



**Klaus Hotel Limited v Kedong Ranch Limited (Environment & Land  
Case 282 of 2016) [2023] KEELC 15864 (KLR) (1 March 2023) (Ruling)**

Neutral citation: [2023] KEELC 15864 (KLR)

**REPUBLIC OF KENYA  
IN THE ENVIRONMENT AND LAND COURT AT NAKURU  
ENVIRONMENT & LAND CASE 282 OF 2016**

**JM MUTUNGI, J  
MARCH 1, 2023**

**BETWEEN**

**KLAUS HOTEL LIMITED ..... PLAINTIFF**

**AND**

**KEDONG RANCH LIMITED ..... DEFENDANT**

**RULING**

1. Before me for determination is the defendant's notice of motion application dated February 16, 2021 expressed to be brought under section 1A, 1B and 3A of the *Civil Procedure Act*, order 2 rule 15 and order 17 rule 2 of the *Civil Procedure Rules, 2010*, section 19(1) and 2 of the *Environment and Land Court Act*, Section 73 of the *Land Act* and all other enabling provisions of the law. The application seeks the following orders:-

1. That the Plaintiff herein be struck out as the substratum of the suit stands determined.
2. That the plaintiff be compelled to execute a Surrender of Lease over all that property known as Title No Naivasha/Maraigushu Block 10/29.
3. That in default of the plaintiff executing the Surrender of Lease as in prayer 2 above within 14 days of this Court's order, the Deputy Registrar of this Court do execute a Surrender of Lease by Order of this Court.

Further In The Alternative

4. That this suit be dismissed for want of prosecution.
5. That this Honourable Court be pleased to issue such further necessary orders or directions in relation to the hearing of this Appeal; and
6. That the costs of this application be provided for.



2. The application is supported on the grounds set out on the body of the application and on the affidavit sworn in support by Christine Cronchey dated February 16, 2021. The plaintiff opposed the defendant's application vide a replying affidavit dated June 6, 2022 sworn by Joseph Muya Njiru a director of the Plaintiff Company Respondent.
3. The defendant in support of the application stated that it was the registered owner of land title Naivasha/Maraigushu Block 10/29 and had vide a Lease Agreement dated September 22, 2010 and registered on November 17, 2010 leased the suit property comprising a building (Longonot Ranch House) with living and other accommodation together with usual conveniences sitting on approximately 200 acres to the plaintiff. The Longonot House within the leased premises was on or about November 8, 2015 gutted down by fire prompting the plaintiff to cease paying rent and/or settling the accrued rent arrears as at the time the fire broke aggregating Kshs 2,299,487.84. The plaintiff instituted the instant suit vide a plaint dated July 28, 2016 together with an application for injunction to restrain the defendant/applicant from evicting or interfering with the plaintiff's quiet possession of the leased premises pending determination of the suit. The Court on the May 17, 2017 delivered a Ruling on the application to the effect that the plaintiff could continue to be in use of the suit property on condition that the plaintiff paid all the accrued rent arrears in full before the fire and all the utility bills including water and power upto to the time of the Ruling and also the percentage proportion of rent certified as payable by a government Valuer from the date of the fire.
4. The defendant further contended that the plaintiff had in breach of the lease transferred and/or assigned the lease to a third party by transferring the majority of the shareholding to Africa Classic Limited which was in breach of Clause 1(bb) of the lease which provided that such action would entitle the defendant to re-enter into the premises and the lease would determine. The defendant in consequence stated that it served the plaintiff with notice to terminate the lease on account of breach of Clause 1(bb) and contended that the lease stood determined and therefore the substratum of the suit had disappeared with the consequence that the suit was unsustainable.
5. . The defendant further in the alternative contended that the plaintiff had not taken any step since September 30, 2019 towards the prosecution of the suit which is indicative of the fact that the plaintiff had no interest in pursuing his claim and hence it is in the interest of justice that the defendant's application be allowed as prayed.
6. The defendant in the affidavit sworn in support of the application sworn by Christine Cronchey, Chairperson of the defendant's board of directors, reiterated the grounds set out on the body of the application and exhibited copies of Title deed of the suit property registered in the defendant's name on November 12, 2001 and the copy of the lease agreement dated 22/9/2010 between the defendant and the plaintiff. Clause 1(bb) of the lease provided as follows:-

“1(bb) Not to assign transfer sublet or part with possession of the premises or any part thereof and it is hereby declared that upon any breach by the lessee of the terms of this sub-clause, the lessor may thereupon at any time re-enter upon the premises and if the lessor shall do so, the terms hereby created shall terminate absolutely and, in the case of a corporate lessee (other than a public company quoted on the Nairobi Stock Exchange, any allotment or transfer of shares in the lessee whereby control of the lessee shall be altered shall, for the purposes of this sub-clause, constitute an assignment or transfer of this lease”.

