



REPUBLIC OF KENYA

IN THE ENVIRONMENT AND LAND COURT

AT MOMBASA

ELC CASE NO. 300 OF 2018

CANARIAN HOLDINGS LIMITED.....PLAINTIFF

VERSUS

MOHAMED SAID ABDULREHMAN (*Sued as the Attorney of the Wakf of the*

***Late Harith Al-Amin Bin Mazrui*).....DEFENDANT**

JUDGEMENT

The Plaintiff avers that he is the registered proprietor as lessee from the Estate of the Late Sheikh Al-Amin Bin Ali of all that property comprised of that parcel of land known as Subdivision Number 3071 (original number 2419/5) of Section VI Mombasa Mainland North (being a portion of the premises comprised in a Lease registered in the Land Titles Registry at Mombasa as Number C.R. 13155/1 (hereinafter “the suit property”) for a term of 99 years from the 1st day July, 1963. Sheikh Ali Al’Amin Bin Ali was registered as proprietor as Trustee of the Wakf of that piece or parcel of land containing eight point three (8.3) acres or thereabouts known as sub-division No. 2419(original No. Part of 48) of Section VI Mainland North situate in Mombasa Municipality in Mombasa District more particularly delineated and described on Deed Plan No. 76612 and registered as C.R. No. 13097/1 by the Acting Registrar of Titles on 27th November, 1963. On 30th December, 1978, Sub-Division No. 2419 Section VI Mainland North was further sub-divided into sub-divisions No. 3045, 3070 and 3071 with other lands vide a certificate of sub-division dated 29th January, 1977 by the Municipal Council of Mombasa. On 27th December, 1989 Sheikh Ali Al’Amin Bin Ali transferred Subdivision Number 3071 (original number 2419/5) of Section VI Mombasa Mainland North measuring 0.2764 ha (with other lands) to Bahali Mills Limited for Kshs 9,000, 000. That by an Agreement dated 2nd January, 1997 the Plaintiff purchased the suit property from Bahali Mills Limited at the price of Kshs. 3,750,000.00 and subsequently acquired the leasehold interest in the suit property from the lessor, the Wakf of the Late Sheikh Ali Al-Amin Bin Ali, pursuant to the transfer dated 27th February, 1997 and registered on 3rd April, 1997 as entry number CR No. 29876/1 and the Instrument of Rectification and Confirmation registered on 6th March, 1998 as CR No. 29876/2. It was a fundamental term of the Agreement between the Plaintiff and Bahali Mills Limited under clause 9A that the Plaintiff acquired the property subject to the acts, conditions, covenants, stipulations, easements, reservations and restrictions under which the same was held by the Bahali Mills Limited but free from any charges or similar encumbrances. That the Wakf of the Late Sheikh Al-Amin Bin Ali was at all material times an absent lessor but as at the time of the Plaintiff’s acquisition of the lease, it was being represented by its duly appointed and authorized Attorney, Mr. Munir Mohammed Mazrui, and who consented in writing to the Plaintiff’s acquisition of the lease from Bahali Mills Limited in accordance with the terms of the lease.

The Plaintiff avers that the rent reserved in the lease for the full term of the lease is Kshs. 530.00 payable monthly in advance. The Plaintiff avers that the Defendant, being a successor in office and/or an assign, is expressly bound by the terms of the lease, and has no power or authority to unilaterally amend, impose or interfere with the conditions and covenants of the lease before the expiry of the term of the lease and reversion to him as a representative of the lessor. Pursuant to and in compliance with the terms of the lease, the Plaintiff leased the suit property to Kenya Oil Company Limited, for a term of twenty (20) years with effect from 1st May, 1999, which lease and all conditions and covenants therein, was duly consented to by Mr. Munir Mohammed Mazrui who was at that time the duly appointed and authorised Attorney of the Wakf of Sheikh Ali Al’Amin Bin Ali in accordance to clause 4 of the Head Lease. Presently, the Plaintiff and persons claiming through it are in possession of the suit property, and are entitled to peaceful and quiet possession and enjoyment of the same, without interference by the Lessor or the Defendant. The Plaintiff avers that it has further complied with all its obligations under the lease, including the obligations to pay rent, which the Plaintiff dutifully paid to the duly appointed Attorney, Mr. Munir Mohammed Mazrui up to and until the year 2012, when he ceased to be the Attorney and no longer had authority to act for the lessor.

