



**Kenol Kobil PLC v Canarian Holdings Limited; Canarian Holdings Limited
(Plaintiff); Kenol Kobil PLC (Defendant) (Environment & Land Case
111 of 2019) [2023] KEELC 20945 (KLR) (25 October 2023) (Judgment)**

Neutral citation: [2023] KEELC 20945 (KLR)

**REPUBLIC OF KENYA
IN THE ENVIRONMENT AND LAND COURT AT MOMBASA
ENVIRONMENT & LAND CASE 111 OF 2019
SM KIBUNJA, J
OCTOBER 25, 2023**

BETWEEN

KENOL KOBIL PLC PLAINTIFF

AND

CANARIAN HOLDINGS LIMITED DEFENDANT

AND

CANARIAN HOLDINGS LIMITED PLAINTIFF

AND

KENOL KOBIL PLC DEFENDANT

JUDGMENT

1. Canarian Holdings Ltd, hereinafter referred to as the Plaintiff, commenced its claim vide the Amended Statement of Defence and Counterclaim dated the 17th May 2021 seeking for inter alia:
 - a. Declaration that the lease it had with defendant over subdivision 3071 was determined by effluxion of time on 30th April 2019.
 - b. The defendant’s continued possession of the same without the plaintiff’s authority or consent and continued refusal to vacate the premises from 1st May 2019 amounts to tortious acts of trespass and a violation of plaintiff’s obligation under clause 1 (dd) of the lease dated 19th July 1992.
 - c. The plaintiff has suffered loss and damages and seeks judgement for Kshs. 19,437,653 and mesne profits at Kshs.2,850,947 per month plus interest at court’s rates from 1st May 2019



until the date the full restoration works will have been paid for and completed as pleaded under paragraph 78A.

- d. Declaration that the defendant breached clause 1(t) of the said lease over subdivision 3071 by allowing its shares whereof control of the lessee passed to M/s Rubis Energie SAS, without first obtaining the lessor's written consent, and that the plaintiff was therefore entitled under clause 1(t) and 3(a) of the lease dated the 19th July 1999 to re-enter the premises without notice and determine the lease.
- e. Declaration that defendant breached clause 1(t) of the lease between them dated 19th April 2000 over subdivision 3904 by allowing transfer of its shares whereof control of the lessee passed to M/s Rubis Energie SAS, without first obtaining prior written consent of the lessor, and that the plaintiff was therefore entitled under clause 1(t) and 3(a) of the lease dated the 19th July 1999 to re-enter the premises without notice and determine the lease by the notice of forfeiture dated 20th March 2019.
- f. Declaration that the defendant's continued acts of possession of subdivision 3904 and refusal to vacate the premises despite issue of notice of forfeiture and re-entry pursuant to clauses 1(t) and 3(a) of the lease dated 19th April 2000 and its possession of the premises from 30th April 2019 until the date the full restoration works will have been paid for and completed as pleaded under paragraph 78A(b) above, are tortious acts of trespass.
- g. Declaration that defendant's refusal to vacate from subdivision 3904 by 30th April 2019 despite issue of notice of forfeiture of the leases and re-entry and repeated requests to vacate by the plaintiff is in breach of the defendant's obligation under clause 1(ee) of the lease dated 19th April 2000.
- h. Judgement for Kshs.5,458,681 and Kshs.3,341,700 per month plus interest at court's rates from 1st February 2020 until the date the full restoration works will have been paid for and completed as pleaded under paragraph 78A(b) above.
- i. Declaration that the defendant breached clause 1(X) of the lease between them dated the 23rd August 2001 over subdivision 653 by allowing transfer of the beneficial interest of more than fifty per centum of the shares of the defendant to M/s Rubis Energie SAS without first obtaining prior consent of the lessor
- j. Declaration that the defendant having effected transfer of shares resulting to change of control without obtaining prior written consent, the plaintiff was entitled to re-enter the subdivision 653 without notice and determine the lease dated the 23rd August 2001 under clauses 1(X) and 3(a) of the said lease by notice of forfeiture dated 20th March 2019.
- k. Declaration that the defendant's continued acts of possession of subdivision 653 and refusal to vacate the premises despite issue of notice of forfeiture and re-entry pursuant to clauses 1(t) and 3(a) of the lease dated 23rd August 2001 and its possession of the premises from 30th April 2019 until the date the full restoration works will have been paid for and completed as pleaded under paragraph 78A(b) above are tortious acts of trespass.
- l. Declaration that the defendant's refusal to vacate subdivision 653 by 30th April 2019 despite issue of notice of forfeiture of the leases and re-entry and repeated requests to vacate by the plaintiff is in breach of the defendant's obligation under clause 1(ee) of the lease dated 23rd August 2001.



