



REPUBLIC OF KENYA



KENYA LAW
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**Njoga v Njenga (Environment & Land Case 607 of 2017)
[2022] KEELC 78 (KLR) (12 May 2022) (Judgment)**

Neutral citation: [2022] KEELC 78 (KLR)

**REPUBLIC OF KENYA
IN THE ENVIRONMENT AND LAND COURT AT NAIROBI
ENVIRONMENT & LAND CASE 607 OF 2017
LC KOMINGOI, J
MAY 12, 2022**

BETWEEN

BONAVENTURE MWANGI NJOGA PLAINTIFF

AND

ASUMPTER WANGARI NJENGA DEFENDANT

JUDGMENT

1. By a Plaint dated 26th September 2017, the Plaintiff prays that judgment be entered against the Defendant for:-
 - a. An order of vacant possession and eviction from shop No.3 on L.R. No.209/1354.
 - b. Mesne profits of kshs.111,500 for the period Defendant was in illegal occupation and further mesne profits at the rate of kshs.18,000/= per month with effect from February 2017 increasable by 10% per year until possession is delivered up.
 - c. Damages for trespass.
 - d. Costs and interest.
2. It's the Plaintiff's case that the Defendant trespassed on his shop no.3 located on the parcel of land known as L.R No.209/1354, made payments of rent in the name of the former tenant who had vacated known as Joseph Wahome and later attempted to pay rent directly to the Plaintiff but he refused. The Plaintiff contended that once he became aware that the Defendant was the one paying rent illegally in the name of the former tenant, he demanded that the Defendant vacates but she refused to do so.
3. The Plaintiff further contended that he intends to use the property for his tailoring business thus the Defendant's continued stay will cause him irreparable loss and damage.



The Defendant's case

4. The Defendant filed the defence dated 24th October 2017. She contended that the Plaintiff has no locus to institute this suit for lack of proof that he is the registered owner of property known as LR No.209/1354 and that the jurisdiction over this matter lies with the Business Premises Rent Tribunal since the tenancy between her and the Plaintiff is a controlled tenancy within the provisions of Section 2 of the *Landlord and Tenants (Shops, Hotels and catering Establishments) Act cap 301*, Laws of Kenya.
5. It is her case that she has been in occupation of the suit premises pursuant to a letter dated 25th August 2015 written by Sedco Consultants Limited who were the Plaintiff's appointed agents at the time and that the subsequent conduct of the parties which included payment and acceptance of enhanced rent created a tenancy between the Plaintiff and the Defendant that was terminable by notice or alternatively was subject to provisions of the *Landlord and Tenant (Shops, Hotels and Catering Establishments) Act cap 301*, Laws of Kenya.
6. She contended that the Plaintiff's suit is actuated by malice since the reason offered in the plaint to terminate his tenancy is untrue as the Plaintiff is a retired gentleman who resides in Murang'a and there are other vacant shops that are unoccupied which the Plaintiff could use for that purpose.

