



Salim (Suing as the Administrator of the Estate of the Late Mohamed Salim Mbarak) v Sidik Abdulrehman Abdalla t/a Baitulam House (Environment & Land Case E080 of 2021) [2025] KEELC 1031 (KLR) (4 March 2025) (Judgment)

Neutral citation: [2025] KEELC 1031 (KLR)

**REPUBLIC OF KENYA
IN THE ENVIRONMENT AND LAND COURT AT MALINDI
ENVIRONMENT & LAND CASE E080 OF 2021
FM NJOROGE, J
MARCH 4, 2025**

BETWEEN

SALIM MOHAMED SALIM (SUING AS THE ADMINISTRATOR OF THE ESTATE OF THE LATE MOHAMED SALIM MBARAK) PLAINTIFF

AND

SIDIK ABDULREHMAN ABDALLA T/A BAITULAM HOUSE DEFENDANT

JUDGMENT

1. Vide a Plaint dated 20/9/2021, the Plaintiff herein impleaded the Defendant and sought for the following reliefs:
 - a. A declaration that the Defendant is in breach of the lease agreement dated 1/7/2004 and the variation of lease agreement dated 11/3/2009.
 - b. An order of a permanent injunction against the Defendant restraining him, his agents, servants, employees and/or representatives from interfering with the Plaintiff's quiet possession of Plot No. Lamu/Block III/160.
 - c. An order for vacant possession and/or eviction of the Defendant from Lamu/Block III/160 belonging to the Plaintiff.
 - d. Damages for breach of lease agreement dated 1/7/2004 and the variation of lease agreement dated 11/3/2009.
 - e. That the costs of this suit be borne by the Defendant.
2. The facts pleaded in the Plaint were that the parties herein entered into an agreement dated 1/7/2004 to lease Lamu/Block III/160 together with the buildings and improvements thereon (hereinafter "the suit property"), for a period of 25 years. The Plaintiff was identified as the Lessor, while the



Defendant's company, Shella Island Hotel Limited, as the Lessee. Subsequently, the parties signed a variation agreement dated 11/3/2009 where the Lessee changed to the Defendant's name herein. The variation agreement also included a clause barring the Defendant from sub-letting or transferring his interests to a third party without the written authority of the Plaintiff.

3. The Plaintiff averred that the Defendant has continued to breach the terms of the agreements by failing to pay rent as prescribed, particularly, he has failed to : remit the rent for the period beginning January 2021 to September 2021; failing to maintain the interior of the premises in good and leasable condition; sub-letting the premises to a third-party contrary to the agreement; using part of the graveyard contrary to the restriction registered against the title deed; and failing to honor the Plaintiff's termination notice dated 18/6/2021.
4. The Defendant entered appearance and filed a defence and counterclaim dated 25/10/2021. The Defendant denied the allegations that he has refused to pay rent. He pleaded that he has always made payment of rent as when it was due and owing and any such delays were explained and acknowledged by the Plaintiff whom as of late has severally refused to accept such payments. In his counterclaim, the Defendant made a claim against the Plaintiff for a breach of the lease agreement and improper termination of the lease.
5. The particulars of breach were set out therein. The Defendant averred that the Plaintiff has breached the terms of the lease agreement by issuing a one-month notice dated 18/6/2021 to terminate the lease, as opposed to issuing a six months' notice; that the said notice is improper for failure to take due regard to such improvements and make an offer to settle the costs of developments valued at Kshs. 25,000,000/-. The Defendant thus counterclaimed for these orders: -
 - a. That the Defendant in the counter-claim be ordered to pay for damages for breach of the lease agreement and improper termination of lease.
 - b. That the Defendant in the counter-claim be ordered to pay specific damages of a total of Kshs. 25,000,000/- for the improvements made on the suit property.
 - c. Costs of the counter-claim and interest.
 - d. Any such order as this court may please to order.
6. Expectedly, the Plaintiff filed a response to the defence and counter-claim dated 28/1/2022. He averred that the lease did not allow for major developments and if any were done, they were done illegally. The Plaintiff denied the allegations of improper termination and stated that the only clause requiring a 6 months' notice is in reference to the lessee. He added that the Defendant made renovations to the suit property before execution of the lease, and that no further renovations were done after execution of the lease in 2004. The Plaintiff denied owing the Defendant Kshs. 25,000,000/- as no major developments were done to the suit property.
7. Notably, when the suit came up for hearing on 31/10/2024, the Defendant was absent thus his counter-claim was dismissed for non-attendance. The Plaintiff testified on his own behalf and did not call any other witness.
8. He adopted his written statement filed on 22/9/2021 as his evidence-in-chief. He equally produced as PEXH 1-8 the documents listed in the list of documents dated 20/9/2021. The Plaintiff told the court that the Defendant neglected the suit property from the date of the notice. In addition, he told the court that the Defendant had not paid the rent from January 2021 to the date of his testimony.



