



**REPUBLIC OF KENYA**

**High Court at Eldoret**

**Civil Case 34 of 2003**

**ELDO TYRE CENTRE.....PLAINTIFF**

**VERSUS**

**UMAR MOHAMMED**

**MANSURALI MOHAMMED**

**SALIM MOHAMMED**

**MUNIR MOHAMMED**

**SHAKIL MOHAMMED.....DEFENDANTS**

**JUDGMENT**

This Suit proceeded for full hearing before Hon. Justice Gacheche who was transferred before she could write the judgment. The Honourable Judge directed that this court deals with the writing and delivery of the Judgment. Counsels for both parties agreed by consent that although the matter was fully heard by a different court where 9 witnesses testified and written submissions filed however under Order 16 Rule 10 of the Civil Procedure Rules this court can consider the evidence on record and deliver judgment. I agreed to deliver the judgment based on the evidence in the court record. The Plaintiff filed this Plaint on the 26.3.2003 praying for the following orders:

1. That an restraining the Defendants from evicting the Plaintiff from the suit premises or interfering in any way with the Plaintiff's business on and/or occupation of the suit premises
2. An order directing the Defendants to forthwith renew the Plaintiff's lease over the suit premises in terms of the memorandum of understanding between the Plaintiff and the Defendants.

The Plaintiff's case is that it entered into a memorandum of understanding with the Defendants on 31.7.1997 where the parties agreed to the Plaintiff to spend kshs. 3,000,000 to develop the suit premises by constructing an executive car show room and large tyre centre with adequate storage. That pursuant to the memorandum of understanding the parties entered into a lease agreement for a term of five years and three months which was to expire on the 31<sup>st</sup> March 2003. The Plaintiff contended that they have an indefeasible right to a new term of five years and three months to commence at the expiry of the first term. The Plaintiff further averred that Defendants have refused to renew the Plaintiff's tenancy and are saying that they can only renew the tenancy for a term of three years at an exorbitant rent of Kshs. 85,000 per month. That the Defendant constructed the suit premises at a cost of millions of shillings and that the Plaintiff has observed all the terms of the tenancy agreement and was not in breach. The Plaintiff states

that unless the Defendants are restrained they will evict the Plaintiff leading to the collapse of its multimillion shillings business. Together with the Plaintiff, the Plaintiff filed an Application for temporary injunction orders and interim orders were granted by the Court on the 28<sup>th</sup> March 2003, the orders were confirmed on the 23.5.2003 by Honourable Justice Omondi Tunya.

The Defendants filed an Amended Defence dated 5.6.2003. The Defendants stated that they never entered into a memorandum of understanding as claimed by the Plaintiff and the said Memorandum of Understanding dated 31.7.1997 was fraudulent. The Defendants as required under the law set out the particulars of fraud in their statement of Defence by stating that the Plaintiff has affixed the likeness of the Defendants' signatures on the purported memorandum of understanding. The Defendants further stated in the defence that the only agreement they entered to with the Plaintiff is the lease agreement dated 12.11.1997 granting the Plaintiff a lease of 5 years and 3 months over the demised premises. They prayed for the Plaintiff's suit to be dismissed with costs to the Defendants.

The suit proceeded by way of viva voce evidence and a total of 9 witnesses testified.

There is one main issue in contention in this dispute. The issue is with regard to the existence of a memorandum of understanding dated 31.7.1997. The Plaintiff's claim is purely anchored on the existence of the memorandum of understanding which they claim entitles them to a new term of lease of 5 years and 3 months after the expiry of the first term which was to end on the 31<sup>st</sup> March 2003.

On the other hand the Defendants argue that the only agreement between them and the Plaintiff was the lease agreement dated 12.11.1997 granting the Plaintiff a lease of 5 years and 3 months over the demised premises. The Defendants contended that the said memorandum of understanding was fraudulent, that it did not exist.

The court in trying to determine whether the memorandum of understanding was procured fraudulently sought the assistance of handwriting experts.