The Plaintiff's evidence

7. PW1, Bonventure Mwangi Njoga, the Plaintiff, testified on 4th February 2020. His witness statement filed on 27th September 2017 was adopted as part of his evidence in chief. He told the court that the Defendant was a tenant in shop no.1 and that he got eviction orders against her and she left shop no.1 but refused to vacate shop no.3. He added that the Defendant did not enter shop no.3 with his permission. He further stated that he realized that the Defendant was in possession of the shop when he wanted to sue the previous tenant one Joseph Wahome. He asked her to leave through a demand notice and she replied through her advocates. He also stated that he wants to use the said shop for his business and he has bought all the machines and paid all the licenses required to undertake knitting and embroidery business. He refuted claims to having sold the premises to someone else.
8. When he was referred to the agreement dated 29th November 2014 handing over the shop to the Defendant from the previous tenant Joseph Wahome, he stated that he did not take part in the negotiations. In reference to the letter dated 23rd May 2014 addressed to Joseph Wahome by Sedco Consultants Limited stating that Sedco Consultants Limited had no objection to his intention to vacate shop no.3 and requesting him to advise the tenant interested in the said shop to contact their offices, he stated that the letter was copied to him. He was referred to the letter dated 1st March 2016 in which the local administration mediated the conflict over ownership of the suit premises between Joseph Wahome, the Defendant and his agents, he stated that he was not involved in the said negotiations. He stated that he did not see the Defendant's letter dated 24th March 2016 addressed to Sedco Consultants Limited and that at the time, the matter was in court. He added that the letter dated 18th April 2016 addressed to Sedco Consultants Limited from the Plaintiff's Advocates refers to the lease between the Plaintiff and Joseph Wahome yet the lease does not provide for subletting /sale of the premises without a written consent as per paragraph (h) of the lease. He stated that the lease for shop no.1 was properly terminated. He also stated that in 2017 when he refused to accept the rent, the Business Premises Rent Tribunal compelled him to accept the rent. He prayed for mesne profits, damages for trespass plus costs of the suit.
9. When cross-examined, he stated that Sedco were his agents for purposes of collecting rent. When referred to the letter dated 25th August 2015 addressed by Sedco Consultants to the Defendant advising



that her tenancy had expired and offering a 6 year term renewal, he stated that Sedco has been his agents for some time. He stated that the Defendant paid rent for shop no.1 to Sedco Consultants Limited. He stated that the previous tenant Joseph Wahome desired to vacate. When referred to the letter dated 23rd May 2014 addressed to Joseph Wahome by Sedco Consultants stating, "Advise the tenant interested to contact our offices" he stated that the said letter is copied to him. He also stated that he is not aware of the agreement between Joseph Wahome and the Defendant in the offices of Sedco Consultants. He added that he continued to receive rent from Wahome on account of shop No,3 until he realized there was someone else in that shop. He stated that Sedco wrote to the Defendant the letter dated 25th August 2015 advising her that her tenancy had expired and offering a 6 year term renewal. He stated that the rent paid by Joseph Wahome was kshs.13,000/= before the increment. It is now kshs.13,500/=.

10. He told the court that he did not enter into six (6) year lease with the Defendant but she has continued to be in the premises. He further stated that he has not sued Sedco Consultants Limited but the 1st Defendant deposits rent to them without his consent. He also stated that Joseph Wahome stopped paying rent sometime in 2016 so he sued Wahome vide Tribunal Case 294 of 2017 at the business Premises Rent Tribunal and got orders to distress for rent but the Defendant herein filed an objection in Misc.151 of 2017 and claimed that the items distressed from shop no.3 which were tyres belonged to her and the court ordered the items to be returned to the Defendant.
11. On re-examination, he stated that the Defendant went to the Tribunal to stop her eviction from shop no. 1 but she did not succeed and she filed an appeal vide ELCA 2 of 2019 which was also dismissed and she was ordered to vacate. He further stated that Joseph Wahome was not allowed to sublet. He also stated that the Defendant paid rent on Joseph Wahome's account but when he realized it was the Defendant who was paying, he refunded the same.

The Defendant's evidence

12. DW1, Assumpter Wangari Njenga, the Defendant testified on 28th October 2021. She told the court that she has been on the building owned by the Defendant since 2006 from where she has been operating her business. She adopted her witness statement filed on 21st February 2018 and her list of documents dated 21st February 2018 as part of her evidence in chief.
13. She told the court that she found a vacant shop next to her shop which is shop no.3 and she got interested and she agreed with the person who was the tenant named Joseph Wahome to go to Sedco consultants who were the Plaintiff's agents where she paid the said Joseph Wahome kshs.350, 000/= as a refund of good will and she took over the shop. She referred to the letter dated 23rd May 2014 addressed to Joseph Wahome by Sedco Consultants where he was told to advise the tenant interested in shop no.3 to contact their offices since he was vacating. She added that after paying good will, Joseph Wahome handed over shop no.3 to her on 29th November 2014 and she is up-to-date with rent payments but she was not given a new lease. She added that Sedco Consultants Limited wrote to her the letter dated 25th August 2015 offering to renew her tenancy for shop no.3 on a 6 year lease term and the letter was copied to the Plaintiff.
14. She stated that she filed reference No.163 of 2017 at the Tribunal where the Plaintiff herein is the Respondent and the case is still pending. She added that the Plaintiff filed this suit to get her out of the premises. She further stated that the Plaintiff filed a Miscellaneous application 151 of 2017 which is not yet concluded in Milimani Court with a view to evicting her from the premises yet by 23rd February 2017, she was the tenant as Wahome had vacated in 2014. She stated that she moved the court and she was reinstated into the premises and paid rent through the tribunal and later to the Plaintiff's account.



