



REPUBLIC OF KENYA

High Court at Nairobi (Nairobi Law Courts)

Civil Suit 615 of 2010

ISAAC GATHUNGU WANJOHI..... PLAINTIFF

- VERSUS -

SAMSON NJOROGE.....1ST DEFENDANT

MARSON ELECTRONICS LIMITED2ND DEFENDANT

JUDGMENT

1. The plaintiff claims Kshs 4,140,581 from the defendant for unpaid rent, interest, costs of repairs and bank charges. The facts are fairly straightforward. On 19th April 2000, the 1st defendant wrote a letter on the note paper of the 2nd defendant company agreeing to lease the plaintiff's property known as LR No 209/4070, Nanyuki road, Nairobi. The letter was endorsed by the plaintiff and the plaintiff's letting agents. The letter set out the key terms of the tenancy. Rent was Kshs 30,000 payable quarterly in advance. The term was 5 years and 1 month from 1st July 2000. A formal lease was prepared but was not executed by the tenant.

2. The plaintiff testified that he instructed a firm of estate agents, Best Properties Limited, to get a tenant for the premises. He was under the impression that the 1st defendant was taking up the premises in his personal capacity. He conceded in cross-examination that the acceptance letter was on the 2nd defendant's note paper. His answer was that his lawyers advised him to commence suit against both defendants. The tenant defaulted in payment of rent. By 31st October 2007, the arrears had risen to Kshs 2,433,476. The plaintiff applied 10% interest on that sum as per the agreement totalling a further Kshs 1,636,595. A number of cheques issued by the tenant were dishonoured. The plaintiff thus incurred Kshs 2,250 in bank charges. In the meantime, the plaintiff had instructed Panama Rover Auctioneers to distress for rent. The plaintiff testified that the 1st defendant admitted owing the rent. For example, by a letter dated 20th August 2007, he admitted owing the sum of Kshs 2,242,323.60 and pleaded to liquidate it in 9 monthly installments. It came to nought. Throughout the tenancy, the plaintiff only received the sum of Kshs 410,000 as rent. On 31st July 2005, the lease expired by effluxion of time. The tenant failed to hand over possession. The plaintiff could thus not lease the premises immediately to a new tenant. The plaintiff said he spent the sum of Kshs 98,260 to repair the premises. The defendants have not repaid that sum.

3. The 1st defendant filed a statement of defence but did not call any witness at the trial. His counsel of record was content with cross-examination of the plaintiff. The 2nd defendant did not enter an appearance. Interlocutory judgment was formally entered against it on 24th April 2012.

4. I have considered the evidence and submissions by the parties. The pertinent issues for determination can be compressed into four:

i) *Did the parties enter into a legally binding contract for lease of the plaintiff's premises? In particular, was the 1st defendant bound by the tenancy agreement or liable for arrears of rent?*

ii) *Are the defendants jointly or severally liable for arrears of Kshs 2,433,476, repair costs of Kshs 98,260 or bank charges of Kshs 2,250?*

iii) *Is the plaintiff entitled to claim 3 % annual increment of rent and interest on arrears at the rate of 10 % p.a?*

iv) *Who is liable for costs of the suit?*

5. It is not disputed that the plaintiff is the registered proprietor of LR No 209/4070, Nanyuki road, Industrial Area, Nairobi. It is also common ground that the property was let out by Best Properties Limited, the agents of the plaintiff, to the defendants. The 1st defendant is an engineer. He was trading as Marson Electronics Limited. The plaintiff knew him. The plaintiff is himself an engineer which partly explains the courtesies between the parties and the informal tenancy agreement. No formal lease was signed. The plaintiff testified that a lease was drawn and sent to the defendants by his agents but it was never returned. The parties clearly wanted to create a binding contract. I am therefore satisfied that the letter dated 19th April 2000 executed by the plaintiff, the 1st defendant and the agent is a firm contractual basis for the tenancy. The letter is issued on the note paper of the 2nd defendant company. I am alive to the notion that Samson Njoroge, as a director or shareholder of the company is distinct from the company and vice versa. *Salomon Vs Salomon* [1897] AC 22. But in the absence of any evidence in rebuttal and in view of the interlocutory judgment against the 2nd defendant company, I am of the considered opinion that both defendants became tenants of the plaintiff. If there was any doubt, it is completely erased by the copies of cheques appearing at page 3 and 4 of the plaintiff's bundle. The learned defence counsel tried to draw a distinction between the liabilities of the two defendants. That stratagem is on a legal quicksand for two main reasons. First, no formal lease was made between the plaintiff and any of the two defendants. Secondly, although the letter or agreement of 19th April 2000 is made on the note paper of the company, it is not *stricto sensu* executed properly by the company: It is signed by one director, there is no formal resolution. The plaintiff testified that he was introduced to the 1st plaintiff as a prospective *individual* tenant. He testified that he understood that the 1st defendant was taking up the premises to run his business interests as opposed to the company taking over the premises. To the plaintiff, Marson Electronics was just one of the 1st defendant's businesses. I thus readily find that the 1st defendant took up personal liability for the rents and outgoings of the demised premises. Nothing would have been easier than for the 1st defendant to call evidence in rebuttal. He has chosen to go mum and ride on a technicality that is ill founded. That posturing is anathema to the overriding objective of the court to do substantial justice to the parties. Even if I were wrong in that finding, I also find that given the admissions of indebtedness by the 1st defendant and the circumstances under which the tenancy was procured, this would have been a good case to lift the corporate veil. That answers issue number 1 in the affirmative.

