



REPUBLIC OF KENYA



**Sayani Investments Limited v Finham & Company Limited & another (Civil Case 364 of 2015)  
[2022] KEHC 16036 (KLR) (Commercial and Tax) (24 November 2022) (Judgment)**

Neutral citation: [2022] KEHC 16036 (KLR)

**REPUBLIC OF KENYA  
IN THE HIGH COURT AT NAIROBI (MILIMANI COMMERCIAL COURTS)  
COMMERCIAL AND TAX  
CIVIL CASE 364 OF 2015  
WA OKWANY, J  
NOVEMBER 24, 2022**

**BETWEEN**

**SAYANI INVESTMENTS LIMITED ..... PLAINTIFF**

**AND**

**FINHAM & COMPANY LIMITED ..... 1<sup>ST</sup> DEFENDANT**

**TWO STAR AGENCIES LIMITED ..... 2<sup>ND</sup> DEFENDANT**

**JUDGMENT**

1. The plaintiff herein, Sayani Investments Limited, filed the plaint dated July 14, 2015 seeking the orders:-
  - a. That the principal sum of Kshs 27,968,691.10/-
  - b. Interest born (a) above at court rates from June 26, 2015 till payment in full.
  - c. Costs of the suit.
2. The plaintiff's case was that it was at all material times relevant to this suit, the registered proprietor of all the developments commonly known as Textile House being LR No 209/4920 and Caxton House being LR No 209/923, 209/924 and 209/925 respectively all situated within the City County of Nairobi with lettable space offered out to clients upon agreed terms and conditions.
3. The defendants were tenants of the plaintiff occupying certain lettable space within the subject premises, on Caxton and Textiles Houses respectively. The defendants have since vacated Caxton House but still occupy the entire first and second floor of Textile house.



4. The Plaintiff further states that by the month of August, 2014 the defendants had fallen into arrears and were not able to regularly meet their tenancy obligations thereby forcing the plaintiff to exercise its rights and levy distress on the defendants through the firm of Messers Wareen Traders Limited (K).
5. To forestall the impending attachment of their good the defendants hastily entered into an agreement with the auctioneer and committed to liquidate the rent arrears in monthly. However the plaintiff avers that it was not a party to the said agreement.
6. The “purported” agreement was that the defendants would liquidate the rent arrears of Kshs 7, 788, 739.20/- through monthly instalments of Kshs 500,000/-= beginning the month of September, 2014.
7. The defendants then reneged on their own agreement with Warleen Traders Limited (K) thus forcing the plaintiff to instruct Garam Investments Auctioneers to proclaim the defendants’ goods to realize the rent arrears.
8. The plaintiff’s action to instruct Garam Investments to realize the rent arrears from the defendants forced the defendant to file HCCC No 349 of 2014 at the then Milimani Commercial Courts in which they cited the agreement with Warleen Traders Limited(K) and they managed to obtain orders of injunction but have never been keen to proceed with the matter.
9. The defendants have since September, 2014 not paid the plaintiff rent regularly as required, including the admitted arrears as at August 31, 2014 and to date the defendants owe the plaintiff Kshs 27,988,691.10/- as at June 26, 2015 and this continues to occasion the plaintiff loss in rental incomes.
10. The plaintiff ‘s claim against the defendants jointly and severally is for recovery of rent arrears owing from the defendants to the plaintiff as at 26<sup>th</sup> June, 2015 with interest at court rates from the date due till payment in full.
11. The defendants filed a joint defence on October 30, 2015 which defence was subsequently amended, with the leave of the court, through an amended defence and counter claim dated February 25, 2016.
12. Through the amended defence the defendants aver that there is a misjoinder of parties as the plaintiff’s alleged cause of action against the defendants is separate and in respect of each defendant.
13. The 1<sup>st</sup> defendant concedes that it had rented part of the plaintiff’s 2<sup>nd</sup> floor of Exchange Building and the whole of 3<sup>rd</sup> floor of Caxton House but that despite various pending cases and court orders the plaintiff violently evicted it from all the rented areas on March 4, 2015.
14. The 2<sup>nd</sup> defendant also averred that it rented the ground floor shop on Caxton House but was similarly violently evicted on March 4, 2015 when it ceased being a tenant in the said premises.
15. The defendants deny the claim that they owe the plaintiff the sum of Kshs 27,968,691.10 being the alleged rent arrears and further state that their repeated requests to the plaintiff to furnish them with evidence of the alleged arrears have not borne any fruits.
16. Through the counterclaim, the defendants aver that they are in the business of renting office spaces and subletting the same to subtenants, a fact which the plaintiff was aware of and consented to. The defendants further state that on March 4, 2015, the plaintiff, with the assistance of the police and hired goons unlawfully and violently evicted them and their subtenants from the Caxton House thereby exposing the property in the leased premises to damage and loss.
17. The defendants seek the following orders in the Counter Claim:-
  - a. General damages.