- m. Judgement in Kshs.7,903,378: USD 12,7521.20 and Kshs.2,850,947 per month plus interest at court rates from 1st November 2020 until the date the full restoration works will have been paid for and completed as pleaded under paragraph 78A(C) above.
 - n. General damages for trespass.
 - o. Damages for breach of covenant.
 - p. Compound interests at commercial rates on the mesne profits on subdivision 3071, 3904 and 653 until the full restoration works have been completed and paid for in full as pleaded above.
 - q. Costs of the suit with interests at court rates from date of judgement till payment in full.
 - r. Such other order and or remedies the court deems fit and just to grant.
2. The plaintiff's claim is denied by Kenolkobil PLC, hereinafter referred to as the defendant, vide its amended reply to the defendant's statement of defence and defence to counterclaim dated the 11th February 2022, inter alia denying any breach of the covenants in the leases; that Plaintiff has not sought for any relief over subdivision 3071; that though it had informed the Plaintiff that it would hand over subdivision 3071 on the 28th August 2019 and pay outstanding rent through its letter dated the 19th August 2019 due to the delay on account of mutual discussions over sale of the property between April to August 2019 that fell through; that the Defendant carried out the requisite renovations and kept its promise; that the Plaintiff rejected and returned the rent and is thereof not entitled to any claim over subdivision 3071 thereof; that the Defendant had not sought for any relief in its plaint over subdivision 3071, whose lease had expired; that the Defendant has not trespassed onto subdivision 3071 and Plaintiff is therefore not entitled to any mesne profits over it as all rents over the said property had been paid; that the Defendant's obligation under the lease was to yield subdivision 3071 to the Plaintiff in good and tenable repair and condition in accordance with the covenants contained in the lease and not to rebuild, redevelop and or improve the premises as demanded by the Plaintiff; that the Defendant denies that it was required to seek prior written consent of the Plaintiff prior to transferring or parting possession, or assigning any of the leased premises; that its legal status as a limited liability company has not changed and there has been no material change that is detrimental to the contractual relationship between the plaintiff and defendant; that the lease over subdivision 3904, Mtwapa, expired on the 31st January 2020, but the Defendant stayed on paying rent until 31st July 2020 with the knowledge and consent of the Plaintiff owing to their ongoing sale discussions; that Plaintiff declined to take over the premises due to the presence of Simbisa Brands Kenya Limited, with whom the plaintiff had engaged and agreed to let it continue operating on the premises; that the lease over subdivision 653, Jomvu, expired on 31st October 2020; that the Defendant renovated the premises but the Plaintiff declined to take possession demanding that the Defendant rebuild, redevelop, and improve the premises which was not the Defendant's obligations under the lease; that the Defendant had fulfilled its obligations under the lease including paying the rent and handed over the premises to the Plaintiff on the 26th January 2021 in good and tenable repair and condition in accordance with the lease; that the issue of costs can only be determined at the conclusion of the suit; that the opportunity costs and loss of time and resources claim is not known in law; that the Plaintiff is not entitled to compensation on account of any alleged loss of business; that claims at paragraph 75 of the amended statement of defence and counterclaim are fanciful and speculative as subdivisions 3905 and 653 were leased to the Defendant until sometime in 2020, and that the claim for loss and or special damages is denied. That the counterclaim should be dismissed with costs.
3. In support of the counterclaim, the plaintiff called Alex Trachtenberg, a director, who testified as PW1. He adopted his statement dated the 30th April 2021 as his evidence in chief and produced the



