



REPUBLIC OF KENYA



**KENYA LAW**  
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**Lavington Shopping Complex Ltd v Bconcept Limited & 2 others (Environment & Land Case 3 of 2021) [2022] KEELC 4827 (KLR) (19 September 2022) (Judgment)**

Neutral citation: [2022] KEELC 4827 (KLR)

**REPUBLIC OF KENYA**  
**IN THE ENVIRONMENT AND LAND COURT AT NAIROBI**  
**ENVIRONMENT & LAND CASE 3 OF 2021**  
**MD MWANGI, J**  
**SEPTEMBER 19, 2022**

**BETWEEN**

**LAVINGTON SHOPPING COMPLEX LTD ..... PLAINTIFF**

**AND**

**BCONCEPT LIMITED ..... 1<sup>ST</sup> DEFENDANT**

**BARRY NDEGEYINGOMA ..... 2<sup>ND</sup> DEFENDANT**

**SAMIA FNINE ..... 3<sup>RD</sup> DEFENDANT**

**JUDGMENT**

**Background**

1. The Plaintiff is the owner of a commercial premises in Nairobi, Lavington area known as ‘Lavington mall’ on Land Reference No. 3734/115 and 3437/116. The 1<sup>st</sup> Defendant is a tenant in the Plaintiff’s premises running an ultra-modern entertainment facility known as ‘Gossip Ultra Lounge’ and ‘Dejavu ‘Café Fusion Resto Lounge’. The terms and conditions of the tenancy are governed by 2 documents referred to as ‘Heads of Terms’ dated 18<sup>th</sup> November 2015 and 10<sup>th</sup> July 2017. The 2<sup>nd</sup> and 3<sup>rd</sup> Defendants on the other hand jointly and severally guaranteed payment of rent and other overheads by the 1<sup>st</sup> Defendant and agreed to be personally liable to the Plaintiff for any breach by the 1<sup>st</sup> Defendant (the lessee) of its obligations in the Heads of Terms.
2. The Plaintiff pleads that the 1<sup>st</sup> Defendant became a ‘habitual defaulter’ in payment of rent and as 1<sup>st</sup> March 2021, the rent due and owing (inclusive of other overheads payable) was Ksh 39,058,386.21. The Plaintiff has tabulated the said amount due and owing at paragraph 17 of the Plaint. The 2<sup>nd</sup> and 3<sup>rd</sup> Defendants as guarantors are therefore liable for the failure/default by the 1<sup>st</sup> Defendant for the amounts due and owing.
3. The Plaintiff therefore prays for judgement against the Defendants for;



- i. Ksh 39,058,386.21 being rent arrears, service charge and electricity as at 1<sup>st</sup> March 2021 jointly and severally against the Defendants.
  - ii. Order of re-entry of the premises by the Plaintiff and or eviction of the 1<sup>st</sup> Defendant.
  - iii. Interest on the arrears of rent from 31<sup>st</sup> December 2017 to-date.
  - iv. Costs of the suit.
  - v. Any other relief the court deems fit to grant.
4. Apparently and upon service of summons to enter appearance, the Defendants did not enter appearance and or file a statement of Defence. Judgement was therefore entered in favour of the plaintiff against the Defendants on 8<sup>th</sup> October 2021 for the sum of Ksh 39,058,386.21 being rent arrears, service charge and electricity charges as at 1<sup>st</sup> March 2021.
  5. An order was made to the effect that the matter be listed for formal proof in respect of prayers (b) and (c), of the Plaint. So, all that I am going to deal with is prayers (b) and (c) and off course the prayer for costs of the suit.

#### **Evidence Adduced on behalf of the Plaintiff.**

6. Two witnesses testified on behalf of the Plaintiff; Irene Nyakio Kinuthia who is a director of the Plaintiff company and Samuel Mwangi, a representative of the property manager in charge of managing the Plaintiff's premises.
7. In a nutshell, the witnesses affirmed the allegations in the Plaintiff's Plaint reinforcing their testimonies with the documents on the Plaintiff's list of documents dated 2<sup>nd</sup> June 2021 and which were produced as exhibits. They affirmed that the 1<sup>st</sup> Defendant had consistently defaulted in payment of rent and other dues which had accumulated to Ksh 57,958.100/= as at 30<sup>th</sup> June 2022. Further, the witnesses testified that the leases had since lapsed but the 1<sup>st</sup> Defendant had adamantly continued to occupy the suit premises and refused to vacate despite notices to do so from the Plaintiff.

#### **The Plaintiff's Submissions**

8. The Plaintiff filed submissions dated 26<sup>th</sup> July 2022. The Plaintiff identified 4 issues for determination namely:-
  - i. Whether the 1<sup>st</sup> Defendant is in breach of the terms of the tenancy.
  - ii. Whether the 2<sup>nd</sup> and 3<sup>rd</sup> Defendants are jointly and severally liable to pay the claim.
  - iii. Whether the Plaintiff is entitled to an order of re-entry of the premises.
  - iv. What orders should be made as to costs?
9. The Plaintiff submitted on each of the identified issues. I have had the opportunity to read through the Plaintiff's submissions.