DW1 Hezron Wabomba Wamalwa was one of the expert witnesses who testified. He stated that he was a document examiner with over 35 years experience. He went to school of Questioned Documents, Forensic Science Lab Bureau of Chief postal Inspector, Washington DC USA. On his return in 1968 he was posted to the CID as full time document examiner where he worked for 29 years before he retired. During his work in government his services were extended to Uganda and Tanzania Governments.

He stated that on the 25.6.03 he received a phone call from Roselyne Odede Advocate to examine certain documents which were to be adduced as evidence in Court. That he collected the documents on the 1.7.03 which was a photocopy of memorandum dated 31.7.97; original copy of lease dated 12.11.97. He asked for specimen signatures from the people who purportedly executed the documents, these are the 5 Defendants, which they provided to him. In summary he found all the signatures in the memorandum to have been a forgery. He gave his report which was marked as exhibit D3 and accordingly his conclusion was that the Defendants did not sign the memorandum produced as Exhibit D1.

On cross examination DW1 stated that individual's signature varies from time to time and with passage of time as well as health. He stated that one can also vary signature to achieve particular purpose. That the only instrument he used was low/high powered magnifying glass which according to him was sufficient for signature Identification. He stated that for his services he was paid kshs. 15,000/-

The Court also had the evidence of Antipas Nyanjwa a document examiner attached to the CID. He stated that he has a master's degree in criminology and forensic science and trained as forensic document examiner at Interpol headquarters in Leone France, Mat police Headquarters in Jerusalem Israel, Federal police Headquarters in Sydney, among other qualifications. He stated that he was requested by the Deputy Registrar of the Court to examine one original memorandum of Understanding dated 31.7.2003 which had disputed signatures. He was also give a lease dated 12.11.97 and was to compare the two sets of signatures. In summary he stated that he compared the signatures and he could not find any indistinguishable differences. He wrote a report of his findings on the 21.1.2004 and forwarded to the

court and the report was produced as **exhibit x**.

According to PW1 Ravi Nitranjan Chaniyara who was the Branch manager of the Plaintiff negotiations between the parties commenced sometimes in June 1997. The Memorandum of understanding (MOU) was drawn by Dorcase Kitaa Advocate in Nairobi. It was forwarded to the Plaintiff to give to the Defendants to execute. He testified that the 5 Defendants signed the MOU at different times and there was no exact single date of execution but he was not present when it was executed. He stated that on execution of the MOU the Defendants were paid token of kshs. 500,000 by way of cheque which was banked on 8.11.97. He referred to document no. 10 and 11 in the Plaintiff's bundle of documents. On cross-examination PW1 stated that he did not take part in the negotiations in 1997 but said from the record he sees that it was executed on 6.11.97.

According to PW2 Manoj Shah who was the Managing Director Kingsway Group Companies he stated that between May and June 1997 he had meetings with all the Defendants. That pending a formal lease they drafted an MOU which was duly executed. He gave a copy of the MOU to the Defendants and they finally concluded the terms towards the end of November 1997. That he personally came with the MOU to the residence of the Defendants at Elgon View given a cup of tea and the MOU was executed. He recalls the date to be 15.11.1997. He further testified that the MOU provided for payment of a token of kshs. 500,000, which he immediately the MOU was signed issued a cheque of Kshs. 500,000 to the Defendants. He referred to Exh.10 and 11. He stated that the Lease was also executed the same date.

DW3 Evan Ogeto Miyienda an advocate stated that he worked with the firm of Nyairo & Co Advocates in 1997 as an Associate. He testified that he did the lease between the Defendants and the Plaintiffs over ELD. MUN. BLOCK 2/49/1 which lease was Exh. 2. He confirmed that he is the one who drew the document, witnessed and stamped. That all the Defendants signed in his presence on 12.11.97. He said it was his practice to date the documents on the actual day of signing. He further stated the Plaintiff's representative was not there he did not know when he signed. That alongside the lease he also drew an MOU for which he received instructions from Mr. Nyairo and he attested the signatures of Umar Mohammed and Shakil Mohamed ( the 1<sup>st</sup> and 5<sup>th</sup> Defendants). He stated that the others were not in Eldoret at the time and the Plaintiff needed it urgently to sign and return it for the other 3 Defendants to execute. He stated that he did not date this document as it had not been fully executed. It was done after the lease was drawn but the document was never returned to him. He stated that the MOU produced as Exh.1 was similar to the one he drew except the renewal clause. He stated that he did not have instructions to include renewal clause.

