



**REPUBLIC OF KENYA**

**IN THE ENVIRONMENT AND LAND COURT**

**AT MOMBASA**

**ELC CASE NO. 469 OF 2017**

**PETER KAMAU KIMONDO.....PLAINTIFF**

**VERSUS**

**BEATRICE NTHULI T/A AMAZING GRACE CHURCH...DEFENDANTS**

**JUDGEMENT**

It is the plaintiff's case that at all materials times herein the Plaintiffs deceased father, the Late Stephen Kimondo Karuku was the purchaser in possession of the suit premises known and described as Plot No. Mombasa/MS/ Block III/462. The Defendant was in occupation of the premises as a tenant of the Late Stephen Kimondo Karuku from January 2011 to September 2015. Sometimes on or about the 20<sup>th</sup> December, 2010, the Plaintiffs deceased father entered into a lease agreement with the Defendant herein for a tenancy in the property known and described as Plot No. Mombasa/MS/Block III/462 for a term of seven (7) years on the agreed terms and conditions. The lease commenced on 1<sup>st</sup> January 2011 and was set to expire on 31<sup>st</sup> December 2017. The Defendant occupied the suit premises and commenced the tenancy term as stipulated in the Lease agreement dated 20<sup>th</sup> December, 2010. The Defendant honoured her obligations of remitting the monthly rent diligently up to the month of March 2012. Upon the demise of the Plaintiffs father on 30<sup>th</sup> April, 2012, the Defendant neglected her contractual duty and failed to honour the monthly consideration as stipulated. She further entered into an agreement with a third party, one Douglas M. Njoroge without the consent of the Plaintiff herein. The rent was being paid to Douglas M. Njoroge by the Defendant notwithstanding the fact that the Defendant had a valid lease agreement with the Plaintiffs deceased father, which lease dated 20<sup>th</sup> December 2010 had not been terminated. On 30<sup>th</sup> September, 2015 the Defendant vacated from the suit premises prior to the time stipulated in the lease agreement as the lease term was to expire on 31<sup>st</sup> December, 2017. The Defendant also breached the terms of the lease agreement by failure to give adequate notice as stipulated in the lease agreement thus necessitating this suit. Particulars of special damages are;

a. Outstanding accrued rent arrears due to the breach by Kshs. 390,000/- the Defendant(Rent arrears August 2013- September 2015 (26 months) @Kshs. 15,000/-)

b. Anticipated monthly rent until the completion of the Kshs. 405,000/- lease agreement (Rent October 2015- December 2017 [27 months] @Kshs. 15,000/-)

Total Kshs.795.000/-

The Plaintiff avers and maintains that there is no other suit pending before any other Court save for (Mombasa) HCCC No.32 of 2012 Douglas Mungai Njoroge vs Peter Kamau Kimondo (legal representative of the estate of the late Stephen Kimondo Karuku (Deceased) and Beatrice Nthuli T/A Amazing Grace Church herein as interested parties but the Defendant herein Beatrice Nthuli t/a Amazing Grace Church has already withdrawn the suit as against the Plaintiff herein through a Notice of Withdrawal of the suit dated 15th August 2016 and (Mombasa) CMCC No. 860 of 2013 Douglas Mungai Njoroge & Beatrice Nthuli T/A Amazing Grace Church =Vs= Peter Kamau Kimondo wherein the prayers for injunctions were set aside vide a Ruling dated 15<sup>th</sup> February 2015 by the Honourable D. Wasike. This particular suit seeks to challenge the rights of the landlord to levy distress for rent due and owing as at the time of distress. The amount claimed in this suit is not within the subject of the said distress and does not fall for determination in this suit. Therefore the Plaintiff prays for judgment against the Defendant for:

1. Special damages of Kshs. 795,000/-

2. Costs of the suit.

3. Interest on (a) at court rates above from the date of filing suit in court and on (b) at court rates from the date of judgement until payment in full.

4. Further or any other relief that this Honourable Court may deem just and fit to grant in the circumstances of the case.

