



**Gathogo & another v Attorney General (Environment & Land Case
1306 of 2015) [2023] KEELC 826 (KLR) (9 February 2023) (Judgment)**

Neutral citation: [2023] KEELC 826 (KLR)

**REPUBLIC OF KENYA
IN THE ENVIRONMENT AND LAND COURT AT NAIROBI
ENVIRONMENT & LAND CASE 1306 OF 2015
OA ANGOTE, J
FEBRUARY 9, 2023**

BETWEEN

DAVID KIBIRO GATHOGO 1ST PLAINTIFF

ANNE MUTHONI KIBIRO 2ND PLAINTIFF

AND

THE HON. ATTORNEY GENERAL DEFENDANT

JUDGMENT

1. The plaintiffs herein instituted this suit vide plaint dated December 17, 2015 alongside ELC Case no 1305 of 2015, in which the 1st plaintiffs is the sole plaintiffs. While these suits concern different subject matter properties, they were heard simultaneously as they involved similar parties and events.
2. In this suit, the plaintiffs sought the following reliefs:
 - a. Delivery of vacant possession of the thirty-eight (38) flats in a good and tenantable state of repair and condition.
 - b. Payment of rent arrears now amounting to kshs 25,118,000.00 for the period up to and inclusive of the month of December 2015 and such further sums as shall have accrued at the time vacant possession is finally given, at the rate of kshs 1,026,000.00 per month for all the (38) flats.
 - c. Costs of the suit.
 - d. Interest on (b) and (c) above at court rates from the date of filing of this suit till payment in full.
3. The facts as pleaded by the plaintiffs are that through an undated lease, they leased out to the government nineteen two-bedroom flats at the rate of kshs 12,000/- and nineteen one-bedroom flats at the rate of kshs 10,000/- on plot nos A117, Sector 1 and C28, Sector 3 in Umoja Innercore, Nairobi



for a period of three years with effect from March 1, 2009 and that following the expiry of the lease on February 28, 2012, the government agreed to renew the leases of all 38 houses for a further three-year term from March 1, 2012 at the rate of kshs 15,000 per month for each two-bedroom flat and kshs 12,000 for each one-bedroom.

4. It is the plaintiffs' case that vide the letter dated March 12, 2012, the government forwarded the lease document to them; that they executed the same and returned it, but the defendant failed to send a counterpart of the signed lease for their records and that the government continued paying rent according to the old lease rate after expiry of the initial lease.
5. It is the plaintiffs' case that despite the government's acceptance to renew the lease at kshs 15,000/- per month, the government continued to pay rent at the old rate of kshs 12,000 per month after expiry of the initial lease; that the government informed them through a letter dated May 26, 2014 that the lease expired on December 31, 2013 and that it was not willing to renew the lease.
6. The plaintiffs averred that in the said letter, the government also gave three months' notice of its intention to vacate and hand back possession of the flats to them and that they indicated their acceptance of the notice to vacate the premises vide his letter dated June 17, 2014 and requested to arrange for a joint inspection of the premises and for settlement of utility bills and rent arrears. September 1, 2014 i.e kshs 1,026,000.00 per month.
7. Despite expiry of the notice to vacate on August 25, 2014 and a joint inspection conducted on August 25 and 26, 2014, the plaintiffs averred that the government is yet to prepare a joint inspection report for handing over, and has neither handed back possession of the premises nor paid the requisite rent.
8. The plaintiffs averred that following the government's failure to hand back possession, under section 14 of the *Distress for Rent Act*, it became liable to pay rent at double the monthly rate from September 1, 2014 until vacant possession is given, which is 1,026,000.00 per month.
9. The defendant responded to the suit vide a Statement of Defence dated February 17, 2016 in which it admitted that the government had entered into a lease agreement with the plaintiffs; that the lease expired in February 2012 and that while the parties were engaged in renewal of the lease, it did not culminate into a contract as the same was not signed by all parties.
10. It was averred by the defendant that on March 26, 2014, the government duly informed the plaintiffs of its intention not to renew or continue with the lease and gave notice of expiry of the lease; that the defendant did indeed vacate the premises and handed over vacant possession of the premises to the landlord with all the keys before the joint inspection being conducted on August 25 and 26, 2014. According to the defendant, following the inspection, the landlord/plaintiffs refused to sign the handing over/ taking over certificate and is thereby misleading this court.
11. The defendant averred that upon handing over vacant possession and keys of the premises to the plaintiffs, it was not obligated to pay any rent because the premises are in the plaintiffs' possession and that section 14 of the *Distress for Rent Act* only applies when a tenant is in possession.
12. The defendant denied that it is in arrears; that the claimed sums arise from the period which the plaintiffs were handed vacant possession but refused to sign the repair certificate; that the plaintiffs are aware of the repair works bill but have refused to facilitate the payment and that the plaintiffs are to blame for the delay in repair works.



