



JAYNTILAL DHAMSHI GOSRANIPLAINTIFF

VERSUS

KENYA OIL COMPANY LTD. DEFENDANT

JUDGMENT

This suit was filed on 24/1/2005 by Jayantilal Dharamshi Gosrani against the defendant, Kenya Oil Company Limited. The plaintiff is a registered owner as lessee for a term of 99 years from 1/12/1926 of parcel of land L.R.209/13700, Muranga Road, Nairobi, on which stands a petrol station together with improvements, amenities and usual facilities consisting of a main building, fore court canopy, mini supermarket, restaurant, kitchen service bay, generator room, stores, office room, toilets, bathrooms and changing rooms.

It is pleaded that by a lease dated 12/4/2001 and registered on 18/4/2001 against the title the plaintiff as lessor granted to the defendant lease of the above said property for a fixed period of fifteen years from 1/6/2001 with option to extend the lease for a further 5 years from the expiry of first 15 years.

The defendant took possession on 1st June 2001 through its dealer until 31/5/2004. Under the lease it was provided:-

- (a) Rent payable by defendant to plaintiff every month would be Kshs.600,000/= for the first 5 years from 1/6/2001 and thereafter rent would be increased at the rate of 12 ½ % after every five years;**
- (b) That the rent would be payable**
 - (i) 2 ½ years rent in advance at the time of possession of aforesaid rent;**
 - (ii) Further advance rent of six months on/or after December 2001 making a total advance rent for the first 3 years of the said term;**
 - (iii) Thereafter rent would be paid every 24 months in advance to the plaintiff during the remaining period of the said term.**

It was agreed that the defendant would be responsible for payment of annual ground rent and City Council rates for the entire term of the lease which at the time of executing the lease stood at Kshs.29,700/= and Kshs.63,000/= per year respectively. The plaintiff pleaded that change of user was granted by Nairobi City Council on 21/1/2000 under the **Physical Planning Act**. Development drawings were approved on 25/5/2000. Registration No. DL 567 and Certificate of Occupation was issued on 30/5/2001.

On 8/12/2000 Survey of Kenya accorded change of user to the Petrol Station and Ministry of Roads and Public Works accorded change of user on 23/5/2001. Further more Commissioner of Lands gave his consent with effect from 1/6/2001 with his letter dated 2/7/2001 and Compliance Certificate No.03424 from Director of Physical Planning.

It was necessary to surrender the first lease in exchange of a fresh lease and new title. The surrender of lease was forwarded to defendant by the plaintiff by its letter dated 23/9/2003. See also letters dated 17/10 and 25th November 2003. On 23/1/2004 there was a meeting between plaintiff and his advocate and representatives of defendants and Mr. Mwangi of the defendant where defendant requested for the reduction of rent from Kshs.600,000/= p.m. to Kshs.300,000/=. The request was turned down by the plaintiff's letter dated 15/3/2004.

It is pleaded by the defendant that the plaintiff did not obtain change of user as a petrol station consequent to which it would hand over the petrol station to the plaintiff on 31/5/2004. It is to be remembered that the defendant had occupied the property since 2001 under a registered lease. It is pleaded that on that date (31/5/04) in the early hours of the morning, the defendant raided the petrol

station and removed signboards, the huge billboard, the fuel pump, the compressor, the greasing pumps, the pressure gauge, the air gauge and the side garden lights and also carted away the defendant's belongings supplied to its dealer, everything to do with running a petrol station. The defendants retaliated that it was its property.

The plaintiff maintains that the flagrant and wanton acts of defendant was in retaliation of the refusal to reduce the rent from Kshs.600,000/= to Kshs.300,000/= p.m. requested by the defendant and therefore intention to breach the contract for payment of advance rent in the agreed sum of Kshs.14,400,000/= falling due on 1/6/2004 and the sum of Kshs.100,462,500/= and land rent 2005-2016, Kshs.29,700/= per year and City Council rates Kshs.63,000/= per year for 12 years totaling Kshs.11,240.00. Total Kshs.101,574,900/=.

The plaintiff pleaded an alternative claim under which he claims damages, punitive damages and general damages. The prayers pleaded are:-

- (a) **Kshs.101,574,900/=;**
- (b) **Exemplary and punitive damages**
- (c) **Interest at court rates from date of filing suit;**
- (d) **Costs together with interest thereon.**

The defendant did file the Statement of Defence. Paragraph 3 stated that the head lease did not permit the land to be used for purpose of petrol station, restaurant and required the prior consent of Commissioner of Lands for any sub lease. These prohibitions are still illegal.