Despite being aware that the Plaintiff had an obligation to pay rent under the lease, the Lessor deliberately failed to notify the Plaintiff of the cessation of the appointment of Mr. Munir Mohammed Mazrui as its Attorney and to notify the Plaintiff of its newly and duly appointed trustee, agent or attorney for the purposes of receiving rent despite the fact that the Plaintiff was at all material times able, ready and willing to pay the rent, but was unable to pay due to the lessor’s acts complained of herein. On or about 23rd October, 2018, the Defendant herein informed the Plaintiff that the Wakf of Ali Al-Amin Bin Mazrui had appointed him as its lawful attorney pursuant to an instrument of General Power of Attorney dated 11th July, 2018 but registered on 16th July, 2018. Following the Defendant’s appointment, on 23rd October,

2018, the Plaintiff's representatives, in order to avoid any future non-payment of rent due on account of the absence of duly appointed agent, attorney or trustee, together with the Defendant computed, calculated and verified the rent due as per the lease from 1st January, 2012 up to the date of expiry of the term of the lease on 30th June, 2062 together with penalties for late payment and interest and paid to the Defendant a sum of Kshs. 371,863.90 in full settlement thereof, which amount the Defendant acknowledged receipt of.

The Plaintiff avers that the dating of the letter as 24th July, 2018 while it was delivered by email on 18th October, 2018 and a hard copy thereof delivered physically on 23rd October, 2018 is in bad faith, as it was intended to create an impression that the Plaintiff had been issued with a notice of at least 3 months and had failed to rectify the breach in order to justify the Defendant's unlawful forfeiture of the Lease. The Plaintiff avers further that the allegations of fraud and breach of the lease by the Defendant in its letter dated 24th July, 2018 but first received via email on 18th October 2018 are untrue on all material particulars, and appear to have been a deliberate maneuver to justify the issue of notice of forfeiture. The Plaintiff avers that he paid all rents due and reserved under the lease until the year 2012, when the Attorney of the Lessor, Mr. Munir Mohammed Mazrui, who previously received rent, informed the Plaintiff that he no longer had authority to act for the Lessor or to receive rent. The non-payment of rent between 2012 and October 2018 was precipitated by the Defendant's own acts, as a result of the withdrawal/cessation of the powers of the previous appointed Attorney without notice to the Plaintiff and both the failure to appoint a new attorney or agent for purposes of receiving the Plaintiff's rent and the failure to notify the Plaintiff of such appointment, despite the Plaintiff being able, ready and willing to pay the rent. Upon the Defendant notifying the Plaintiff of his appointment as the new attorney for the Lessor, the Plaintiff together with the Defendant calculated the entire rent due under the lease, from 2012 to the expiry of the lease, and upon agreement on the figure the Plaintiff paid the entire rent, being both the withheld rent and the rent for the un-expired term of the lease, in order to avoid any future claim of rent default caused by revocation/cessation of power of attorney without notice.

The Defendant's allegation that the monthly rent stipulated in the transfer of lease is grossly low in relation to the value of the leased property is untrue, contrary to both the Head Lease and the Plaintiff's Lease and is unreasonable because the Plaintiff acquired the lease from Bahali Mills Limited in consideration of a substantial stand premium of Kshs. 3,750,000.00 in the year 1997 and a with reserved monthly rent for the term of the lease of Kshs 530.00, with the consent of the duly appointed attorney of the Lessor, Mr. Munir Mohammed Mazrui. The lease specifically reserved the monthly net rent payable of Kshs 530.00 for the term of the lease, having taken into account the substantial stand premium on acquisition of the Lease by the Plaintiff. Further, considering the substantial stand premium in acquiring the lease, the Lessor did not reserve the right to revise the reserved rent, but instead, clearly and expressly specified the net monthly rent due under the term of the lease i.e. from 1st July, 1963 to 30th June, 2062. That the Defendant in leasing out the suit property together with other properties to Bahali Mills Limited in the year 1989, had received a substantial stand premium on the Leases together with other lands of Kshs 9,000, 000. Having had and received substantial stand premium in leasing out the suit property to Bahali Mills Limited and subsequently to the Plaintiff for the term of 99 years with a reserved rent for the term of the lease, the Defendant/Lessor is estopped from further attempting to renege on the terms of the Lease by purporting that the reserved rent does not reflect the value of the property.

