



REPUBLIC OF KENYA



KENYA LAW
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**Gathogo v Attorney General (Environment & Land Case 1305 of 2015)
[2023] KEELC 919 (KLR) (9 February 2023) (Judgment)**

Neutral citation: [2023] KEELC 919 (KLR)

**REPUBLIC OF KENYA
IN THE ENVIRONMENT AND LAND COURT AT NAIROBI
ENVIRONMENT & LAND CASE 1305 OF 2015
OA ANGOTE, J
FEBRUARY 9, 2023**

BETWEEN

DAVID KIBIRO GATHOGO PLAINTIFF

AND

ATTORNEY GENERAL DEFENDANT

JUDGMENT

1. The Plaintiff herein instituted this suit vide a Complaint dated 17th December 2015 alongside ELC Case No. 1306 of 2015, in which he and his wife, Mrs. Anne Muthoni Kibiru are Plaintiffs. While these suits concern different properties, they were heard simultaneously as they involved similar parties and events.
2. In this suit, the Plaintiff sought for the following reliefs:
 - a. Delivery of vacant possession of the 57 flats in a good and tenantable state of repair and condition.
 - b. Payment of rent arrears now amounting to Kshs. 40,014,000.00 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. 1,710,000.00 per month.
 - 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.
 - e. Such other or further relief that this Honourable Court may deem fit and just to grant.



3. The Plaintiff's case is that vide a lease agreement dated 3rd April 2009, he leased out to the Government fifty-seven (57) flats on Plot Nos A64, A46 and A48 in Sector 3 in Umoja Innercore, Nairobi for three years, with effect from 1st March 2009 at Kshs. 12,000 per flat per month. The Plaintiff averred that when the lease expired on 28th February 2012, the Government agreed to renew the lease for a further three-year term with effect from 1st March 2012 at Kshs. 15,000/- per flat per month.
4. According to the Plaintiff, the Government forwarded the lease to him for execution vide a letter dated 12th March 2012, which he did, but the Government did not send a counterpart copy of the duly executed lease.
5. It is the Plaintiff's 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 him through a letter dated 26th May 2014 that the lease expired on 31st December 2013 and that it was not willing to renew the lease.
6. The Plaintiff 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 him and that he indicated his acceptance of the notice to vacate the premises vide his letter dated 17th June 2014 and requested to arrange for a joint inspection of the premises and for settlement of utility bills and rent arrears.
7. Despite expiry of the notice to vacate on 25th August 2014 and a joint inspection conducted on 25th And 26th August 2014, the Plaintiff avers 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 Plaintiff 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 1st September 2014 until vacant possession is given, which is Kshs. 30,000/- per flat per month; that up to and inclusive of December 2015, the Government was in arrears to the tune of Kshs. 40,014,000.00.
9. The Defendant responded to the suit vide a Statement of Defence dated 17th February 2016 in which it admitted that the Government had entered into a lease agreement with the Plaintiff; 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 26th March 2014, the Government duly informed the Plaintiff 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 25th and 26th August 2014. According to the Defendant, following the inspection, the landlord/Plaintiff 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 Plaintiff, it was not obligated to pay any rent because the premises are in the Plaintiff's 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 Plaintiff was handed vacant possession but refused to sign the repair certificate; that the Plaintiff is aware of the repair works bill but has refused to facilitate the payment and that the Plaintiff is to blame for the delay in repair works.



Hearing and Evidence

13. The Plaintiff, PW1, relied on his written statement dated 21st April 2017 wherein he reiterated the grounds set out in his 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 him 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 Plaintiff 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 26th May 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 Plaintiff produced into evidence a bundle of documents which included a lease agreement dated 3rd April 2009; a letter from Office of the President dated 28th February 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 29th February 2012 accepting the proposal and a letter from the Ministry of Housing dated 12th March 2012 forwarding the lease in duplicate for execution.
18. PW1 also produced in evidence the Lease agreement executed by the himself only; the letter to the Permanent Secretary, Office of the President dated 19th April 2013 on the non-payment of the new rent; the letter from the Ministry of Lands, Housing and Urban Development dated 26th May 2014 giving three months' notice of termination of lease and the letter from his advocate dated 17th June 2014 to the Ministry of Lands, Housing and Urban Development asking them to arrange a joint inspection and handing back of the premises.
19. Several other letters were produced in evidence which I will refer to later.
20. DW1, Linus Munene, who works at Administration Police headquarters relied on his statement sworn on 13th September 2019, in which he stated that the Defendant vacated the suit premises on 31st December 2013 and handed over vacant possession of the 57 units on A46, A48 and A64 to the Plaintiff on 25th August 2014, following a three months termination notice issued on 26th May 2014.
21. DW1 informed the court that following the hand over, a joint inspection was conducted in the Plaintiff's presence on 25th and 26th August 2014 to assess repair costs; that the Plaintiff refused to sign the joint report stating that the valuation of the bill of quantities was too low and that the Plaintiff is 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.
22. DW1 asserted that the units on A64, A46 and A48 were paid up to and including September 2018 and that the Defendant is awaiting the Plaintiff to sign the valuation report for purposes of releasing the funds for repair of the houses if he has not repaired them.
23. 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.

