



Maina (As the Estate administrator of Eliud Wanjohi Maina (Deceased) v Mwangi (Environment & Land Case E032 of 2021) [2023] KEELC 19965 (KLR) (20 September 2023) (Judgment)

Neutral citation: [2023] KEELC 19965 (KLR)

**REPUBLIC OF KENYA
IN THE ENVIRONMENT AND LAND COURT AT MERU
ENVIRONMENT & LAND CASE E032 OF 2021
CK NZILI, J
SEPTEMBER 20, 2023**

BETWEEN

ERNEST WANJOHI MAINA (AS THE ESTATE ADMINISTRATOR OF ELIUD WANJOHI MAINA (DECEASED)) PLAINTIFF

AND

ALBERT GACHORE MWANGI DEFENDANT

JUDGMENT

1. By a defense and counterclaim dated 20.4.2022, the plaintiff to the counterclaim sued the defendant as the legal representative of Earnest Wanjohi Maina (deceased), claiming that by a lease agreement dated 15.5.2014 over LR No. Ntima/Igoki/2406 was to conditionally occupy the premises for five years from 1.8.2014 to 1.8.2019. He pleaded that as per Clause No. 10 of the lease, he was to develop the property into a hotel, restaurant, bar, or nightclub and that if the lease were not renewed, the defendant would compensate him for the developments thereon.
2. The plaintiff averred that under the lease, he took possession of the suit property and built a big hotel and restaurant known as CheckMate Lounge valued at Kshs 48 million as per the valuation report by Property Valuers Limited dated 6.10.2021.
3. The plaintiff averred that before the expiry of the lease, he sought an extension as per Clause 10 (III) of the lease agreement, but the defendant refused to renew it and hence sought a refund of Kshs 48 million with interest and in the alternative to occupy the suit premises utilizing Kshs 48 million as rent till the same was exhausted. Additionally, the plaintiff sought general damages for the breach of the lease agreement with costs and interest. The counterclaim was accompanied by a list of witness statements and documents in a paginated bundle dated 5.5.2023. Additionally, the defendant filed another list of witness statement dated 24.6.2023.



4. Through a reply to the defense and defense to counterclaim dated 28.6.2023, the defendant averred that the plaintiff was granted a one-year extension of the lease, effectively placing the question of the valuation and payment of equivalent thereof out of question.
5. The defendant averred that the plaintiff failed to seek an extension of the lease three months before the expiry thereof. He termed the statement of defence as a sham, a ploy filed to avert responsibility and deny him due justice. The defendant denied the assertion that in the event of non-renewal, valuation and payment of the equivalent developments were to happen.
6. The defendant averred that it was the plaintiff who blatantly and without any color of right forcibly gained possession of the suit land to the defendant's extreme prejudice and disadvantage while refusing to yield rent, all while reading non-existent clauses into the lease to occupy the premises into perpetuity which he termed as amounting to trespass.
7. The defendant termed the counterclaim as a sham, an abuse of the court process, bad in law, unwarranted, ambiguous, and grossly incompetent. He gave a notice of preliminary objection to that effect. A list of issues dated 28.6.2022 accompanied the defence. There is no indication if the plaintiff in the counterclaim filed a reply to the defence to the counterclaim.
8. Albert Gachore Mwangi the plaintiff testified as PW 1 and adopted his witness statements, one filed on 5.5.2022 and another on 24.6.2022 as his evidence in chief. He told the court that by a lease agreement, he acquired a lease for the suit premises to run from 1.8.2014 and end on 1.8.2019 where he was to develop the property into a hotel, restaurant, bar and nightclub.
9. PW 1 testified that clause No. 10 of the lease stated that in the event the lease was not renewed he would be compensated for all his developments on the suit land, currently valued at Kshs 48,000,000. Before the lapse of the lease the plaintiff testified that he invoked Clause No. 10 of the lease agreement, sent a letter through his lawyers to the defendant and Joseph Wambugu Nderitu the co-lessor who invited him to Nairobi to sign a new lease.
10. Further, PW 1 told the court that he went and signed the lease but the defendant was absent to execute it and efforts to contact him were in vain until September 2021, when Mr. Waiganjo advocate on behalf of the defendant summoned him to his Nanyuki office.
11. PW 1 said that he went to Nanyuki with his advocates on record only to be told to sign a lease which he had not read or sought advice on it from his lawyers.
12. The plaintiff testified that he sought for more time to read the lease only to be served with the court papers. He denied receiving any notice to sue for any wrongdoing or to give up vacant possession.
13. Since he has honoured his part of the lease agreement, PW 1 asked the court to order for the payment of Kshs 48 million for the developments. He produced the lease agreement dated 15.5.2014 as P. Exh No. (1) and the valuation report as P. Exh No. (2).
14. In cross-examination by Mr. Cheruiyot advocate for the defendant PW 1 said that the lease was to expire after 5 years and that he had applied for the renewal of the lease through a letter but received no response.
15. PW 1 said that he sought for a valuation report as per clause No. 10 (5) of the lease agreement. He denied that it was the landlord who should have procured the services of a land valuer. He denied that the valuation report carried out through him was against the tenancy agreement. On whether he was meeting monthly rent payments, PW 1 told the court that at some time he had difficulties meeting monthly rental payments, but had regularized the same after the court ordered him to do so. He denied