The defendant avers that she has always paid rent as required and directed by court in HCCC No.32 of 2012 Douglas Mungai Njoroge vs Peter Kamau Kimondo (legal representative of the estate of the late Stephen Kimondo Karuku (Deceased) and Beatrice Nthuli T/A Amazing Grace Church. That by a letter dated 17<sup>th</sup> September 2015, the building was condemned by the County Government of Mombasa, Department of Health and upon receipt of the notice to vacate wound up her activities and vacated the premises.

This court has carefully considered the evidence and the submissions therein. The case is the Defendant was in occupation of the premises as a tenant of the Late Stephen Kimondo Karuku from January 2011 to September 2015. Sometimes on or about the 20<sup>th</sup> December, 2010, the Plaintiffs deceased father entered into a lease agreement with the Defendant herein for a tenancy in the property known and described as Plot No. Mombasa/MS/Block III/462 for a term of seven (7) years on the agreed terms and conditions. The lease commenced on 1<sup>st</sup> January 2011 and was set to expire on 31<sup>st</sup> December 2017. The Defendant occupied the suit premises and commenced the tenancy term as stipulated in the Lease agreement dated 20<sup>th</sup> December, 2010. The Defendant honoured her obligations of remitting the monthly rent diligently up to the month of March 2012. Upon the demise of the Plaintiffs father on 30<sup>th</sup> April, 2012, the Defendant neglected her contractual duty and failed to honour the monthly consideration as stipulated. The plaintiff testified that she further entered into an agreement with a third party, one Douglas M. Njoroge who claimed to be the new owner of the premises and paid rent to him. That by a letter dated 17<sup>th</sup> September 2015, the building was condemned by the County Government of Mombasa, Department of Health and upon receipt of the notice to vacate wound up her activities and vacated the premises. That the third party produced ownership of the said suit premises.

I find that it is not disputed that the plaintiff entered into a tenancy agreement with the plaintiff's father commencing the 1<sup>st</sup> January 2011 for 7 years. Having been put into possession of the land, the defendant cannot not escape its duty under the tenancy by questioning the plaintiff's title to the land. In the **Halsbury's Laws of England 4<sup>th</sup> Edition Vol. 27 at page 11** the authors opine that;

*"Whilst the tenancy continues, a tenant is absolutely estopped from denying the title of the landlord by whom he was let into possession, whether or not he has notice of any defect in title."*

A similar position was taken by the court in *E.H. Lewis & Son. -v- Morelli, (1948) 2 All ER 1021* and restated in the case of *Kasturi Limited v Nyeri Wholesalers Limited (2014) eKLR*. As such the Plaintiff's position was that the Defendant could not unilaterally terminate the said lease mid-term and enter into another lease with a third party. I agree this position is supported by the case of the Plaintiff relied on the case of **Kenya Commercial Bank Limited vs Popatial Madhavji & Another (2019) eKLR**, where the Court of Appeal held that;

**"But having found as we have above that an agreement to lease for a period of 5 years and 3 months had resulted from the terms outlined in the letter of 23rd December 1998 and the ensuing correspondence, the appellant was bound to a lease term of a period exceeding five years, which removed it from the ambits of Cap 301. This meant that termination of the lease mid-term was not available to the appellant. The consequence of this was that the notice of termination of 25th March 2002 could not validly terminate the lease, with the result, we find that, the appellant was obligated to continue to occupy the suit premises for the entire period of the lease, and to pay the agreed rent and service charge for the period up to the date of expiry, that being the 31st December 2003."**

Likewise, in the case of **Chimanlal Meghji Naya Shah & Another vs Oxford University Press (EA) Limited (2007) eKLR**, Hon **Warsame** (as he then was) held as follows;

*"Equally there is no doubt that the subject lease did not contain and/or provide a termination clause to enable the tenant to end its relationship with the Plaintiffs. Perhaps it is also essential to point out that no landlord can force a tenant to stay in his premises for a particular period whether a lease exists or otherwise. The situation depends on many issues that would determine the relationship either way."*