24. 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 Plaintiff vide a letter dated 28th February 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.
25. 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 Plaintiff raised many issues and disputed the bill of quantities. DW1 produced in evidence many letters which I will allude to later.

Submissions

26. Counsel, on the Plaintiff's behalf, submitted that the Defendant has not been honest with this court; that while DW1 testified that the police officers vacated the premises on 31st December 2013, a letter by the Ministry dated 26th May 2014 indicated the intention of the Ministry to vacate and hand back possession of the premises to the Plaintiff, after expiry of 3 months' period.
27. It was submitted that neither the Ministry nor the Deputy Inspector General ever wrote back to the Plaintiff's advocates confirming that they had vacated the leased premises and handed back possession to the Plaintiff and that the Ministry tried to persuade the Deputy Inspector General to pay up the outstanding arrears of rent as demanded.
28. It was Counsel's submission 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 171,000/- per month (the difference of the new and old rent being Kshs. 3,000 for 57 flats) with effect from 1st March 2012 up to 25th August 2014, when the Defendant's termination notice expired.
29. It was submitted that the outstanding arrears from underpayment for 30 months amounts to Kshs. 5,130,000 and 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 25th August 2014, the Defendant became liable to pay rent at double the monthly rate from 1st September 2014 until vacant possession was given.
30. It was submitted by the Plaintiff's counsel that because the Plaintiff took back possession in March 2018, they are entitled to payment of double rent at Kshs. 30,000 from September 2014 up to February 2018, a period of 42 months, which translates to a total of KShs. 71,820,000/ for all the 57 flats.
31. Lastly, counsel submitted 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.
32. According to counsel, the Plaintiff having taken possession of his property without any repairs done, he should be compensated for damages according to the Ministry's computation of repairs as set out in their inspection of Plot No.s A46 (Kshs. 1,500,100/-), A48 (Kshs. 1,139,100/-) and A64 (Kshs. 1,136,400), which aggregates to KShs. 3,775,600/-.
33. Counsel for the Defendant 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. It was submitted that no evidence was tendered of continued occupation by the Defendant and that the Plaintiff refused to sign the Bill of Quantities, which does not grant him a reason to seek to be paid double rent and that this dispute relates to rates payable in relation to repair works.



34. 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 Plaintiff has always received his rent as per the lease agreement.

Analysis and Determination

35. 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 Plaintiff.
36. The undisputed facts of this case are that the Plaintiff is the legal owner of 57 two bedroom flats standing on Plot Nos A64, A46 and A48 in Sector 3, Umoja Innercore in Nairobi. The Plaintiff leased the 57 flats to the Government for a period of three years from 1st March 2009, at the rate of Kshs. 12,000 per month.
37. Upon expiry of the Lease on 28th February 2012, the parties entered into negotiations for renewal of lease. In his letter dated 28th February 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.
38. The Plaintiff accepted this offer through the letter dated 29th February 2012. The Ministry of Housing thereafter forwarded the lease by a letter dated 12th March 2012, which the Plaintiff executed and forwarded to the Ministry. However, the Plaintiff did not receive a copy of the lease duly executed by all parties.
39. It is the Plaintiff's 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 until 26th May 2014 that the Government informed the Plaintiff that the lease expired on 31st December 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 to the Plaintiff.
40. The evidence before this court shows that the Plaintiff accepted the notice to vacate the premises vide a letter dated 17th June 2014. The parties conducted a joint inspection between 25th And 26th August 2014. However, according to the Plaintiff, the Government has never prepared a Joint Inspection Report for handing over, neither has it handed back possession of the premises nor paid rent.
41. Neither party has disputed that the Defendant had a right of renewal of lease under the contract that it entered into with the Plaintiff. 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.”