that he was on the suit premises without a valid lease for his entry therein was lawful and with the knowledge of the landlords. Even though the lease had expired in 2019, PW 1 told the court that he was still entitled to a refund or compensation for the developments. He said that it was the landlord who could not be traced till the lease expired in May 2020, after which they were also unable to reach an agreement on the new lease. PW1 denied that he was unjustly demanding compensation or for an extension of the lease.

16. In his view PW 1 told the court that he has been on the suit premises for over 4 years since the expiry of the lease but was still entitled to compensation given it was the defendant who failed to renew the lease. He termed the valuation report as genuine and unchallenged by a rival report.
17. Asked by the court on rent payments PW 1 said that he had cleared all pending rent though no receipts were before the court to that effect.
18. At the conclusion of the plaintiff's evidence the defendant did not offer any defence. Instead, parties opted to file written submissions by 9.3.2023. The plaintiff relying on written submissions dated 10.3.2023 isolated two issues for determination. On whether there was a breach of contract, the plaintiff submitted that P. Exh No. (3) dated 19.1.2019 sought for the renewal of the lease in line with Clause No. 10 (iii) of P. Exh No. (1) which never elicited a response that there had been a breach of the lease on his part.
19. On whether the plaintiff was entitled to the reliefs sought the plaintiff submitted that clause 10 (vi) of the lease agreement was clear and has not been challenged by the defendant on account of invalidity or non-existence. In this case, the defendant failed to renew the lease as well as engage a valuer to the property. Therefore, the plaintiff took the view that the valuation that he made has not been challenged and in the absence of ventilation of the defence by way of evidence, the same remained mere allegations. Reliance was placed on [KPLC v Pamela Awino Ogunyo](#) [2015] eKLR.
20. On the other hand, the defendant to the counterclaim set out two issues for determination. On whether, there was any justification for the plaintiff to continue staying on the suit land, it was submitted that after the lease expired, the plaintiff continued to stay on the land without paying any rent up to the hearing date on 9.2.2023, when there was no schedule of all payments made filed as ordered by the court, despite the admission of arrears on 16.11.2021.
21. The defendant submitted that falling in rent arrears the plaintiff flouted clauses No. 4 and 9 (1) of the lease agreement which required rent by the 5th day of every month. Therefore, upon the expiry of the lease on 1.8.2019, the defendant submitted that the plaintiff stayed for more than 2 years without paying rent which act was a breach of the contract. Relying on Blacks' Law Dictionary 9th Edition page 213, the defendant submitted that the plaintiff had come to court with unclean hands due to the breach and hence could not be granted any relief.
22. On effluxion of time and the expiry of the lease, the defendant submitted that the plaintiff was not justified to remain on the suit premises. Reliance was placed on the [Brand City Ltd v United Housing Ltd](#) [2016] eKLR.
23. On whether the plaintiff was entitled to the reliefs sought, the defendant submitted that the duty was on the plaintiff to prove under Section 107 (1) of the [Evidence Act](#) that he was justified to claim Kshs 48,000,000/=.
24. The defendant submitted that under clause No. 10 of the lease, he was the one to procure the services of a valuer and not the plaintiff. Therefore, the defendant submitted that the valuation report produced before the court was contrary to the lease agreement and since parties were bound by the terms of their