documents in the list filed on the 9th July 2019 and 25th September 2019 as exhibits. The witness also produced as exhibits the documents in the list filed on 5th March 2020, except documents numbers 30 to 32 and also those in the list dated 17th May 2021 except those by Knight Frank and Shelter Solutions. During cross examination, PW1 stated that the lease for plot 3904 indicated expired on the 31st January 2020. That the defendant however continued to remain in occupation and that is why the plaintiff is asking for mesne profits at the rate of Kshs.3,341,700 from the date of expiry until the premises is repaired. That the leases for each of the premises had renewal clauses with the rent payable, but the defendant as the tenant did not seek for it. That the defendant had proposed to buy the Mtwapa and Jomvu stations, and the plaintiff had no problem with the negotiations going on, but had insisted on the handover of the premises after repairs to be done upon expiry of the leases. That the plaintiff returned the USD 19,320 received from the defendant upon advice of their advocate, that accepting it would make the defendant a protected tenant. That their claim is based on the profits they would have gotten and not the rent, as they had notified the defendant that they wanted to operate the stations. That the plaintiff deployed security guards on plot 3071 on 8th November 2019, and at plots 653 and 3904 on the 18th January 2021 to safeguard the premises after defendant abandoned them. That at plot 3904 there is Inscore Limited [Simbisa] operating Chicken Inn, Pizza Inn and Creamy Inn but the plaintiff does not collect rent from them lest they become protected tenants. Next was John Maina, an accountant with Maina Macharia & Company CPA, who testified as PW2. He told the court that he prepared the Forensic Accounting Report dated 10th December 2019 that he produced as exhibit. He testified that his projected net profit before tax for the Mtwapa, Changamwe and Jomvu stations for three months was Kshs.9,290,001, Kshs.7,395,501 and Kshs.8,552,841 respectively. In cross examination PW2 stated that he relied on data from nearby petrol stations for period between 1st May 2019 to end of July 2019 and the maximum price given by EPRA to get the project net profits before tax figures in his report. PW3 was Sammy Mkalla, a valuer with Knight Frank Valuers who testified on instructions received from the plaintiff to prepare schedules of dilapidation of their petrol stations and assessment of the repairs required to restore the buildings. He prepared several reports as detailed in his testimony that he produced as exhibits. During cross examination PW3 stated that he did not know the state of the service stations at the time the parties entered into the leases. That he first visited the service stations alone and later with others during the joint exercises. That the third visit was to see whether the works noted during the joint visit had been done. That Duncan Kibunyi and Peter Kimati had represented the plaintiff and defendant respectively, while Chemtai Biwott was from Knight Frank and Shelter were consulting for the plaintiff. That their reports were limited to highlighting the works required but not its costs, that needed to be done by a quantity surveyor. That costing of the works was done by Robert Ouma. PW1 to PW3 testified before my predecessor, Munyao J before his transfer out of the station. The next to testify was Robert Ouma John, a quantity surveyor with Shelter Coast Solutions, who testified as PW4, and told the court how the plaintiff engaged him to determine the cost of remedial works necessary to put the Mtwapa and Jomvu service stations to order. He prepared the reports he detailed and produced as exhibits. During cross examinations, PW4 stated that the repair works that he found had been done on the service stations did not make them rentable.

4. The defendant called Peter Kimatu, a civil engineer, who testified as DW1 and adopted his statement recorded on the 11th February 2022 as his evidence in chief. He produced the documents in the list dated the 10th February 2023 as exhibits. During cross examinations, the witness testified that he was involved in the transactions over the suit properties even at the lease agreements stages. That the service stations were then newly built. That the lease over subdivision 3071, Changamwe Service Station was for twenty years from 1st May 1999 and expired on the 30th April 2019, and that defendant handed it over to the plaintiff on 28th August 2019 after repairs were carried out. He agreed that the letter dated 11th November 2019 from their advocates indicated that the handing over of the service station