The Plaintiff avers that the Defendant's allegation that the Plaintiff fraudulently sublet the premises to Kenya Oil Company without permission of the lessor is untrue due to the irrefutable fact that the sublease was consented to and approved by the Lessor's duly appointed and sole surviving trustee, Mr. Munir Mohammed Mazrui. The Defendants allegation that the Plaintiff procured the leases to Diamond Trust Bank by fraud is unfounded and untrue as the Plaintiff did not require any consent to charge under Clause 4 of the Lease but only to transfer, sublet assign or part with the possession of the said premises. The Plaintiff having paid the rent as provided for in the Lease, the Defendant's demand of "total amount of the rent arrears that has accumulated since 27th February 1997 using a reasonable amount for monthly rent that considers the value of leased property", has no basis in the lease and is contrary to the express terms of the lease that reserves the net monthly rent payable for the term of the lease at Kshs 530.00, which is a common practice of reserving nominal rent where the Plaintiff has paid a substantial stand premium on acquisition of the Lease.

The Plaintiff avers that having paid, and the Defendant having had, received and accepted the cheque of Kshs. 371,863.90 as drawn in settlement of the rent for the period from 1st January, 2012 to 30th June, 2062 with no further claim whatsoever, the Plaintiff fulfilled its entire obligation to pay rent under the lease, and the Defendant is estopped from claiming that the Plaintiff has committed a breach of, or has omitted to perform the condition of the Lease requiring the payment of rent and the right to forfeit the lease on account of default of rent under the Lease does not rise at all. That in total disregard and in breach of the lease, the Defendant has now, by a letter dated 1st November, 2018 and received on 22nd November, 2018 purported to issue a notice of forfeiture of the Plaintiff's lease over the suit property alleging default of rent while it has by the same letter returned the Plaintiff's cheque issued in favour of the Defendant in settlement of all the outstanding and future rent of Kshs. 371,863.90. The Defendant, in open violation of clause 6 of the lease which in mandatory term requires the Defendant to give the Plaintiff a written notice to put any breach in order, has deliberately failed to do so in his purported notice of forfeiture. By a letter dated 29th November, 2018 and received by the Plaintiff on 13th December, 2018, the Defendant has, through his Advocates, confirmed that he returned the Plaintiff's cheque for Kshs. 371,863.90/- without providing any reason thereto and further issued the notice of forfeiture of the lease without complying with either the terms of the Lease or the law. The Plaintiff avers that the Power of Attorney dated 11th July, 2018 appointing the Defendant as the Attorney and shown and made available to the Plaintiff on 23rd October 2018 reveals that Alamin Mohamed Mazrui was appointed trustee, who upon appointment did not contact the Plaintiff to notify it of his appointment. The Plaintiff prays for judgment against the Defendant for:

- a) A declaration be and is hereby issued that the Plaintiff is the registered proprietor as lessee from Sheikh Al-Amin Bin Ali of all that property comprised of that parcel of land known as Subdivision Number 3071 (original number 2419/5) of Section VI Mombasa Mainland North (being a portion of the premises comprised in a Lease registered in the Land Titles Registry at Mombasa as Number C.R. 13155/1 for a term of 99 years from the 1st of July 1963 at a net monthly rent of Kshs 530. 00 for the term of the lease.
- b) A declaration be and is hereby issued that the Plaintiff is entitled to quiet and peaceful possession of the property comprised of that parcel of land known as Subdivision Number 3071 (original number 2419/5) of Section VI Mombasa Mainland North (being a portion of the premises comprised in a Lease registered in the Land Titles Registry at Mombasa as Number C.R. 13155/1 for a term of 99 years from the 1st of July 1963 without interference from the lessor or its successors in office or assigns.
- c) A declaration be and is hereby issued that before exercising the right to forfeiture under clause 6 of the lease in respect of the suit

property Subdivision Number 3071 (original number 2419/5) of Section VI Mombasa Mainland North in the case of a breach, the Lessor shall first give the Lessee written notice to put the same in order, and if the lessee shall fail to do so for a period of three calendar months after the receipt of such notice then only such right of re-entry and forfeiture may be exercised.