7. The defendant deposed that following breach of Clause 1(bb) of the lease, it served the plaintiff a Notice to terminate the lease dated 15/2/2018 and signified its intention to exercise its right of re-enter. (“KRL - 6”). The notice prompted the plaintiff to file an application dated 22/5/2018 seeking



to have the Defendant's Directors to be held in contempt for allegedly disobeying the Court's orders issued pursuant to the Ruling of the Court on May 17, 2017 annexed as "KLR-7". As per the Ruling of Munyao, J before whom the defendant argued the shareholding of the plaintiff had altered where Africa Classic Limited held 600 shares out of the shareholding of 1000 of the plaintiff and referring to Clause 1(bb) of the lease the Judge stated thus:-

"12.From the above clause, it is apparent to me that the applicant had an obligation under the lease, not to allot or transfer shares through which its control would be altered, and if it did so, this would, under the lease, be constituted as an assignment or transfer of the lease which the applicant was not permitted to do. I have seen from the lease that the same was signed by Klaus Schroder and Margaret Hopt Schroder and it is not denied by the applicant that there has been a transfer of shares to Africa Classic Limited and that at the moment, it is Africa Classic Limited which is the majority shareholder of the applicant company. It therefore seems to me that there has been an allotment, transfer or allotment of shares, which contravenes the provisions of Clause 1(bb) of the lease. The respondent has stated that it has re-entered the premises pursuant to this breach by the applicant".

8. The defendant thus reiterated that the substratum of the suit ceased to exist following the termination of the lease and the re-entry of the defendant into the suit premises under the terms of the lease and hence sought to have the suit struck out.
9. The plaintiff opposed the defendant's application vide the replying affidavit sworn on 6/6/2022 by Joseph Muya Njiru, one of its directors. The plaintiff vide the replying affidavit set out in considerable detail the events leading up to the filing of the suit. The plaintiff explained that the suit premises had been leased to it pursuant to a lease entered into on September 22, 2010 for a term of 15 years but were on November 8, 2015 gutted by fire rendering them unusable. The plaintiff averred that despite the incidence of the fire, the defendant insisted on the full terms of the lease including payment of rent and other charges continuing to be made notwithstanding that Clause 3(b) of the lease provided for suspension of the rent until the premises were restored. The plaintiff stated it was thus prompted to file suit on July 28, 2016 seeking inter alia, injunctive orders against the defendant. The plaintiff explained that the Court vide the Ruling delivered on May 17, 2017, ordered the plaintiff to continue in possession upon satisfying the condition as to payment of rent arrears and the utilities. The plaintiff averred that even after payment of Kshs 2,300,000/= being the rent arrears, the defendant refused to give access and/or possession of the suit premises to the plaintiff which prompted the plaintiff to institute contempt proceedings against the directors of the defendant/applicant vide the application dated May 22, 2018 which the Court ruled upon on March 12, 2019.
10. The plaintiff averred that the defendant had misconstrued the effect of the Rulings delivered on May 17, 2017 and March 12, 2019 as the Court never determined that the substratum of the suit had disappeared. The plaintiff urged the Court held the substratum of the suit remained alive and that explained why the Court ordered maintenance of the status quo provided the plaintiff met certain conditions which the plaintiff asserts it had satisfied as it had paid the rent arrears of Kshs 2,300,000/= which was the precondition it had to meet in order to continue to have use of the premises. The plaintiff thus contended whether or not there was change of shareholding in the plaintiff company and the implications of any such change would be a matter of evidence for determination at the hearing of the suit.
11. The plaintiff further averred it desired to have the suit heard and determined and denied it was responsible for the delay in getting the suit to trial and in that regard cited the unprecedented Covid-19 Pandemic that affected court operations for the larger part of 2020 as a contributory factor for the



inaction during the period it had ravaged the country. The plaintiff urged the Court in the interest of justice to disallow the defendant's application and permit the suit to be heard substantively on merit.

