



**REPUBLIC OF KENYA**

**High Court at Nairobi (Milimani Commercial Courts)**

**Civil Case 544 of 2011**

**PICKWELL PROPERTIES LIMITED.....PLAINTIFF**

**-VERSUS-**

**KENYA COMMERCIAL BANK LIMITED.....DEFENDANT**

**JUDGMENT**

1. The suit herein was instituted by way of a Plaint dated **1<sup>st</sup> December 2011**.
2. The Plaintiff is a limited liability Company incorporated in Kenya and is the registered proprietor as lessee for all the unexpired residue of the term of 99 years from 1 May 1955 of a parcel of land known as L.R No. 209/4283 on which is situated a commercial building known as ‘Shankardass House’( hereinafter referred to as “the building”).
3. The Defendant is a limited liability company incorporated in Kenya and a banking institution registered under the Banking Act.
4. According to the Plaint, by a letter dated **29<sup>th</sup> November 1993** (hereinafter referred to as the “Tenancy Agreement”), the Plaintiff offered to grant a lease to the Defendant of premises situated on the Ground floor and the Mezzanine floor (hereinafter referred to as the premises) of the said building for a term of 12 years commencing on **15<sup>th</sup> December 1993** and expiring on **14 December 2005** and the Defendant accepted the offer.
5. The Plaintiff avers that the Tenancy Agreement incorporated the terms and conditions contained in the letters dated **9<sup>th</sup> January 1978**, when the Defendant first became a Tenant of part of the said premises and the letter dated **18<sup>th</sup> November 1993**. The salient terms were as follows:-
  - a) **Rent was to be paid at biannual intervals in advance, save that it was subsequently agreed that rent for the Mezzanine Floor with effect from 1 August 2003 would be paid at quarterly intervals in advance.**
  - b) **Rent outstanding 14 days after the due date for payment would incur interest at the Defendant’s then prevailing lending rates or 21% per annum, whichever was the greater.**
  - c) **The Defendant undertook to redecorate and restore the said premises to their original layout state and condition as at the commencement of the tenancy during the final year of the said term.**
6. By a letter dated **29<sup>th</sup> June 2005**, the Defendant notified the Plaintiff that it would not renew its tenancy of the said premises upon its expiry on **14<sup>th</sup> December 2005**. However, according to the Plaintiff

the Defendant did not vacate the said premises upon the expiry of its tenancy, but continued to retain possession of them until **31 October 2006**, when it removed the last of its trade fixtures and equipment, namely two bank safes each weighing in excess of 300 kilograms, and thereby gave vacant possession of the said premises to the Plaintiff. The Plaintiff alleges that the Defendant failed to pay rent for the period it occupied the said premises from 15<sup>th</sup> December 2005 until 31<sup>st</sup> October 2006.

7. The Plaintiff also alleges that, in breach of its obligation to pay rent on the due date, the Defendant did not pay rent for the latter half of 2005 for the Ground Floor or for the Mezzanine Floor on their due dates. The Defendant only paid rent for the Ground floor on 5<sup>th</sup> April 2006 and for the Mezzanine Floor on 12<sup>th</sup> May 2006, and interest thus became due on the delayed payments.

8. It was also the Plaintiff's case that they assented to the Defendant's continuing in possession of the said premises after the expiry of the tenancy agreement as the Defendant had failed, prior to the expiry of the said term, to redecorate and restore the said premises to their original layout state and condition as at the commencement of the tenancy, contrary to its obligation and undertaking to do so. The Defendant subsequently offered to pay to the Plaintiff the sum of **Kshs. 13,500,000/=** in lieu of its aforesaid obligation to redecorate and restore the said premises. Upon making the said payment, the Defendant deducted the sum of **Kshs. 3,921,800/-** stating that the said deduction constituted the replacement cost of items belonging to it. However the Plaintiff maintains that the said items were fixtures annexed to the said premises and which were at all times the property of the Plaintiff.

