



Kenya Commercial Bank of Kenya Limited & another (Suing as Executors of the Estate of the Late Prof. Simon Ominde) v Godfrey Ngatia Njoroje t/a Karen Auto Bazaar (Environment & Land Case 2099 of 2007) [2024] KEELC 603 (KLR) (1 February 2024) (Judgment)

Neutral citation: [2024] KEELC 603 (KLR)

**REPUBLIC OF KENYA
IN THE ENVIRONMENT AND LAND COURT AT NAIROBI
ENVIRONMENT & LAND CASE 2099 OF 2007
LC KOMINGOI, J
FEBRUARY 1, 2024**

BETWEEN

**KENYA COMMERCIAL BANK OF KENYA LIMITED 1ST PLAINTIFF
ELIZABETH OGAJA 2ND PLAINTIFF
SUING AS EXECUTORS OF THE ESTATE OF THE LATE PROF. SIMON
OMINDE**

AND

GODFREY NGATIA NJOROGE T/A KAREN AUTO BAZAAR DEFENDANT

JUDGMENT

1. By a Plaint dated 8th December 2006 filed at the High Court and later transferred to this court, the Plaintiffs claim that they got into a 6 year tenancy agreement with the Defendant for suit premises LR No. 13400 Karen with effect from 1st December 2004. The Defendant continuously defaulted in his rent payment and on 27th February 2006, they issued him a notice to terminate the tenancy effective 31st March 2006. Upon expiry of the said notice, the Defendant refused to deliver vacant possession of the premises and has been residing thereon to date. They thus sought for:
 - a. An order for vacant possession of the premises known as LR No. 13400 Karen comprising of 0.5 acre land with a 3 bedroom house with other buildings.
 - b. Mesne profit at current market rates on the present value of the property from 31st March 2006 until the date of handing over possession.
 - c. Interest on (b) above.
 - d. Costs of suit and interest.



2. In the Amended Statement of Defence and Counterclaim dated 26th April 2012 the Defendant denied either being in rent arrears of the suit premises LR; No. 13400 or receiving a termination notice. He confirmed being in possession of the suit premises as well as continuously adhering to his rental obligations. In his counterclaim, he seeks Kshs. 12,131,080 arising from goods carried away by the Plaintiffs' auctioneers on 24th June 2011 and sought for the following reliefs:
 - a. Kshs. 12,131,080 as prayed in paragraph 11 of the counterclaim;
 - b. Interest;
 - c. Costs of this suit.
3. The Plaintiffs in their reply to defence and defence to counter claim contested that their tenancy termination notice was defective and the allegation that the Defendant had been paying the rent. They also contested the accusation that goods worth Kshs. 12,131,080 were carried away stating that only goods worth Kshs. 6,300 were collected as shown in the inventory. They thus sought for dismissal of the counterclaim with costs.

Evidence of the Plaintiffs

4. PW1, Wycliffe Ongwae a Director of Tysons (K) Limited the property manager of the suit premises adopted his witness statement as part of his evidence in chief and produced eight documents marked as P. Exhibit 1-8.
5. On cross examination he stated that his firm sent the Defendant an offer letter dated 24th November 2004 for a six year lease starting 1st December 2004. Prior to the letter of offer, they had various discussions with the Defendant who agreed to apply for change of user from residential to commercial. Although the condition was not stipulated in the agreement there was a letter from the Defendant confirming that he would be responsible for the change of user. This letter was not produced in court. He stated that the change of user would take approximately six months to procure and would involve an Environment Impact Assessment (EIA) if necessary. The Defendant indicated that he would undertake a temporary change of user which would not warrant amendment of title. He went on to state that the Defendant confirmed to them that he had obtained the change of user but in early 2005, he indicated that he had been harassed by Nairobi City Council and he was reminded to apply for a change of user. This was communicated through a letter. This letter was also not produced in court.
6. When the Defendant defaulted in payment rent he was issued with a one month termination notice. The lease was then terminated due to breach of terms and they levied distress for rent. Every levy for rent distress was accounted for and the defendant had a copy of the inventory. He stated that the value of goods levied was Kshs. 6,300 and not Kshs. 12 million as claimed by the Defendant. He stated he was neither aware that the Defendant's motor vehicle was attached nor that the Defendant had deposited Kshs. 300,000 in court and if at all the Kshs. 300,000 had been deposited, they would credit it. He stated that at the time this suit was instituted, the rent arrears was stood at Kshs. 3,850,000. He also admitted that the Defendant paid Kshs. 30,000 as legal fees for drafting of the lease but the lease was never prepared and they were ready and willing to refund the said money.
7. On Re-examination he confirmed that the tenant was to effect a temporary change of user.
8. PW2, Elizabeth Mary Ominde Ogaja the 2nd Plaintiff and co-executor in the Estate of the late Prof. Simon and a lecturer at Kabarak University adopted her witness statement as part of her evidence in chief she also produced as exhibits the documents in the bundles documents.