It is admitted that agreement was entered into in writing on 29/3/2001. It is pleaded that possession was granted but in breach of the said special conditions contained in the head lease. The consent was void as it was obtained by plaintiff fraudulently by concealment or misrepresentation of material facts namely withholding from Commissioner of Lands the fact that the land was being used contrary to the special conditions as petrol station.

Section 38 Government Lands Act, Section 5 of Petroleum Act and Nairobi City By Laws. Furthermore the lease contained provisions to renew for a period of 5 years. The plaintiff's estate shall have expired. Furthermore, the petrol station was being carried on by an independent not an agent of the defendant. There was no evidence led on this issue and the defendant denies that he carried business thereon from 1/6/2001 to 31st May 2004. The lease also ceased to be effective as from 19/2/2003 when the plaintiff accepted a surrender of the lease. This is not true, the defendant had accepted a replacement lease in similar terms.

The defendant was entitled to terminate the lease in writing but as it did on 31/5/2004 did remove from the premises all the possessions, moveable assets and other fixtures belonging to the defendant. The defendant was not obliged to occupy the premises at any time of the leasehold as it paid rent.

The defendant will rely on the Doctrine of *ex dolo malo non oritura action* meaning "A right of Action cannot arise out of fraud". It is also pleaded that the plaintiff has failed to mitigate his loss. The Statement of Defence was re-amended on 4/6/2000 and plaintiff amended plaint on 5/6/2009 after taking all evidence on both sides the plaintiff opted to file written submission and the defendant counsel for defendant to address court orally.

The plaintiff submits that the claim arose out of an agreement to lease plaintiff's premises. The lease was registered on 18/4/2001 for a term of 15 years. The defendant took possession some time in May/June 2001 though the leasing commenced on 1/6/04 and placed a dealer who was carrying on the business of petrol station up to 31/5/2004 when the defendant with its employees and agents violently vacated the premises and took with it all its chattels.

This suit was filed claiming anticipatory damages of Kshs.101,574,900/= for breach of the lease agreement which was for a fixed period of 15 years to 31st May 2016. The plaintiff also seeks exemplary and punitive damages, costs and interest at court rates. Defendant entered appearance and filed defence on 4th March 2005. It was amended on 8/11/2006 and re-amended on 5th June 2009. And the plaintiff replies on 6/4/2005, 21 dealer 2006, 25/1/2007 and 8/6/2009.

According to the plaintiff issues for determination are listed:-

1. **Did the plaintiff enter into the lease of property known as L.R. No.209/13700 (Onyango 2009/demised premises) for a period of 15 years from 1/6/2001. The answer is as in exhibit and is an affirmative;**
2. **Was the lease for the demised premises illegal and/or void for the following purposes special condition in the head lease did not permit of a restaurant and expressly forbid its use as petrol station and expressly required prior consent of the Commissioner of Lands for any sub lease;**

3. *And contained an option for renewal beyond the period of grant;*
4. *Was the consent for the grant of lease obtained fraudulently by concealment or misrepresentation of material facts which party obtained consent? Can defendant rely on the alleged fraud concealment, misrepresentation to avoid the lease?*
5. *Was the defendant aware of terms of grant when it entered into the lease? If so, what was the effect of entering into the lease?*
6. *Did the plaintiff's term upon which the grant should be surrendered and a lease on the same terms as existing between the plaintiff and the defendant be granted to the defendant? The what effect did it have on the existing lease between the plaintiff and the defendant?*
7. *Whether defendant terminated the lease with effect from 31/5/2004 or at all.*
8. *Whether the defendant is liable to plaintiff for loss and damages arising from the lease of the demised premises and so what is the quantum of the said damages? Who is liable to pay costs?*

According the plaintiff, he gave evidence and confirmed that he is registered as proprietor of leasehold suit property L.R.209/13700 having purchased the same in 1999 from Dason Industries who obtained approval of City Council of Nairobi for putting up a petrol station to operate on the said plot. It is the vendor who obtains consent and change of user.