15. When cross-examined, she stated that she knew the Plaintiff as the landlord in 2006 as they met and talked before she took over shop no.1. She further stated that she has his phone number and that she knew that he was the owner of the building but she did not contact him personally with respect to shop no.3. She added that the Sedco Consultants was in control and she got a letter from them which was copied to the Plaintiff. She was paying rent through mpesa. She stated that her tenancy over shop no.3 was not a collusion between her, Wahome and Sedco Consultants. She stated that she communicated that she wanted her tenancy renewed as per the letter dated 25th August 2015 but she has no letter confirming acceptance of renewal of lease. She stated that the lease was for six (6) years from 2016.
16. She also stated that good will would be paid once but rent could be increased periodically. She stated that she did not receive a lease agreement. She also stated that she paid good will to Joseph Wahome since he had paid the Plaintiff goodwill. She further stated that the Plaintiff took her to the area chief who told him to give her back her money. When referred to the letter from the chief dated 1st March 2016, she stated that it does not state that the landlord took her to the chief. When referred to the demand letter dated 18th April 2016 by Mr. Gachoka to Sedco Consultants, she stated that if given Kshs.350,000/= and related expenses, she would vacate the suit premises. She stated that Sedco Consultants consented to her takeover of shop no.3. When referred to the lease between Joseph Wahome and the Plaintiff, she stated that she has no written consent from the Landlord allowing her to occupy shop no.3. She stated that the case at the Tribunal is still pending and that in ELCA 2/2019, the dispute was over shop.No.1 and the court ordered her to vacate shop no.1. When referred to the handover document dated 29th November 2014 signed by Janet N. Muguyi who was acting for Joseph Wahome, she said that she was Wahome's wife and representative in the transaction.
17. At the close of the oral testimonies, parties tendered written final submissions.

The Plaintiff's submissions

18. They are dated 12th January 2022. Counsel for the Plaintiff submitted that the Plaintiff has established that he is the owner of the suit premises and that he never authorized in writing or otherwise any issuance a lease to the Defendant who has been on the suit premises without paying rent. He added that in the alternative, the intended term if at all there was a lease was for 6 years which period expired in August 2021 thus the Plaintiff is still entitled to possession since he has proved that he requires the property for his own use.
19. It was his submission that the Defendant failed to prove that this case should be at the Business Premises Rent Tribunal as alleged since the matter is outside the jurisdiction of Business Premises Rent Tribunal as provided for under Cap 301, Laws of Kenya as that the intended lease from was for a period of 6 years.
20. He relied on the case of Sabeb v Hassanlly Civil Appeal No. 28 of 1980 [1984] KLR, Salim Mohamed Garwan v Mohamed Said Abdalla & Aidarus Abdulrehman HCC No. 283 of 2000 and Reuben Muli Musyoki t/a Konza Merchants and Wayua Mutisya Kinothyia & Quentine Wambua Mutisya C.A No.3 of 2002.

The Defendant's submissions

21. They are dated 11th February 2022. Counsel for the Defendant framed the following issues for determination: -
 - a. Does the court have jurisdiction to hear and determine this case?
 - b. Is the Defendant a trespasser on the Plaintiff's premises?



