff produced a statement of account detailing an outstanding rent and service charge of Kshs. 10,743,283.03/= as at 22nd September, 2022.



22. The Plaintiff also asserted that it was entitled to interest on the outstanding rent of Kshs. 1,269,537.69/= in accordance with Clause 1 and Clause 4.18 of the Lease Agreement, which read as follows:-

“1.9 Interest Rate” means Fifteen (15%) per centum per annum charged on the outstanding sums equal to the amount then due to the Landlord.”

4.18 Interest on Arrears

4.18.1 Without prejudice to any right of re-entry or distress conferred by law or by this Lease if the Tenant shall fail to pay the rents or any other sum due under this Lease within Thirty (30) days of the date due whether formally demanded or not the Tenant shall pay to the Landlord Interest on the rents or other such sum at the Interest Rate from the date when they were due to the date on which they are paid and such Interest will be recoverable by the Landlord as additional rent.””

23. Flowing from the above, I find that the Plaintiff has proved its claim for breach of the lease agreement against the Defendants to the required standard and is entitled to Kshs.10,743,283.03/= rent arrears and service charge outstanding as at September 2022 and Kshs. 1,269,537.69/= being interest on (b) above according to Clause 4.18 of the Lease Agreement.

24. I now turn to the Plaintiff’s prayer for an award of Kshs. 21,568,362.20/= as damages for breach of contract. The Plaintiff argued that since the lease agreement provided that the term was six years from October 2020 and did not contain a provision for termination, it was entitled to rent for the remainder of the term being the damages for breach of the lease.

25. In the Court of Appeal decision in *Kenya Commercial Bank Limited v Popatial Madhavji & Another* [*supra*], cited in the Plaintiff’s submissions, it was observed as follows:-

“But having found as we have above that an agreement to lease for a period of 5 years and 3 months had resulted from the terms outlined in the letter of 23rd December 1998 and the ensuing correspondence, the appellant was bound to a lease term of a period exceeding five years, which removed it from the ambits of *Cap 301*. This meant that termination of the lease mid-term was not available to the appellant. The consequence of this was that the notice of termination of 25th March 2002 could not validly terminate the lease, with the result, we find that, the appellant was obligated to continue to occupy the suit premises for the entire period of the lease, and to pay the agreed rent and service charge for the period up to the date of expiry, that being the 31st December 2003.”

26. From my evaluation of the present case and the evidence presented, it is clear that the lease agreement was for a term of six years from October 2020. The Plaintiff’s case is that the Defendants refused to pay the rent and service charge as and when they fell due, leading to accrual on rent arrears running up to Kshs. 10,743,283.03/= as at 22nd September, 2022. The Plaintiff produced a demand for rent arrears dated 22nd March, 2022. It also produced a letter of termination dated 5th May, 2022, issued to the Defendants by its Advocates through which it demanded them to vacate the premises. Further, the Plaintiff produced a notice to vacate the premises, dated 23rd June, 2022.

27. From a perusal of the lease agreement, I note that there is no provision for termination allowing either party to terminate the lease mid-term. Hence, the termination notice issued by the Plaintiff’s advocate could not validly terminate the lease agreement.



28. In the High Court decision in *Chimanlal Meghji Naya Shah & Another v Oxford University Press (EA) Limited* (Civil Case 566 of 2005) [2007] eKLR, it was stated as follows:-

“Equally there is no doubt that the subject lease did not contain and/or provide a termination clause to enable the tenant to end its relationship with the Plaintiffs. Perhaps it is also essential to point out that no landlord can force a tenant to stay in his premises for a particular period whether a lease exists or otherwise. The situation depends on many issues that would determine the relationship either way.

If for example, the lease provides for a fixed period of 6 years and the tenant is unable to pay the rent applicable, then the tenant cannot be heard to say that the landlord cannot end or terminate his lease. In my view where there is no termination clause and the lease is terminated before its period of expiry, the situation that obtains is a breach of a contract. Where the parties are not regulated by their lease agreement as to the nature and mode of notice, if the lease is terminated by either party, then the party offended is entitled to damages for breach of contract. In essence, my position is that a lease agreement properly registered is a form of a contract and therefore when there is a default, the terms of breach of a contract aptly applies.”

29. From the above, it is deducible that the non-payment of rent by the tenant which led to the break of the term of the lease was also not a valid mode of termination of the lease, and was a breach of the lease agreement. Therefore, the Defendants were bound to discharge their obligations to the end of the term. Thus, I find that the Plaintiff is entitled to the agreed rent and service charge from September 2022 to the remainder of the term of Kshs. 21,568,362.20/=.

30. In conclusion, judgment is entered against the 1st, 2nd and 3rd Defendants jointly and severally for:-

- a) A declaration that the Defendants have breached the terms of the Lease Agreement;
- b) Kshs. 10,743,283.03/= rent arrears and service charge outstanding as at September, 2022;
- c) Kshs. 1,269,537.69/= being interest on (b) above;
- d) An award of Kshs. 21,568,362.20/= being rent for the remainder of the lease period;
- e) Interest on (b) & (c) above at court rate from the date of the judgment until payment in full;
- f) Costs of this suit.

DATED AND DELIVERED VIRTUALLY VIA MICROSOFT TEAMS THIS 30TH DAY OF JULY 2024

ALEEM VISRAM, FCIArb

JUDGE

In the presence of;

..... For the Plaintiff

..... For the 1st Defendant

..... For the 2nd Defendant

..... For the 3rd Defendant