12. After several failed attempts by the parties to reach an amicable settlement of the matter, the Court on March 23, 2022 directed that the defendant's application dated February 16, 2021 be canvassed by way of written submissions. The plaintiff who had as at that time not filed a response to the application was granted leave to file a response within 15 days. The plaintiff filed its response on 6/6/2022 and the defendant filed its submissions on 13/6/2022. When the matter came up for mention, the plaintiff was granted leave to file its response submissions within 21 days. On 18/7/2022 when the matter was once again mentioned to ascertain compliance, the plaintiff had not as yet filed its submissions. The Court reserved the ruling and as at the time of preparing this ruling, the plaintiff had not filed their submissions.
13. I have set out the background to the defendant's application as borne out by the pleadings both in support and in opposition. Quite simply the issues for determination are whether or not the suit ought to be struck out on the basis that the substratum on which it was founded has ceased to exist; and; alternatively whether the suit should be dismissed for want of prosecution. The plaintiff's suit as pleaded in the plaint dated July 28, 2016 is predicated and founded on the lease, dated September 22, 2010 for a term of 15 years and expected to expire on March 25, 2025. The incidence of the fire in 2015, that gutted part of the leased premises prompted the actions that led to the filing of the instant suit. A fact that appears not to be in dispute however, is that before the fire incidence, the plaintiff had accrued rent arrears in the sum of Kshs 2,300,000/= in addition to some utility bills. In instituting the suit, the plaintiff wanted to have the defendant restrained from evicting, repossessing, and/or in any other manner interfering with the plaintiff's possession and peaceful occupation of the leased premises. The issues relating to possession and payment of rent were appropriately dealt with by Munyao, J while disposing of interlocutory applications and therefore, need not concern me in the disposal of the current application save as the determination may have a bearing to the determination of the present application.
14. The defendant's application is inter alia brought under the provisions of order 2 rule 15 of the [\*Civil Procedure Rules, 2010\*](#) which provides as follows:-
  - “ 15.(1)At any stage of the proceedings, the Court may order to be struck out or amended any pleadings on the grounds that:-
    - a. It discloses no reasonable cause of action or defence in law; or
    - b. it is scandalous, frivolous or vexatious; or
    - c. it may prejudice, embarrass or delay the fair trial of the action; or
    - d. it is otherwise an abuse of the process of the court and may order the suit to be stayed or dismissed or judgment to be entered accordingly, as the case may be.
15. The defendant has submitted that the plaintiff by transferring the majority of its shares to a new shareholder, Africa Classic Limited ceded control of the company and that was in clear breach of Clause 1(bb) of the lease between the plaintiff and the defendant. The remedy for the breach was that the defendant was entitled to re-enter the property and to take possession. The defendant duly exercised the right of re-entry and is now lawfully in possession. The defendant further submitted that the plaintiff having breached Clause 1(bb) of the lease as the Court rightly held vide its ruling on March 12, 2019 and the defendant having regained possession of the suit property, the plaintiff's suit lacks



any substratum as the same was founded on the lease which was determined as a consequence of the plaintiff's actions.