- c. Is the Defendant entitled to the orders sought?
- d. Who should bear the cost?
22. On the issue of jurisdiction, he submitted that there are active proceedings in Milimani Commercial Magistrate's Court Misc. Civil Application No,157 of 2017 and in BPRT Tribunal case No.163 of 2017 in relation to shop no.3.He put forward the case of Owners of Motor Vessel "Lilian S" v Caltex Kenya Limited(1989) KLR 1 and the Supreme court case of Samuel Kamau Macharia v Kenya Commercial Bank Limited & 2 Others, Civil Application No.2 of 2011[2012]eKLR and urged the court to down its tools since it lacks jurisdiction.
23. On whether the Defendant is a trespasser, he submitted that the Plaintiff's agents could not have written to the Defendant vide the letter dated 23rd May 2014 and the subsequent letter of 25th August 2015 in her capacity as a 'trespasser' and continue receiving rent from her as a trespasser. He added that the Defendant is not entitled to mesne profits since they were not specifically pleaded as required. He added that one cannot owe rent arrears unless one is a tenant. It was his submission that the order for damages for trespass cannot be granted as the Plaintiff did not prove that the Defendant is a trespasser since she got into the shop as shown by vide the letter dated 23rd May 2014 and the subsequent letter of 25th August 2015.
24. I have considered the pleadings and the evidence on record. I have also considered the written submissions filed on behalf of the parties and the authorities cited. The issues for determination are:-
- i. Whether there exists a tenancy relationship between the Plaintiff and the Defendant.
 - ii. Is the Plaintiff entitled to the reliefs sought?
 - iii. Who should bear costs of this suit?
25. It is not in dispute that the Defendant allegedly took over possession of Shop No 3. The previous tenant in the shop was Joseph Wahome. The Defendant in her testimony stated:-
- “I found a vacant shop next to my shop. I got interested. We agreed with the person who was a tenant. I and Joseph went to Sedco who were the landlord's agents. We agreed and went with Wahome to Sedco. I refunded goodwill to Joseph Wahome. I entered the shop on 29th November 2014 and paid rent to Sedco”
26. When she was cross examined by Mr. Thimba for the Plaintiff she stated that she did not contact the Plaintiff with respect to shop no.3. she also admitted that the landlord (Plaintiff) was ordered to receive the rent by the Business Premises Rent Tribunal. She was referred to a letter dated 25th August 2015 by Sedco Consultants where she was required to confirm acceptance within seven (7) days. She admitted that she had no letter confirming acceptance and that she did not receive a lease agreement. She stated that she paid good will to Joseph Wahome.
27. It is clear from the foregoing that there is no lease agreement between the Plaintiff and the Defendant in respect of Shop No. 3. PW, the Plaintiff told the court that the lease with Joseph Wahome did not allow him to sublet or sell the premises without the consent of the Plaintiff.
28. He also stated that the rent was paid in the name of Joseph Wahome until he realized there was someone else in the shop. He further stated that he was not involved in any negotiations between the Defendant and Joseph Wahome. He also stated that he refused to accept rent from the Defendant in respect of the shop but he was compelled by the Business Premises Rent Tribunal.