d) A Declaration be and is hereby issued that the Defendant's purported notice of forfeiture dated 1st November, 2018 is in violation of Clause 6 of the lease and is illegal and unlawful and is therefore null and void ab initio.

e) It is hereby ordered that the Plaintiff do pay to the Defendant the full rent due under the lease which had been paid to and accepted by the Defendant and which the Defendant returned to the Plaintiff by the purported notice of forfeiture dated 1st November, 2018 and in default of the Defendant rejecting the same, the Plaintiff do deposit the said rent in this Honourable Court.

f) The Honourable Court be pleased to and hereby issues a relief against forfeiture in the nature of a permanent injunction restraining and/or barring the Defendant, the trustee, attorney or any person claiming interest through the Wakf of the late Sheikh Ali Al'Amin Bin Ali whether by themselves, their employees, servants, agents, or nominees from forfeiting, evicting and/or in any other manner whatsoever interfering with the Plaintiff's quiet enjoyment and possession of the parcel of land known as Subdivision Number 3071 (original number 2419/5) of Section VI Mombasa Mainland North (being a portion of the premises comprised in a Lease registered in the Land Titles Registry at Mombasa as Number C.R. 13155/1 for the term of the lease, being 99 years from 1st July, 1963 subject only to the compliance with the conditions of the lease;

g) The Honourable Court be pleased to issue and hereby issues an order permanently staying and/or setting aside the purported notice of forfeiture dated 1st November 2018 and served on 22nd November, 2018, and further permanently staying/prohibiting its implementation or any action thereunder other than its withdrawal either by the Defendant or any other person claiming interest through the Wakf of the late Sheikh Ali Al'Amin Bin Ali whether by themselves, his employees, servants, agents, or nominees

h) The Honourable Court be pleased to and hereby issues an Order vesting all that property known as Subdivision Number 3071 (original number 2419/5) of Section VI Mombasa Mainland North subject to the payment of the monthly rent of Kshs. 530.00 as provided for under the Lease in the Plaintiff for the remainder of the term of the Lease, compliance with the conditions of the lease;

i) Costs of the suit, together with interests at Court rates from date of judgment till payment in full.

j) Such other Order and/or further remedies as this Honourable Court deems fit.

The Defendant avers that the initial lease between the Sheikh Ali Al'Amin as lessor and The Kenya Rayon Mills Limited registered on the 8th May 1964 had the following salient terms and conditions;

a. The lease was for a term of Ninety Nine years commencing on the First day of July One Thousand Nine Hundred and Sixty Three yielding and paying thereafter during the said term the net monthly rental of Kshs 530 payable in advance.

b. That the Lessee shall be at liberty to transfer, sublet, assign or part with the possession of the said premises or part thereof with the written consent of the Lessor first had and obtained but such consent shall not be unreasonably withheld in case of a respectable person company firm or corporation but no consent will be given for the erection of a church or as a bar.

c. If at any time the said rent hereinbefore reserved or any part thereof shall be in arrears and unpaid for ninety days after any of the days hereinbefore appointed for the payment of the same whether legally demanded or not or if there shall be any breach by the lessee of any of the conditions of this lease, the lessor may re-enter upon the said premises and immediately thereupon the said term.