9. The Plaintiff prays for judgment against the Defendant for:

a) **Interest on delayed rent for the period 1 July 2005 to 30 November 2011. Kshs.8,124,671.78**

b) **Rent for the period 1 January 2006 to 31 October 2006. Kshs. 32,113,291/-**

c) **Interest on (b) at 21% per annum from 1 January 2006 to 30 November 2011. Kshs. 63,976,544/06**

d) **Combined total of (a) – (c) Kshs. 104,214,506.84**

e) **Interest on (d) from 1 December 2011 until payment in full at the rate provided for in the Tenancy Agreement.**

f) **Amount deducted from reinstatement sum Kshs. 3,921,800/-**

g) **Interest on (f) at 21% per annum from 28 August 2006 to 30 November 2011 Kshs. 6,987,749**

h) **Combined total of (f) and (g) Kshs. 10,909,549/60**

i) **Interest on (h) from 1 December 2011 until payment in full at 21% per annum.**

j) **Any other relief that this Court deems fit.**

k) **Costs.**

10. In controverting the Plaintiff's claim, the Defendant filed a Defence, set off and Counter Claim dated **25<sup>th</sup> January 2012** and filed on even date. It is the Defendant's defence that they did not accept the terms of the Letter of Offer dated **29<sup>th</sup> November 1993** in writing or at all. The Defendant averred that no agreement was executed between the parties in terms of the mandatory requirements of Section 3(3) of the Law of Contract Act and therefore no suit can lie against the Defendant on the basis of the said offer letter.

11. In view of the foregoing, the Defendant averred that at all material times it remained in law, a month

to month tenant, and only liable to pay the monthly rent that it had accepted to pay at different times, in consideration for its occupation of the tenancy premises. The Defendant denies the 21% interest claimed by the Plaintiff for the late payment of rent, stating that in the absence of a Tenancy agreement between the parties the issue of interest could not become due and/or payable.

12. The Defendant further denies that there was any agreement to restore the premises to their original condition at the end of the tenancy as alleged by the Plaintiff. It is the Defendant's contention that the Plaintiff without any lawful justification resisted the termination of the tenancy and refused to take back the tenancy premises. The Defendant contends that it was the plaintiff's claim that the termination was in breach of the Tenancy agreement and that the Defendant was obliged to restore the tenancy premises to their original condition.

13. It is further contended by the Defendant that by the time it notified the Plaintiff that it would not renew the tenancy it had already vacated the premises save that it had not removed two safes from the premises. It is the Defendant's position that the safes could not have been a reasonable excuse for the Plaintiff not to take back its premises. In the circumstances the Defendant maintains that they are not liable to pay rent for the premises in respect of the period after 14<sup>th</sup> December, 2005.

14. It is further averred by the Defendant that following the Plaintiff's refusal to take back its premises, and in a bid to resolve the dispute amicably, the parties entered into negotiations on a without prejudice basis, which negotiations resulted in the payment of **Kshs. 9,578,200/=** to the Plaintiff by the Defendant. This payment was for the restoration of the tenancy premises to their original condition.

15. In its set off and counterclaim the Defendant averred that during the period of tenancy it paid various amounts of monies as deposit and, or security for the due performance of its tenancy obligation. By the time the Defendant terminated the tenancy on **14<sup>th</sup> December 2005**, it had paid to the Plaintiff a cumulative of **Kshs. 12,766,223.40** as deposit. The defendant further averred that the cumulative amount of the deposit paid was to be refunded at the end of the tenancy, provided that the Plaintiff would be entitled to apply the deposit or any part thereof towards the discharge of the defendant's tenancy obligations, in the event of failure, or default on the part of the Defendant to discharge the tenancy obligations.

16. On **13<sup>th</sup> October 2011**, the Defendant wrote to the plaintiff, demanding the refund of **Kshs. 12,766,223.40** being the cumulative total amount of the security deposit. By a letter dated **31<sup>st</sup> October 2011**, the Plaintiff admitted receipt of the said deposit money but contended that it was holding the money as a result of the Defendant's alleged failure to pay arrears of rent together with interest, at the rate of 21% per annum. It is the Defendant's case that, the Plaintiff has no justifiable cause in law not to refund the said deposit and therefore their claim against the Plaintiff is for the payment of the sum of **Kshs. 12,766,223.40**.

