



REPUBLIC OF KENYA



KENYA LAW
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**Gumo v Juma (Environment & Land Case 63 of 2020)
[2022] KEELC 2985 (KLR) (23 June 2022) (Judgment)**

Neutral citation: [2022] KEELC 2985 (KLR)

**REPUBLIC OF KENYA
IN THE ENVIRONMENT AND LAND COURT AT KITALE
ENVIRONMENT & LAND CASE 63 OF 2020**

**FO NYAGAKA, J
JUNE 23, 2022**

BETWEEN

OLIVER MAGERO GUMO PLAINTIFF

AND

SILVANUS JUMA DEFENDANT

JUDGMENT

1. On 19/10/2020, the Plaintiff brought this suit vide a Plaint dated 15/10/2020. He sought the following prayers:
 - a. An eviction order against the Defendant from part of the premises situated on L.R. 2116/7/ IV in Kitale Town as leased by the Defendant from the Plaintiff herein.
 - b. Rent arrears of Kshs. 1,405,000.00 as at 01/01/2020.
 - c. Mesne profits as from 01/01/2020 up to the date of the judgment in this matter.
 - d. Costs of the suit as provided for.
2. The Defendant entered appearance and filed his statement of Defence. It was dated 27/11/2020. He denied the allegations in the Plaint. The Pre-trial conferencing under Order 11 of the Civil Procedure Rules, 2010 confirmed that parties had complied with the provision. This paved way for the hearing of the substantive suit.
3. On 18/01/2022, both parties Counsel were present when the hearing of this matter was adjourned to 21/03/2022. However, the neither the Defendant nor his Counsel appeared before me on this day. The suit thus proceeded with the evidence of the Plaintiff.



The Plaintiff's Case

4. The Plaintiff was the sole witness. He testified that he was, at all material times to the suit, the lessor of Elgon House Hold Shop situated on L.R. No. 2116/7/IV in Kitale Township along Kenyatta Street within Kitale Municipality. His further evidence was that he entered into a landlord tenant relationship with the Defendant on 16/09/2016 for a period of five (5) years with effect from November 1, 2016 to October 31, 2021. It was then agreed that the rent payable monthly was Kshs. 150,000.00. Upon execution of the said contract, the Plaintiff acknowledged that he was in receipt of Kshs. 2,100,000.00 being rent for the first fourteen (14) months in the period from November 1, 2016 to 31/01/2018. The parties agreed further that the rent would increase by five (5) % or Kshs. 7,500.00 annually. It was agreed further that if the tenant breached any of his obligations captured under contract, it would be lawful for the landlord to re-enter upon the premises without notice and the term would determine absolutely. The contract was produced in evidence as P. Exhibit 2.
5. In his testimony, the Plaintiff stated that for the period February 2018 to February 2019, the Defendant remitted a sum Kshs. 100,000.00 instead of Kshs. 157,500.00 in monthly rent. He thus had accumulated arrears to the tune of Kshs. 690,000.00 due and owing to the Plaintiff. He testified that the Defendant continued to pay the sum of Kshs. 100,000.00 monthly in lieu of Kshs. 165,000.00 monthly for the period March, 2019 to January, 2020. He computed the arrears at Kshs. 715,000.00. The Plaintiff thus testified that the Defendant owed him a sum of Kshs. 1,405,000.00.
6. Being dissatisfied with the Defendant's rent arrears, which was a breach of the terms encapsulated in the contract dated September 16, 2016, the Plaintiff served him with a notice to terminate the contract with effect from January 1, 2020. The notice dated October 9, 2019 was produced in evidence and marked as P. Exhibit 1. His evidence was that since the notice remained unchallenged, the Plaintiff averred that the same remained valid. He also produced a return of service sworn on October 15, 2020 by Jackson N. Simiyu as proper proof of service of the termination notice. The said Jackson N. Simiyu served the Defendant with a termination notice on October 20, 2019. The Return was produced in evidence and marked as P. Exhibit 3.
7. The Plaintiff testified that in spite of being served with the termination notice, the Defendant remained on the subject suit property. This prompted the Plaintiff to file an Application seeking to bar the Defendant from making use of the property. The order, issued by this Court on September 21, 2021 was produced in evidence and marked as P. Exhibit 4. Consequently, he sought a sum of Kshs. 3,500,000.00 between the period 01/03/2020 and September 21, 2021.
8. He base-rated his mesne profits at Kshs. 175,000.00 as during this period, this would have been the amount the Defendant would have paid as rent. He sought a total sum of Kshs. 4,905,000.00. He also prayed for costs of the suit.
9. In challenging the averments captured in the Defendant's statement of Defence, the Plaintiff noted that the Defendant did not deny that he was a tenant in the Plaintiff's premises. He denied that they varied the terms of the contract.
10. The Plaintiff did not call any other witness. With his testimony he closed his case. He also closed the Defendant's case. It is noteworthy that neither the Defendant nor his counsel participated in the hearing of this matter despite being aware of the hearing date that was taken by consent in court in the presence of both parties' Counsel.



Submissions

11. On April 28, 2022, the Plaintiff filed submissions dated April 28, 2022. He submitted that he had proved his case on a balance of probabilities. He urged this court to grant the reliefs sought in the Plaintiff.