On 30/11/2000 he wrote a letter to the Commissioner of Lands asking for approval for change of user to that of petrol station. The letter was exhibit 3. Later some officers of Kenol/Kobil visited the site when it was almost complete and inquired if the petrol station was for leasing. Later the officers of the defendant Mr. Segman and Mr. Lando visited the office of the plaintiff and inspected all relevant documents and promised to send a written offer for lease of a petrol station. The letter was exhibited as "P.Exhibit 5" dated 29/3/2001.

The defendant requested for original title to the property. The plaintiff handed over on defendant's promise that once lease was registered the defendant shall return the document the to the plaintiff. The note was produced as "exhibit 6". The lease was prepared by one Field Marsham & Co. Advocates of defendant and the lease was executed and registered at the Land Registry on 18/4/2001. The main terms were the term of 15 years from 1/6/2001 and the rent was Kshs.600,000/= per month in advance every 24 months and the rent was to be increased after every 5 years at the rate of 12 ½ %. The written lease was produced as exhibit No.7. Both parties entered into the lease freely and are bound by the terms thereof.

It is not disputed that the plaintiff was the owner at the time of entering into it and the registration thereof. Regarding, the user of the said property as petrol station was appointed for the use specified in the lease. Exhibit "1" dated 1/2/2000 signed for Director, City Planning and Architecture Department for approval of development permission given to Dason Industry. The plaintiff said that the process of change of user was in progress as he was purchasing the land.

Change of user was from residential cum business to petrol service station subject to conditions enumerated in that letter of permission. One of the condition was:-

- (i) ***Payment of revised rates as will be determined by Commissioner of Lands;***
- (ii) ***Payment of revised rates as will be determined by Chief Valuer of Nairobi City Council among other conditions.***

The approval was given to M/S Danson Industry C/O Chema M. Katwa. The consent of Commissioner of Lands was obtained by advocates who are the ones who are the ones who pursued the issue of registration at Lands Office. The Lands Office would not have registered the lease without consent of Commissioner of Lands. There is evidence that the consent of Commissioner of Lands was obtained.

The lease was prepared by advocates of the defendant, Field-Marsham & Co. Advocates. It is clear that by the time the lease was registered after execution everything was lawfully complied with:-

- (1) ***Mainly on 20.11.2000 – Registration of transfer to the plaintiff;***
- (2) ***On 18.4.2001 registration of lease for 15 years from 1/6/2001 at a rent of Kshs.600,000/= monthly.***

"D.Exh.6" shows that this document was a grant to Danson Industries and dated 13/3/2000 by order of the President in pursuance of a surrender registered in Government Land Titles Registry at Nairobi as entry No. I.R.2238/17.

However, the term of the lease from 1926 would not need to be extended. 1926 + 99 will expire on 31/12/2025. On the change of user it was granted on 1/2/2000 to the previous registered owner. It surely would not be required again upon change of ownership.

There is therefore sufficient evidence that exhibit "P.Exh.1" the necessary consents and approvals were granted by February 2000 when the first purchase taking place and also on 25/5/2000. The evidence

was in the fact of the transfer from Danson Industries to the plaintiff. The defendant's Senior Officers found the plaintiff constructing the petrol station. It is to be noticed that there was two leases on this land. Head lease between the Commissioner of Lands on behalf of the Government and the plaintiff herein and that sub-lease between the plaintiff and the defendant each binding the relevant party and the conditions for each party.

The agreements/conditions of the head lease was to be complied with by the plaintiff to the satisfaction of the Kenya Government. From the record there is no complaint that there was any breach of those conditions or fraud.

Regarding the sub lease, there was no complaint from defendant until when the defendant asked for a reduction of monthly rent from the plaintiff. The sub lease was properly registered and the operations of petrol station were running without any problem. Where does this doctrine of **"ex dolo malo non oritur action"** come in. The defendant was given all legal documents concerning the land to examine. The documents are records in public domain in the Lands Office and the transaction was handled by their legal advisers.

It is clear that on the night of 31/5/2004 the defendant had decided to move out of the plaintiff's plot and to carry away its goods and all its chattels relating to the petrol station. Defendant sent its people at night and in the morning the plaintiff found the defendant's petrol station had been demolished. This act was masterminded by the defendant and it is not denied and the defendant cannot blame the plaintiff.

The plaintiff thereafter handed the premises to the dealer who was a limited liability company run by the plaintiff's sons who took possession as from 1/6/2004 on the same terms as in the dealership of the defendant dealers at a rent of Kshs.100,000/= per months. At the time he was giving evidence he said that his sons were still in occupation of the petrol station. The head lease would expire on 20/11/2025 it is not unlawful to stipulate that the head lease and sub lease would be extended. The head lease can be extended by the grace of the Head Lease.