Hearing and evidence

13. The 1st plaintiffs, PW1, relied on his written statement wherein he reiterated the grounds set out in the Plaint, which I have summarized above. PW1 testified that the suit premises had been vacant with effect from March 2018, after which he moved in and started repairs.
14. It was his evidence that following negotiations for lease renewal, a lease was signed between them and the defendant to the effect that a two- bedroom apartment was to fetch kshs 15,000 and a one-bedroom apartment, kshs 12,000. In his bundle of documents, the plaintiffs exhibited a lease which was not dated and not signed by the Government.
15. PW 1 confirmed in cross examination that he had accepted the three months' notice given by the defendant vide a letter dated May 26, 2014. He also confirmed that he was there when the inspection was conducted but stated that he did not refuse to sign the joint inspection report. According to PW1, the police officers moved out of the suit premises at the end of August and that the government paid the rent well between 2012 and 2014.
16. In re-examination, PW1 stated that he was not informed when the police officers vacated the houses, which he estimated was in 2014. He deponed that he took over the houses after he filed this suit.
17. The plaintiffs produced into evidence a bundle of documents which included a lease agreement dated April 3, 2009; a letter from office of the president dated February 28, 2012 proposing to pay rent at kshs 15,000 per month for two-bedroom flats and kshs 12,000 for one-bedroom flats; a letter dated February 29, 2012 accepting the proposal and a letter from the Ministry of Housing dated March 12, 2012 forwarding the lease in duplicate for execution.
18. PW1 also produced in evidence the Lease agreement executed by the themselves only; the letter to the permanent secretary, office of the president dated April 19, 2013 on the non-payment of the new rent; the letter from the Ministry of Lands, Housing and Urban Development dated May 26, 2014 giving three months' notice of termination of lease and the letter from his advocate dated June 17, 2014 to the Ministry of Lands, Housing and Urban Development asking them to arrange a joint inspection and handing back of the premises. Several other letters were produced in evidence which I will refer to later.
19. DW1, Linus Munene, who works at administration police headquarters relied on his statement sworn on September 13, 2019, in which he stated that the defendant vacated the suit premises on December 31, 2013 and handed over vacant possession of the suit premises to the plaintiffs on August 25, 2014, following a three months' termination notice issued on May 26, 2014.
20. DW1 informed the court that following the hand over, a joint inspection was conducted in the 1st plaintiff's presence on August 25 and 26, 2014 to assess repair costs; that the plaintiffs refused to sign the joint report stating that the valuation of the bill of quantities was too low and that the plaintiffs are in possession of the premises and no evidence has been presented to show that the defendant refused to vacate and were in possession of the premises beyond the termination date.
21. DW1 asserted that the units on A117 and C28 were paid up to and including September 2018 and that the defendant is awaiting the plaintiffs to sign the valuation report for purposes of releasing the funds for repair of the houses if they have not repaired them.
22. In cross-examination, DW1 stated that he was involved in the management of the houses as a staff officer but not in the signing of leases, which is the mandate of the accounting officer in the ministry, the principal secretary, internal security. It was his evidence that he was involved in the payment of rent due from the properties and that he prepared the termination notices when the leases expired.



