



**REPUBLIC OF KENYA  
IN THE HIGH COURT OF KENYA  
AT NAIROBI (NAIROBI LAW COURTS)**

**Civil Suit 96 of 2005**

**CHARLES MWANGI KAGONIA .....**  
**APPLICANT**

**VERSUS**

**DHRAJ D. POPAT**

**MANSUKHLAL D. POPAT T/ADAYALAL BHANJI & SONS.....1<sup>ST</sup>**  
**DEFENDANTS**

**CASH CROP AUCTIONEERS.....2<sup>ND</sup>**  
**DEFENDANT**

**JUDGMENT**

This suit concerns a Lease Agreement which was entered into between the plaintiff and the defendant on 18<sup>th</sup> February 2003 whose term was to last for 5 years and 1 month.

The said lease provided that the plaintiff would pay rent regularly 6 months in advance. It also provided that the plaintiff would not assign or sublet the premises or part thereof without written consent of the defendant. The plaintiff breached the two conditions above. He sublet part of the premises to third parties and defaulted in rent payment and was in arrears to the tune of Shs.284,375/=.

The defendant sent auctioneers, the second defendant to levy distress for rent. This forced the plaintiff to move to court to stop the proclamation of his goods and obtained an injunction pending the hearing of this suit. The plaintiff admits that he had sublet part of the suit premises and that he had defaulted in rent payment and was in arrears but contends that this was occasioned by the defendant for non-disclosure of material facts when the Lease Agreement was signed. He stated that after taking possession of the suit premises he renovated it and applied to the bank for a loan to enable him run his business but the bank informed him that it could not approve the loan since the main lease of 99 years between the Government and the defendant had expired. When he informed the defendant about it, the defendant admitted that the 99 years lease between him and the Government had actually expired but he had applied for extension and was waiting. The plaintiff further told the court that because he could not get the loan his business went down and he was not able to pay the rent regularly.

On the 29<sup>th</sup> January 2005 the defendant sent auctioneers to his premises who proclaimed his goods. It is

the plaintiff's contention that since the lease between the defendant and the Government had expired at the time he entered into the Lease Agreement with the defendant which fact the defendant never disclosed, the defendant has no right to claim rent from him. Under the purported lease, the defendant's interest over the suit premises having ceased at the expiry of the term of the lease between the defendant and the Government.

The second defendant was only sued in his capacity as an auctioneer who was sent to the suit premises by the first defendant to levy distress for rent and this fact is admitted. The 1<sup>st</sup> defendant concedes that at the time he entered into a Lease Agreement with the plaintiff over the suit premises the 99 years lease between him and the Government had actually expired but he had applied for extension and was waiting. He also admitted that the lease between him and the plaintiff could not be registered since the main lease had expired.

The plaintiff took possession of the suit premises and paid rent regularly as agreed until around December 2004 when he ran into arrears. The defendant sent auctioneers to levy distress for rent but the plaintiff resisted and filed this suit seeking orders to stop the defendant from demanding rent from him based on an illegal Lease Agreement.

The defendant on being served with summons filed a defence and counterclaim in which he urged the court to dismiss the plaintiff's claim and enter judgment for the counterclaim.

As I had said earlier the defendant concedes that at the time he entered into the Lease Agreement with the plaintiff, the lease between him and the Government had expired but he had already applied for extension. Since the lease had expired there was nothing for extension. What has ceased to exist by operation of law cannot be extended. What is the position of the law about extension of leases?

Section 60 of the Registered Land Act provides:

*“The agreements, and conditions contained in any registered lease may be varied negatived or added to and the period of any registered lease may from time to time be extended by an instrument executed by the lesser and the lessee for the time being and registered before the expiration of the then current term of the lease.”*

As admitted above the defendant entered into a lease agreement after the lease between him and the Government had expired and his interest on the suit premises had ceased. This was therefore an illegal contract.

It is the plaintiff's contention that since the lease between the defendant and the Government had expired at the time he entered into the lease agreement with him which fact though within the knowledge of the defendant he never disclosed to him, the defendant has no right to claim rent under the purported lease, the defendant's interest over the suit premises having ceased at the expiry of the term of the lease between the defendant and the Government.

The defendant on his part submits that he is entitled to the rent arrears as per the Lease Agreement which provided thus:

- (1) That the plaintiff would pay rent regularly without delay or default.
- (2) That the plaintiff would not assign or sublet the premises or part thereof without written consent of the defendant.

The plaintiff having defaulted in rent payment and having sublet part of the premises without the written consent of the defendant he had breached the terms of the lease. Having breached the terms of the Lease Agreement he did not come to court with clean hands. At this juncture, I would say that neither of them came to court with clean hands.

The defendant had entered into the Lease Agreement with full knowledge that his interest in the suit premises had ceased after the lease between him and the Government had expired while the plaintiff had sublet part of the suit premises without the written consent from the defendant and had defaulted in rent payment.

The defendant's interest in the suit premises having ceased, he could not enter into a valid Lease Agreement with the plaintiff. The contract was therefore illegal. The effect of the order sought is to give effect to an unlawful contract. Since the defendant had entered into the Lease Agreement fully aware that his interest in the suit premises had ceased he alone has to bear the illegality.

The following passage in the ***Judgment of Lord Morris of Borth-Gest in the Case of Mistry Amar Singh V. Kulobya [1963] EA 408 at page 414 Letter D***, admirably sums up the position of the parties in this case:-

***“Ex Turpi Causa non Ovitir action. This old and well known legal maxim is founded in good sense and expresses clear and well recognized legal principle which is not confined to indictable offences. No court ought to enforce an illegal contract, or allow itself to be made an instrument of enforcing obligations alleged to arise out of a contract or transaction which is illegal, if the illegality is brought to the attention of the court and if the person invoking the aid of the court is himself implicated in the illegality. It matters not whether the plaintiff has pleaded the illegality or whether he has not. If the evidence adduced by the plaintiff proves the illegality the court ought not assist him.”***

The obvious rights which the defendant has as a leasehold owner had ceased. The issue of extension of an expired lease is barred by statute which provides that the term of a registered lease may be extended by an instrument executed by the lessor and the lessee for the time being and registered before the expiry of the then current term of the lease. The insurmountable hurdle which faces the lessee is that he cannot establish lawful occupation. A party cannot be allowed to benefit from an illegality. Once the 99 years lease between the Government and the defendant expired and he did not apply for extension which must be granted and executed by the lessee and the lessor and registered before the expiry of the then current term the interest of the lessee ceases and once the interest of the lessee ceases the land becomes available for allocation by the Commissioner of Land who is at liberty to allocate the same to any deserving applicant following the laid down procedures.

For the court to grant the prayers sought is to give effect to an unlawful contract. Neither the plaintiff nor the defendant can be allowed to enforce an unlawful contract.

For the above reasons, I dismiss both the plaintiff's suit and the defendant's counter-claim.

Each party to bear own costs.

Dated and delivered at Nairobi this 16<sup>th</sup> day of February 2006.

**J.L.A. OSIEMO**

JUDGE