42. The renewal clause of the expired Lease dated 3rd April 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.”

43. 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.

44. In this matter, the process of renewal of a further term of three years was instituted by the Ministry through its letter dated 28th February 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.

45. The Plaintiff accepted the Government’s offer vide a letter dated 29th February 2012, specifically for the proposed rate of Kshs. 15,000/- for two-bedroom flats. The Ministry thereafter forwarded the lease for the Plaintiff’s execution on 12th March 2014. In a letter by the Plaintiff to the Government dated 19th April, 2013, the Plaintiff refers to a further letter sent by the Ministry dated 14th March 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.

46. The correspondences alluded to above shows that there was no meeting of the minds between the parties. Furthermore, despite the government forwarding to the Plaintiff 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.

47. 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 Plaintiff. The Plaintiff all the same accepted rental payments.

48. 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.”

49. 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...”

50. 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 26th May 2014, in which the Ministry issued a three months’ notice of intention to vacate the premises and hand back the property to the Plaintiff.

51. This position was buttressed in the letter dated 21st August 2014 issued by the Ministry to the Deputy Inspector General, Administration Police Service and copied to the Plaintiff, indicating that the notice was to expire on 22nd August, 2014. The periodic tenancy thus expired on 25th August 2014.

52. The termination notice was accepted by the Plaintiff vide his advocates letter dated 17th June, 2014 in which the Plaintiff’s 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.”

53. The letter of 21st August, 2014 invited the Plaintiff 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 Plaintiff’s properties took place on 25th and 26th August 2014, which was attended by the Plaintiff.

54. 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 Plaintiff did not occur. The Defendant has contended that such failure was frustrated by the Plaintiff’s denial to sign the repair work bill while the Plaintiff blames the delay on the Defendant for not presenting the joint report for signing.

55. Indeed, as correctly argued by the Plaintiff, the Ministry is culpable for delaying the verification of the payable rates, which it apologized for in its letter dated 30th April 2015. After all, it was not until 23rd March 2015, seven months later, that the Chief Quantity Surveyor confirmed that the rates in the Bill of Quantities are reasonable and at market rates.

56. It is on the basis of the failure to officially handover vacant possession of the suit premises to the Plaintiff 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 25th August 2014, when the lease terminated and March 2018, when he purportedly took over possession of the houses.



57. The 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.
58. 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.
59. 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...”
60. While there was no official handing over of the properties, the Plaintiff does not contest that the keys to the property were handed back to him following the joint inspection of the property. The Plaintiff also testified that the police vacated his houses sometime in 2014.
61. 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 26th August, 2014, being the last day the inspection was undertaken, but failed to undertake or to pay for the necessary repairs.
62. 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.
63. 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 Plaintiff’s bid for double payment of rent from 1st September 2014 until vacant possession is given therefore fails.
64. Indeed, the Plaintiff in this matter did not offer any evidence to show that as at the time the notice to vacate lapsed, the government owed him rent. In his evidence, the 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...”
65. 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 Plaintiff for delivery of vacant possession has been overtaken by events because the Plaintiff has since taken possession.



66. With respect to the Defendant's duty to cater for the repairs of the Plaintiff's houses, the Defendant has produced inspection reports for Plot Nos A46, A48 and A64 in Sector 3 in Umoja Innercore, Nairobi, which estimates shows the costs of repairs as Kshs. 1,500,100, 1,139, 100 and 1,136,400 respectively totaling to KShs. 3,775,600.
67. Although the Defendant has not disputed its duty to cater for the costs of the repairs, the Plaintiff 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."
68. The upshot of the foregoing is that the Plaintiff's claim partially succeeds with respect to its claim for the repairs of the 57 flats. For those reasons, I partially allow the Plaintiff's claim as follows:
- a. The Defendant shall pay the Plaintiff compensation of Kshs. 3,775,600 being the cost of repairs of the 57 flats on Plot Nos A46, A48 and A64 in Sector 3 in Umoja Innercore, Nairobi.
 - 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 Plaintiff 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 of;

No appearance for Plaintiff

Mr. Motari for Defendant

Court Assistant - June