was done on the 8th November 2019. That the lease for Subdivision 3904, Mtwapa Service Station had expired on the 31st January 2020 but the court had allowed the defendant to vacate by end of July 2020 and that they indeed vacated between July to October 2020. That after the witness was referred to a letter by their advocates on a joint inspection visit to Subdivision 653, Jomvu and 3904, Mtwapa service stations that he attended, he stated that going by the contents of the letter, the Mtwapa service station was handed over on 26th January 2021. He however could not tell whether the defendant had paid rent for the extra one year, but indicated that the service station was not in operation from 2020 to 26th January 2021. He confirmed indicating in his statement that the defendant had continued operating the service stations even after the leases had expired. That the lease over Subdivision 653, Jomvu Service Station had expired on the 31st October 2020 but they left it on 26th January 2021. He stated that he was not aware that they had to pay rent and VAT thereof for the period after the lease expired or whether it had been paid. He confirmed that under the leases the defendant was obligated to leave the premises in rentable conditions and that the plaintiff had prepared and served the defendant with Reports with schedules of dilapidations on each of the service stations that he had countersigned. That by 4th November 2020 the defendant had undertaken all the repair works on Subdivision 653, Jomvu service station and handed it over on that very date, and they withdrew their security from the premises. That after the witness was shown the letter from their advocate dated the 16th November 2020 on some works not done, he agreed that the plaintiff had on 4th November 2020 lodged a claim on additional works costing about Kshs.6,000,000 for which their advocate had offered Kshs.5,000,000. PW4 confirmed that in their advocates letter dated the 15th December 2020, they had indicated that their contractor needed more time to finish the outstanding works. He confirmed that on the 26th January 2021 he signed the last inspection report for Subdivision 653, Jomvu and 3904, Mtwapa service stations detailing the works done and outstanding, that was forwarded to their advocates on the 8th February 2021. He clarified that contrary to what he had stated earlier, the court had directed that they hand over the service stations and continue paying the rent as per the leases. That they had paid rent for the Subdivision 3071, Changamwe service station without VAT but the plaintiff declined to receive it.

5. the learned counsel for the plaintiff and the defendant in the counterclaim filed their submissions dated the 3rd April 2023 and 24th July 2023 which the court has considered.
6. The following are the issues for the determinations by the court:
 - a. Whether the defendant breached the terms of any or all the three leases in respect of change of control clause, and if so, whether the plaintiff was entitled to determine any or all the leases.
 - b. Whether the act of the defendant remaining in possession of the suit properties amounted to trespass, and if so, whether the plaintiff has suffered loss and damages.
 - c. Whether plaintiff is entitled to mesne profits in respect of the suit properties, and if so from when.
 - d. Whether the plaintiff is entitled to the restoration costs pleaded in respect of the suit properties.
 - e. Who bears the costs of the suit.
7. The court has carefully considered the pleadings by the parties, oral and documentary evidence tendered, submissions by the learned counsel, the superior courts decisions cited thereon and come to the following determinations:
 - a. The proceedings herein were initiated by KenolKobil through their plaint dated 20th June 2019 and filed on the 21st June 2019 against Canarian Holdings Limited. There was an interlocutory application that was filed, heard and determined through the ruling delivered on the 7th July



2020 in which the court inter alia directed the KenolKobil to hand over vacant possession of subdivisions 3071 and 3904 by the end of July and August 2020 respectively, if not already done, to Canarian. That within that period the KenolKobil was to allow the Canarian to enter and inspect the premises and the parties were asked to negotiate and agree on the rent payable for the period till handing over date. In respect of subdivision 653, Kenolkobil, the Defendant, was ordered to hand over the premises on the expiry of the lease on the 31st October 2020 and continue paying rent in the manner agreed in the lease instrument and allow the Canarian to inspect the premises. The parties were further directed to enter into negotiations on whether mesne profits or damages were payable. Liberty to apply to the court was also granted.