- b. Exemplary and punitive damages for the plaintiff's high handedness and taking the law in its own hand.
  - c. Loss of business income.
  - d. Costs in this counterclaim.
  - e. Any other remedy deemed appropriate.
18. The plaintiff filed a reply to counterclaim dated May 20, 2016 wherein it reiterated the contents of the plaint and denied the allegations made in the counterclaim.

### **The hearing**

19. At the hearing of the case, the plaintiff presented the evidence of its Managing Director Mr Karim Jetha (PW1) who testified that the defendants were the plaintiffs tenants in three premises within the Nairobi being Caxton House, Textile House and Fourth Granite Flats. He stated that the defendants occupied the premises in 2003/2004 and that the defendants' main business was to take up premises and sub-let the same as agents.
20. It was the plaintiff's case that the defendants initially met their rent obligations but later on defaulted in the payments and fell in arrears from 2009 which rent accumulated to the tune of Kshs 27,968,691.10.
21. The witness referred to the plaintiffs supplementary list of documents containing rent invoices dispatched to the defendants every month which he claimed added up to about Kshs 28 million. He stated that the defendants only paid part of the rent for some months but did not pay the whole amount thus leading to the accumulation of the arrears.
22. On cross examination, PW1 testified that he became a director in the plaintiff company in November 2014 and that he was aware of the terms of the tenancy agreement between the plaintiff and the defendants. He stated that he did not have the copy of the tenancy agreement but that the plaintiff has all the records.
23. He stated that sometime in 2013 the plaintiff served the defendants with notices to terminate the tenancy but the tenants filed a reference to the Rent Tribunal. He denied any knowledge of an agreement with the tenants to the effect that the outstanding rent was Kshs 7 million. He conceded that there were discrepancies in the rent statements and what the plaintiff filed in court but attributed the same to land rates and land rents which the defendants agreed to pay. He confirmed that the tenants were evicted from the leased premises on March 4, 2015.

### **Defendant's case.**

24. The defendants presented the testimony of their Managing Director Mr Mohamed Omolo Khayundi who adopted his witness statement as evidence in chief and produced the defendant's bundle of documents as exhibits.
25. He denied the allegation that the defendants owe the plaintiff the amount claimed as outstanding rent. He stated that the plaintiff had the onus to prove its claim.
26. Parties filed submissions at the close of their respective cases which I have considered.
27. The plaintiff claims a specific sum Kshs 27,968,691.10, being rent arrears as at June 26, 2015 together with interest and costs.



28. It is trite that a claim for a specific sum of money must not only be pleaded but must also be strictly proved.
29. It was not disputed that the plaintiff leased its premises to the defendants and that the parties had a dispute over rent payment that culminated in distress for rent action and litigation before the Rent Tribunal and the Chief Magistrates Court at Milimani.
30. It was also not disputed that the defendants were eventually evicted from the suit premises which eviction is the basis of the defendants counterclaim.
31. The main issues for determination are as follows:-
  - a. Whether the plaintiff proved its claim against the defendants.
  - b. Whether the defendants counter claim is merited.

### **The Plaintiff's claim**

32. I have perused the plaintiff's witness statement signed by PW1 Mr Karim Jetha and admitted at the hearing as his evidence in chief in the said statement, the witness states as follows:-

“By the month of August, 2014 the defendants had fallen into arrears and were not able to regularly meet their tenancy obligations as to payment of monthly rent to the plaintiff forcing the plaintiff to exercise its rights and levy distress on the defendants through the firm of Messers Warlen Traders Limited (K), licenced Auctioneers who on August 27, 2014 levied distress upon the defendants for accumulated rent arrears.

To forestall the impending attachment of their good the defendants hastily entered into an agreement with the auctioneer and committed to liquidate the rent arrears in monthly.

The agreement was that the defendants would liquidate the rent arrears of Kshs 7,788,739.20/= through monthly instalments of Kshs 500,000/-, beginning from the month of September, 2014.

The defendants then reneged on their own agreement with Warleen Traders Limited (K) forcing the plaintiff to instruct Garam Investments Auctioneers to proclaim the defendants' good to realize the rent arrears which forced the defendant to file HCCC No 349 of 2014 at the then Milimani Commercial Courts in which they cited the agreement with Warleen Traders Limited (K) and they managed to obtain order of injunction but have never been keen to proceed with the matter.

The defendants have since September 2014 not paid to the plaintiff rent including the admitted arrears as at August 31, 2014 and to date the defendants owe the plaintiff Kshs 27,968,691.10/- as at June 26, 2015 and this continues to occasion the plaintiff loss in rental incomes.”

33. From the above extract of the plaintiff's statement, there is an indication that in September the defendants agreed to liquidate the rent arrears of Kshs 7,788,739.20 by monthly instalments of Kshs 500,000/- it is however noteworthy that the alleged agreement was not produced as an exhibit in this case. The plaintiff did not also explain to this court how the rent arrears shot from 7.7 million as at September 2014 to Kshs 27,968,691.10 as at June 26, 2015.
34. It did not escape the attention of this court that even though the plaintiff claimed that it entered into a written lease agreement with the defendant's, no such agreement was presented before this court as



an exhibit. Needless to say, it is only through such an agreement that the court can discern the terms of tenancy including the agreed monthly rent to be paid to the plaintiff.

