



**REPUBLIC OF KENYA**

**IN THE HIGH COURT OF KENYA AT MERU**

**CIVIL SUIT NO. 9 OF 2017**

**COUNTY GOVERNMENT OF MERU.....PLAINTIFF**

**VERSUS**

**MERCY MUTHONI KARIYU.....DEFENDANT**

**JUDGMENT**

1. By a plaint dated 3<sup>rd</sup> march 2017 (fast track) the plaintiffs herein sought for judgement seeking the following orders

- a. Payment of arrears for Kshs. 18,828,000
- b. Interest at court rates on (a) above from 1/11/2014 when lease was terminated until the same is paid in full
- c. Costs of the suit
- d. Such other or further relief as this honorable court may deem just

2. The above prayers were grounded on the facts that the defendant entered into a 10 year lease for Meru County Hotel with the plaintiff. The monthly rent payable every month was Kshs. 575,000 and the lease would be terminated if the rent remains unpaid for a period of 14 days after the same was due. The defendants however failed to pay the monthly rent of Kshs. 575,000 by the end of every month and accumulated arrears totaling to 18,828,000 as of 1<sup>st</sup> November 2014. After the failure of the defendant to pay the outstanding rent the County Assembly of Meru approved the termination of the lease. They issued the defendant with a notice of termination of lease which indicated that the defendant was to vacate the premises on 1<sup>st</sup> September 2015. Through a surrender of lease dated 8<sup>th</sup> august 2014 the parties agreed that the lease would be terminated on 1<sup>st</sup> November 2014.

3. The application was opposed by the defendant's statement of defense where she admitted to entering into a lease with the plaintiff. However, she stated that on 15<sup>th</sup> June 2011 the county council of Meru reduced the rent to Ksh. 325,000 to allow her to recover development costs.

4. This matter was heard by way of viva voce evidence where **PW1 IRA NKUBI** the chief legal officer of the plaintiff told the court that on 4<sup>th</sup> February 2010 the defunct county council of Meru floated a tender for Lease and management of Meru County Hotel. The tender was awarded to the highest bidder, the defendant on 22 March 2010. The defendant had quoted Kshs. 575,000 as the monthly expected rent. The plaintiffs were thereafter presented with a 10 year lease for the said premise for a monthly rent Kshs. 575,000 which would start on 1<sup>st</sup> July 2010.

5. During that time no request was made to reduce the rent and the council did not sit to review the terms of the lease agreement. Clause 3 (d) of the agreement provided that for a review to be done it had to be in writing and that an agreement would be entered into and registered. No such variation was done by the defunct council. The letter dated 15<sup>th</sup> June 2011 was not sanctioned by the council or a special committee. The Meru County assembly conducted investigations on management and rental income being collected by the county government for the premises and they found that the letter dated 15<sup>th</sup> June 2011 signed by Mr. S. M. Muguna was defective, invalid and irregular as it did not have supporting minutes by a special finance committee or a full council approving the reduction of rent. Subsequently, the council recommended the termination of the lease due to non-performance. A letter dated 8<sup>th</sup> August 2014 gave one year notice which was to end on 1<sup>st</sup> September 2015. However, following the notice the defendant came with a proposal to forgo the one year notice period therefore the lease was to terminate on 1<sup>st</sup> November 2014 and not 1<sup>st</sup> September 2015. At the time of surrender the outstanding rent was Ksh. 19,641,000 shillings.

6. At cross examination **PW1** stated that as at 15<sup>th</sup> June 2011 S.M. Muguna was still a clerk of the defunct county council. Additionally, it was not indicated in the lease agreement as to who was the representative of the county council. The lease agreement at clause 2 (d) provides

that parties will not have claims against each other provided that the defendant hand over the lease forthwith. It goes on to provide that parties had the capacity to waive terms of lease.

7. **PW2 FRANCIS NJEGA** the assistant Director Financial Reporting, formerly the director Revenues told the court that when he prepared the statement in respect to rent he was the director of revenue. The defendant was supposed to pay 33,925,000 by the time she vacated the premises but she did not. She had paid 14,284,000 for the period she was in occupation of the hotel. Therefore the outstanding rent payment was ksh. 19,641,000 which the defendant has failed to settle. The defendant was supposed to make payments of 575,000 but as per the bank statements she paid 377,000 in some months while others she paid 325,000.