17. The Defendant is also claiming a refund or a set off for the sum of **Kshs. 9,578,200.00**. It is the Defendant's contention that the Plaintiff ended up leasing the premises to Safaricom Limited and Equity Bank Ltd without carrying out any restoration works on the premises. In the circumstances, the payment of **Kshs. 9,578,200.00/=** by the Defendant to the Plaintiff resulted in the unjust enrichment of the Plaintiff.

18. The Plaintiff filed a Reply to Defence and Defence to Counterclaim on **9<sup>th</sup> February 2012** essentially reiterating its claim in the Plaintiff. The plaintiff averred that **Section 3(7)** of the Law of Contract Act stated that the provisions of **section 3(3)** of the said Act did not apply to any agreement or contract made or entered into before the commencement of that subsection. It is therefore the Plaintiff's case that the provisions of section 3(3) do not apply to the tenancy agreement. The Plaintiff also avers that its cause of action is founded on the tenancy agreement which provided for a tenancy of 12 years commencing on **15 December 1993** and expiring on **14 December 2005**.

19. This suit was prosecuted by way of written submissions. The Plaintiff filed its written submissions on

**30<sup>th</sup> May 2012** and further submissions on **3<sup>rd</sup> August 2012**. On the other hand the Defendant filed its submissions on **11<sup>th</sup> July 2012** and further submissions on **4<sup>th</sup> October 2012**. The submissions were highlighted before me on **30<sup>th</sup> January 2013** with Mr. Wandabwa appearing for the Plaintiff and Mr. Kangata appearing for the Defendant.

20. Mr. Wandabwa for the Plaintiff submitted that there was an offer letter from the Plaintiff but that no tenancy agreement was executed. He further submitted that the Defendant gave out the keys to the premises in July 2006. It was also his submission that the Plaintiff was suing for rent for the period during which the Defendant continued to hold the premises. Secondly, the Plaintiff was also suing for interest for late payment of rent.

21. Mr. Kangata for the Defendant pleaded the defence of limitation. It was his submission that the amount claimed was due on 1<sup>st</sup> July 2005 and therefore the limitation period ended on 30<sup>th</sup> June 2011. The present suit was filed on 8<sup>th</sup> December 2011. He also raised the issue of whether any amount was payable for the period after 14<sup>th</sup> December 2005 when the previous agreement/lease had expired. He submitted that the Plaintiff refused to take back the premises when they were surrendered on the basis that they had not been renovated. It was his submission that the said reason could not be a ground to refuse to take up the premises. Reliance was placed on the case of; **Owuor v Kenya Medical Research Institute, Malaria and other Protozoal Diseases Research Center, Civ. Appeal No. 25 of 1987** where it was held that a Landlord could not refuse to accept possession of the premises for the reason that the tenant committed a breach of the covenant to repair.

22. Mr. Kangata further submitted that the interest of 21% was not enforceable outside the alleged contract period. He also submitted that the safes were removed in October 2006 and that they did not stand in the way as they were to be removed in the cause of renovations. Furthermore, it was his submission that the parties were involved in negotiations, and hence the failure to remove the said safes in time.

23. In reply, Mr. Wandabwa submitted that the Plaintiff's claim for rent for July to December 2005 was not barred by Limitation as the rent was paid in May 2006. He referred to section 23 (3) of Limitation of Actions Act and submitted that time was enlarged once payment was made. It was his submission that the rent for the aforesaid period was paid 6 months later and therefore six years had not passed at the date of filing the suit.

24. It was also his submission that the allegation that the Plaintiff refused to take up premises was not supported by evidence. He questioned why the Defendant had kept the keys to the premises until 31<sup>st</sup> July 2006 and removed their safes in October 2006. He submitted that the Plaintiff could not use the premises until the safes were removed. He further submitted that as long as the safes were still in the premises, the Defendant was still in effective occupation. Counsel also placed reliance on the **Owuor Case (supra)** in submitting that the Landlord, the Plaintiff herein, was entitled to mesne profits which he equated to the rent and interest claimed in the Plaintiff.