DW4 Salim Mohammed Umar stated that the parties entered into a tenancy agreement on 12.11.97 for a lease of 5 years 3 months and the conveyance was drawn by M/S Nyairo Advocates. According to him apart from this lease they did not draw any MOU. He confirmed that there was a draft MOU prepared by DW3 which was sent to the Plaintiff in Nairobi. He referred to document no. 8 of the Defendants' list. He said that the draft MOU was signed by 1<sup>st</sup> and 5<sup>th</sup> Defendants and was not received back from the Plaintiff. According to him the draft MOU did not provide for renewal of the lease. That he received a letter from the Plaintiff intimating that a renewal clause for further 5 years and 3 months be included, he referred to proposal produced as Exh 4. That they finally agreed that there could be renewal but it was never incorporated into a written MOU and signed by the Defendants.

**DW5** Umar Mohammed Umar stated that during the negotiations he was in the United Kingdom. He stated that he signed the lease but was out of the country on 31.7.97 when the MOU was allegedly signed. He denied the signature in the document to be his. He however confirmed that they received Kshs. 500,000 in respect of goodwill from the Defendants in November 1997.

On cross examination DW5 confirmed that he resides in Elgon view in the same compound as the 3<sup>rd</sup> Defendant. He denied ever meeting Manoj Shah (PW2) prior to seeing him in court. He confirmed to have signed the MOU prepared by M/S Nyairo Advocates together with his brother Shakil.

DW 6 was Munir Mohammed Umar he stated that other than the Lease there was a draft MOU (D. Exh no. 8) which he did not sign. He stated that he resides in Nanyuki and was available to sign the MOU.

DW7 was Mansur Ali Mohammed. He stated that Eldo Tyres, the Plaintiff were their tenants. That they gave them a lease of 5 years and 3 months over the demised premises Block 2/49/1. He states that his brother Salim Mohammed was handling the matter and did not know the lawyer who prepared the MOU. He stated that he did not sign. He also stated that they agreed verbally that Eldo Tyre Centre, the Plaintiff would get a renewed lease term and would discuss the terms. He confirmed that the Plaintiff paid them Kshs. 500,000 through a cheque dated 15.11.1997. He stated that the payment was to entice them to close their business in the premises and vacate he stated that they spent the money which according to him was goodwill.

From the above testimonies it is not disputed that the parties entered into the lease agreement dated 12.11.1997 which was to expire on the 31<sup>st</sup> March 2003. It is the Plaintiff's case that the lease ought to be renewed for another term of 5 years and 3 months based on the term so of the MOU the parties executed. The Defendants deny that this MOU existed. They denied having signed the MOU dated 31.7.1997. according to the Defendants version there was draft MOU prepared by M/S Nyairo Advocates which was signed by the 1<sup>st</sup> and 5<sup>th</sup> Defendants and their signatures attested by the 3<sup>rd</sup> Defendant advocate. That it was sent to the Plaintiff to execute but was never returned. However whereas the Defendant in paragraph 4 of the Amended Defence totally denied having received kshs. 500,000 or any other amount as token from the Plaintiff. DW5 and DW7 confirmed to have received the money which they said was goodwill.

The genuineness of the MOU is highly contested issue. All the Defendants stated that they have not signed it. However DW4 testified that they received a letter from the Plaintiff intimating that the lease be renewed for another term of 5 years and 3 months. He stated that they agreed to this but it was not put in a written memorandum signed by the parties. DW7 also stated that they verbally agreed that the lease be renewed although he said he did not sign the memorandum.

The two expert witnesses gave contradicting reports with DW1 stating that the signatures of the Defendants were forged whereas Antipas Nyanjwa who was called by the court stated that he could not find any indistinguishable differences.

I have looked at the Lease agreement. It does not provide for a renewal of the lease upon expiry of the term therein. It also does not provide for payment of kshs. 500,000 whether as token or goodwill. The only hotly contested issue in the MOU is the provision for renewal of the lease for another term upon expiry of the first term. It also provides that a non- refundable token of kshs. 500,000 shall be paid by the Plaintiff to the Defendant upon signing of that agreement (MOU).