35. The only document that the plaintiff tendered, as proof of its claim was what the plaintiff referred to as “statement of accounts maintained by the plaintiff in respect of rent account of the 1<sup>st</sup> and 2<sup>nd</sup> defendants.”
36. I have perused the said statements and I note that they are not signed and do not indicate the identity of their maker or if the same was shared with the defendants. There was also no evidence to show that the plaintiff ever demanded the said rent arrears of Kshs 27.7 million from the defendants.
37. I note that the plaintiff filed a supplementary list of documents dated May 20, 2016 wherein it attached statement of accounts of rent collection and a letter dated October 21, 2015 from the 2<sup>nd</sup> defendant. Once again, I note that the maker of the said statement of account is not disclosed and neither is it signed. Furthermore, nowhere in the statements is it indicated that the rent arrears due is Kshs 27.7 million.
38. The plaintiff’s witness did not testify that he authored the said statements. I am therefore not satisfied that the statements meet the strict proof threshold expected in a claim for a specific amount of money.
39. In a nutshell, I am not satisfied that the plaintiff proved its case against the defendants to the required and I therefore dismiss the claim.
40. Turning to the defendants’ counterclaim, the defendants claimed that:-

“On or about the March 4, 2015 between 3 and 4 a.m the plaintiff assisted by police from Central Police Station hired a gang of about 100 goons who violently evicted the defendants and their subtenants from Caxton House and the said goons, street urchins, and members of the public looted the defendants ‘subtenant’ movable goods.

The plaintiff’s act of hiring goons to violently evict the defendants and their subtenants from the office spaces they occupied in Caxton House was not only ruthless but was also in total violation of law and in contempt of court. It was in breach if the tenancy agreements between the plaintiff and the defendants and amount to the torts of conversion of the defendants’ subtenants’ goods and trespass on the defendant’s property.”

41. The defendants claimed that the plaintiff forcefully evicted them from the leased premises despite the fact that they had obtained restraining orders against the plaintiff in HCCC No 349 of 2014 and despite the fact that they had requested the plaintiff to furnish them with evidence of the alleged rent arrears to no avail.
42. I have considered the documents relied upon and produced by the defendants as exhibits and especially exhibit 8, a copy of the Nation Newspaper Sheet dated March 6, 2015. The exhibit contains a story/narration of the eviction that is the subject of the defendants’ counterclaim. A perusal of the newspaper article reveals that the eviction was carried out by unnamed but powerful politicians. The article states as follows in part:-

“A top official in the Jubilee administration and two Nairobi politicians were yesterday implicated in Wednesday morning’s violent attempt to evict tenants and take over a prime building on Nairobi’s Kenyatta Avenue.



Investigations reveals that the down raid on the three storey Caxton House was planned and executed by more than 200 gangsters hired by the two city politicians to evict the tenants and pave way for the transfer of the property to the senior government official.

Aware that the property's lease expired 2007 and is yet to be renewed, the top government official is said to be scheming to dispossess the original owner of the property by arm-twisting the National Land Commission(NLC) not to renew the lease and instead, transfer it to his proxy.

It is a strategy used by land sharks to gain possession of prime land or property from their original owners by colluding with Ministry of Lands officials not to renew expired leases.

NLC Vice Chairperson Abigael Mbagaya Mukolwe confirmed that the building belonged to a private company , Sayani Investment Ltd. She also said that the property's lease had expired and the owners had sought its renewal, a request the commissioner has accepted.

“ As a commission, we will follow the law on leases that have expired. This particular lease expired in 2007 and the owner, Sayani Investments applied for renewal. The Commissioner has already given consent for the lease to be renewed and we really don't know where the delay is coming from,” She said on phone.

Ms Mukolwe said the law gave preference to the existing owner and challenged those out to take over the property to provide evidence of ownership, adding that they had documents to prove ownership of the property.”

43. My take is that the defendants' own exhibit/newspaper article reveals that the eviction in question may have been conducted at the behest of certain powerful politicians who were out to cash in on the expiry of the plaintiffs lease.
44. I am therefore not satisfied that the defendant proved their claim against the plaintiff for damages arising out of the eviction.
45. Having regard to the reasons and observations I have stated in this judgment, I find that both the plaintiffs' claim and he defendants counterclaim have not been proved to the required standards.
46. Consequently, I dismiss the plaintiffs suit and the defendants' counterclaim. Each party shall bear its own costs.

**DATED, SIGNED AND DELIVERED VIRTUALLY AT NAIROBI THIS 24<sup>TH</sup> DAY OF NOVEMBER 2022.**

**W A OKWANY**

**JUDGE**

**In the presence of: -**

Mr Ombete for defendants.

Mr Njoroge for Mongeri for plaintiff

Court Assistant – Sylvia