That the Salient terms and conditions therein were to bind any subsequent lessee who was assigned, transferred or sublet the proprietary rights of the suit property. The defendant admits that the Sub-Division No.2419 (Original No. Part of 48) Section VI Mainland North situate in Mombasa Municipality was further subdivided on 30th December 1978 to Subdivisions Number 3045, 3070 and 3071 the subject of the present suit. Save to admit that Subdivision Number 3071 was subsequently transferred to Bahali Mills Limited and to the Plaintiff herein through a transfer dated 27th February 1997. That the Plaintiff was to comply with the terms, conditions and covenants contained in the initial lease registered on the 8th May 1964, the Defendant is a stranger to the terms and conditions between the Plaintiff and Bahali Mills Limited as contained in Paragraph 8 of the Plaintiff. That the Wakf of the Late Sheikh Ali Al-Min bin Ali had at all material times appointed and nominated Mr. Munir Mohamed Mazrui and Harith Al'Amin Mazrui as the lawful attorneys a fact that was at all material times at the knowledge of the Applicant herein. The Defendant denies the amount of Kshs 530 payable monthly as stipulated in the lease registered on the 8th May 1964 was cast in stone and incapable of being varied, re-assessed or enhanced until the expiry of the 99 years. The Defendant denies that the Plaintiff was authorized by the lawful attorneys of the Wakf of the Late Sheikh Ali Al-Min bin Ali to lease the suit property to Kenya Oil Company Limited or the Chargee Diamond Trust Bank Limited. The Defendant contends that the above transaction was unilaterally conducted by the Plaintiff without the knowledge of the Wakf or its appointed attorneys and thus they are null and void. The Defendant further avers that it's a stranger to the averments that Mr. Munir Mohammed Mazrui ceased to be a lawful attorney of the Wakf the Late Sheikh Ali Al-Min bin Ali in 2012. The Defendant avers that the admission by the Plaintiff that the last rental payment was made in the year 2012, is irrefutable confirmation that it is in breach of Clause 6 of the lease registered on the 8th May 1964. Additionally, the admission that the Plaintiff is paid an approximate amount of USD 57,960/- annually by Kenya Oil Company Limited in an illegal lease from the lens of the trustees of the Wakf, renders a mockery the monthly rent of Kshs 530/- which the Plaintiff insists should be paid to the Defendant.

That further the attempt by the Plaintiff herein to make a payment of the Defendant of Kshs. 371,863.90cts was an attempt to hoodwink the Defendant by making a payment up to 30th June 1962 and unlawfully bind the Defendant. The Defendant insists that there was no written

consent to the lawful attorneys of the Wakf of the Late Sheikh Ali Al-Min bin Ali sanctioning the lease to Kenya Oil Company Limited and charge to Diamond Trust Bank Limited. The Defendant further states that even in the event that the Defendant acknowledged and banked Cheque Number 000663 of Kshs. 371,863.90cts the right of forfeiture would not be defeated in light of the provisions of Section 73(3) of the Land Act. That further, Clause 6 of the initial lease registered on the 8th May 1964 was unequivocal that the Lessor had a right for forfeiture and re-entering the premises immediately if the Lessee was in breach of the rental payments. This had crystallized in view of the letter dated 24th July 2018 by the Defendant's former advocates to the Plaintiff herein. The Defendant prays for judgement by way of counterclaim for;

1. Immediate forfeiture of the lease by the defendant herein in respect to all that property comprised of that land parcel of land known as Subdivision Number 3071(original Number 2419/5) of Section VI Mombasa North.
2. Vacant possession of all that property comprised of that parcel of land known as Subdivision Number 3071(original Number 2419/5) of Section VI Mombasa North.
3. Costs of the suit herein and counterclaim.

This court has considered the evidence and the submissions therein. The first issue to be determined is whether or not there was a breach of the said lease by the plaintiff to warrant the forfeiture. The terms and conditions of the Head Lease provides, inter alia, as follows:

(a) Clause 1 "That the Lessee will during the continuance of the term, hereby granted pay the said monthly rent as hereinabove reserved to the Lessor at Mombasa"

(b) Clause 4 " That the Lessee shall be at liberty to transfer, sublet assign or part with the possession of the said premises or any part thereof with the written consent of the Lessor first had and obtained but such consent shall not be unreasonably withheld in case of a respectable person, company, firm or corporation but no consent will be given for the erection of a church or as a bar'

(c) Clause 6 "if at any time the said rent hereinbefore reserved or any part thereof shall be in arrear and unpaid for ninety days after any of the days hereinabove appointed for the payment of the same whether legally demanded or not or if there shall be any breach by the Lessee of any of the conditions of this Lease, the Lessor may re-enter upon the said premises and immediately thereupon the said term shall absolutely cease and determine provided however that in the case of a breach the Lessor shall first give the Lessee written notice to put the same in order, and if the lessee shall fail to do so for a period of three calendar months after the receipt of such notice then only such right of re-entry and forfeiture may be exercised..."