On the issue of the grant of lease being obtained fraudulently by concealment or misrepresentation of material facts and if the defendant can rely on the alleged fraud concealment of misrepresentation to avoid the sub lease. Firstly, no fraud, misrepresentation and concealment has been proved. The defendant through its officers visited the site and saw the plot, then they obtained all legal documents, took them to their offices and had full opportunity to study the same and if there was any confusion they were able to visit the Lands Office to check the Government records. If any misrepresentation or concealment, they ought to have abandoned the sub lease at the commencement.

In any case the defendant cannot rely on such allegation to avoid the lease. The Commissioner of Lands had already signed Head Lease on 30/12/2003. See Defence exhibit No.4. This issue of surrender of the sub lease shows that the plaintiff may obtain a new Head Lease is discussed at **"P.Ex. No.17"**. It appears the plaintiff requested the defendant to surrender the duly registered lease with plaintiff for a period of 15 years from 1/6/2001 with option to renew for a further five years so that a new Head Lease could be granted by Government of Kenya to the plaintiff.

The defendants told the plaintiff in their letter dated 17/10/2003:-

"We have no objection to surrender or lease to pave way for issuance of new Title with new approved change of user for PSS provided that a replacement lease is executed by both parties and registered simultaneously with the surrender of the lease."

And to their lawyers the defendant wrote on 25/11/2003. The defendant stated:-

"We have no objection subject to and on condition that the parties do execution a replacement lease to be registered simultaneously with the lease."

The issue of replacement was raised by defendant:-

"We have checked with the Commissioner of Lands who advises us that endorsement of Title documents stopped in 1999 hence the Title Deed could not be amended by way of endorsement. We enclose under-mentioned documents to enable you to act our request."

This letter was written on 25/11/2003 by defendant. On 21/5/2004 the defendant wrote to plaintiff:-

"Original grant does not permit user of petrol station."

Then they stated:-

"We shall remove our goods on 31/5/04".

The defendant did just that on the night of 31/5/04.

"determining any other previous arrangements in respect of above station. We shall subsequently hand over the station on that date."

Since they had been in custody of the original document how is it that they noticed this issue only

on 21/5/2004. It is quite clear all the allegations of fraud, misrepresentation were not genuine and the defendant cannot rely on the same to avoid the lawfully registered lease.

Following the events occurring on the night/morning of 31/5/2004, the defendant moved off with his chattels. The plaintiff communicated with his then advocate Hon. Senior Counsel Satish Gautama who addressed the defendant through Managing Director on the issue of the defendant ***“entering the petrol station and carrying a raid with 50 people involved and number of vehicles reminiscent of an early morning attack. The plaintiff’s goods damaged estimated at Kshs.100,000/= or Kshs.150,000/=”***.

The letter warned the defendant of a suit to be filed for ***“anticipatory damages which will be substantial agreed rental derived by my client for un expired term from 1/6/2004 to 31st May 2016 would have been Kshs.98,962,500/= . In addition exemplary and punitive damages will be claimed for the manner in which forcible possession and his right under the lease have been trampled upon”***. A reply by defendant’s advocate was a two sentence letter denial of liability on 26/6/2004.

As pointed above, it is clear all requirements and change of user and necessary approvals were granted on the purchase of plot from Danson Industries construction of petrol station by the plaintiff. After registration of lease of 15 years by defendant, the change of user and all requirements by Kenya Government’s Head Lease had been complied with. The requirements of the sub lease were also complied with. Then the plaintiff desired to exchange old lease to a new head lease.

It is clear the sub lease was to be surrendered in exchange of New terms and conditions of Head Lease. The defendant had no objection of surrendering sub lease except he demanded that a replacement lease be prepared for registration together with surrender.

By 20/2/2004 there was exchange of correspondence because plaintiff said defendant was delaying process of surrendering replacement lease and surrender of lease. There was disagreement on reduction of rent to Kshs.300,000/=. By March 2004 the registration of surrender had not taken place because the defendant did not present the documents. Then on 21/5/2004 the defendant said they were moving out of the plot on 31/5/2000 which they did as Satish Gautama explained in his letter of same date.