23. It was the evidence of DW1 that the increase in rent was never approved by the negotiating team from the ministry and that a proposal was made by the Ministry to the plaintiffs vide a letter dated February 28, 2012 which was accepted, but the lease was never signed by the accounting officer, and as a result, the new rent could not be processed and was not paid.
24. DW1 testified that he had the report that was compiled following the joint inspection as well as the bill of quantities and that he did not have a joint report as the plaintiffs raised many issues and disputed the bill of quantities. DW1 produced in evidence many letters which I will allude to later.

Submissions

25. Counsel, on the plaintiffs' behalf, submitted that the defendant has not been honest with this court; that while DW1 testified that the police officers vacated the premises on December 31, 2013, a letter by the ministry dated May 26, 2014 indicated the intention of the ministry to vacate and hand back possession of the premises to the plaintiffs, after expiry of 3 months' period.
26. It was submitted that neither the ministry nor the deputy inspector general ever wrote back to the plaintiffs' advocates confirming that they had vacated the leased premises and handed back possession to the plaintiffs and that the ministry tried to persuade the deputy inspector General to pay up the outstanding arrears of rent as demanded.
27. The plaintiffs' counsel submitted that because of non-payment of the new agreed rent after expiry of the initial lease, the defendant accrued arrears of rent at the rate of kshs 95,000/- per month (the difference of the new and old rent being kshs 3,000/ for 19 two-bedroom flats and kshs 2,000/- for 19 one-bedroom flats) with effect from March 1, 2012 up to August 25, 2014, when the defendant's termination notice expired. They submit that the outstanding arrears from underpayment for 30 months accrues to kshs 2,850,000/-.
28. Counsel also submitted that pursuant to section 14 of the *Distress for Rent Act*, when the government failed to hand back possession after expiry of notice to vacate on August 25, 2014, the defendant became liable to pay rent at double the monthly rate from September 1, 2014 until vacant possession was given.
29. As the plaintiffs took back possession in March 2018, the plaintiffs' counsel submitted that the plaintiffs are entitled to payment of double the rent at kshs 30,000 for the two-bedroom flats and kshs 24,000 for one-bedroom flats from September 2014 up to February 2018, a period of 42 months, which translates to a total of kshs 43,092,000/- for all 38 flats.
30. Lastly, it is the plaintiffs' counsel's submission that the ministry had a responsibility to hand back the premises in good state of repair and condition; that the expired lease did not contemplate payment in lieu of repairs and that the joint inspection was to ensure that the premises were handed back in a good state of repair.
31. Counsel submitted that as the plaintiffs took possession of their property without any repairs done, they should be compensated for damages according to the ministry's computation of repairs as set out in their inspection of plot nos A117 (kshs 1,500,100/-), and C28 (kshs 1,438,690/-) which aggregates to kshs 2,938,790/-.
32. The Defendant's Counsel submitted that the Defendant handed over vacant possession of the suit land as per the termination notice and the lease agreement, which took place after the joint inspection conducted on 24th and 25th August 2014. They argued that no evidence was tendered of continued



occupation by the defendants after such date and that the Plaintiffs refused to sign the Bill of Quantities.

33. It was counsel's submission that the tenant executed his obligation in handing over the premises and vacated the premises as per the notice. In addition, that there is no claim for rent arrears as the plaintiffs have always received their rent as per the lease agreement.

