



REPUBLIC OF KENYA

High Court at Mombasa

Civil Suit 4 of 2012

1.MULLA SAHBBIR SHEIKH

AKBERALI.....PLAINTIFF

2.MURTAGA SHEIK

AKBERALI.....PLAINTIFF

VERSUS

ABBAI MOHAMED HAJI MOHAMED NUR.....DEFENDANT

RULING

1. The ruling herein is necessitated by the failure of the parties to agree on the quantum of mesne profits following the order of this court in its ruling dated 20th September, 2012. The court had also ordered the Defendant herein to vacate the plaintiff's premises within thirty days from the date of that ruling. Additionally, the parties had been ordered to agree the mesne profits payable by the defendant from 1st July, 2011, up to date of handing over vacant possession.

2. The parties have filed written submissions in respect of the mesne profits. The Defendant submitted that the quantum of mesne profits should be assessed at no more than Shs. 21,000/- based on the initial rent paid under the lease. On their part, the plaintiffs submitted that the mesne profit should be assessed on the present basis of the market rent of the suit premises. They relied on the court's ruling where it had opined that:

“mesne profit being compensation for illegal use of another's property would be based on market rent”

3. On the above basis the Plaintiff obtained a valuation report prepared by a registered valuer who gave his opinion after:

“taking into account comparable rents from similar properties in the area, the valuer established that Kshs. 67,000/- per month would be a fair market rent for this particular premises.”(pg 3 pf the Valuation Report by Maina Chege).

The Plaintiff seeks that the mesne profits be pegged on the valuer's report, plus interest at 12% per annum as ordered by the court. The period for which the mesne profits is calculable is **1st July 2011 to 16th November, 2012**, the latter date being when the Defendant vacated the premises.

4. None of the submissions of either counsel appear to me to be reasonable. The Defendant, basing his proposal on quantum upon the original rent in the lease, seeks a rent reversal. On the other hand, the plaintiffs have opted to do an appraisal of what the rent would be on the open market as at 30th

October 2012 just before the hand-over of vacant possession. The valuer has taken into account comparable premises.

5. The three comparables used by the valuer do not seem to me to analyse like-for-like. Comparable 1 fetches 1,175/- p.s.m, whilst comparable 2 is almost double at 2,105/- p.s.m; and comparable 3 is at almost one-third of comparable 1 at Shs. 444.40 p.s.m. The average given as the proposed valuation therefore does not explain the huge differentials and why those premises with such differentials were sample-selected.

6. In my view, since the Defendant was in occupation illegally by holding over on a lease, the mesne profits must relate the amount of rent that was then actually the market rent due on the premises. I would take the rent to be based on what was contained or envisaged in the lease. It must be remembered that the lease itself had a self-regulating rental increment clause to take into account the market environment for the time of its duration.

7. In its earlier ruling, the court held that the lease between the parties, which was for a duration of five years and three months, expired on 30th June, 2011. The rent at commencement of the lease was 21,000/- per month increasing every two years by 20%. So that, on 1st April 2008, the rent was or would be 25,200/- per month; and on 1st April, 2010 it would be 27, 240/- per month up to the termination of the lease on 31st June, 2011.

8. From 1st July 2011 I would assess the rent to be at twenty percent (20%) more than that payable at 30th June 2011. This would give a rent of shs. 32,650/- per month.

9. Accordingly I assess the rent from **1st July, 2011** up to **16th November, 2012** i.e 16 1/2 months at $16 \frac{1}{2} \times 32,650 = 538,725/-$ The total mesne profits for the period in issue are therefore directly assessed at Shs. 538,725/- plus interest at 12% (as earlier awarded) which interest amounts, to Shs. 64,647. The total mesne profits are therefore Shs. 538,725 + 64,647. ie Shs. 603,372/- I therefore award the Plaintiff Shs. 603,372. Interest on the said amount shall accrue at 12% from the date of this award. Given that this assessment emanated from the parties failure to agree on the quantum, each party shall carry its own costs.

Orders accordingly

25th March, 2013
R.M. MWONGO
JUDGE

Read in open court

Coram:

Judge: **Hon. Justice M. Odero**

Date 10th April, 2013

Court clerk:.....

In Presence of Parties/Representative as follows:

- a).....
- b).....
- c).....
- d).....