**If for example, the lease provides for a fixed period of 6 years and the tenant is unable to pay the rent applicable, then the tenant cannot be heard to say that the landlord cannot end or terminate his lease. In my view where there is no termination clause and the lease is terminated before its period of expiry, the situation that obtains is a breach of a contract. Where the parties are not regulated by their lease agreement as to the nature and mode of notice, if the lease is terminated by either party, then the party offended is entitled to damages for breach of contract. In essence my position is that a lease agreement properly registered is a form of a contract and therefore when there is a default, the terms of breach of a contract aptly applies."**

**Be that as it may, DW1** in her evidence told the court that due to the frustrations the Plaintiff that she went to court and got an injunction and was ordered to pay rent into court which she did through the third party who had the title document of the suit premises. The Defendant stated that she received a notice to vacate by a letter dated 17<sup>th</sup> September 2015, the building was condemned by the County Government of Mombasa, Department of Health and upon receipt of the notice to vacate wound up her activities and vacated the premises.

The court takes note that the property is now registered in the name of the third party Douglas Mungai Njoroge who is not a party to this suit and there is an ownership dispute vide HCCC No. 32 of 2012 Douglas Mungai Njoroge vs Stephen Kimondo Karuku. I find that the plaintiff jumped the gun by bringing this matter to court for special damages for breach of contract before the question of ownership is resolved. The defendant also pleads the doctrine of frustration. The doctrine of frustration, as I know it, is a complex one in the law of contract. It provides a vent for each party to bear the loss or gains of a contract which cannot be performed at a particular point in time. The Court of Appeal recently in *Charles Mwirigi Miriti v Thananga Tea Growers Sacco Ltd & another (2014) eKLR* stated as follows;

“This now leads us to the issue of whether the agreement was genuinely frustrated.

In Halsbury's Laws of England, Vol. 9(1), and 4th Edition at paragraph 897:-

“As subsequently developed, the doctrine of frustration operates to excuse from further performance where: (1) it appears from the nature of the contract and the surrounding circumstances that the parties have contracted on the basis that some fundamental thing or state of things will continue to exist, or that some particular person will continue to be available, or that some future event which forms the basis of the contract will take place; and (2) before breach, an event in relation to the matter stipulated in head (1) above renders performance impossible or only possible in a very different way from that contemplated. This assessment has been said to require a 'multi-factorial' approach. Five propositions have been set out as the essence of the doctrine. First, the doctrine of frustration has evolved to mitigate the rigour of the common law's insistence on literal performance of absolute promises so as to give effect to the demands of justice. Secondly, the effect of frustration is to discharge the parties from further liability under the contract, the doctrine must not therefore be lightly invoked but must be kept within very narrow limits and ought not to be extended. Thirdly, the effect of frustration is to bring the contract to an end forthwith, without more and automatically. Fourthly, the essence of frustration is that it should not be due to the act or election of the party seeking to rely upon it, but due to some outside event or extraneous change of situation. Fifthly, that event must take place without blame or fault on the side of the party seeking to rely upon it; nor does the mere fact that a contract has become more onerous allow such a plea.”

In the case of;- Davis Contractors LTD -vs- Fareham U.D.C, (1956) A.C 696, Lord Radcliffe at page. 729 held:

“...frustration occurs whenever the law recognizes that, without the default of either party a contractual obligation has become incapable of being performed because the circumstances in which the performance is called for would render it a thing radically different from that which was undertaken by the contract. “Non haec in foedera veni”. It was not what I promised to do”.

From 2013 the defendant failed to get quiet enjoyment of the premises as the feuding parties kept sending auctioneers to her premises. After receiving the notice to vacate from the authorities the defendant vacated on the 30<sup>th</sup> September 2015. I find that any rent payable at that time will not be justified even when the ownership dispute is resolved. This suit was premature in the circumstances. I find that the plaintiff has failed to prove his case on a balance of probabilities and I dismiss it with no orders as to costs.

It is so ordered.

**DELIVERED, DATED AND SIGNED AT MOMBASA THIS 18<sup>TH</sup> JANUARY, 2022**

**N.A. MATHEKA**

**JUDGE**