9. On cross examination she confirmed having leased the premises to the Defendant with effect from 1st December 2004 for 6 years as per the letter of offer dated 24th November 2004 although it did not provide for a termination clause. She confirmed that the Defendant paid Kshs. 30,000 as legal fees for drafting of the lease agreement. She also confirmed that she was aware that the Defendant had not been paying the rent regularly and the notice to terminate the tenancy was issued regularly. She added that she was not aware of the allegation that the Nairobi City Council had stopped the Defendant's operations. She was also not aware that Simeon Hongo Ominde and Rosemary Ominde had instructed auctioneers to levy distress for rent. She confirmed that her sister Rosemary Ominde had a responsibility of taking action regarding the suit property. She also confirmed that it was the Landlord's responsibility to obtain change of user.
10. On re-examination she confirmed that Tysons (K) Limited had the responsibility of managing the suit property and its representative had testified as PW1 and that it was the Defendant who applied to lease the suit property.

Evidence of the Defendant

11. DW1, Godfrey Ngatia Njoroge adopted his witness statement as part of his evidence in chief and produce the documents in the bundle of documents as exhibits in this case. He stated that as per the letter of offer dated 24th November 2004 the lease agreement was for a period of six (6) years. He stated that he paid for the lease but it was not prepared. Upon taking possession, he started conducting the business but shortly thereafter the Officers Nairobi City Council arrested his employees since the business was operating without a change of user. Since he could not operate the business without the change of user he decided to reside on the suit premises. He claims that Tysons (K) Limited and KCB Limited were aware of this development and had promised to obtain the change of user. He stated that due to the non-operation of the business, he delayed in paying rent and his goods were taken away by the auctioneers on instructions from the plaintiffs. He therefore claims for damages and the value of the goods carried away during the distress.
12. On cross examination he stated that his business was closed down due to lack of change of user which he requested Tysons (K) Ltd to effect unsuccessfully although he had not presented the letters in court. He confirmed that he resides on the suit property but had not paid rent in recent times and could not recall the last time he did. He stated that he was not given a notice to terminate the tenancy although on 4th June 2011 some auctioneers levied distress for rent in his absence. He confirmed that there was an inventory of the goods they had carried away dated 3rd August 2011 which included crates of beers which he indicated were not for commercial purpose but for his personal consumption. He also confirmed that the auctioneers who visited him in 2021 did not take anything.
13. On re-examination he stated that he had sought for Kshs. 12,131,008 in his Counter claim
14. At the close of the oral testimonies parties tendered final written submissions.

The Plaintiffs Submissions

15. Counsel for the Plaintiffs outlined the following as issues for determination: whether the Defendant breached terms of the agreement for lease and if so, whether the Plaintiffs are entitled to the money claimed; and whether the Defendant should deliver vacant possession of the suit premises. Counsel submitted that the Plaintiffs on 24th November 2004 entered into a 6 years lease agreement with the Defendant to use LR No. 13400 for commercial purposes. Between the year 2004 and 2006, the Defendant continuously defaulted in his rental obligations which was a breach of terms. As a result they issued him a Notice to terminate the tenancy on 27th February 2006 effective 31st March 2006.



However, the Defendant failed to hand over vacant possession of the premises and should be compelled to vacate and pay the money accumulated over the years as stipulated under Section 60 of the [Land Act](#). With reference to Redbull Group Ltd vs rent Management Ltd & 2 others [2006] eKLR. The Plaintiff was thus entitled to the money claimed.

The Defendant's submissions

16. Counsel for the Defendant submitted on the following issues: Whether the Plaintiffs have proved their case and whether the Defendant had proved his case. Counsel confirmed that a lease agreement was entered between the parties however the Plaintiffs breached the following terms: Not issuing the Defendant with copy of the lease agreement; refusal to change the property user to suit the intended purpose; not being served with a termination notice and in any case the said termination was defective since it ought to have been issued for a period commensurate to the rent payment period which was quarterly. As such, the Defendant was legally in occupation of the premises as the Plaintiffs had not discharged their burden of proof that the alleged termination notice was validly served and received nor the alleged rental arrears as per Section 107 and 108 of the [Evidence Act](#) as was held in Fredrick Korir Sotik vs Soin United Women Group (sued through Eunice Towett, Jane Mwolomet, Lucio Cheboch) [2016] eKLR. Adding that the Plaintiffs had also not proved their case for mesne profits.
17. Due to the Plaintiffs breach of terms such as not changing the premises change of user, the Defendant suffered loss and damage because he could not carry out his business as anticipated. And had also suffered loss from the goods proclaimed by the Plaintiffs. As such the Defendant's counterclaim should be allowed as prayed together with costs and interest.