- b. The record and evidence adduced in the form of letters done through counsel, reports by experts and oral testimonies confirms that the parties continued engaging in and outside the court after the ruling of 7th July 2020. During the proceedings of 14th February 2022 KenolKobil's learned counsel notified the court that it was not pursuing all the prayers in the plaint and that the issue of costs would be left for a later determination. This left the counterclaim, which is a suit on its own, as the only one remaining determination.
- c. As submitted by the learned counsel for the plaintiff and defendant, parties are in law bound by their contracts, unless where fraud, coercion or undue influence leading to the contracts are pleaded and proved as held in the Court of Appeal decision in the case of National Bank of Kenya Ltd versus Pipeplastic Samkolit (K) Ltd & Another [2001] eKLR. It is also trite as submitted by the learned counsel for the plaintiff that where the contract is in writing and unambiguous, no extrinsic evidence may be required to be called to add or detract from it, as was held in the case of Damoder versus Eustace [1967] EA 153 at page 159.
- d. There is no dispute that the parties before the court had contractual relationships under the three lease agreements that they executed in respect of the three suit properties herein. The plaintiff has accused the defendant of breaching the terms of their lease agreements, while the defendant has denied having committed any breach. The plaintiff, as the party who alleges breach of the terms in the leases, has the legal obligation to tender proof. This is the edicts of the law under sections 107 to 109 of the *Evidence Act*, chapter 80 of the Laws of Kenya and in line with the findings in the case of M'Bita Ntiro versus Mbae Mwirichia & Another [2018] eKLR. The Plaintiff has pleaded that it was a term in the leases with the defendant that the latter was not to transfer, assign or part with possession of the leased premises without the written consent of the defendant, and that a breach of the terms entitled the plaintiff to re-enter the premises without notice and determine it. That the transfer of defendant's shares leading to the lessee passing control to another party constituted a transfer of the premises and required prior written consent of the plaintiff which was not obtained.
- e. The defendant has not disputed that the entity known as Rubis Energie SAS acquired all of its issued shares, leading to its being delisted from the Nairobi Stock Exchange without first obtaining the plaintiff's written consent contrary to clauses 1(t), 1(u) and 1(x) the respective leases. The plaintiff has further shown the action it took through its letter dated the 20th March 2019 to the defendant asking for vacant possession of the suit premises by 30th April 2019, which was not honoured. Indeed, despite the defendant denying that it was required to seek written consent, and taking the position that the plaintiff was not adversely affected, the court finds that its action of ceding its shares to another legal entity, without first obtaining written consent from the plaintiff amounted to breach of the respective terms of the three leases. The plaintiff was thereafter entitled to exercise its right of forfeiture and re-enter the premises in accordance with the provision of section 73(1)(a) of the *Land Act* No. 6 of 2012. The decision



in the case of Emarilly Investments Ltd & 13 Others versus Deluxe Motors Ltd & 2 Others [2019] eKLR, cited by the plaintiff is spot on in respect of the right of a landlord in exercise of forfeiture and re-taking of leased premises before end of lease.

- f. The plaintiff has also alleged that the defendant did not give vacant possession of the leased premises upon expiry and or determination of the leases and that its continued possession amounted to trespass. From the evidence tendered, the lease in respect of subdivision 3071 was to expire on the 30th April 2019, and in addition, the plaintiff had issued the defendant with the notice to vacate by 30th April 2019 dated the 20th March 2019. It has been established that the defendant only vacated from the said premises on 8th November 2020. The defendant's continued occupation on the premises from 1st May 2019 to 8th November 2020 was without the plaintiff's authority, consent or concurrence and hence amounted to trespass. There is no dispute that the leases for subdivisions 3904 and 653 expired by effluxion of time on the 31st January 2020 and 31st October 2020 respectively. In the ruling of 7th July 2020, the court had directed the defendant to give vacant possession of subdivisions 3071, 3904 and 653 by the end of July 2020, end of August 2020 and 31st October 2020 respectively. However, the available evidence confirms that the defendant vacated subdivisions 3904 and 653 in January 2021, and had been in possession of the said premises from the dates of expiry of the leases, and directions of the court in the ruling of 7th July 2020 without consent, authority or concurrence from the plaintiff. The defendant was therefore a trespasser for that extra period it remained on the said suit properties without permission.
- g. On the mesne profits reliefs, the plaintiff submitted at paragraph 6.13 that the court award them Kshs.2,645,167, Kshs.3,341,700 and Kshs.2,850,947 per month plus interest for the specified periods for the Changamwe, Mtwapa and Jomvu Service Stations respectively. On its part the defendant submitted at paragraph 5.14 inter alia that the mesne profits for subdivision 653 should only be for three (3) months from 31st October 2020 to 26th January 2021 at the rate of USD 7305.37 and for subdivision 3071 for only four months from 28th August 2019. That for the previous period from 1st May 2019 to 28th August 2019 the plaintiff should only get rent as previously offered. That in respect of subdivision 3904 no mesne profits should be awarded to the plaintiff as defendant had stayed on the premises after the lease expired on 31st January 2020 by virtue of the negotiations going on between the parties.
- h. On the restoration claim, it is important to establish the state of repairs of the three service stations at the commencement of the leases. The defendant's witness, DW1, a civil engineer in the employment of the defendant told the court that he was involved in the transactions leading to lease agreements between the parties. He further confirmed during cross examination that "...I agree at the start of lease agreements, the stations were newly built." Without belabouring the point, the defendant more or less took possession of the three service stations at the commencement of the leases when they were in good order as they were newly built. They were therefore under obligation in accordance with clauses 1(dd), 1(ee) and 1(hh) of the three leases to "...yield the premises at the expiration or determination of the term hereby granted with the storage tanks, fuel pumps, machinery equipment and fixtures and fittings in good and tenantable repair condition..." The plaintiff's position is that the defendant did not carry out their obligations as required as hence their claim. The plaintiff called witnesses who detailed the outstanding works. The defendant disputes the plaintiff's entitlement on the restoration claim and called their witness, DW1. It is important to not that DW1 agreed to have been present during the inspection of the premises as detailed by the plaintiff's witnesses and countersigning the report thereof, which he belatedly tried to impugn in part. The plaintiff has at paragraphs



