



REPUBLIC OF KENYA



Nyoro v Karinstreap Investment Limited (Environment & Land Case E100 of 2020) [2023] KEELC 16911 (KLR) (20 April 2023) (Judgment)

Neutral citation: [2023] KEELC 16911 (KLR)

**REPUBLIC OF KENYA
IN THE ENVIRONMENT AND LAND COURT AT NAIROBI
ENVIRONMENT & LAND CASE E100 OF 2020**

OA ANGOTE, J

APRIL 20, 2023

BETWEEN

NELLY WANJIRU NYORO PLAINTIFF

AND

KARINSTREAP INVESTMENT LIMITED DEFENDANT

JUDGMENT

1. Before the Court for determination is a suit commenced by way of a Plaint dated 24th August 2020. The Plaintiff is praying for judgement against the Defendant for:
 - a. Forfeiture of lease.
 - b. Cancellation of the lease registered on 22.11.2016.
 - c. Rent arrears accrued until possession is delivered up.
 - d. General damages for breach of the lease agreement.
 - e. Costs of the suit.
2. The Plaintiff avers that at all material times, she was the registered owner of Title No. Dagoretti/Riruta/1596 (hereinafter 'the suit property'); that on or around 15th September 2016, she entered into a lease agreement with the Defendant for a portion of land measuring 100ft by 100ft on the suit property and that the agreement was for a period of 26 years (15th September 2016 to 1st January 2043).
3. It was averred by the Plaintiff that as per the agreement, the Defendant was to construct permanent residential and commercial houses for rental purposes and that the Defendant was to collect rent from the houses and pay the Plaintiff quarterly rent that was fixed at Kshs. 120,000 per month for the first five years after which it would be reviewed.



4. Additionally, it was averred, it was an express term of the agreement that upon expiry of the lease period, the Defendant would surrender the houses to the Plaintiff free of charge and free of any liabilities and that as per the agreement, construction of the houses was to begin on 15th September 2016 and end on 30th June 2017.
5. The Plaintiff averred that the Defendant breached the agreement. The particulars of breach were stated as follows: failing to commence construction of the aforementioned residential houses and commercial flats/houses during the stipulated period to date and defaulting in the payment of rent from November 2019 to date.
6. It was averred that the Plaintiff gave the Defendant notice to remedy the breach under Section 75 of the Land Act but the Defendant did not comply and that the Plaintiff has suffered loss and damage, the particulars of which were stated as loss of proprietary rights to the suit property.

Hearing & Evidence

7. During the hearing, the Plaintiff testified as PW1. She adopted her witness statement as her evidence-in-chief and produced her bundle of documents as exhibits. In her witness statement dated 24th August 2020, she reiterated the above facts and further stated that she entered into the agreement with the representatives of the Defendant namely: Racheal Wanjiru Nduta and Edison Ndungu Mbugua.
8. PW1 stated that the Defendant was to construct houses on a portion of the suit property, collect rent from the same and pay her Kshs. 120,000 per month; that this amount was to be paid quarterly and that the total payable for the lease period was to be Kshs. 38,034,180.
9. However, PW1, at the time of filing the suit, the construction was yet to commence and no rent had been paid to her since November 2019. In conclusion, the Plaintiff stated that she exercised her right as the lessor and forfeited the agreement on account of the Defendant's breach by issuing a 60 days' notice of Forfeiture of Lease which indicated the Defendant's breach of the agreement.
10. The Defendant was served with the Plaint and Summons. The Defendant neither entered appearance nor filed the Defence.

Submissions

11. The Plaintiff submitted that there was a legally binding and recognized lease which was in writing and signed. It was submitted that the agreement was registered and an entry made in the Certificate of Title on 22nd November, 2016.
12. It was submitted that the Defendant breached Clause 3 of the agreement which provided that the lessor would grant the lessee a grace period of nine months beginning 15th September 2016 to construct the houses and that the Defendant also breached Clause 4(a) of the agreement which required that the Defendant pay the Plaintiff rent on or before the 10th day of every month.
13. Consequently, it was submitted, the Defendant is in default of rent arrears totalling Kshs. 4,080,000; that relying on Sections 75 and 56 of the Land Act and Clause 6 of the agreement, the Defendant breached the agreement; that the Plaintiff gave a notice for the breach to be remedied and that when the breach was not remedied, the Plaintiff's notice of forfeiture came into play.
14. While relying on the case of *Shaneebal Limited vs County Government of Machakos* [2018] eKLR, the Plaintiff submitted that since her suit was not controverted, she had proved the same on a balance of probabilities, and was entitled to the reliefs sought.



Analysis and Determination

15. The suit was undefended. Section 107 (1) of the [Evidence Act](#) provides that whoever desires any court to give judgement as to any legal right or liability dependent on the existence of facts which he asserts must prove that those facts exist. Lord Denning in *Miller vs Minister of Pensions* [1947] 2 ALL ER 372 stated as follows concerning the burden of proof:

“That degree is well settled. It must carry a reasonable degree of probability, but not so high as is required in a criminal case. If the evidence is such that the tribunal can say: ‘We think it more probable than not, the burden is discharged, but, if the probabilities are equal, it is not. Thus, proof on a balance or preponderance of probabilities means a win, however narrow. A draw is not enough. So, in any case in which the tribunal cannot decide one way or the other which evidence to accept, where both parties’ explanations are equally (un)convincing, the party bearing the burden of proof will lose, because the requisite standard will not have been attained.”

16. Justice Hancox in the case of *Karugi & Another vs Kabiya & 3 Others* [1983] eKLR stated as follows concerning the burden of proof in undefended cases:

“The burden on the plaintiff to prove his case remains the same, though it is true that, where the matter is not defended, or, as here, validly defended that burden may become easier to discharge.”