Analysis and determination

18. I have considered the pleadings, evidence on record, the rival submissions and the authorities cited. The issues for determination are:
 - i. Whether the Plaintiffs are entitled to an order for vacant possession of the premises known as LR No. 13400 Karen.
 - ii. Whether the Plaintiffs are entitled to Mesne profits at current market rates from 31st March 2006 with interest until the date of handing over possession.
 - iii. Whether the Defendant was entitled to Kshs. 12,131,080 for loss and damage as prayed in his counterclaim together with interest;
 - iv. Who should bear costs of the suit?
19. This protracted case, spanning over a decade, revolves around a tenancy dispute between the Plaintiffs and the Defendant. The undisputed facts are: the parties entered into a 6 year tenancy agreement, commencing on the 1st of December 2004. However, within the first two years of the tenancy, the Defendant consistently failed to meet his rental obligations. The Plaintiffs thus issued a termination notice in February 2006, set to take effect on 31st March 2006. Regrettably, the Defendant failed to vacate the premises upon the expiry of the stipulated period, subsequently continuing to occupy the property up to the present day, all the while refraining from remitting rent payments. The Plaintiffs produced as exhibits offer of lease dated 24th November 2004 and notice to terminate the tenancy dated 27th February 2006.
20. The Plaintiffs have thus implored this court to grant them vacant possession of the suit premises and to award mesne profits covering the period from March 2006 until the point at which rightful possession is restored to them.



21. The Plaintiffs acknowledged that they obtained orders from the court authorizing distress for rent. However, the goods seized fell short of what the Defendant owed.
22. The Defendant admits he is still in occupation of the suit premises but stated that he could not recall when he last paid rent. According to the Defendant, the Plaintiffs breached the lease agreement when they failed to secure a change of user for the premises, from residential to commercial use. This impeded his ability to conduct the intended business, leading him to use the premises as his residence. He thus lodged a counterclaim seeking compensation amounting to Kshs. 12,131,080 for goods allegedly carried away by auctioneers during the distress for rent.
23. I have considered the documentary evidence adduced before court by the plaintiff. I note that the letter of offer of lease dated 24th November 2004 stipulates that the lease would be for a period of six years with effect from 1st December 2004 with the following being the schedule for rent: 2004-2006 Kshs. 55,000; 2007-2008 Kshs. 60,500 per month and 2009-2010 Kshs. 55,000 per month.
24. There is a confirmation letter of the same which shows that Kshs. 305,000 was paid as deposit, legal fees deposit and 1st quarter's rent.
25. The Defendant stated that there was no lease agreement drafted despite having paid for it. PW1 acknowledged this fact and said he was ready and willing to refund the Kshs. 30,000 paid as legal fees.
26. In my view, even though the lease agreement was not reduced into writing as agreed, Clause 17 reads: The lease will be prepared in the form of the landlord standard lease which shall include the clauses in this letter in addition to other standard clauses therein and which shall be binding... Acceptance shall be in writing. It is trite law that courts cannot rewrite contracts as was held by the Court of Appeal in Pius Kimaiyo Langat v Co-operative Bank of Kenya Limited [2017] eKLR where it was stated "... We are alive to the hallowed legal maxim that it is not the business of Courts to rewrite contracts between parties. They are bound by the terms of their contracts, unless coercion, fraud or undue influence are pleaded and proved..."
27. Having carefully considered the offer letter which stipulate that the lease agreement would contain clauses in the offer letter among others, I am persuaded that the letter of offer dated 24th November 2004 executed by the parties constituted a valid contract between them. Moreover, their conduct showed their intention to execute the agreement as was.
28. Following the intermittent rent payment by the Defendant, the Plaintiffs issued a one month termination notice dated 27th February 2006 produced as exhibit and in a letter dated 29th March 2006 the Defendant contested the notice on the grounds that it was of no legal effect. The letter also stated that the Defendant was unable to use the premises for commercial purposes due to lack of change of user from residential to commercial and was using the premises as his residence.
29. It is on record that to date, the Defendant is on the suit premises. Based on this fact, it is immaterial whether the termination notice was valid or not and whether the change of user for commercial purpose was acquired or not. This is because the factual position is the Defendant is still occupying the suit premises. This means that the six year lease period was exhausted and he still continues to be in occupation. Had the Defendant been aggrieved by the Plaintiffs conduct, the most probable cause of action would be to relinquish possession and seek a legal action against the Plaintiffs. But what the Defendant chose to do was seek legal redress while still in occupation. It is plain and simple that the Defendant is obligated to adhere to rental obligations for the premises he has been occupying for all this period. As of 1st December 2010 when the tenancy period was to come to an end, the Plaintiffs claim that the Defendant owed them Kshs. 3,840,850 in rent arrears.