8. During cross examination PW2 indicated that the reconciliation shows that he had computed rent up to 1<sup>st</sup> August 2015 ad he was not aware that there was a surrender of lease for 29<sup>th</sup> October 2014. **PW2** also indicated that he was not aware that the defendant started paying VAT to the county government of Meru or whether the plaintiff was issued with ETR receipts for the same.

9. **DW1 MERCY MUTHONI** relied on her statement dated 20<sup>th</sup> November 2018 where she indicated that indeed she entered into a lease agreement with the defunct county council of Meru. The said lease was entered into with the presumption that the hotel was functional but upon commencement of the lease it became apparent that renovations and furnishings were needed to bring the hotel to the standards as required by the county council. On 15<sup>th</sup> June 2011 the County Council of Meru central through their county clerk Mr. S. M Muguna gave her authorization to carry our renovations and furnish the hotel and withhold Kshs. 250,000 towards reimbursing the renovation expense. The justification for the proposal was anchored in the provisions of clause 1 (w) which specifically made the county council the beneficial owner of any fixture furniture or otherwise brought to the hotel. Additionally the rent payable from 25<sup>th</sup> September 2012 was increased to Ksh 377,000 after the county council gave notice that was required to charge V.A.T.

10. At all material times the rent due was paid and the rents accruing from the months of June July August and October 2014 was agreed to be recovered from the refundable deposit of Ksh. 1,725,000.

11. I have carefully perused through the evidence for the plaintiff as well as the defendants evidence together with submissions and the record in its entirety and it is not in dispute that the defunct county council of Meru Central executed a lease agreement dated 20<sup>th</sup> June 2011 in respect to plaintiff's Meru County hotel at a monthly rent of Ksh. 575,000/-. It is also not in dispute that the plaintiff issued a notice of termination of the lease to the defendant and that a surrender of lease dated 29<sup>th</sup> October 2014 terminating the defendants lease effective 1<sup>st</sup> November 2014 was also executed by the parties herein. What is pending for determination are:

**a. Whether the terms of the lease agreement were reviewed?**

**b. Whether the defendant owes any arrears of rent to the plaintiff in respect of Meru County Hotel.**

**c. Whether the plaintiff is entitled to interest in respect to the outstanding rent and cost of the suit?**

12. The agreed rent for the said hotel was set at Ksh. 575,000 payable each month and a refundable deposit of Ksh. 1,725,000 which was paid. However, trouble brewed when the defendant found that the said hotel was not functional and required additional renovations. Through a letter dated 15<sup>th</sup> June 2011, the county council of Meru vide their county clerk S. M. Muguna indicated that after a Special Finance Meeting held on 10<sup>th</sup> June 2011 the defendants request to furnish renovate and develop Meru County Hotel was considered. The committee resolved that the defendant was expected to pay a monthly rent of Kshs. 325,000 as she would retain Ksh. 250,000 towards recovery of the developments value.

13. It is the plaintiffs argument that the letter dated 15<sup>th</sup> June 2011 was not sanctioned by the council and it therefore invalid. In the cases of **Murgan v Launchbury & Others 1972 2 ALL ER 605; PA Okiro & Another T/A Kaburu Okello and Partners v Stella Karimi Kobi, Civil appeal No. 183 of 2003** the court held inter alia as follows on vicarious liability;

**“In assigning vicarious liability, it arises when the tortious act is done in the scope or during the course of his employment”**

14. Similarly, in the case of **Muwonge v Attorney General of Uganda 1967 EA 17** Sir Charles Newbold stated the following on employer liability:

**“The legal position is quite clear and has been quite clear for some considerable time.**

**A Master is liable for the acts of his servant committed within the course of his employment. The master remains so liable whether the acts of the servant are negligent or demonstrate or wanton or criminal. The taste is where the acts done in the course of his employment.”**