25. I have carefully considered the Pleadings, the written submissions and the authorities cited.

26. The Parties did not file a Statement of agreed issues. That being the case, this Court has developed the following issues for determination:-

- a) **Was there a Tenancy Agreement between the Plaintiff and the Defendant?**
- b) **Is the Plaintiff entitled to interest on delayed rent payment from July 2005 to December 2005?**
- c) **When did the Defendant vacate the suit premises?**
- d) **Is the Plaintiff entitled to rent for the period of January 2006 to October 2006?**

**e) Is the Defendant entitled to repayment of deposit and the money it paid to the Plaintiff for restoration of the suit premises?**

27. On the issue of **Tenancy Agreement**, I have read the letter dated **29<sup>th</sup> November 1993** which is referred to as the Tenancy Agreement by the Plaintiff. The Defendant's defence was that the Plaintiff's claim was unenforceable as no document had been executed as contemplated under **section 3(3) of the Law of Contract Act**. However, it seems that counsel for the Defendant abandoned the said defence during the highlighting of submissions after counsel for the Plaintiff had established that the said section had not come into effect in 1993.

28. That notwithstanding, I will still address the issue of whether or not there was a tenancy agreement between the parties. On **29<sup>th</sup> June 2005**, the Defendant gave a six months' notice to the Plaintiff that it did not intend to renew the tenancy arrangement when it expired on 14<sup>th</sup> December 2005. It means that the defendant had subjected itself to the terms and conditions set out in the offer letter dated 29<sup>th</sup> November 1993 whether the same was a Tenancy Agreement or not. The defendant was in possession since 1993 and had presumably paid rent in accordance with the provisions in the letter dated 29<sup>th</sup> November 1993.

29. From the foregoing it can only be construed that the intentions of the parties was to enter into a tenancy arrangement and therefore the letter dated 29<sup>th</sup> November 1993 operated as the Tenancy Agreement. The Defendant was therefore bound by the terms and conditions of the said offer letter. The said letter might not have expressly stated that it was a tenancy agreement but by the conduct of the parties for the twelve years, it is clear that they were governed by the contents of the letter and the same amounted to an agreement. See *Clarke vs Sondhi Ltd, Civil Appeal No. 68 of 1962* the learned Judge held as follows:-

**“(ii) an unregistered lease could operate as a contract inter parties and confer on the party in the position of the intending lessee a right to enforce the contract specifically and to obtain from the intending lessor a register able lease.**

**(iii) the proviso to s.40 of the Registration of Titles Ordinance does not exclude the use of an unregistered lease to show the terms of the contract between the parties...”**

The Learned Judge further held that-

**“the instrument, though not registered, operated as a contract and that the appellant was liable under the Covenant therein to pay rent, but that if he was wrong in that conclusion the appellant was any way liable in the same sum for use and occupation...”**

30. On the **second issue**, the defendant did not pay rent for the period of July 2005 to December 2005 when it first became due in July 2005. According to the Plaintiff, the payment was only made in March 2006. The Defendant has not disputed that indeed it paid the rent due for that period in 2006. Therefore there was default on the part of the Defendant and the Plaintiff was entitled to interest on late payment. However, it was submitted on behalf of the Defendant that the Plaintiff's claim was time barred. Counsel for the Defendant submitted that the amount claimed was due on 1<sup>st</sup> July 2005 and therefore the limitation period ended on 30<sup>th</sup> June 2011.

31. It is my understanding that what the Plaintiff is claiming is interest on delayed payment of rent for the period 1<sup>st</sup> July 2005 to December 2005. The rent for the aforesaid period was paid sometime in 2006 and only then could the Plaintiff quantify the amount of interest owing and claim the same. Therefore it can be said that the cause of action arose in 2006 for which the limitation period would lapse in the year 2012. In that case the Defendant is not entitled to plead the defence of limitation. Accordingly, the Plaintiff is entitled to interest on delayed rent payment from July 2005 to December 2005.

32. With regard to when the Defendant vacated the premises, it is on record that the defendant handed

over the keys to the premises on **31<sup>st</sup> July 2006**. Furthermore the Defendant removed the last of its fixtures and equipment on **31<sup>st</sup> October 2006**. It is the Defendant's case that the Plaintiff without any lawful justification resisted the termination of the tenancy and refused to take back the tenancy premises. It is also the Defendant's case that the Plaintiff refused to take back the premises because it was not renovated. The Defendant also contends that the fixtures could not hinder the Plaintiff from taking back the premises.