Analysis and determination

34. Having considered the Plaintiff, the Defence, the evidence and the submissions, the issues for determination are as follows:
- i. Whether the parties renewed the lease for a further term
 - ii. Whether handing over of the premises took place, and if so when.
 - iii. Whether this court should grant the reliefs sought by the plaintiffs.
35. The undisputed facts of this case are that the plaintiffs are the legal owners of 19 two-bedroom flats and 19 one-bedroom flats on plot no A117, Sector 1 and plot C28, Sector 3 in Umoja Innercore in Nairobi. In such capacity, the plaintiffs leased the 38 flats to the government for a period of three years from March 1, 2009, at the monthly rates of kshs 12,000/- for two-bedroom flats and kshs 10,000/- for one-bedroom flats. Upon expiry of the lease on February 28, 2012, the parties entered into negotiations for renewal of lease.
36. In his letter dated February 28, 2012, the permanent secretary, office of the president, offered to renew the lease for a further period of three years at kshs 15,000 per month for two-bedrooms and kshs. 12,000/- for one-bedrooms.
37. The plaintiffs accepted this offer through the letter dated February 29, 2012. The Ministry of Housing thereafter forwarded the lease by a letter dated March 12, 2012, which the plaintiffs executed and forwarded to the Ministry. However, the plaintiffs did not receive a copy of the lease duly executed by all parties.
38. It is the plaintiffs' case that despite the defendant agreeing to pay kshs 15,000/- for each apartment, it continued to pay the old rent of kshs 12,000 and that it was not until May 26, 2014 that the government informed the plaintiffs that the lease expired on December 31, 2013 and that it was not willing to renew the lease. Consequently, the defendant gave a three months' notice of its intention to vacate and hand back possession of the suit premises houses to the plaintiffs.
39. The evidence before this court shows that the plaintiffs accepted the notice to vacate the premises vide a letter dated June 17, 2014. The parties conducted a joint inspection between August 25 and 26, 2014. However, according to the plaintiffs, the government has never prepared a joint inspection report for handing over, neither has it handed back possession of the premises nor paid rent.
40. Neither party has disputed that the defendant had a right of renewal of lease under the contract that it entered into with the plaintiffs. The importance of the right to renew a lease was canvassed by the court in the case of *Sands vs Mutual Benefits Ltd* [1971] E A 156 as quoted in *Brand City Limited vs United Housing Estate Limited* [2016] eKLR:

“In the absence of agreement or a method of securing agreement to the new rent there was no effective renewal of the lease. In that case, Chanan Singh J reviewed a number of authorities on the subject among them British Columbia Court of Appeal case of *Young vs Van Beneen* (1953), 3 D L R 702 where Bird J A stated among others that;



“Determination of the questions raised on the appeal, in my opinion, depends upon whether the respondent under the terms of the option, acquired any right to a tenancy of the premises which is enforceable in law, and if so, whether that right subsisted at the date of service of the demand for possession. An agreement for a lease, if its terms are sufficiently certain, may be specifically enforced, like any other contract, but if the parties fail to express what they mean with reasonable certainty, the agreement is unenforceable, and will be held void.”

In the said case, the said judge stated further that:

“It must be certain when the term is to begin and how long it is to continue, as well as the rent to be paid.”

41. The renewal clause of the expired Lease dated April 3, 2009 is provides as follows:

“The lessor shall on the written request of the lessee made three (3) months or more before the expiration of the term provided there shall not at the time of such request be any existing breach of any of the lessee’s conditions herein contained at the expense of the lessee grant to it a lease of the premises for a further term of three (3) years at a new rent to be negotiated and agreed, but subject to the same conditions herein reserved and contained with the exception of the present condition provided that there shall not have been during the term of the lease, a breach of any of the lessee’s obligations/ conditions herein contained.”

42. This clause passes the test of certainty as it provides that the new terms are to begin on expiry of the subsisting lease, for a period of three years, and the rent is subject to agreement by the parties.

43. In this matter, the process of renewal of a further term of three years was instituted by the ministry through its letter dated February 28, 2012, wherein it proposed to renew the lease at the rate of kshs 15,000 per month per unit for two-bedroom unit and kshs 12,000 for one-bedroom units.