#### **Issues for Determination.**

10. I am in agreement with the Plaintiff's identification of the issues for determination having considered the totality of the Plaintiff's claim, but with an addition of one issue. The issues for determination in this matter therefore are:-



- I. Whether the 1<sup>st</sup> Defendant is in breach of the terms of the tenancy.
- II. Whether the 2<sup>nd</sup> and 3<sup>rd</sup> Defendants are jointly and severally liable to pay the claim.
- III. Whether the Plaintiff is entitled to an order of re-entry of the suit premises.
- IV. Whether interest is payable on the arrears of rent as claimed from the 31<sup>st</sup> December 2017 to-date.
- V. What orders should be made as to costs?

### **Analysis and Determination.**

#### **A. Whether the 1<sup>st</sup> Defendant is in breach of the terms of the tenancy.**

11. From the evidence of the Plaintiff's witnesses, the 1<sup>st</sup> Defendant has constantly been in default of rent, service charge, promotional levy and electricity charges which as at the date of the hearing of the case had accumulated to Ksh 57,958.100.00. The evidence of the witnesses was supported by the documents produced as exhibits in the case. In any event, the evidence is uncontroverted.
12. The obligation of a tenant to pay rent is a fundamental condition in a tenancy relationship. The 1<sup>st</sup> Defendant/tenant having failed and or defaulted to pay rent is no doubt in breach of the tenancy agreements with the Plaintiff.

#### **B. Whether the 2<sup>nd</sup> and 3<sup>rd</sup> Defendants are liable to pay the Plaintiff's claim.**

13. The 2<sup>nd</sup> and 3<sup>rd</sup> Defendants guaranteed performance of the tenancy terms and conditions by the 1<sup>st</sup> Defendant. They undertook and committed themselves in writing to ensure due performance of the tenancy obligations by the 1<sup>st</sup> Defendant failing which they would take personal responsibility. They are therefore liable for the default of the 1<sup>st</sup> Defendant jointly and severally. I agree with the Plaintiff's submissions that the 2<sup>nd</sup> and 3<sup>rd</sup> Defendants are personally liable for the arrears of rent. Having read the written commitments by the 2<sup>nd</sup> and 3<sup>rd</sup> Defendants, I will go further and state that they are not only liable for the arrears of rent but for any other and further consequential losses arising from the default of the 1<sup>st</sup> Defendant including the costs of the suit.

#### **C. Whether the Plaintiff is entitled to an order of re-entry of the suit premises and or an eviction order.**

14. Having found the 1<sup>st</sup> Defendant in breach of the terms and conditions of the tenancy agreements, its right of occupation of the suit premises is extinguished. Furthermore, the tenure of the tenancy having expired, the 1<sup>st</sup> Defendant is obligated to handover the suit premises to the Plaintiff.
15. The Plaintiff's case is that despite notice to the 1<sup>st</sup> Defendant, it has refused to vacate the suit premises.
16. I am guided by the Court of Appeal decision cited by the Plaintiff in the case of *Gusii Mwalimu Investment Co. Ltd v Muabimn Hotel Kisii Ltd* ( 1996) eKLR where the court stated that,
 

“ .....unless a tenant consents or agrees to give possession, the landlord has to obtain all orders from a competent court or statutory tribunal to obtain an order for possession”.
17. I therefore grant the Plaintiff an order of re-entry of the suit premises and or eviction against the 1<sup>st</sup> Defendant.



#### **D. Whether interest is payable on the arrears of rent as claimed from the 31<sup>st</sup> December 2017 to-date.**

18. This was one of the issues that was to be decided during formal proof. I note that the Plaintiff has not submitted on it but correctly listed it as one of the prayers pending determination by this court. The Plaintiff, in the Plaint sought interest on the arrears of rent from 31<sup>st</sup> December 2017 to-date.
19. In the case of *Jane Wanjiku Wambu v Antony Kigamba Hato & 3 Others* (2017) eKLR, Justice Joel Ngugi discussed in details the issue for interest. At the onset, it is clear that under section 26(1) of the *Civil Procedure Act*, the court has the discretion to award and fix the rate of interest, to cover two stages namely: -
- a. The period from the date the suit is filed to the date when the court gives its judgement, and
  - b. The period from the date of the Judgement to the date of payment of the sum adjudged.
20. When it comes to the period before filing the suit, section 26 of the *civil procedure Act* is not applicable. Joel Ngugi J (as he then was), in the above cited case stated that;-
- “Interest prior to the date of the suit is a matter of substantive law and is only claimable where under an agreement there is stipulation for the rate of interest (contractual rate of interest) or where there is no stipulation but interest is allowed by mercantile usage (which must be pleaded and proved) or where there is a statutory right to interest or where an agreement to pay interest can be implied from the course of dealing between the parties.”
21. The Plaintiff in this case did not lead any evidence to justify the award of interest on the arrears of rent prior to the filing of suit. I must also point out that the rent arrears claimed did not all fall due at the same time (i.e as at 31<sup>st</sup> December 2017).
22. The court therefore declines to award the Plaintiff interest from 31<sup>st</sup> December 2017. The court will instead award the Plaintiff interest on the rent arrears claimed in prayer (a) of the Plaint at the court rates but from the date of filing suit.