On the issue of consent, I find that on the transfer dated 27th February 1997 between Bahari Mills Limited and Canarian Holdings Limited (plaintiff) effectively transferred the lease over the suit property to the plaintiff, and this was consented by Munir Mohamed Mazrui a trustee to the registered lessor at the material time. The plaintiff became the new lessee under the lease registered on 27th November 1963. Secondly, the plaintiff did not breach the head lease when they sublet to Kenya Oil Company limited on 19th July 1999, as this was again consented to by Munir M. Mazuri, as per the terms of the head lease clause 4, which required the lessee to seek the written consent of the lessor before transferring, subletting, assigning or parting with the possession of the suit land. On the issue of charging the property to Diamond Trust Bank Limited, I find that the plaintiff did not breach the head lease by charging the suit property without seeking the lessor's consent as this was not a requirement in the lease. In the case of National Bank of Kenya Ltd vs Pipeplastic Samkolit (K) Ltd (2002)2 EA 503 the court stated that;

"A court of law cannot rewrite a contract, between parties. The parties are bound by the terms of their contract, unless coercion, fraud or undue influence are pleaded and proved. There was not the remotest suggestion of coercion, fraud or undue influence in regard to the terms of the charge. As was stated by Shah JA in the case of Fina Bank Ltd v Spares and Industries Ltd [2000] 1 EA 52: "It is clear beyond peradventure that save those special cases where equity might be prepared to relieve a party from a bad bargain, it is ordinarily no part of equity's function to allow a party to escape from a bad bargain".

The Defendant contends that the plaintiff breached the head lease for failing to pay rent from 1st January 2012. The last rent paid by the plaintiff was on 26th February 2002, for the period between 1st January 2002 to 31st December 2011 amounting to Kshs 63,600/=. Clause 2 of the initial lease registered on the 8th May 1964 provided as follows;

"That the Lessee will from time to time and at all times during the term pay and discharge all rates, taxes, duties, charges-assessments and outgoings whatsoever which are now or at any time hereinafter be assessed, charged or imposed upon or payable in respect of the said premises or the owners or occupiers in respect thereof."

The plaintiff in their pleadings and evidence, admitted to not paying rent after 2012 and in his defence PW1 states that they did not pay as they did not know who to pay the rent to. That Mr. Munir Mohammed Mazrui, the sole surviving Trustee of Wakf of the late Sheikh Al-Amin Bin Amin Mazrui (deceased), declined to receive rent on the ground that he no longer had the authority to receive the same. That the plaintiff only became aware, that the defendant is the newly appointed Trustee, pursuant to a Power of Attorney registered on 16th July 2018, when they were served with a letter demanding the rent accrued.

Section 66 (1)(a) of the Land Act 2012, stipulates that the payment of the rent reserved in the lease at the times and in the manner specified in the lease is a mandatory condition implied on part of the lessee. Section 107 of the Evidence Act places the burden of proof on the party seeking to rely on the existence of a fact to provide evidence that support the existence of those facts. The Plaintiff testified that On or about 23rd October, 2018, the Defendant herein informed the Plaintiff that the Wakf of Ali Al-Amin Bin Mazrui had appointed him as its lawful attorney pursuant to an instrument of General Power of Attorney dated 11th July, 2018 but registered on 16th July, 2018. Following the Defendant's appointment, on 23rd October, 2018, the Plaintiff's representatives, in order to avoid any future non-payment of rent due on

account of the absence of duly appointed agent, attorney or trustee, together with the Defendant computed, calculated and verified the rent due as per the lease from 1st January, 2012 up to the date of expiry of the term of the lease on 30th June, 2062 together with penalties for late payment and interest and paid to the Defendant a sum of Kshs. 371,863.90 in full settlement thereof, which amount the Defendant acknowledged receipt of. Before notifying the Plaintiff of his appointment, the Defendant had through its advocates, forwarded a letter dated 24th July, 2018 by an email received on 18th October, 2018 to the Plaintiff and a physical letter the Defendant personally delivered to the Plaintiff on 23rd October, 2018 stating that:

“That you are the Lessee of Plot No.V1MN/71 pursuant to the instrument of transfer of lease dated 27th February 1997 and instrument of rectification & confirmation dated 27th February 1998 particulars thereof well within your knowledge.

That subsequent to the transfer of lease, you have failed and/or refused to pay the monthly rent on the respective due dates, in addition to breaching other terms and conditions of the lease.

That the monthly rent stipulated in the transfer of lease is grossly low in relation to the value of the leased property.