In view of what is stated above, it is clear the property upon which petrol station was registered in the name of the plaintiff. The plaintiff stated that at the time he purchased the land the process of change of user was in progress the previous owner had applied for change of user and all conditions required were complied with when the defendant through its Senior Officers found on the plot was a petrol station and proceeded to arrange to enter into a lease agreement.

There are documents exhibited to prove the position. Eventually the defendant took possession and installed a dealer. On 29/6/2004 the plaintiff filed an affidavit against the title in support of an application under **Section 45** of the **Registration of Titles Act** for the withdrawal of an entry of a lease which has been terminated. The document was registered on 1st July the year 2004. In that affidavit the plaintiff states that the lease between him and the defendant moved was terminated when defendant out of the premises before the expiration of the term which was to expire on 30/5/2016 and that from 1/8/2004 he wanted to let the premises to a new tenant.

Let it be noted that on 1/6/2004, the defendant was due to pay Kshs. 14.4 million but had not paid. The defendant’s evidence was given by DW1 George Njoroge Mwangi who was the Group Assistant Managing Director of defendant. He admitted there was a lease in respect of plaintiff’s plot L.R. 209/13700. There was also a license to operate petrol station given to the operator not the landlord. He testified of how the Government wanted to extend the road and therefore the space of petrol station would be reduced. He is the one who wrote the letter dated 21/5/2004 to the plaintiff notifying him that the defendant would move out their equipment on 31/5/04 and that they were to discuss handover.

However, it is to be noted that the defendant came at night of 31/5/04. He admitted receiving the letter from Gautama, Advocate. He said that at that time the head lease did not allow for petrol station. He said he did not see any approvals. He testified as if he wanted to renegotiate the terms of the lease all over again, saying defendant was not making money because rent was too high and it was unbearable. He admitted he went to the petrol station on 31/5/04.

In cross-examination he admitted that change of user was obtained as they were operating the station. See exhibit 13. He confirmed the issue of replacement lease and surrender of the defendant’s lease. He confirmed that he wanted rent reduced. The defendant was not making profit. He testified that the advocates advised them to pull out on the ground that the documents were not in order although they had operated for 3 years out of 15 years. He said:-

“6 months later I opted to terminate the lease.”

During the evidence of the defendant’s witness, at no time did he show that the operations of the

petrol station was interrupted by any concerned. The defendant's counsel made oral submissions. Firstly, he submitted that the plaint discloses no cause of action saying that the plaintiff got possession from 21/5/2004. Defendant raided the property and removed goods belonging to it and failed to pay Kshs.14,400,000/= to plaintiff anticipatory damages Kshs.101,574,900/= for remainder of fixed period of 15 years.

No disclosure of damages for repudiation of contract and acceptance of that situation by innocent party pleaded high-handed manner of breach cannot give award to exemplary damages. On this issue Mr. Ismail cited the case of **Total Oil vs. Thompson Garages 1971 All E.R.** and **Obongo vs. Kisumu County Council 1971 E.A.** where it was held that the law concerning exemplary damages in tort is authoritatively set out in **Rookes vs. Bernard.** The effect of **Rookes vs. Bernard** is that the exemplary damages for tort may only be awarded in two classes of cases:-

- 1. Where there is oppressive, arbitrary or unconstitutional conduct by a servant of government and;***
- 2. where the defendant's conduct was calculated to give him some benefit not necessary financial at the expense of the plaintiff (or where it is authorized by statute).***

He further submitted on the issue of repudiation of contractual obligations, acceptance and confirmation. This is not a contract but a demise of lease registered and valid in everyway. A lease of immoveable property determines:-

- by efflux of time;
- where time is limited conditionally on the happening of some event, by happening of such event;
- where the interest of lessor in the property terminates by express surrender in case the lessee yields up his interest under the lease to the lessor under mutual agreement between them by implied surrender or by forfeiture or on expiration of notice to quit.

On determination of lease the right of the lessee to continue in possession of the premises comes to an end and for any period he continues to occupy the premises thereafter he becomes liable to pay damages for use and occupation at the rate of which the landlord could have let out the premises.