33. There is evidence that the Plaintiff initially resisted the termination of the tenancy but there is no evidence that the Plaintiff refused to take back the tenancy premises. If it was clear to the Defendant that there was no lease agreement expiring in December 2011 as alluded to by the Plaintiff, they should have vacated the premises in December 2005, notwithstanding the Plaintiff's position. There is no indication or evidence to show that there was any hindrance to vacating the premises in Dec 2005, as earlier intended. In view of the foregoing, it is plain that the Defendant vacated the premises on 31<sup>st</sup> October 2006.

34. The next issue is whether the Plaintiff is entitled to rent for the period of January 2006 to October 2006. Having made the above finding, that the Defendant vacated the premises in October 2006, it goes without saying that the Plaintiff is entitled to rent for the said period. Subsequently, the Plaintiff is entitled to interest on delayed payment. The Defendant continued to occupy the premises during the aforesaid period and in the absence of any other agreement or contract, the terms in the earlier agreement applied.

35. The other issue is whether the Defendant is entitled to a refund of the deposit as well as the monies paid for restoration of the premises. It is the Defendant's case that by the time it terminated the tenancy on **14<sup>th</sup> December 2005**, it had paid to the Plaintiff a cumulative of **Kshs. 12,766,223.40** as deposit. The Plaintiff admitted receipt of the said deposit money but contended that it was holding the same as a result of the Defendant's alleged failure to pay arrears of rent together with interest, at the rate of 21% per annum.

36. It is not in dispute that the Defendant paid the aforesaid deposit and was entitled to a refund at the end of the tenancy. However according to the agreement the Plaintiff was entitled to apply the deposit or any part thereof towards the discharge of the Defendant's tenancy obligations, in the event of failure, or default on the part of the Defendant to discharge the tenancy obligations. As has been earlier found, the Defendant has not paid rent for the period of January 2006 to December 2006, including interest on delayed rent. Therefore, the Defendant is in default of its obligations and is not entitled to the deposit until it discharges the said obligations.

37. As for the sum of **Kshs. 9,578,200.00** paid to the Plaintiff for restoration of the premises, it is the Defendant's contention that the said sum was not used for restoration amounting to unjust enrichment. It is common ground that it was the Defendant's obligation to restore the premises to their original state and condition at the expiry of the tenancy. However, the Defendant elected to pay the sum of **Kshs. 9,578,200.00** in discharge of the said obligations. It is therefore irrelevant as to whether the said amount was applied for restoration or not. What is relevant is whether the Defendant discharged its obligation.

38. In relation to the foregoing, the Plaintiff is claiming for **Kshs. 3,921,800/-** being the sum deducted from the money for restoration which was initially agreed at **Kshs. 13,500,000/=**. In deducting the said sum, the Defendant averred that the same was the amount it paid to the previous tenant for items purchased from the said tenant when the Defendant took up the premises. It is submitted for the Plaintiff that it was not a party to that transaction and received no benefit from it. I agree with the said submission and that being the case the Defendant was not justified to deduct the said amount. However, there is no basis for the Plaintiff to demand interest at 21% per annum for the said amount, as this amount was never rent in the first place, but a deposit which, ordinarily is not returnable with interests.

39. In view of the foregoing, I enter judgment for the Plaintiff as follows:-

**a) Interest on delayed rent for the period I July 2005 to 30<sup>th</sup> December 2005.**

- b) Rent for the Period 1 January 2006 to 31<sup>st</sup> October 2006 at Kshs. 32,113,291.**
- c) Interest on delayed rent for (b) at 21% per annum from January 2006 until filing of the suit.**
- d) Amount deducted from reinstatement sum at kshs. 3,921,800/-**
- e) Interest on a, b, c and d above at Court rates until payment in full.**
- f) Costs of this suit.**

**DATED, READ AND DELIVERED AT NAIROBI THIS 20<sup>TH</sup> DAY OF MARCH 2013.**

**E. K. O. OGOLA**

**JUDGE**

**PRESENT:**

Wandabwa H/B for Kapila for Plaintiff

Kangata for defendant

Teresia – Court Clerk