That you further proceeded to fraudulently sublease the leased plot to Kenya Oil Company Limited at a monthly rent of US\$54, 000 per month vide the agreement dated 19th July 1999 without the consent of the lessor, which is an outright violation of the terms and conditions of the lease agreement.

That on 19th May 2015 you further proceeded to fraudulently secure a charge on the leased property for US\$2,300, 000 to Diamond Trust Bank of Kenya through the Law Firm of MOHAMED MADHANI & CO ADV, without the consent of the Lessor which is another outright violation of the terms and conditions of the lease agreement.

Our instructions are to demand from you which we hereby do that you do a reconciliation of the total amount of the rent arrears that has accumulated since 27th February 1997 using a reasonable amount for monthly rent that considers the value of leased property and revert to us with a proposed schedule on payment of arrears within Fourteen (14)Days of the letter, failure to which we have mandatory instructions to issue you with a notice for forfeiture of the lease due to breach of the lease agreement on your part.”

The defendant’s counsel served the plaintiff with a Notice of Forfeiture of the lease dated 1st November 2018 on 22nd November 2018 claiming that the plaintiff had refused to pay rent thus breaching the lease. Counsel further stated that the defendant was misinformed into negotiations with the plaintiff and the plaintiff issued a cheque of Kshs 371,863.90/= in the defendant’s favour. The defendant proceeded to return the said cheque as well as notifying the plaintiff to grant vacant possession since the lease stood forfeited. The plaintiff submitted that the said letter was not a notice for forfeiture as contemplated by Section 75 of the Land Act, and that the rent of Kshs 530/= reasonable taking into consideration that the plaintiff paid Kshs 3,750,000/= while acquiring the lease in 1997. The defendant submitted that he was within his right under the lease agreement to seek re-entry of the premises and forfeiture the lease. That the notice of 24th July 2018 envisaged a period of 3 months prior to the forfeiture notice of 1st November 2018. The defendant argued that the rent of Kshs 530 that was sent on 8th May 1964 is subject to review by the lessor as stipulated in Clause 2 and that Kshs 3,750,000/= was paid by the plaintiff to Bahati Mills Limited when they transferred the lease to them and not to the lessor.

The right of a lessor to forfeiture is provided for by Section 73 of the Land Act, 2012. The lessor has a right to forfeit the lease, by entering and possessing the premises if the lessee commits any breach of, or omits to perform any condition expressed or implied in the lease. This right to forfeit can only be exercisable where the lessor served the lessee notice, as stated in Section 75 of the Land Act:-

- a) *Specifying the particular breach complained of;*
- b) *If the breach is capable of remedy, requiring the lessee to remedy the breach within such reasonable period specified in the notice;*
- c) *In any case requiring the lessee to make compensation in money for the breach; and*
- d) *The lessee fails, within a reasonable time thereafter to remedy the breach, which is capable of remedy to make reasonable compensation in money, to the satisfaction of the lessor for the breach.*

The breach of nonpayment of rent is capable of remedy, within the meaning of Section 75 of the Land Act. It is not disputed that the defendant accepted a cheque from the plaintiff which computed all the outstanding rent together with agreed penalties and interest. The defendant cannot now turn round and return the cheque with their letter dated 1st November 2018 forfeiting the lease on the ground of nonpayment of rent. In the famous decision by Lord Denman CJ, *Pickard vs Sears 112 E.R. 179* the court held that;

“The rule of law is clear that where one, by his words or conduct, willfully causes another to believe in the existence of a certain state of things, and induces him to act on that belief, so as to alter his own previous position, the former is precluded from averring against the latter a different state of things as existing at the time.”

In the Court of Appeal’s decision in *Serah Njeri Mwobi vs John Kimani Njoroge (2013) eKLR*, the Court held that:

“The doctrine of estoppel operates as a principle of law which precludes a person from asserting something contrary to what is implied by a previous action or statement of that person.”

The notice before forfeiture allows the lessee time to comply with their obligations before action is brought against him. In the case of Expert Clothing Ltd vs Hillgate House 1 CH 340, the court held that,

“The concept of capability of remedy for the purpose of Section 146, must surely be directed to the question whether the harm that has been done to the landlord by the relevant breach is for practicable purpose capable of being retrieved. In the ordinary case, the breach of a promise to do something by a certain time can for practical purposes be remedied by the thing being done, even out of time. For these reasons I reject the plaintiff’s argument that the breach of the covenant to reconstruct by 28 September 1982 was not capable of remedy merely because it was not a continuing breach.”