- contract as held in Chesire & Fifoot on the Law of Contract 2nd Edition pages 21-22, the plaintiff could not rely on such report when no evidence was tendered on any notice sent or posted.
25. On Clause No. 10 (viii) of the lease, the defendant submitted that there was an exit clause for a further 5 years while yielding rent and was to terminate on 1.8.2024 and therefore, Kshs 48 million would not be payable. Additionally, the defendant submitted that for the plaintiff to seek to exhaust Kshs 48 million for a monthly rent of Kshs 70,000/= would be unreasonable and the court should not rewrite a contract for parties as held in *Fine Bank Ltd v Spares & Industries Ltd* [2000] IEA 52, *Elson Plastics of (K) Ltd v National Water Conservation and Pipeline Corporation* [2014] eKLR, *National Bank of Kenya v Pipeplastic Samkolit (K) Ltd & another* [2001] eKLR and *Kasturi Ltd v Nyeri Wholesalers Ltd* [2014] eKLR.
 26. The defendant submitted that the plaintiff was using the court to unlawfully enrich himself for compensation he does not deserve.
 27. The court has carefully gone through the pleadings, evidence tendered and written submissions. The issues for determination are:
 - i. If there is a valid counterclaim before the court.
 - ii. If the plaintiff has proved the claim in the counterclaim to the required standards.
 - iii. If the court has jurisdiction to entertain the counterclaim.
 28. Order 7 Rule 1 of the *Civil Procedure Rules* allows a defendant to file a counterclaim in compliance with Order 7 Rules 3 and 5 thereof. A counterclaim is in nature of a cross-suit and must be accompanied by an affidavit under Order 4 Rule 1 (2) thereof. The counterclaim must also be tilted as per Order 7 Rule 8 thereof. Upon the dismissal of a suit, a counterclaim may proceed for hearing under Order 7 Rule 13 of the said Rules and judgment given as per Order 7 Rule 14 thereof if the counterclaim is merited.
 29. The initial plaintiff is also entitled to file a defence to the counterclaim as per Order 7 Rule 17 of the said *Rules*. The counterclaim filed on 5.5.2022 did not comply with the above rules. It was never accompanied by a verifying affidavit. It was not paid for by way of filing fees. The receipt issued on 5.5.2022 at 15.01 was for Kshs 500/= only. No assessment or payment was made for the three prayers sought in the counterclaim.
 30. In the absence of compliance with the law I find the pleading incompetent and incurable at this stage. See *Teclah Jepkirui Wilson Tuwei v Kimaiyo Chirchir* [2021] eKLR, *Salim Verjee v AG & others* [2021] eKLR, *Priska Onyango Ojwang & another v Henry Ojwang Nyabende* [2018] eKLR.
 31. On whether the court has jurisdiction to hear the counterclaim both parties admit that the tenancy for fixed terms expired by May 2020. What exists between them is a periodic tenancy which is a controlled tenancy by dint of Section 2 of *Landlord & Tenant (shops, Hotels & Catering Establishments)* (Cap 301).
 32. The proper forum to ventilate whether or not the lease was subject to extension and on what terms as per Section 60 of the *Land Act* is in the Business Premises Rent Tribunal under the *Landlord and Tenant (Shop, Hotels and Catering Establishment) Act*.
 33. The first port of call by the plaintiff to the counterclaim was the said tribunal. He can only come to this court by way of an appeal. This was the holding in *Kaka Mohamed v Mohamed Ali* (2018) eKLR.



- The plaintiff to the counterclaim had also raised a preliminary objection dated 6.12.2021 to the initial plaint. He cannot therefore purport to maintain that his counterclaim is properly before this court.
34. On whether the plaintiff has proved his counterclaim to the required standard the lease agreement dated 15.5.2014 was signed by the owners of LR No. Ntima/Igoki/2406.
 35. The plaintiff has not proved that the defendant to the counterclaim is a legal representative of the estate of the owner of the suit land with the capacity to be sued and to bind the estate. One of the parties to the lease agreement was Joseph Wambugu Nderitu who has not been joined to this counterclaim.
 36. There is no evidence that the plaintiff to the counterclaim had regularized his tenancy agreement with any of the legal representatives or beneficiaries of the late Eliud Wanjohi Maina who passed on on 17.3.2021.
 37. The valuation report was not produced by the maker. It lacks vital information including an official search for the suit property. It is also short of approved building plans approvals, certificates, permits and licenses.
 38. Additionally, there was no evidence that any development therein was approved and or brought to the attention of the landlords or the legal representatives after 2021.
 39. Similarly, the plaintiff did not plead and strictly prove the particulars of Kshs 48,000,000/= which in law must be pleaded and proved as special damages. It is trite law that courts of law do not rewrite contracts for parties who have the freedom to contract. See *Pipeplastic* (supra).
 40. In this suit there is no evidence that the lease was registered and stamp duty paid for yet it is a registrable document under the *Registration of Documents Act*. See *Mega Garment Ltd v Mistry Jadva Parbat & Co. EPZ Ltd* (2016) eKLR.
 41. The upshot is I find the counterclaim incompetent, bad in law and lacking merits. The same is dismissed with costs.

DATED, SIGNED AND DELIVERED VIA MICROSOFT TEAMS/OPEN COURT AT MERU ON THIS 20TH DAY OF SEPTEMBER 2023

HON. CK NZILI

ELC JUDGE

In presence of

C.A Kananu/Mukami

Miss Kimotho for wachira for the plaintiff**

Gichohi for Mutuma for defendant