Plaintiff's submissions

9. On whether the Defendant breached the lease agreement and variation agreement thereto, counsel referred the court to Clause 1 (c) and 3 (a) of the lease agreement and 1 (d) of the Variation. He also relied on the definition of breach of contract as was expressed in the book Contract Law 8th Edition by Robert Duxbury at page 158, in the Oxford Advance Learner's Dictionary- International Student's edition, page 169, and in the Law Dictionary 6th Edition, page 63. He submitted that the Defendant acknowledged in his witness statement to having rent arrears. To counsel, this should be treated as an admission. To support this argument, counsel relied on the case of Cheruiyot v Afrocan Merchant Assurance Co. Limited; Ngugi & another (Interested Parties) [2023] KEHC 26529 (KLR).
10. Counsel further submitted that the present suit meets the parameters provided under Section 3 of the Law of Contract Act to warrant granting the reliefs sought and rightly so under Section 73 of the Land Act, 2012. Counsel asserted that the Plaintiff has equally discharged the burden of proof required of him in this suit under the provisions of Section 107 and 112 of the Evidence Act and as was expressed in the case of Francis Wainaina Kirungu (suing as the personal representative of the estate of John Karanja Wainaina) v Elijah Oketch Adella [2015] eKLR.
11. Counsel further submitted on damages for breach of contract. Quoting the cases of Woodar Investment Development Limited v Wimpey Construction (U.K) Ltd, HL, 1980 and CBA Property Holdings Limited v Ahmednasir Maalim Abdullahi & another (ELC E277 OF 2020) [2022] KEELC 2564 (KLR), counsel submitted that despite being notified to clear any outstanding arrears, the Defendant has refused to do so and left the suit property unused and unkempt making it inhabitable. As such, counsel argued that he should be condemned to damages for breach.
12. Counsel urged the court to award the costs of this suit to the Plaintiff and be guided by Section 27 of the Civil Procedure Act, and the following cases: Pete Gichihi Njuguna v Jubilee Insurance Co. Ltd [2016] Eklr; Election Petition No. 6 of 2013 Party of Independent Candidate of Kenya & Another v Mutula Kilonzo & Others; and Republic v Rosemary Wairimu Munene (ex-parte Applicant) v Ihururu Dairy Farmers Co-operative Society Ltd JR Application No. 6 of 2004.

Analysis

13. Having considered the pleadings, evidence and submissions filed, the issues for determination are: -
 - i. Whether the Defendant breached the Lease entitling the Plaintiff to damages thereof.
 - ii. Whether an order for eviction should issue against the Defendant.
 - iii. Who bears the costs of the suit?
14. Breach of Contract is defined by the Black's Law Dictionary 9th Ed. at page 213 as: "Violation of a contractual obligation by failing to perform one's own promise, by repudiating it, or by interfering with another party's performance."
15. A claimant for general damages for breach of contract is entitled to damages, though nominal, notwithstanding that they did not prove the loss suffered. In the Anson's Law of Contract, 28th Edition at pg 589 and 590 states that: -

"Every breach of a contract entitles the injured party to damages for the loss he or she has suffered. Damages for breach of contract are designed to compensate for the damage, loss or injury the claimant has suffered through that breach. A claimant who has not, in fact,



suffered any loss by reason of that breach, is nevertheless entitled to a verdict but the damages recoverable will be purely nominal”.

16. The existence of the lease and variation agreements was not disputed in this case. In fact, due to the Defendant’s failure to adduce any evidence, the Plaintiff’s evidence stands uncontroverted. However, this does not mean that the Plaintiff’s case will automatically succeed. The Plaintiff still bears the burden to prove their case on a balance of probabilities as is required by law. In the case of *Gichinga Kibutha –v- Caroline Nduku* (2018) eKLR the Court held that:

“It is not automatic that instances where the evidence is not controverted the Claimant shall have his way in Court. He must discharge the burden of proof. He must proof his case however much the opponent has not made a presence in the contest.”

17. The Plaintiff stated the particulars of breach to be neglecting to pay rent, failing to maintain the suit property and sub-letting the suit property to a third party. The rent payable was clearly stated under Clause 1 (A) of the lease agreement dated 1/7/2004, and it was to be paid in advance. The Plaintiff claimed that the Defendant had defaulted on that term beginning January 2021. This position is in fact echoed in the statement of defence and counterclaim and Defendant’s advocate’s letter dated 1/6/2021. The Defendant did not deny being in arrears. It is therefore evident that the Defendant was in breach of contract, as far as the said clause is concerned.

