



**REPUBLIC OF KENYA**

**IN THE HIGH COURT OF KENYA**

**AT NAIROBI**

**CIVIL SUIT NO. 281 OF 2004**

**HILLSIDE ESTATE LIMITED.....PLAINTIFF**

**VERSUS**

**KENYA RAILWAYS CORPORATION LIMITED.....DEFENDANT**

**JUDGMENT**

1. Hillside Estate Ltd, the plaintiff herein, filed the plaint on 24<sup>th</sup> March, 2004 which was amended and filed on 12<sup>th</sup> May, 2010 seeking judgment as hereunder:

***a) A declaration that on the true construction of the agreement dated 30<sup>th</sup> October, 2001, the plaintiff is entitled to the grant of the lease of the space measuring 13,200 square feet situated on Plot LR. No. 209/12180-Bunyala Road within Nairobi as particularized at paragraph 4 of the plaint and that the defendant is liable to grant actual possession and full enjoyment of the leased premises to the plaintiff.***

***b) Kshs.61,414,656.25/= as particularized in the amended plaint.***

***c) Interest on (b) above at court rates from the date of filing the suit or other date as shall be ordered until payment in full.***

***d) Costs of the suit together with interest thereon at court rates until payment in full.***

***e) Any other and further reliefs that the court may deem fit.***

2. The defendant filed an amended statement of defence and counterclaim on 9<sup>th</sup> June, 2010.

3. The background of the suit is that the defendant is alleged to have leased a timber shed with an open space to the plaintiff for a term of two (2) years vide a letter dated 15<sup>th</sup> January, 2001 and that through a second letter dated 30<sup>th</sup> October, 2001, the defendant agreed to lease an extra open space to the plaintiff. That the lease was extended and the plaintiff undertook various developments on the suit premises and in doing so, incurred expenses and/or liabilities.

4. The plaintiff added that the defendant unlawfully purported to withdraw the extra space granted vide its letter of 30<sup>th</sup> October, 2001 and has denied the plaintiff access to the suit premises.

5. In his defence, the defendant inter alia claimed that the lease which commenced on 1<sup>st</sup> February, 2001 was for a fixed term with no option of renewal; that it has no knowledge of the losses particularized in the amended plaint and argued that the plaintiff was not entitled to the suit premises upon expiry of the lease. In its counterclaim, the defendant alleged that the plaintiff continues to utilize the suit premises despite the expiry of the lease and in so doing, has caused the defendant to suffer loss and damage. In the circumstances, the defendant is claiming damages for trespass at the monthly sum of Kshs.300,000/= until possession is delivered.

6. The plaintiff called three (3) witnesses whereas the defendant summoned one (1) witness.

7. Japhet Kimathi Kiara (PW1) gave evidence stating that the lease was for an initial period of 2 years but that the plaintiff had sought an extension of the same and was assured a 10-year extension by the defendant. The witness also stated that the plaintiff thereafter invested a large amount of money in establishing a restaurant on the suit property prior to the purported withdrawal of the lease by the defendant.

8. That most of the materials used by the plaintiff were vandalized and that a list of all the equipment purchased has been availed.

9. In cross-examination, PW 1 averred inter alia that the plaintiff had made a request for an adjustment of the term of the lease from 2 years to 5 years but that there was no response from the defendant. The said witness indicated that there was no specific letter from the defendant granting its request to open the restaurant but that the defendant authorized the use of its space as a restaurant subject to certain conditions being met. The witness also admitted that there was no written lease for the 10-year term and this was reiterated at the point of re-examination in addition to the fact that there was no formal letter granting the plaintiff additional space.

10. Kioko Mutunga, (PW2) a quantity surveyor testified stating that the plaintiff did engage his services for the purpose of estimating the costs of developments undertaken by itself on the suit premises, following which he prepared a report and charged his professional fees.

11. Upon cross-examination, this witness stated that he could not recall with precision the date on which he received the aforesaid instructions from the plaintiff. He acknowledged that he was not provided with the history of the suit premises at the time of preparing his report and that during his visit to the same, he noted that construction was ongoing and there was no business activity taking place. The witness admitted that he does not recall seeing any structural drawings.

12. David Njuguna Mungai, (PW3) indicated that he is a Certified Public Accountant. He gave evidence that he had prepared an accountant's report in respect to the plaintiff's business. He acknowledged that at the time of his report, the business had not commenced and he had not visited the premises but that his estimates were based on the assumption that the suit premises would operate as a restaurant or a night-club and that the business would take off immediately.

13. PW3 admitted that he operated under the wrong parameters of the existence of a lease relating to a night-club, adding that he only saw the letter requesting for an extension of the lease. On being re-examined, PW3 stated that the plaintiff led him to believe that it had the necessary documentation to run a restaurant.

14. Pauline Wambui Kiarie (DW1), stated that apart from the sums of Kshs.425,000/= and Kshs.185,000/=, the plaintiff has made no further payments to the defendant. The witness denied the existence of the 10-year lease.

15. The witness further stated in cross-examination that no lease was drawn but a letter of offer was given and that the defendant usually grants Temporary Occupation Licenses (TOLs) for leases below the term of six (6) years and that such TOLs are not renewable though parties can negotiate on the same.

16. The witness also asserted that the additional premises previously given were repossessed by the defendant for the reason that the same were being used for businesses outside the parameters of the TOL.