16. The plaintiff through its replying affidavit has argued that there was no proof of the shares having been transferred as claimed by the defendant and that would require proof at the trial. The Court has perused the record of proceedings and its evident that Munyao, J on February 7, 2018 issued an order directing the Registrar of Companies to issue the current directors of Klaus Hotel Ltd; The Registrar of Companies vide a letter dated February 13, 2018 to the Deputy Registrar, affirmed that as per the annexed return dated 20/6/2016, the directors were as follows:-
  1. Klaus Schroder ..... 200 shares
  2. Margaret Stopt Schroder .....200 shares
  3. Africa Classic Limited.....600 shares.
17. The Company was registered on June 8, 2010 with a share capital of Kshs 100,000 divided into 1000 shares of Kshs 100 each. As per the Memorandum, and articles of Association exhibited in the affidavit of Christine Cronchey filed on 15/2/2018 both Klaus Schroder and Margaret Hopt Schroder were the initial subscribers of the Company and each had subscribed for 500 shares. On the basis of this information, it was evident that the shares in the Company had been transferred to Africa Classic Limited and that the latter had become the majority owner of the plaintiff Company. That was undoubtedly in clear breach of Clause 1(bb) of the lease between the plaintiff and the defendant.
18. The defendant in support of its submissions relied on the case of *Talent Academy Ltd v Kenya National Highways Authority* [2019] eKLR for the proposition that where the substratum of the suit is lost, the Court has no business in continuing to sustain the suit. The defendant further placed reliance on the case of *Kiranga Estates Limited v National Bank of Kenya Ltd* [2017] eKLR where the Court underscored the need for the Court to maintain its integrity in the administration of justice by not encouraging or sustaining scandalous or vexatious actions and focusing on fostering the overriding objective rendering justice in an expedient, efficient manner and at a cost affordable to the parties.
19. In the instant matter, I am satisfied that indeed the substratum of the plaintiff's suit was lost once in breach of clause 1(bb) of the lease the plaintiff transferred the majority of the shares of the company to Africa Classic Limited. This constituted an assignment or transfer of the lease without the lessor's consent. The plaintiff in entering the lease with the defendant was expectant, that the then existing shareholders Klaus Schroder and Margaret Hopt Schroder who exercised the lease as the directors/ shareholders of the plaintiff's company would remain in control of the company. The defendant did not contemplate Africa Classic Ltd would take control of the plaintiff company. The lease under clause 1(bb) expressly forbid such action and the defendant lawfully re-entered the premises on account of the breach and the lease consequently stood terminated absolutely as provided under the lease terms.
20. The defendants have further in the alternative sought to have the plaintiff's suit dismissed for want of prosecution. I wish to state that had I held that the substratum of the suit is alive and continuing, I would not have found the plaintiff's suit as meriting to be dismissed for want of prosecution. The matter was last in Court on 30<sup>th</sup> September 2019 when the Court delivered a ruling. Pre-trial directions had then not been taken and in my view either party has some responsibility to get the suit ready for trial. The incidence of the Covid-19 Pandemic during 2020/2021 without doubt disrupted court processes as for the greater part of 2020 court functions were to a great extent scaled down. The defendant filed the present application in February 2021. In the circumstances I would have found the delay excusable and allowed more time for compliance.



21. Before I conclude this ruling, there is another issue which I wish to flag that may have perhaps rendered this suit unsustainable. I have perused the court record and the record does not show that the plaintiff took out summons to enter appearance for service upon the defendant and there is no copy of summons on the court file.
22. The plaint dated July 28, 2016 was filed simultaneously with the notice of motion of even date on the same date. In the affidavit of service dated August 4, 2016, Kamara Benjamin advocate indicates under paragraph 2 the documents he received for service on August 1, 2016 were a notice of motion application together with a plaint dated July 28, 2016 and a hearing notice. These were the documents served on the defendant. There was no summons to enter appearance served. The Court record does not indicate any were actually prepared as there is no copy in the court file or evidence of collection by the plaintiff.
23. Under order 5 rule 1(5) of the CPR, summons to enter appearance are required to be prepared by the plaintiff or his advocate and filed with the plaint and under sub-rule (6) the summons except where the Court is to effect service must be collected for service within thirty days of issue or notification whichever is later, failing which the suit abates.
24. In the present suit, no summons were prepared or issued. It is no wonder that the defendant's advocates in the suit merely filed a Notice of Appointment of Advocate dated August 2, 2016 and not a Memorandum of appearance. As per the record, the defendant has never filed a statement of defence. Indeed, it is only upon being served with summons, is a defendant obligated to file a defence within the period prescribed in the summons. The plaintiff did not prepare summons as required under order 5 rule 1 and none were issued. Order 5 rule 1(2) provides that summons are to be signed without delay and in any event within 30 days from the date of filing the suit.
25. It is worth of note that under order 5 rule 2(1), summons are valid in the first instance for 12 months from the date of issue but if not served may be extended by the court from time to time if satisfied it was just to do so. Where no application for extension is made, the court under order 5 rule 2(7) may without notice dismiss the suit at the expiry of 24 months from the issue of the original summons.
26. Having regard to the provisions of order 5 on service of summons as referenced above, it is evident the plaintiff did not comply with the provisions as to service of summons and as such there is no valid suit against the defendant as the suit is deemed to have abated for want of issue and collection of summons for service upon the defendant.
27. The upshot is that I find merit in the application by the defendant and I accordingly order the suit struck out.
28. The lease having been terminated on account of breach of Clause 1(bb) of the lease, I order the Land Registrar, Naivasha to cancel the lease over Title Number Naivasha/Maraigushu Block 10/29 registered in favour of Klaus Hotel Limited.
29. I have given consideration to the circumstances of this matter, and in exercise of my discretion, I order that the parties shall bear their own costs of the application and the suit.

**RULING DATED, SIGNED AND DELIVERED THIS 1<sup>ST</sup> DAY OF MARCH, 2023.**

**JM MUTUNGI**

**ELC JUDGE**