6.4, to 6.9 submitted on the various dilapidation reports and cost valuation in support of their claim on restoration costs of Kshs.19,437,653, Kshs.5,458,681.60 and Kshs.7,903,378 plus interest for Changamwe, Mtwapa and Jomvu Service Stations respectively. The defendant has submitted at clause 6.8 that the defendant's obligation under the lease was simply to return the suit properties to good and tenantable condition while the reports produced by the plaintiff show their intention is not to restore the suit properties, but rather to re-build the said properties anew. The court has after considering the various experts reports, the totality of the evidence by the witnesses availed by the parties, including the fact that the defendant, as confirmed by DW1, had in fact made an offer which was rejected to pay the plaintiff Kshs.5,000,000 for the pending works in respect of Jomvu Service Station, come to the finding that the plaintiff has proved to the standard required that the defendant vacated the three demised properties without fully discharging its obligations under the leases to bring the premises in "good and tenantable condition." The defendant appear not to have done any costing of the outstanding works detailed during the joint inspection exercise which the court could have considered alongside that presented in the reports produced by the plaintiff. I have looked at the costing of the works detailed in the report produced by PW4 and find on the evidence tendered, it is reasonable.

- i. The plaintiff submitted on the VAT and interest claim at paragraph 6.17 to 6.20 setting out the applicable clauses 1(a), 1(c), and 1(e) of the Jomvu Service Station lease. I have not seen any specific rejoinder on this in the defendant's submissions and being aware of the testimony of DW1 on the matter, I find the plaintiff has proved its case on this item.
- j. On whether a party can be entitled to both general damages and mesne profits for trespass on the same land over the same period of time, the answer is in the negative as confirmed by the Court of Appeal in the case of Kenya Hotel Properties Ltd versus Willsden Investments Ltd [2009] eKLR, where it was held that;

"...once the learned judge made the award under the subhead "mesne profits" there was no justification for him awarding a further Kshs.10 million under the subhead "trespass", since both mean one and the same thing."

In this matter the court will award the plaintiff mesne profits at the monthly rent rates under the expired lease agreements from the dates claimed to the time the restoration amount, which I find reasonable, will have been paid. The claim for loss of the tabulated net profits is unsustainable in a situation where mesne profits and restoration claims have been awarded.

- k. That on costs, the court has taken note of the orders of 14th February 2022 when the defendant in the counterclaim application to have the remaining prayers in their plaint, with the exemption of that for costs, to be marked abandoned was granted. The court proceeded to order that costs will be addressed in the judgement and the parties to proceed with the hearing of the counterclaim. It is clear that the defendant is the one who brought the plaintiff to court first. The plaintiff has definitely incurred expenses defending the defendant's claim against him, and has by an large been vindicated through the previous orders culminating with that of 14th February 2022 of the defendant having their prayers marked abandoned. In the meantime, the plaintiff had lodged its counterclaim and the foregoing conclusions show that it has substantially succeeded in its claim against the defendant. That as under section 27 of the *Civil Procedure Act* chapter 21 of Laws of Kenya, costs should follow the events unless otherwise for good cause ordered, I find in this case the plaintiff [Canarian Holdings Limited], is entitled to costs.