17. Accordingly, the Plaintiff was required to prove her case on a balance of probabilities even though it was undefended.

18. The Plaintiff has shown that she entered into a lease agreement with the Defendant. This is evidenced by the documents on record, that is: a title deed, a lease agreement dated 15th September 2016 and a copy of records from the Registrar of Companies showing that the people who signed the lease agreement are directors of the Defendant.

19. Section 2 of the preamble of the agreement reads as follows:

“The Lessor has agreed to lease and the lessee has agreed to take a lease of the demised premises for purpose of building permanent residential and commercial flats/houses for rental purposes. The lease is for a period of 26 years commencing 1/7/2017 to 1/1/2043..”

20. Section 3 of the preamble provides as follows:

“The Lessor hereby grants the lessee a grace period from the date hereof to 30/6/2017 (9 months) to enable the lessee to construct the said houses.”

21. The lease was for the construction of residential and commercial houses. In the absence of evidence that such houses were constructed, the Plaintiff’s position that the agreement was breached by the Defendant is correct.

22. Section 73 (1) of the [Land Act](#) provides as follows:

“Subject to the provisions of section 76 and to any provisions to the contrary in the lease, the lessor shall have the right to forfeit the lease if the lessee-



- a. commits any breach of, or omits to perform, any agreement or condition on his part expressed or implied in the lease.”

23. Section 75 of the *Land Act* provides:

“Notwithstanding anything to the contrary contained in the lease, no lessor shall be entitled to exercise the right of forfeiture for the breach of any agreement or condition in the lease, whether expressed or implied, until the lessor has served on the lessee a notice of not less than thirty days—

- (a) specifying the particular breach complained of; and
- (b) if the breach is capable of remedy, requiring the lessee to remedy the breach within such reasonable period as is specified in the notice; and
- (c) in any case other than non-payment of rent, requiring the lessee to make compensation in money for the breach, and the lessee has failed to remedy the breach within thirty days thereafter, if it is capable of remedy, and to make reasonable compensation in money.”

24. Having established that the agreement was breached by the Defendant’s failure to construct the houses, I find that the Plaintiff’s right to forfeiture came into play. I also find that the right of forfeiture was properly exercised by the Plaintiff as per the law.

25. The Plaintiff, through her advocates, issued a notice of forfeiture to the Defendant dated 28th May 2020. The particulars of breach were listed in paragraph four of the notice. In paragraph five of the same, the Plaintiff gave the Defendant 60 days’ notice within which to remedy the breach and specified the monetary compensation required.

26. In view of the foregoing, I am satisfied that the Plaintiff having proven that there was a valid lease which was breached and having followed the right procedure in exercising her right of forfeiture, she is entitled to an order of the Court enforcing that right and cancelling the lease that was registered at the lands office on 22th November, 2016.

27. The Plaintiff has asked the Court to grant her rent arrears accrued until possession is delivered up. However, she has not shown that the Defendant was/still is in possession of the suit property, and if so, from which date.

28. Furthermore, the notice of forfeiture became effective on 28th November 2020. Even if the Defendant was in possession of the suit property, she would only be entitled to rent accruing up until that date.

29. While discussing the issue of the payable damages, the court in the case of Kenya Women Microfinance Ltd vs Martha Wangari Kamau [2021] eKLR stated as follows:

“In Kenya Tourist Development Corporation vs Sundowner Lodge Limited (supra), the appellant had agreed to give the respondent a loan of Kshs, 15,000,000 for construction of a hotel. However, the appellant unilaterally withdrew that offer. The respondent filed a suit claiming general damages of Kshs. 421,760,000 in the form of opportunity costs and loss of business following breach of contract. The High court awarded general damages of Kshs. 30,000,000 for breach of contract. On appeal, the Court of Appeal held that as a general rule, general damages are not recoverable in cases of alleged breach of contract. Damages for



breach of contract are compensation to the aggrieved party and a restitution of what he has lost by the breach.”

30. In *Dharamshi vs Karsan* [1974] EA 41, it was held that general damages are not awardable for breach of contract in addition to the quantified damages as it would amount to a duplication. And in *Securicor Courier (K) Ltd vs Benson David Onyango & another* [2008] eKLR, the Court of Appeal reiterated that general damages are not awardable for breach of contract. (See also *Provincial Insurance Co. EA Ltd vs Mordechai Mwanga Nandwa*, (KSM Civil Appeal No 179 of 1995).
31. Flowing from the above principles of law, the Plaintiff is not entitled to damages for breach of contractual obligations, save for the lost rent for the period between when the rent was due to when the forfeiture notice lapsed.
32. As per her notice of forfeiture, the Plaintiff was owed Kshs. 960,000 as at June 2020. For the next two months while the notice was in place, she was owed Kshs. 240,000 (at Kshs. 120,000 per month). The total amount in rent arrears accruing to her is therefore Kshs. 1,200,000. That is the amount the Plaintiff is entitled to.
33. For those reasons, the Plaintiff’s claim is allowed as follows:
 - a. An order for cancellation of the lease registered on 22.11.2016 on parcel of land known as Dagoretti/Riruta/1596 be and is hereby issued.
 - b. The Defendant to pay the Plaintiff damages for the accrued rent of Kshs. 1,200,000.
 - c. The Defendant to pay the costs of the suit.

DATED, SIGNED AND DELIVERED VIRTUALLY IN NAIROBI THIS 20TH DAY OF APRIL, 2023.

O. A. ANGOTE

JUDGE

In the presence of;

Mr. Ng’ang’a for Plaintiff

No appearance for Defendant

Court Assistant: June