Termination by lessee is not provided for in ITPA or for a breach of covenant by lessor. The counsel relies on Atkins Court Forms Volume 12 (2nd Edition) at page 395 where there is a form of pleading in a case of ***"damages for breach of contract"*** and submits that the plaintiff did not plead in that manner therefore he has no case (Form 36) and the case of **Total Oil Great Britain Ltd. vs. Thompson Garages (Biggin Hill) Ltd.** was relevant. This was concerning the agreement between Oil Company and a dealer. Lease of petrol station by oil company tenant agreeing to take all supplies of oil from landlord. There arose some disagreements as a result of which the oil company sought an injunction to restrain the dealer from obtaining oil from other sources other than the oil company (plaintiff) in breach of the agreement. It was held that the disagreements bringing new stipulations as to payment amounted to a repudiation of the contract and the dealer was thereupon entitled to accept that repudiation of contract and obtain supplies elsewhere.

The agreement and the lease were not two separate transactions but one composite legal transaction and a lease unlike an ordinary contract did not come to an end on repudiation and acceptance. The lease subsisted,

"a lease is a demise, it does not come to an end like an ordinary contract on repudiation and acceptance."

In this case the dispute is only on lease between oil company (defendant) and the land owner. There was breach of the lease. The defendant indicated the intention to move out and did move out by 31/5/2004. On 1/6/2004 the defendant was due to pay rent. It did not. There was non payment of rent. As stated in the above authority a lease is not terminated by the principle of repudiation and acceptance.

In his evidence, the plaintiff stated that the dealer at the petrol station was a company managed by his sons. He told his sons to take over running the station on the same terms as they were operating with defendant. DW1 Mr. Mwangi, stated that he went to the petrol station on 1/6/2004. He did not say he was carrying the payment of rent. He said he found the premises taken over by another person. The evidence is that the dealers at this station were the defendant's dealers. How did he know that they had changed the flag so to speak? He is the one who had said the defendant would vacate on 31/5/2004.

Later the plaintiff filed an affidavit under **Section 45 of the Registration of Titles Act, Cap. 281** where he indicated that he wanted to register another lease in favour of another tenant. This document was registered on 1/7/2004. By the time the plaintiff took this action the defendant had already moved out of the premises and had failed to pay rent due.

Defendant reiterated submissions that the plaintiff was in breach of Government law and the rules

of Nairobi City Council but there is no proof. On this issue the counsel cited the authorities of: (1) **Manji vs. Begum 1957 EA 101** – this was concerning sale of Mailo land in Uganda. It was necessary to obtain Governor’s consent. The transaction was said to be void. (2) **Kau vs. Noor Mohamed [1956] 23 EACA** – where the Nairobi City Council by its By Law made a criminal offence to permit occupation of unauthorized structures. It was held that no relationship of landlord and tenant would be created. (3) **Heptulla vs. Noor Mohamed [1984] KLR 580** where it was held that no court ought to enforce an illegal contract where the illegality is brought to its notice and if the person invoking the aid of the court is himself implicated in the illegality.

In this case the defendant was aware of all conditions of the head lease because it had collected and was keeping the original grant in its custody. Therefore, if there were any illegality the defendant was implicated and it should not take advantage. However, there is no illegality involved. The President has not complained. Nor has the City Council raised any complaint. This means that as the plaintiff shows all requirements of the law under the enacted laws and Local Authorities By-laws were complied. The authorities involved with registration of these transactions could not have committed illegalities in registration of transfer to the plaintiff and the lease in favour of the defendant.

On the issue of damages defendant submitted that the goods removed from the station was the defendant’s. The lease did not say that the lessee must occupy the demised premises therefore there was no breach in moving out of premises. No damages can be awarded. Further a party has to mitigate its loss. Defendant relies on Chitty on Contracts on page 1160 paragraph 1818:-

“Plaintiff cannot recover damages which he could have avoided by taking reasonable steps to mitigate the loss resulting from defendant’s breach.”

In this case he did not value property for rental purpose. He allowed his sons to continue dealership at a fee of Kshs.100,000/= p.m. It is submitted that plaintiff made no effort to obtain reasonable rent. He gave the property to his sons. Although Mr. Mwangi said the rent ought to be Kshs.500,000/= per month, it is clear the defendant terminated the lease because it wanted the rent to be lowered to Kshs.300,000/= per month.

The issue of surrendering lease to obtain a new lease was acceptable by the head lessor but the defendant delayed until the dispute on renegotiating rent arose and then the defendant decided to move out the premises and not to pay due rents. Here the defendant relies on the authority of **Bakshish Singh Brothers & Pan African Hotels Ltd.** where the matter was concerning contract. It was held a party is entitled to resist an action for breach of contract on any ground that is available even though before the action he gave no reason at all.