#### **E. What orders should be made on costs?**

23. Costs normally follow the cause. I see no reason to deviate from the norm. Accordingly, I award the Plaintiff costs of the suit against the Defendants jointly and severally.
24. I did note that the Plaintiff in the submissions made a case for an award of Ksh 57,958.100.00 being the figure of the accumulated arrears of rent, service charge and electricity charges as at the date of the hearing of the case. The Plaintiff however did not seek to amend the plaint in order to plead this figure and substitute the figure of Ksh 39,058,386.21, that it had claimed in its plaint. Furthermore, this matter was merely coming up for formal proof in respect of the prayers (b) and c) since judgement had already been entered for the prayer number (a). It is a settled principle of law that parties are bound by their pleadings. The court too is bound by the pleadings of the parties.
25. In the case of the *Independent Electoral and Boundaries Commission v Stephen Mutinda Mule & 3 others* (2014) eKLR the court reiterated the principle that parties in litigation are bound by their pleadings. The court in the case cited with approval the decision of the Malawi Supreme Court of Appeal in *Malawi Railways Ltd v Nyasulu* (1998) MWSC 3 where the court quoted an article by Sir



Jacob entitled, “the present importance of pleadings” published in 1960 where the author had stated that,

“As the parties are adversaries, it is left to each one of them to formulate his case in his own way, subject to the basic rule of pleadings, for the sake of certainty and finality, each party is bound by his own pleadings and cannot be allowed to raise a different or fresh case without due amendment properly made. Each party thus knows the case he has to meet and cannot be taken by surprise at the trial. The court itself is as bound by the pleadings of the parties as they are themselves. It is no part of the duty of the court to enter upon any inquiry into the case before it other than to adjudicate upon the specific matters in dispute which the parties themselves have raised by the pleadings. Indeed, the court would be acting contrary to its own character and nature if it were to pronounce any claim or defence not made by the parties. To do so would be to enter upon the realm of speculation. Moreover, in such event, the parties themselves or at any rate one of the might feel aggrieved for a decision given on a claim or defence not made or raised by or against a party is equivalent to not hearing him at all and thus be a denial of justice. In an adversarial system of litigation therefore, it is the parties themselves who set the agenda for trial by their pleadings and neither party can complain if the agenda is strictly adhered to. In such an agenda, there is no room for an item called “Any other business” in the same sense that points other than those specific may be raised without notice.”

26. The supreme court of Nigeria on the other hand in *Adetoun Oladeji (NIG) v Nigeria Breweries PLC* SC91/2002 re-emphasized the principle that parties are bound by their pleadings and further stated that,

“In fact, that parties are not allowed to depart from their pleadings is on the authorities basic as this enables parties to prepare their evidence on the issues as joined and avoid surprises by which no opportunity is given to the other party to meet the new situation.”

27. In the case of *Raila Odinga & another v IEBC & 2 others* (2017) eKLR the Supreme Court of Kenya pronounced the essence of pleadings and stated that,

“It is also a settled legal proposition that no party should be permitted to travel beyond its pleadings and parties are bound to take all necessary and material facts in support of the case set up by them. Pleadings ensure that each side is fully alive to the questions that are likely to be raised and they may have an opportunity of placing the relevant evidence before the court for its consideration. The issues arise only when a material proposition of fact or law is affirmed by one party and denied by the other party. Therefore, it is neither desirable nor permissible for a court to frame an issue not arising on the pleadings.”

28. The Plaintiff by attempting to claim the higher figure without having made an amendment to its plaint is seeking to ‘travel beyond its pleadings’. That is not allowable.

### **Conclusion.**

29. From the foregoing and in addition to the Judgement already entered in favour of the Plaintiff against the Defendants on 8<sup>th</sup> October 2021, judgement be and is hereby entered in favour of the Plaintiff in the following terms: -



- a. An eviction order be and is hereby issued in favour of the Plaintiff against the 1<sup>st</sup> Defendant in respect of the suit premises - the 5<sup>th</sup> floor of Lavington Mall occupied by the 1<sup>st</sup> Defendant on L.R No. 3734/1115 and 3734/1116 in Lavington, Nairobi.
- b. Interest on the arrears of rent (Ksh 39,058,386.21) at court rates from the date of filing suit until payment in full.
- c. Costs of the suit against the Defendants jointly and severally.

It is so ordered.

**DATED, SIGNED AND DELIVERED AT NAIROBI THIS 19<sup>TH</sup> DAY OF SEPTEMBER 2022.**

**M.D MWANGI**

**JUDGE**

In the Virtual Presence of:-

N/A by the Parties

Court Assistant: Hilda

**M.D MWANGI**

**JUDGE**