15. In a similar way the Plaintiff herein cannot therefore escape blame for the actions of the county clerk as he was acting within his scope of work. The fact that the letter dated 15<sup>th</sup> June 2011 was not sanctioned does not affect the effect it had on the lease. The letter dated 15<sup>th</sup> June 2011 indicates that the committee had resolved that the defendant is expected to be paying Ksh. 325,000/- per month and retain Ksh. 250,000/- which will go towards recovery of developments value. The then Clerk to Council SM Muguna also wrote a letter dated 1<sup>st</sup> August 2012 to all the councils tenants notifying them that the Kenya Revenue Authority had instructed them to demand for 16% VAT from all the tenants on its behalf and that hence forth the tenants were expected that all monthly payments should be inclusive of 16% VAT over their normal payments to the council. The plaintiff have not disputed that this particular letter was written by the said SM Muguna on their behalf and cannot therefore be heard to disown the letter that he wrote reviewing rent in this matter in lieu of the renovation that the defendant

undertook in the leased premises. The plaintiff's witnesses confirm that although SM Muguna's letter to the defendant shows that a committee resolved to review the rents due from the defendants the ad hoc committee tasked with issues concerning the hotel noted that records by the committee that agreed to review the rent would not be traced .

16. Secondly, it was also the argument of the plaintiff that Clause 3 (d) of the agreement provided that for a review to be done it had to be in writing and that an agreement would be entered into and registered. However looking at the said lease clause 3 (d) provides;

**“No provision in this lease shall be waived or varied by either party hereto except by agreement in writing which agreement shall if the case so requires be dully registered at the Lands Registry” (emphasis mine)**

The provision does say that the agreement should be in writing which it was as illustrated by the letter dated 15<sup>th</sup> June 2011. The said provision does not state that registration is a must but only says to do so if the case so requires.

17. In consideration of the above finding this court returns the verdict that the Plaintiff's claim for the difference of rent between Ksh 575,000/- and 325,000/- cannot stand because the same was reviewed with the authority of the plaintiff who continued to receive the defendants rents including VAT upto the time that a notice to vacate was issued.

18. Whether the defendant owes the plaintiff any rent arrears this court finds that infact after utilizing the defendants deposit of Ksh. I, 725,000/- it is the plaintiff which owes the defendant an amount of Ksh. 192, 000/-.

#### **Rent June- December 2011**

June- 1,725,000 + 325,000 = 2,050,000

July-December 325,000 \* 6 = 1,950,000

Total – 2,050,000 + 1,950,000 = 4,000,000

#### **Rent January –December 2012**

January – July - 325,000 \* 7 = 2,275,000

August- December (additional VAT) - 377,000 \* 5 = 1,885,000

#### **Rent January – December 2013**

377,000 \* 12 = 4,524,000

#### **Rent January – October 2014**

377,000 \* 10 = 3,770,000

#### **TOTAL RENT EXPECTED**

4,000,000 + 4,160,000 + 4,524,000 + 3,770,000

= **16,454,000**

19. According to the receipts produced by the defendants and the bank statement produced by the plaintiff the following monies was paid by the defendants.

June- December 2011 - 3,975,000 (including refundable deposit)

January – December 2012 - 4,160,000

January – December 2013 - 4,901,000

January – October 2014 - 1,885,000

**TOTAL** **14,921,000**

**ARREARS**

**16,454,000 – 14,921,000 = 1,533,000**

20. The defendant herein indicated that she agreed with the plaintiff that they would recover the rent for June – October 2014 from the refundable deposit. That would be **1,725,000 – 1,533,000 = 192,000**. This would mean that the Plaintiff's herein owed the defendant 192,000 being the remainder of the refundable deposit.

21. In consideration, of the findings above the plaintiffs case does not have merit and the same is dismissed with cost to the defendant. Judgment is entered for the defendant at Ksh. 192,000/- taking into consideration the above I find that the plaint herein lacks merit and is hereby dismissed.

22. Each party to bear its own costs.

**HON A.ONG'INJO**

**JUDGE**

**JUDGMENT DELIVERED DATED AND SIGNED THIS 31<sup>ST</sup> DAY OF OCTOBER 2019**

**IN THE PRESENCE:**

CA: Kinoti

Plaintiff: Mr Muriera Advocate holding brief for Kiruki for plaintiff

Defendant: M/s Koki & Kithinji Advocate for Defendant – No appearance.

**Mr Muriera**

We pray to be supplied with a copy of judgment.

**Order:**

Copy of judgment to be supplied upon payment of copying charges.

**HON A.ONG'INJO**

**JUDGE**