29. The Plaintiff produced the returns for May 2016 by Sedco Consultants as exhibits P 9 and P10. They indicate that Joseph Wahome was still the tenant.
30. The Plaintiff further told the court that by a letter dated 10th July 2017 he demanded vacant possession to which the Defendant ignored necessitating the Plaintiff to file this suit. There is a letter from Sedco Consultants dated 10th May 2017 to the Plaintiff denying that Shop No 3 was properly given to the Defendant.
31. It is the Plaintiff's contention that he intends to use the suit premises for his own use.
32. It is the Defendant's case that there exists a BPRT Case No 163 of 2017 between the Plaintiff and the Defendant in respect to the suit premises. The said reference was filed by the Defendant herein against the Plaintiff after she was given a notice to vacate. I find that the Defendant having admitted that there is no lease agreement between her and the Plaintiff means that there exists no tenancy relationship between them.
33. The pendency therefore of BPRT Case No 163 of 20 17 cannot bar this court from handling this matter. The defence of subjudice is therefore unfounded.
34. It is further the Defendant's contention that this court lacks jurisdiction as this was a controlled tenancy. Section 2 of the *Landlord and Tenancy (Shops Hotels and Catering Establishments) Act* Cap 301, Laws of Kenya defines "a controlled tenancy" as "Tenancy of a shop, hotel or catering establishment-
- a. Which has not been reduced into writing or
 - b. Which has been reduced into writing and which –
 - i. is for a period not exceeding five years; or
 - ii. contains provision for termination, otherwise than for breach of covenant, within five years from the commencement thereof; or
 - iii. relates to premises of a class specified under subsection (2) of this section."
35. The Defendant relies on a letter dated 29th November 2014 by Joseph Wahome to Sedco Consultants Ltd. The same is headed:
- "Handing over of Shop No 3 on LR No 209/1354 Park Road Ngara"
- The same states that the shop has been handed over to Assumpter Wangari Njenga. The same is signed by the said Joseph Wahome and the Defendant. There is no stamp confirming that Sedco Consultants were part of the said agreement. There is nothing to show that the Plaintiff (Landlord) was aware of this arrangement.
36. The Defendant also relies on a letter dated 25th August 2015 by Sedco Consultants to the Defendant. The heading is "Expiry of Tenancy Agreement on LR No 209/1354 Park Road Ngara".
37. The Defendant was given seven (7) days to confirm that the lease could be renewed for a six (6) year term at a rent of Kshs.18,000 per month with a yearly increment of 10% per annum. It is the Defendant's evidence that she did not confirm within the seven days. She also told the court that the lease was not forwarded to her.



38. She also confirmed that the Landlord was compelled by the Business Premises and Rent Tribunal to accept rent from her. The order of the Tribunal is in respect of shop no 1 and 3. It should therefore be noted that the Mpesa statements produced by the Defendant are not in respect of Shop No 3 only.
39. I find that the extended stay by the Defendant on the suit premises was by virtue of the reference she had filed in the Business Premises Rent Tribunal. The Defendant ought to have proved that the landlord accepted rent willingly therefore regularizing her stay on the suit premises. This was not the case.
40. I find that the Plaintiff is entitled to the reliefs sought in the Plaint as the notice to vacate was proper. The Plaintiff is entitled vacant possession. The Defendant did not enter into the suit premises lawfully hence she became a trespasser.
41. It is the Defendant's submissions that the Plaintiff is not entitled to mesne profits because they were not pleaded. This is not true as paragraph 15 of the plaint reads:-

“The Plaintiff's claim against the Defendant is immediate vacation of the suit property and mesne profits from February 2017 at the rent of Kshs18,000/- increasing at 10% every year.”

42. The rent that was being paid by Joseph Wahome was Kshs.16,000 per month. As per the renewed lease which was not executed by the parties the Defendant was to pay Kshs.18,000 per month. In calculating mesne profits the court will use the rent paid by the previous tenant which is Kshs.16,000/- from February 2017 to date which translates to kshs.650,000/- which if added to Kshs.111,500/- will translate to Kshs.761,500/-. If there is any rent the Defendant paid to the Plaintiff by virtue of the orders of the Tribunal in respect of Shop No. 3 the same ought to be deducted from this amount.
43. Though the court declared the Defendant as a trespasser in the suit premises owing to the lack of consent from the landlord, I do not award any damages since the Plaintiff admitted some rent was paid.
44. In conclusion, I find that the Plaintiff has established his case as against the Defendant on a balance of probabilities.
45. Accordingly, judgement is entered for the Plaintiff as against the Defendant as follows:-
- a. That the Defendant is hereby ordered to vacate shop No 3 on LR No 209/1354 Park Road Ngara within twenty one (21) days from the date of this judgement. In default the Plaintiff do use lawful means to evict the Defendant.
 - b. Mesne profits of Kshs.761,500/- less any rent already paid.
 - c. Costs of the suit and interest.

It is so ordered.

DATED, SIGNED AND DELIVERED NAIROBI THIS 12 TH DAY OF MAY 2022.

L. KOMINGOI

JUDGE

In the presence of:-

Mr. Thimba for the Plaintiff

Mr. Gachoka with Ms Ndinda for Mr. Mbaabu for the Defendant

Steve - Court Assistant