30. Section 60 of the *Land Act* provides:

- “(1) If a lessee remains in possession of land without the consent of the lessor after the lease has been terminated or the term of the lease has expired, all the obligations of the lessee under the lease continue in force until such time as the lessee ceases to be in possession of the land.
- (2) A lessor who accepts rent in respect of any period after the lease has been terminated or the term of the lease has expired, shall not, by reason of that fact, be deemed to have consented to the lessee remaining in possession of the land, or as having given up on any of the rights or remedies of the lessor against the lessee for breach of a covenant or condition of the lease, and if the lessor continues to accept rent from a tenant who remains in possession for two months, after the termination of the lease, a periodic lease from month to month shall be deemed to have come into force.

31. As such, the Defendant ought to pay for being in occupation of the suit premises.

In the case of *KCB Ltd Vs. Popatlal Madhanji Brothers Ltd & Another* (2019) eKLR the Court of Appeal referred to *Mega Garment Ltd Vs. Mistry Jadva Parbat & Co (EPZ) Ltd* (2016) eKLR where it was held;

“The time honoured decision of this Court in *Bachetors Bakery Ltd Vs. Westlands Securites Ltd* (1982) KLR 366 which has been followed by along line of subsequent decisions elucidates the status of an unregistered lease. It reiterates and confirms the firmly settled law, first, that a lease for immovable property for a term exceeding one year can only be made by a registered instrument; that a document merely creating a right to obtain another document like the one in this dispute, does not require to be registered to be enforceable; that such an agreement is valid into partes even in the absence of registration but gives no protection against the rights of third parties. That exposition of the law hold true in this case.”

The Court went further to observe;

“.....By virtue of the existence of the agreement to lease in the terms spelt out in the letter dated 23rd December 1998, a valid binding and enforceable agreement for a fixed term period of 5 years and 3 months came into existence as between the parties, and we so find.”

32. The Plaintiffs have also sought for mesne profits at market value of the suit premises till payment in full. Section 2 of the *Civil Procedure Act* defines mesne profits as follows: “...in relation to property, means those profits which the person in wrongful possession of such property actually received or might with ordinary diligence have received therefrom, together with interest on such profits, but does not include profits due to improvements made by the person in wrongful possession..”

33. From the foregoing, it is not in contention that the Defendant began occupying the suit premises on a landlord- tenant relationship and continued to wrongfully occupy it even after expiry of the contractual period. It is thus only fair and just that the Defendant pays for the period he has been in occupation as stipulated in Section 60 of the *Land Act* 2012. The Plaintiffs sought for payment at market value of Kshs. 150,000 but there was no proof of how that amount was arrived at. The Court of Appeal in *Chief Land Registrar & 4 others v Nathan Tirop Koech & 4 others* [2018] eKLR held that: A claim for mesne profit is a claim akin to special damages. It must be pleaded and proved...”



34. In absence of such proof, the court can only base its assessment on the evidence on record which was the rent payable as per the letter of offer. It is on record that as of 2010 the rent payable was 55,000 and from the record the rent payable during the six year agreement went up by Kshs. 5,500 after every two years. I will however adopt the rent from 2011 to be Kshs. 55,000/=per month. This is the amount the court orders payable as mesne profits from 1st December 2010 until payment in full.
35. In the counterclaim, the Defendant seeks Kshs. 12,131,080 for loss and damage for goods distressed for rent. Having found that it is on record that the Defendant had been defaulting in payment of rent and the distress for rent was clearly sanctioned by court, the counterclaim is hereby dismissed with costs to the Plaintiff.
36. In conclusion, I find that the plaintiffs have proved their case as against the defendant on a balance of probabilities.
37. Accordingly Judgment is entered in the favours as follows:
 - i. The Defendant is hereby ordered to pay the Plaintiffs Kshs. 3,840,850 owed as of 1st December 2010 with interest at court rate from the date of this judgement until payment in full.
 - ii. The Plaintiffs are hereby awarded mesne profits of Kshs. 55,000/= from 1st December 2010 until payment in full together with interest at court rate from the date of this judgement until payment in full.
 - iii. The Plaintiffs are hereby ordered to refund the Defendant the Kshs. 30,000 paid as legal fees for the lease agreement.
 - iv. The Defendant is ordered to give vacant possession of the suit premises within 90 days of this judgement. Failure to this, the Plaintiffs have orders to evict the Defendant at his own cost.
 - v. Costs of the suit to the Plaintiffs.

DATED, SIGNED AND DELIVERED VIRTUALLY AT KAJIADO THIS 1ST DAY OF FEBRUARY 2024.

L. KOMINGOI

JUDGE.

In the Presence of:

Ms. Taank for the Plaintiffs.

Mr. Njoroge for the Defendant.

Court Assistant –Mutisya.