Analysis and disposition

12. I have carefully analyzed the pleadings, the oral testimony and the documentary evidence relied on. I have also considered the Plaintiff's submissions. It cannot be gainsaid that the Defendant and/or his Counsel were properly aware of the hearing date in this matter. It was taken by consent in the presence of both parties in court on January 18, 2022. I find that the hearing proceeded regularly as the Defendant was aware of the hearing date.
13. The evidence by the Plaintiff which was uncontroverted was that he was in a landlord-tenant relationship with the Defendant. Under their terms of engagement, the agreed rent commenced at Kshs. 150,000.00 monthly which the Plaintiff acknowledged has having been duly paid. It was also agreed that the monthly rent would increase by five 5 % or Kshs. 7,500.00 annually. To this end, the rent increased to Kshs. 157,500.00 from February, 2018 to February, 2019 and Kshs. 165,000.00 from March, 2019 to January, 2020. The Plaintiff testified that in spite of this, the Defendant remitted a sum of Kshs. 100,000.00 monthly rent between the period February, 2018 and January, 2020. He was thus in arrears of Kshs. 690,000.00 and Kshs. 715,000.00 computed between February, 2018 to February, 2019 and March, 2019 to January, 2020 respectively totaling Kshs. 1,405,000.00.
14. Following the falling due of the arrears, on 20/10/2019 the Plaintiff served the Defendant with a notice to terminate the contract dated October 9, 2019. He produced return of service to evidence delivery of the Notice. The Plaintiff's further testimony was that although the Defendant was issued with a termination notice, he only vacated the premises on 21/09/2021 when this court barred him from making use of the suit property previously leased to him. He thus prayed that this Court grants him mesne profits computed at the total monthly rent he would have been entitled to during this period based on the agreed rate at the time of the Defendant giving up possession. The Plaintiff stated that had the Defendant been a tenant during this period, he would have been remitting a monthly rent sum of Kshs. 175,000.00.
15. On the evidence before me, I have no doubt that the Plaintiff has proved that he was a landlord in the suit premises situated on L.R. 2116/7/IV. He also proved that Defendant was his tenant for the period 01/11/2016 to January 1, 2020. The contractual agreement was terminated on account of the Defendant's rent arrears. This was not rebutted. I thus hold that the Defendant was in breach of the contract dated September 16, 2016. I find that he was in arrears in the sum of Kshs. 1,405,000.00 as computed by the Plaintiff. Under the terms of the parties' engagement, the Plaintiff was at liberty to determine the contract and re-enter upon the premises in the event of breach by the Defendant. Moreover, the Plaintiff issued a termination notice after breach of the obligations under the tenancy. I therefore find that it was within the Plaintiff's right to terminate the contract accordingly. On a balance of probabilities therefore, I find that the Plaintiff proved his case on a preponderance of the evidence adduced.
16. On mesne profits, in *Rajan Shah T/A Rajan S. Shah & Partners v Bipin P. Shah* [2016] eKLR the court discussed at length what it entails. I do no more than reproduce the relevant excerpt here. It stated:

"In *Bramwell vs. Bramwell*, Justice Goddard stated that "... mesne profits is only another term for damages for trespass, damages which arise from the particular relationship of landlord and tenant." Similarly, in an Australian case, *Williams & Bradley v Tobiasen* it was stated



that these words: "Mesne profits are the pecuniary benefits deemed to be lost to the person entitled to possession of land, or to rents and profits, by reason of his being wrongly excluded there from... The wrongful occupant is a trespasser, and the remedy rests on that fact. The action is based on the claimant's possession, or right to possession, which has been interfered with... Mesne profits being damages for trespass can only be claimed from the date when the defendant ceased to hold the premises as a tenant and became a trespasser. The action for mesne profits does not lie unless either the landlord has recovered possession, or the tenant's interest in the land has come to an end.... Halsburys, op. cit, 4th, above, suggests that where mesne profits are awarded they usually follow the previous rent rate and in the absence of that, a fair market value rent.... After the service of a written notice or at the end of the term granted and the tenant holds over without the permission of the landlord, the tenant is liable to pay mesne profits for the use and occupation of the premises till he delivers up possession.

17. Guided by the above authority as compared with the evidence herein, I find that this case qualifies for the award of mesne profits. Firstly, the Plaintiff duly served the Defendant with a written termination notice that took effect on January 1, 2020. Secondly, the Defendant remained in possession of the suit premises in spite of being duly served with the notice. Thirdly, he only gave up possession after the Court order of September 21, 2021. Since mesne profits is calculated on the previous rate of rent, I award Kshs. 3,465,000.00, being the total of the sum due for the period of the effect of notice and the time of the Defendant vacating the premises. It is calculated based on the immediate previous rent pay of Kshs. 165,000.00 prior to the termination of the agreement.

Orders and Disposition

18. Having found that the Plaintiff has proved his case to the required standard of proof, being on a balance of probabilities, and given that the Defendant vacated the premises as at the time of the Plaintiff's testimony and the delivery of the judgment herein, I make the following orders:
- a. The Plaintiff is awarded Kshs. 1,405,000.00 being rent arrears as at January 1, 2020.
 - b. The Plaintiff is awarded mesne profits of Kshs. 3,465,000.00.
 - c. The Plaintiff is awarded costs of the suit.

JUDGEMENT DATED, SIGNED AND DELIVERED AT KITALE VIA ELECTRONIC MAIL ON THIS 23RD DAY OF JUNE, 2022.

DR.IUR FRED NYAGAKA

JUDGE, ELC, KITALE.