44. The plaintiffs accepted the government’s offer vide a letter dated February 29, 2012, specifically for the proposed rate of kshs 15,000/- for two-bedroom flats. The ministry thereafter forwarded the lease for the plaintiffs’ execution on March 12, 2014. In a letter by the plaintiffs to the government dated April 19, 2013, the plaintiffs refers to a further letter sent by the ministry dated March 14, 2012 with a counter-offer, proposing rent at the rate of kshs 12,000/- for two bedroom flats and kshs 10,000/- for one bed room flats.

45. The correspondences alluded to above shows that there was no meeting of the minds between the parties. Furthermore, despite the government forwarding to the plaintiffs the lease document for signing, the defendant’s representative never signed the lease. Consequently, a contract cannot have ensued between the parties considering that the lease was not renewed.

46. Despite non-renewal of the lease, the government remained in occupation of the premises and continued to pay rent at the rate of kshs 12,000 per month. This occupation was not based on the expired lease nor on the drafted lease, and was therefore without the consent of the plaintiffs. The plaintiffs all the same accepted rental payments.

47. In such circumstances, and pursuant to section 60 of the Land Act, a periodic lease from month to month, under the terms of the expired Lease, is deemed to have been in force. Section 60 of the Land Act provides as follows:



- (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.”
48. According to Blacks’ Law Dictionary; ‘periodic tenancy’ means:
- “A tenancy that automatically continues for successive period usually month to month or year to year unless terminated at the end of a period by notice...”
49. The periodic tenancy that ensued after the Lease terminated with effluxion of time came to an end when the government issued a notice vide a letter dated May 26, 2014, in which the ministry issued a three months’ notice of intention to vacate the premises and hand back the property to the plaintiffs.
50. This position was buttressed in the letter dated August 21, 2014 issued by the ministry to the deputy inspector general, administration police service and copied to the plaintiffs, indicating that the notice was to expire on August 22, 2014. The periodic tenancy thus expired on August 25, 2014.
51. The termination notice was accepted by the plaintiffs vide his advocates letter dated June 17, 2014 in which the plaintiffs’ advocate indicated as follows:
- “You are in rent arrears amounting to kshs 23,408,000, for the period up to and including the month of August, 2014 being the last month of the notice.”
52. The letter of August 21, 2014 invited the plaintiffs as well as the deputy inspector general to attend the joint inspection and handover of the properties. It is uncontested that a joint inspection of the plaintiffs’ properties took place on August 25 and 26, 2014, which was attended by the plaintiffs.
53. While the parties herein have contested the events following the inspection, the evidence on record shows that the formal handover of the premises to the plaintiffs did not occur. The defendant has contended that such failure was frustrated by the plaintiffs’ denial to sign the repair work bill while the plaintiffs blames the delay on the defendant for not presenting the joint report for signing.
54. Indeed, as correctly argued by the plaintiffs, the Ministry is culpable for delaying the verification of the payable rates, which it apologized for in its letter dated April 30, 2015. After all, it was not until March 23, 2015, seven months later, that the chief quantity surveyor confirmed that the rates in the bill of quantities are reasonable and at market rates.
55. It is on the basis of the failure to officially handover vacant possession of the suit premises to the plaintiffs that the latter has made a claim under section 14 of the *Distress for Rent Act*, and sought for double rent payment for the period of 42 months between August 25, 2014, when the lease terminated and March 2018, when he purportedly took over possession of the houses.