The clause on dispute resolution between the parties in the disputed MOU and the lease agreement are also similar. Under paragraph 3(a) the lease provides:

***“any dispute arising in connection with any matter relating to this agreement shall be referred to a single arbitrator appointed by both parties by consent BUT in default of agreement the arbitrator shall be appointed by the chairman for the time being of the law society of Kenya”***

The provision in paragraph 12 of the Disputed MOU is similar.

On balance of probabilities and in upholding the intentions of the parties I am of the opinion that the MOU even if disputed by the Defendants not to have signed it reflects the negotiations and agreement of the parties and I make determination to admit it and uphold its terms.

Having made that determination, it is clear that the Plaintiff would be entitled to renewal of the lease for another term of 5 years and 3 months from the 1<sup>st</sup> April 2003 on such terms as to rent to be mutually agreed upon, in the absence of agreement the issue is to be sent for arbitration. As things stand now even the renewed term of the Lease would have expired by 1<sup>st</sup> of August 2009 which is now. If the 2<sup>nd</sup> lease term would not have expired then I would have directed that the issue of the rent in the 2<sup>nd</sup> lease term be forwarded to an arbitrator. However the 2<sup>nd</sup> Lease term has already lapsed and the relationship between the parties determinate. There will be no agreement on whose basis the issue of rent can be submitted.

The only thing that holds this party together is this suit and I am of the opinion that this court is the best forum to resolve the issue.

The Plaintiff enjoyed injunction orders over the said period and their tenancy was not interrupted. This means that the Plaintiff's tenancy cannot be extended unless with the mutual agreement of the parties beyond 1<sup>st</sup> August 2009. I will not address the issue of breach with regard to rental payment at this stage because the same would only have affected in determining whether the Plaintiff was entitled to a renewal of the lease.

In the circumstances of the case the issue of rent for the period after the expiry of the Lease is claimed by the Defendant as mesne profits. The Defendant was claiming for a rent of kshs 85,000 per month of term to give a new term of 3 years (up from kshs. 16,000 payable as the rent for last month) according to the submissions by the Plaintiff's Advocates. The Defendant has submitted a valuation report showing that the market value was Kshs. 101,896 per month. The Defendant claim that the court assess rent after 31.3.2003 at this rate. PW1 in his testimony stated that their head office pays Kshs. 25,000/- per month at the time. He was proposed 30,000-35,000 per month for the new term would be reasonable instead of 85,000 as proposed by the Defendants.

As I stated above the issue rent payable for the 2<sup>nd</sup> lease term was to be mutually agreed and failure to agree the matter was to be taken for arbitration. Because of the lapse of the 2<sup>nd</sup> lease term this may not be a viable option. The parties have taken polarized position on the issue as I have tried to set out. I am of the opinion that what is now important is to try and settle the long standing dispute and the parties give and take whatever reasonable value that each of them is entitled to.

I think after considering the proposal of the Defendant, the valuation report and the proposal by the Plaintiff a monthly rent of kshs. 50,000 will be reasonable for the rent starting from the 1.4.2003 with an escalation of 10% p.a. until the Plaintiff gives vacant possession in terms of this judgment. Judgement is hereby entered in those terms.

As I have stated, the Parties are only tied together by the existence of this Suit. I will therefore order that in the absence of execution of a new lease mutually agreed upon by the parties herein the subsisting injunction orders stand dismissed and vacated at the end of three months from the date of this judgment.

Each party will bear its own costs.

DATED AND SIGNED AT NAIROBI ON THIS 8<sup>TH</sup> DAY OF AUGUST 2012

**M. K. IBRAHIM**  
**JUDGE**

DATED AND DELIVERED AT ELDORET ON THIS 17<sup>TH</sup> DAY OF OCTOBER .2012

**F. AZANGALALA**  
**JUDGE**

In the presence of: Mr. Kyaya for the Plaintiff

Mr. Yego h/b for Mr. Mamani for Defendant