Then the defendant challenged the reliability of the plaintiff as a witness. His demeanor. There is on record that he was sickly and there is medical record. On the issue the case of **Githunguri** – the Court of Appeal said that:-

“This court is a court of law not of morals.”

In the case of **Fercomelal SARL vs. Mediterranean Shipping Co. (1988) 2 All ER** at page 747, it was said when one party wrongly refuses to perform obligation, this will not automatically bring the contract to an end.

“The innocent party has an option. He may either accept the wrongful repudiation as determining the contract and sue for damages. The owners are only entitled to be put in the position of having their ship on a charter which as soon as she got to Hariphong could legally have been cancelled.”

That is nominal charges.

The plaintiff has also filed a list of law applicable to his case. The defendant did amend defence and re-amended defence so as to plead illegality of the lease in that there was not the permitted user of petrol user and that the lease was contrary to **Section 39 of Government Lands Act, Section 5 of Petroleum Act, City Council of Nairobi By-Laws and Environmental Management Co-ordination Act.** These allegations were never proved in court. There is a principle in J. Beatson: Anson’s Law of Contract, 28th Edition (2002) Oxford University Press page 351.

On chapter headed ***“Statutory illegality”*** that statutes only imposes a penalty although the fact that a statutory offence has been committed in the cause of performance of a contract may render a contract unenforceable. It will not necessarily have this effect. For the law to prescribe that the commission of any unlawful act in the course of a contract should inevitably deprive the wrong doers of all contractual remedies might well inflict on the wrong doer a loss far in excess of statutory penalty. This would be unreasonable.

The penalty prescribed under **Petroleum Act** (now repealed by the **Energy Act 2006**) made pursuant to

Section 4 of the said **Act** is Kshs.500/= for every day on which contravention occurs. However, no evidence was led on the alleged contravention. The plaintiff also relies on the authority of **St. John Shipping Corporation vs. Joseph Ronk Ltd. [1957] 1 QB 267.** The statute prohibited to load a ship to such an extent that the load line was under water. It was held that illegal performance of a contract did not render the contract illegal.

The plaintiff again relied on the authority of **Sadavdin Sheriff vs. Tarlocham Singh S/O Singh [1961] EA** where it was held that although under the **Townships Ordinance** the licensing authority had a limited power to refuse a license, the rules themselves are not so worded as to indicate any intention of prohibiting contracts, but only of penalizing those who carry trades without a license, therefore the submissions that the contract, the subject matter of the counter claim was illegal was rightly rejected.

The authority of **Githunguri vs. Jimba Credit Corporation Ltd. – HCC No.3708/1988** it was said that the provisions of **Banking Act** was breached. It was held in High Court (holding 5) where a contract on its performance is implicated with the breach of statute this does not entail that the contract be avoided. If the statute is silent on the civil rights of the parties but penalizes the making or performance of the contract, the court considers whether the **Act** on true construction was intended to avoid contracts of a class to which the contracts belongs or whether it merely prohibited the doing of some **Act**.

In that case the effect of the contravention of the **Act** was to subject the financial institution to a penalty and the contract was not vitiated and was enforceable.

Upon considering all the above matters I have come to the conclusion that the defendant deliberately set on a cause calculated to bring to an end the lease entered between it and the plaintiff. The lease was for a fixed period of 15 years with an option to renew. The lease was registered and valid in all respects. On 31/5/2004 the defendant violently moved out at night and did not pay rent as due on 1/6/2004. The defendant abandoned the lease. The termination was unlawful. It was not in accordance with the manner a lease is terminated. In order to mitigate the loss he allowed the defendant's dealers to take the petrol station and to pay Kshs.100,000/= per month. The defendant did not pay any more rent under the obligation to pay rent contained in the lease.

The plaintiff is therefore entitled to his claim of Kshs.101,574,900/=. There will be deduction of the amount received from the present dealers in the sum of Kshs.100,000/= per month from 1/6/2004 to 31/5/2016 being 12 x 12 x Kshs.100,000/= leaving a sum of Kshs.97,174,900/=. No exemplary or punitive damages have been proved and therefore no award shall be made in this claim.

I therefore, enter judgment for plaintiff against the defendant in the sum of Kshs.97,174,900/= plus interest at court rates and costs of the suit.

Orders accordingly.

DATED, SIGNED and DELIVERED at Nairobi this 21st day of December 2009.

JOYCE N. KHAMINWA
JUDGE