8. The upshot of the foregoing is that the plaintiff in the counterclaim has proved its claim against the defendant on a balance of probabilities. That accordingly, judgement is hereby entered for the plaintiff against the defendant in the following terms:
- a. A declaration is hereby issued that the lease between the Plaintiff and defendant over subdivision 3071 was determined by effluxion of time on 30th April 2019, and the defendant's continued possession of the same without the plaintiff's authority or consent and continued refusal to vacate the premises from 1st May 2019 amounted to trespass and a violation of its obligation under clause 1 (dd) of the lease dated 19th July 1999.
 - b. A declaration is hereby issued that the defendant breached clause 1(t) of the said lease over subdivision 3071 by allowing its shares whereof control of the lessee passed to M/s Rubis Energie SAS, without first obtaining the lessor's written consent, and that the plaintiff was therefore entitled under clause 1(t) and 3(a) of the lease dated the 19th July 1999 to re-enter the premises without notice and determine the lease.
 - c. The plaintiff is hereby awarded Kshs.19,437,653/= for restoration works and mesne profits at the monthly rent rates under the expired lease agreement in respect of Subdivision 3071, Changamwe Service Station, with interest at courts rates from 1st May 2019 until the restoration award herein is fully paid.
 - d. A declaration is hereby issued that defendant breached clause 1(t) of the lease between them dated 19th April 2000 over subdivision 3904 by allowing transfer of its shares whereof control of the lessee passed to M/s Rubis Energie SAS, without first obtaining prior written consent of the lessor, and that the plaintiff was therefore entitled under clause 1(t) and 3(a) of the lease dated the 19th July 1999 to re-enter the premises without notice and determine the lease by the notice of forfeiture dated 20th March 2019.
 - e. A declaration is hereby issued that the defendant's continued acts of possession of subdivision 3904 and refusal to vacate the premises despite issue of notice of forfeiture and re-entry pursuant to clauses 1(t) and 3(a) of the lease dated 19th April 2000 and its possession of the premises from 30th April 2019 amounted to trespass.
 - f. A declaration is hereby issued that defendant's refusal to vacate from subdivision 3904 by 30th April 2019 despite issue of notice of forfeiture of the lease and re-entry and repeated requests to vacate by the plaintiff is in breach of the defendant's obligation under clause 1(ee) of the lease dated 19th April 2000.
 - g. The plaintiff is hereby awarded Kshs.5,458,681.60 for restoration works and mesne profits at the monthly rent rates under the expired lease agreement of Subdivision 3904, Mtwapa Service Station with interest at courts rates from 1st February 2020 until the restoration award herein is fully paid.
 - h. A declaration is hereby issued that the defendant breached clause 1(x) of the lease with the plaintiff dated the 23rd August 2001 over subdivision 653 by allowing transfer of the beneficial interest of more than fifty per centum of the shares of the defendant to M/s Rubis Energie SAS without first obtaining prior consent of the plaintiff.
 - i. A declaration is hereby issued that the defendant having effected transfer of shares resulting to change of control without obtaining prior written consent, the plaintiff was entitled to re-enter the subdivision 653 without notice and determine the lease



dated the 23rd August 2001 under clauses 1(X) and 3(a) of the said lease, as it did by notice of forfeiture dated 20th March 2019.

- j. A declaration is hereby issued that the defendant's continued acts of possession of subdivision 653 and refusal to vacate the premises despite issue of notice of forfeiture and re-entry pursuant to clauses 1(τ) and 3(a) of the lease dated 23rd August 2001 from 30th April 2019 amounted to trespass.
- k. A declaration is issued that the defendant's refusal to vacate subdivision 653 by 30th April 2019 despite issue of notice of forfeiture of the lease and its refusal to vacate after repeated requests by the plaintiff is in breach of the defendant's obligation under clause 1(ee) of the lease dated 23rd August 2001.
- l. The plaintiff is awarded Kshs.7,903,378/= for restoration works, USD 12,7521.20 and mesne profits at the monthly rent rates under the expired lease agreement in respect of Subdivision 653, Jomvu Service Station with interests at courts rates from 1st November 2020 until the restoration award herein is fully paid.
- m. On breach of the leases, the Plaintiff is awarded Kshs.200,000/= as damages in respect of each of the three lease agreements.
- n. The plaintiff is awarded costs of the suit with interests at court rates from date of judgement till payment in full.

It is so ordered.

DATED AND VIRTUALLY DELIVERED THIS 25th DAY OF OCTOBER 2023.

S. M. KIBUNJA, J.

ELC MOMBASA.

In The Presence Of:

Plaintiff : M/s Onyango for Plaintiff/Defendant in counterclaim.

Defendant : Mr Okoth and Ombogi for Defendant/Plaintiff in counterclaim.

Wilson – Court Assistant.

S. M. KIBUNJA, J.

ELC MOMBASA.