6. I am satisfied that the defendants only paid Kshs 410,000. The rent due as at October 2007, when the defendants vacated, was 2,656,736. It is clear from the statement at page 36 of the bundle. This agrees substantially with the pleading at paragraph 17 of the amended plaint. The defendants have not contested that principal debt. The defendants wrote the letter dated 21st December 2006 at page 7 of the plaintiffs bundle. In their own calculation, they admitted owing rent of Kshs 1,290, 000 and pleaded with the plaintiff to get the auctioneers off their back. That position is reinforced by their letter of 30th May

2007. On 20th August 2007, the defendants authored the letter at page 24 of the plaintiff's bundle stating as follows;

"We enclose our computation sheet for your perusal and comments which works out to Kshs 2,242,323.60. We have also included our repayment schedule for the arrears".

After giving the defendants credit for the amounts paid, I am satisfied that as at 31st October 2007, the defendants owed the plaintiff Kshs 2,433,476 in rent arrears.

7. The defendants concede that they left the demised premises in October 2007. In the letter of 19th April 2000 forming the contract between the parties, the defendants were to *"undertake all necessary renovation before handover"*. They did not do so. I have no evidence they even attempted to do so. I am satisfied that the plaintiff hired his own contractor to repair the main door, passage, office areas, bathrooms, first floor and main godown as per the document at page 29 of the bundle. The total cost was Kshs 98,260. There is no rebuttal. I have also perused the documents produced at pages 3,4,5,6,7,8 and 22 of the bundle. They comprise of bounced cheques and debit chits issued to the plaintiff by his bank Housing Finance Company. The total debits are Kshs 1,125 per cheque. The two dishonoured cheques thus attracted bank charges of Kshs 2,250 prayed for at paragraph 17 of the amended plaint.

8. In a synopsis, the defendants owed the plaintiff Kshs 2,433,476 as arrears of rent, Kshs 98,260 for repairs and restoration and Kshs 2,250 in bank charges all totalling Kshs 2,533,986. I would then deduct from that sum Kshs 30,000 being the deposit held by the plaintiff leaving a balance of Kshs 2,503,986 due to the plaintiff. That answers issue number 2 in the affirmative.

9. The other salient matter is whether the plaintiff was entitled to interest on the arrears at 10%. Here, I would refer to the defendant's bundle and the documents there numbered 14 and 24. I also paid regard to the plaintiff's documents at pages 13, 15 and 19. The plaintiff's testimony was that the parties agreed in those correspondences that rent would be increased retrospectively at 3% and that interest would be billed for the arrears at 10% p.a. First, the original tenancy agreement executed on 19th April 2000 did not bear such agreement. The defendant's letter of 8th June 2007 however conceded respectively to the 3% rent increment in arrears. And I have already found the defendants made an unequivocal admission of rent arrears. So that is all water under the bridge. In that same letter, the defendants did accept to pay interest on the arrears at 10% p.a. Parties are bound by commercial agreements that they enter into freely. See *Morris & Company Ltd Vs Kenya Commercial Bank* [2003] 2 E A 605. It is also not the true province of the courts to rewrite contracts for the parties. *National Bank of Kenya Limited Vs Pipeplastic Samkolit and another* [2001] KLR 112. The defendants must thus accept their fair share of bargain. The rate of interest of 10% is reasonable and not usurious. It is well below the court rates. It is also a fair cost and remedy for either party on the monies due. Issue number 3 is thus answered in the affirmative. The plaintiff is entitled to interest on arrears of rent at 10% p.a up to 15th September 2010 (the date of the suit) which is to say

Kshs 1,636,595.

10. In a nutshell I find that the plaintiff has proved his case on a balance of probability. There has been no plausible or special traverse to the claim. I enter judgment in favour of the plaintiff against the defendants jointly and severally for Kshs 4,140,581 made up as follows:

<i>Rent arrears upto 31.10.07</i>	<i>Kshs 2,433,476</i>
<i>Interest at 10% on arrears</i>	<i>Kshs 1,636,595</i>
<i>Repairs and restoration</i>	<i>Kshs 98,260</i>
<i>Bank charges on dishonored cheques</i>	<i>Kshs 2,250</i>

<i>Less deposit held by plaintiff</i>	<i>Kshs</i>	<i>30,000</i>
Total	Kshs	4,140,581

I award the plaintiff further interest on the above sum at court rates from the date of the suit, which is to say, 15th September 2010 until full payment. Costs follow the event and are at the discretion of the court. The plaintiff shall have costs of the suit in any event.

It is so ordered.

DATED and **DELIVERED** at **NAIROBI** this 14th day of May 2013.

G.K. KIMONDO
JUDGE

Judgment read in open court in the presence of

Ms C. Wachira for the Plaintiff.

No appearance for the Defendant.

Mr. C. Odhiambo Court Clerk.