I find from the evidence before me that the defendant did not afford the plaintiff time to remedy the alleged breach after rejecting the cheque and to reconcile the rent owed and make payment. The earlier notice of 24th July 2018 was only served on the 23rd October 2018 and the same cannot be backdated to justify the notice. The defendant’s Notice was invalid on the ground that it was not specific on whether the lessor waives his right to forfeiture or spelled out in particular how the lessee was supposed to remedy the breach. More so, the time that was stipulated in the Notice was 14 days, which in my view was not within a reasonable time to remedy the breach. Section 75 stipulates a notice of not less than 30 days. A remedy to a breach must mean, that a lessee to do what is necessary to put the lessor back into the position he would have been in, had no breach been committed. It was not reasonably possible for the lessee to reconcile the rent according to the premises current value within 14 days, for the reason the Notice fails and in such circumstances, the question of relief from forfeiture does not arise. I find that the defendant has failed to establish his counterclaim on a balance of probabilities and I dismiss it with costs to the plaintiff. From the foregoing I find that the Plaintiff has proved his case on a balance of probabilities and I grant the following orders;

1. A declaration be and is hereby issued that the Plaintiff is the registered proprietor as lessee from Sheikh Al-Amin Bin Ali of all that property comprised of that parcel of land known as Subdivision Number 3071 (original number 2419/5) of Section VI Mombasa Mainland North (being a portion of the premises comprised in a Lease registered in the Land Titles Registry at Mombasa as Number C.R. 13155/1 for a term of 99 years from the 1st of July 1963 at a net monthly rent of Kshs 530 for the term of the lease.
2. A declaration be and is hereby issued that the Plaintiff is entitled to quiet and peaceful possession of the property comprised of that parcel of land known as Subdivision Number 3071 (original number 2419/5) of Section VI Mombasa Mainland North (being a portion of the premises comprised in a Lease registered in the Land Titles Registry at Mombasa as Number C.R. 13155/1 for a term of 99 years from the 1st of July 1963 without interference from the lessor or its successors in office or assigns.
3. A declaration be and is hereby issued that before exercising the right to forfeiture under clause 6 of the lease in respect of the suit property Subdivision Number 3071 (original number 2419/5) of Section VI Mombasa Mainland North in the case of a breach, the Lessor shall first give the Lessee written notice to put the same in order, and if the lessee shall fail to do so for a period of three calendar months after the receipt of such notice then only such right of re-entry and forfeiture may be exercised.
4. A Declaration be and is hereby issued that the Defendant’s purported notice of forfeiture dated 1st November, 2018 is in violation of Clause 6 of the lease and is illegal and unlawful and is therefore null and void ab initio.
5. It is hereby ordered that the Plaintiff do pay to the Defendant the rent due under the lease to date.
6. The Honourable Court be pleased to and hereby issues a relief against forfeiture in the nature of a permanent injunction restraining and/or barring the Defendant, the trustee, attorney or any person claiming interest through the Wakf of the late Sheikh Ali Al’Amin Bin Ali whether by themselves, their employees, servants, agents, or nominees from forfeiting, evicting and/or in any other manner whatsoever interfering with the Plaintiff’s quiet enjoyment and possession of the parcel of land known as Subdivision Number 3071 (original number 2419/5) of Section VI Mombasa Mainland North (being a portion of the premises comprised in a Lease registered in the Land Titles Registry at Mombasa as Number C.R. 13155/1 for the term of the lease, being 99 years from 1st July, 1963 subject only to the compliance with the conditions of the lease.
7. The Honourable Court be pleased to issue and hereby issues an order permanently staying and/or setting aside the purported notice of forfeiture dated 1st November 2018 and served on 22nd November, 2018, and further permanently staying/prohibiting its implementation or any action thereunder other than its withdrawal either by the Defendant or any other person claiming interest through the Wakf of the late Sheikh Ali Al’Amin Bin Ali whether by themselves, his employees, servants, agents, or nominees
8. Costs of the suit to the Plaintiff.

It is so ordered.

DELIVERED, DATED AND SIGNED AT MOMBASA THIS 23RD DAY OF MARCH 2022.

N.A. MATHEKA

JUDGE