17. At the close of evidence parties were directed to file and serve written submissions, which they did. I have considered the same together with the evidence tendered and the documents availed. The following issues arose for the determination of the court:

***i. Whether or not there was a contract between the parties in respect of the additional space;***

***ii. Whether or not there was a breach of contract by either of the parties;***

***iii. Whether or not the plaintiff is entitled to the reliefs sought;***

***iv. Whether or not the defendant is entitled to the reliefs sought in its counterclaim; and***

***v. Who ought to bear the costs of the suit.***

18. As concerns the first issue, it is not in dispute that a letter of offer dated 15<sup>th</sup> January, 2001 was issued to the plaintiff by the defendant to which the plaintiff gave a counter-offer vide the letter dated 31<sup>st</sup> January, 2001 and in turn it forwarded a proposal and development plans for approval by the defendant.

19. The defendant through its letter of 25<sup>th</sup> April, 2002 granted the plaintiff's request for the additional space and also gave the go-ahead for the plaintiff to proceed with the proposed development, though it is noteworthy that the same was conditional. This was accepted by the plaintiff and a sum of Kshs.185,000/= was paid. In my view, the defendant's conduct, this gives rise to a contract.

20. The parties did not set out the terms in writing by way of a signed agreement. Similarly, the renewal-term of the lease was not agreed upon by the parties.

21. This court is aware that the initial term as set out in the purported TOL was for 2 years beginning 1<sup>st</sup> February, 2001. The plaintiff sought a renewal of the same but the issue was not addressed by the defendant. Nevertheless, it would appear the parties proceeded with the agreement upon expiry of the two (2) years, thereby giving rise to an extension of the contract by way of their conduct. In any case, there is nothing to indicate that the contract was non-renewable or incapable of being extended pursuant to the letter of offer dated 15<sup>th</sup> January, 2001.

22. Having established that there was a contract between the parties, it is important to consider the circumstances in which such contract could be terminated vis-à-vis the question as to whether there was a breach of the same by either of the parties. There is evidence that the parties extended the term of the contract for an indefinite period of time. It remains unclear when the agreement was terminated or purportedly withdrawn by the defendant or when the plaintiff was removed from the suit premises as this was not specifically addressed.

23. Further to this, there was no issuance of a termination notice by the defendant. I take the view that whereas it would have been prudent for the defendant to give prior notice, he was not obligated to do so since the agreement between the parties was for an indefinite period of time.

24. While plaintiff submitted that it had provided development plans which were approved by the defendant, it is worth restating that this was conditional as articulated in the letter dated 25<sup>th</sup> April, 2002.

25. On the subject of breach of contract, what comes out clearly is that the suit premises were to be utilized in line with the conditions stipulated by the defendant. This court takes note of the fact that the defendant vide its letter dated 9<sup>th</sup> April, 2003 raised a concern that the plaintiff had violated one of the conditions previously agreed upon by the parties in addition to the outstanding arrears of rent.

26. Furthermore, the defendant submitted that the valuation report relied upon by the plaintiff concerns permanent as opposed to temporary structures. I have perused the valuation report and come to the finding that the same seems to refer to both temporary and permanent structures, contrary to the conditions set out. This court has not been shown any evidence of the payment of the monthly rent of Kshs.85,000/=. I am therefore convinced that the plaintiff was in breach of the agreement.

27. The circumstances surrounding the repossession of the suit premises by the defendant have not been clearly addressed by the parties; however, I am satisfied that there is evidence of breach of the agreement on the part of the plaintiff and the defendant was entitled to repossess the premises under the circumstances.

28. The plaintiff claimed damages for loss accruing from the construction on the suit premises, including loss of business. The plaintiff further submitted that the defendant unlawfully withdrew the lease of the additional space despite the fact that the development of the premises was founded on that particular space.

29. The defendant on its part contended that the valuation was based on permanent structures; that the quantity surveyor who had prepared the report had neither been given the history of the suit premises nor the receipts/invoices used in the claimed purchases.

30. It is the evidence of PW 2 that he was not provided with the history of the suit premises and during his visit of the same, he noted that the construction was ongoing. It would appear that the valuation was in respect of both temporary and permanent structures, whereas the plaintiff was strictly obligated to put up only temporary structures.

31. In my view, the expenses incurred by the plaintiff cannot in circumstances be claimed from the defendant. In any event, there is no way of ascertaining whether the invoices and receipts provided were in fact applied by the plaintiff towards the suit premises as claimed.

32. The plaintiff also prayed for rent and other charges. I find no basis on which to consider these particular reliefs as the same have not been demonstrated.

33. As concerns damages for loss of user, the evidence presented by both PW 2 and PW 3 clarified that the construction was ongoing and that the business had not commenced during the time of valuation and estimation of loss/profits respectively. PW 3 in particular admitted that he had not visited the suit premises prior to preparing his accountant's report and relied solely on the information given to him by the plaintiff. I therefore find no justification to grant this relief either.

34. On the question of the defendant's counterclaim, I am of the view that neither of the parties addressed the same at the hearing or in the course of their submissions. The defendant alleged in its counterclaim that the fair letting value of the property stood at the monthly rate of Kshs.300,000/= thereby causing it to be entitled to damages for trespass. However, no valuation report or relevant evidence was adduced in support of the amount claimed.

35. In view of the foregoing, I find no merit in the plaintiff's case and dismiss the same entirely with costs to the defendant. The counterclaim by the defendant likewise has no merit and the same is dismissed with costs to the plaintiff.

Dated, Signed and Delivered at Nairobi this 28<sup>th</sup> day of February, 2019.

.....  
**J.K. SERGON**

**JUDGE**

In the presence of:

..... for the Plaintiff

.....for the Defendant