56. The 1st plaintiff however gave contradicting evidence as to when he indeed took over the property. In his examination in chief, he stated that he took back his property in 2018 but during re-examination, he stated that he took back his property in 2015, immediately after he filed this suit.
57. Section 14 provides that if a tenant gives notice to his landlord of his intention to quit the premises held by him, at a time mentioned in the notice, and does not accordingly deliver up the possession thereof at the time specified in the notice, then the tenant or his executors or administrators shall from thenceforward pay to the landlord double the rent or sum which he should otherwise have paid.
58. Vacant possession refers to the right to unimpeded enjoyment of property. This was held by the court in *Cumberland Consolidated Holdings Ltd vs Ireland* (1946) KB 264 at 270, as quoted in *Gitonga Wambugu Kariuki & 2 others vs Eliud Timothy Mwamunga* [2018] eKLR as follows:
- “The right to actual unimpeded physical enjoyment is comprised in right to vacant possession. We cannot see why the existence of a physical impediment to such enjoyment to which a purchaser does not expressly or impliedly consent to submit should stand in a different position to an impediment caused by the presence of a trespasser. It is true that in each case, the purchaser obtains the right to possession in law, notwithstanding the presence of the impediment. But it appears to us that what he bargains for is not merely the right in law, but the power in fact to exercise the right...the presence of the rubbish which the purchaser never bought and to whose presence he never submitted did in fact make it impossible for him to use a substantial part of the property which he had bought...”
59. While there was no official handing over of the properties, the plaintiffs do not contest that the keys to the property were handed back to them following the joint inspection of the property. The plaintiffs also testified that the police vacated his houses sometime in 2014.
60. On the basis of the evidence before the court, this court is persuaded that the defendant handed over possession of the houses to the defendant on August 26, 2014, being the last day the inspection was undertaken, but failed to undertake or to pay for the necessary repairs.
61. Indeed, looking at the inspection report, the same must have been done after the defendant’s employees had vacated the premises. I say so because the inspection report provided for the “cleaning and removal of damaged items; fixing and replacement of several item; paint works” amongst others.
62. Consequently, as the previous tenants were no longer in occupation of the property as at the time of the notice to vacate lapsed, the provisions of Section 14 of the *Distress for Rent Act* does not apply. The Plaintiffs’ bid for double payment of rent from 1st September 2014 until vacant possession is given therefore fails.
63. Indeed, the plaintiffs in this matter did not offer any evidence to show that as at the time the notice to vacate lapsed, the government owed them rent. In his evidence, the 1st plaintiff told the court as follows:
- “The police officers continued to stay in the house after expiry of the Lease but paying the old rates. I was not paid the new rents which they had accepted. I think the police officers vacated my houses in 2014...I took over my houses in 2015 after I filed this suit...”
64. Having failed to tender evidence to show that indeed the government was in rent arrears as at the time they inspected the property in August, 2014, the claim for rent arrears fails. The relief sought by the plaintiffs for delivery of vacant possession has been overtaken by events because the plaintiffs have since taken possession.



65. With respect to the defendant’s duty to cater for the repairs of the plaintiffs’ houses, the defendant has produced inspection reports for the suit properties. Although the defendant has not disputed its duty to cater for the costs of the repairs, the plaintiffs did not claim for this money, save for a prayer in the Plaint of “vacant possession of the 57 Flats in a good and tenable state of repair.”
66. The upshot of the foregoing is that the plaintiffs’ suit partially succeeds with respect to its claim for the repairs of the suit properties. For those reasons, I partially allow the plaintiffs’ claim as follows:
- a. The defendant shall pay to the plaintiffs compensation of kshs 2,938,790 for the total cost of repairs of the 38 flats on plot nos A117 Sector 1 and C28, Sector 3 in Umoja Innercore.
 - b. The defendant shall pay interest on the above amount at court rates from the date of filing of this suit until payment in full.
 - c. The defendant will pay to the plaintiffs the costs of the suit.

DATED, SIGNED AND DELIVERED VIRTUALLY IN NAIROBI THIS 9TH DAY OF FEBRUARY, 2023.

O A ANGOTE

JUDGE

In the presence;

No appearance for plaintiffs

Mr Motari for defendant

Court assistant – June