18. I am however of the opinion that the other two particulars of breach were not substantiated to the satisfaction of this court. I say so because firstly, the alleged sub-lease produced in evidence by the Plaintiff, was neither signed by the Defendant nor the third party. It does not therefore, hold any probative value. Secondly, there was no any form of official valuation report showing or particularizing the state of the suit property before and after the agreement. It is therefore quite difficult to ascertain whether or not the Defendant failed to maintain and renovate the suit property.

19. In *Dormakaba Limited v Architectural Supplies Kenya Limited* (Civil Suit 136 of 2020) [2021] KEHC 210 (KLR) (Commercial and Tax) (10 November 2021) (Judgment), Mativo J had this to say: -

“Damages in contract are therefore intended to place the claimant in the same position as he would have been in if the contract had been performed. As early as in 1848 in *Robinson v Harman* it was held “the rule of the common law is, that where a party sustains a loss by reason of a breach of contract, he is, so far as money can do it, to be placed in the same situation, with respect to damages, as if the contract had been performed...”

In a recent decision of this court, I stated that to successfully claim damages, a Plaintiff must show that: (a) a contract exists or existed; (b) the contract was breached by the defendant; and (c) the Plaintiff suffered damage (loss) as a result of the defendant’s breach. The Plaintiff ‘is not required to establish the causal link (between breaches of an agreement and damages) with certainty, but only to establish that the wrongful conduct was probably a cause of the loss, which calls for a sensible retrospective analysis of what would probably have occurred, based upon the evidence and what could be expected to have occurred in the ordinary course of human affairs, rather than an exercise in metaphysics.’ A Plaintiff who at the end of a trial can show no more than a probability that he would not have suffered the loss if the contract had been properly performed, will succeed unless the defendant can discharge the onus of proving that there was no such probability. The test to be applied is whether there is evidence upon which a court, applying its mind reasonably to such evidence, could or might (not should, nor ought to) find for the Plaintiff. This implies that the Plaintiff has to make out a prima facie case, in the sense that there is evidence relating to all the elements



of the claim. The court must consider whether there is evidence upon which a reasonable man might find for the Plaintiff.”

20. As already stated, the existence of the agreements is not in dispute. I have also established that the Defendant was in breach, and continues to be in breach of the agreements. Having established his claim to the required standard, damages for breach would be in that case, an adequate remedy or substitute for performance. The lease was for a period of 25 months, and the breach occurred as from January 2021. I will therefore award damages in accordance to the rent that was to be paid for the remainder of the contract period.
21. The lease was for a term of 25 years with effect from 1/7/2004. The defendant ceased payment of rent in January 2021. The relevant band for the period of default is Kshs 20,000/- per month according to paragraph 5 (iv) of the plaint. The rent arrears from that date to the date of this judgment is Kshs 1,000,000/= (Kenya shillings one million only). I will also award the plaintiff the sum of Kshs. 300,000/= (Kenya shillings three hundred thousand only) being general damages for breach of contract.
22. Accordingly, I find for the Plaintiff and enter judgment in favour of the Plaintiff against the defendant for the total sum of Kshs. 1,300,000/- plus costs of the suit. The said sums shall attract interests at court rates from date of filing suit and date of taxation respectively. For avoidance of doubt, the reliefs sought in the Plaint are granted as follows:
 - a. A declaration is hereby issued declaring that the Defendant is in breach of the lease agreement dated 1/7/2004 and the variation of lease agreement dated 11/3/2009;
 - b. An order of a permanent injunction is hereby issued against the Defendant restraining him, his agents, servants, employees and/or representatives from interfering with the Plaintiff's quiet possession of Plot No. Lamu/Block III/160;
 - c. The defendant shall forthwith allow the plaintiff vacant possession in default of which he shall be evicted from Lamu/Block III/160;
 - d. Kshs 500,000/= being damages breach of the lease agreement dated 1/7/2004 and the variation of lease agreement dated 11/3/2009
 - e. The defendant shall pay to the plaintiff Kshs 1,000,000/= being arrears of rent accrued since January 2021 up to the date of this judgment;
 - f. The costs of this suit shall be borne by the Defendant.
23. It is so ordered.

DATED, SIGNED AND DELIVERED AT MALINDI VIA ELECTRONIC MAIL ON THIS 4TH DAY OF MARCH 2025.

MWANGI NJOROGE

JUDGE, ELC, MALINDI

