



**REPUBLIC OF KENYA**

**IN THE ENVIRONMENT AND LAND COURT**

**AT NAIROBI**

**ELC CASE NO. 27 OF 2014**

**REGINA GERTRUDE NJOGU ALIAS REGINA NJOGU.....1<sup>ST</sup> PLAINTIFF**

**PURITY WAMBUI NJOGU.....2<sup>ND</sup> PLAINTIFF**

**(Suing as Administrators of the Estate of the Late James Evans Njogu)**

**VERSUS**

**GAMING INTERNATIONAL KENYA LIMITED.....DEFENDANT**

**JUDGEMENT**

1. The Plaintiffs filed the Amended Complaint dated 29/03/2016 in which they contended that by a lease dated 20/12/2011, the 1<sup>st</sup> Plaintiff's late husband, James Evans Njogu, entered into a lease with the Defendant for the premises comprising the ground and mezzanine floors of Odeon Plaza being the property known as land reference number 209/4400 Nairobi ("the Suit Property"). The lease which was duly registered on 28/03/2012, was for a period of 6 years with the initial rent being 2,000,000/= per month for the first two years payable quarterly in advance on the first day of each quarter. The rent was to be increased every two years at the minimum rate of 15%. The lease provided that if the rent was to remain unpaid on the due date whether or not it was formally demanded, the lessee would pay the lessor interest at the rate of 5% above the prevailing bank lending rates as quoted by the Bank of India.

2. The Plaintiffs' claim was that in breach of the lease, the Defendant terminated the lease and vacated the Suit Property on 31/10/2013 without restoring the alterations it had made to the premises and that it was in arrears of Kshs. 28,867,986/= on account of rent, unpaid electricity bill of Kshs. 11, 418.25/= and an unpaid water bill of Kshs. 2,730/=; all totaling to Kshs. 28,882,134.25/=. The Plaintiffs also claimed that they lost income due to the Defendant's breach of the lease terms which caused them loss of prospective and anticipated rent. The Plaintiffs sought the sum of Kshs.28,882,134.25/= and general damages for repudiation of the lease, costs of restoration of the Suit Property to its original condition, loss of rental income, interest and costs of the suit.

3. The Defendant filed its Defence and Counterclaim dated 28/02/2014 in which it admitted that it was a tenant of the late James Evans Njogu in the premises described as the ground and mezzanine floor of Odeon Plaza. However, it contended that the lessor breached the lease by frustrating the lease forcing it to terminate it. The Defendant averred that by endorsing his signature on the sublease agreement between the Defendant and Smothers Limited, the lessor allowed it to sublet part of the Suit Property, being the ground floor to Smother Limited for a period of 4 years and 8 months from 19/04/2013. It averred that Smothers Limited took up the premises and renovated it but just when it was ready for occupation on or about September 2013, the lessor denied it access alleging that he was misled, which made the Defendant to continue incurring losses and damages while the lessor continued to demand rent for both the mezzanine and ground floors notwithstanding the fact that the ground floor was now unutilized and it was not generating any income because the lessor had denied the Defendant and the sub-tenant, Smothers Limited, access to it.

4. It was the Defendant's case that the lessor acted fraudulently and misrepresented himself by executing a sub-lease agreement that he never intended to honour; failing to honour the sublease agreement between the Defendant and Smothers Limited dated 11/04/2013; and failing to give the Defendant peaceful enjoyment of the Suit Property. It prayed that the Plaintiffs' suit be dismissed and counterclaimed for general damages for breach of the lease agreement, damages for loss of business and costs of the counter-claim.

5. The 2<sup>nd</sup> Plaintiff testified in court. She produced the lease agreement dated 20/12/2011 between the Defendant and the late James Evans Njogu. She also produced the letter dated 24/06/2013 in which the Defendant had through its advocates admitted that it was in arrears and proposed to pay Kshs. 5,000,000/= every first day of July, August, September and October 2013 and Kshs.100,000/= daily except on public holidays and weekends. She also produced a copy of the letter dated 17/10/2013 authored by the Defendant giving two weeks' notice to vacate the Suit Property by 31/10/2013.

6. The Plaintiff's testimony was uncontroverted as the Defendant did not participate in the hearing of the case. The court notes that the

Defendant's advocate made an application and was allowed to cease acting for the Defendant. The court directed the Plaintiffs to serve the Defendant and there is evidence that the Defendant was duly served through registered post but failed to attend court.

7. The Plaintiffs submitted that the failure by the Defendant to call evidence meant that the defence it filed could not be used to challenge the Plaintiffs' case and therefore the Plaintiffs' case remained uncontroverted and unchallenged. It also submitted that the Defendant's counterclaim was not proven as provided by Section 107 of the Evidence Act. It relied on the decision in **North End Trading Company Limited (Carrying on the Business under the registered name of Kenya Refuse Handlers Limited v City Council of Nairobi [2019] eKLR** where the court held that a defence in respect of which no evidence was adduced to support it could not be used to challenge the plaintiff's case.

8. The court has considered the pleadings, evidence adduced and the submissions filed by the Plaintiffs. The Plaintiffs led evidence in support of their case, which was unchallenged. The claims made by the Defendant in its defence and counter-claim were not proved. The Defendants' counterclaim dated 28/02/2014 is dismissed with costs to the Plaintiffs.

9. The Plaintiffs did not prove how the Defendant altered the premises and the court cannot award the costs for the restoration of the Suit Property. The Plaintiffs did not prove their claim for loss of income.

10. The court awards the Plaintiffs a total of Kshs. 28, 882,134.25 /= being the rent arrears, water and electricity bills owed by the Defendant together with the costs of the suit.

**DELIVERED VIRTUALLY AT NAIROBI THIS 22<sup>ND</sup> DAY OF MARCH 2021**

**K.BOR**

**JUDGE**

**In the presence of:-**

Mr. V. Owuor- Court Assistant.

No appearance for the parties.