Kaur alias Mandeep Kaur v Suri (Environment and Land Case Civil Suit 738 of 2013) [2023] KEELC 18255 (KLR) (7 June 2023) (Judgment)

Neutral citation: [2023] KEELC 18255 (KLR)

REPUBLIC OF KENYA

IN THE ENVIRONMENT AND LAND COURT AT NAIROBI

ENVIRONMENT AND LAND CASE CIVIL SUIT 738 OF 2013

JO MBOYA, J

JUNE 7, 2023

BETWEEN

PARMJIT KAUR ALIAS MANDEEP KAUR ..... PLAINTIFF

AND

AVTAR SINGH SURI ..... DEFENDANT

JUDGMENT

1. The Plaintiff herein, who is the Legal administratix of Gurmit Singh Suri, now Deceased, filed and/or commenced the instant suit against the Defendant and in respect of which the Plaintiff sought for various reliefs.

2. For good measure, the Plaint dated the 24th June 2013, has particularized and enumerated the following reliefs;

    i. A Permanent injunction restraining the Defendant, whether by himself, agents, auctioneers, successors, or assigns from dealing with the Plaintiff's half share of all that property situate on L.R No. 209/662.

    ii. An order of Specific Performance ordering the Defendant to honour the lease and issue to the Plaintiff the accumulated half share rent proceeds of all that parcel known as L.R No. 4275/44.

    iii. An Order nullifying all lease agreements entered into between the Defendant and the tenants on the suit property without consent of the Plaintiff.

    iv. An order for the sub-division of all that property situate on L.R No. 4275/44 into two half's and separate title deeds be issued for the same.

    v. General damages.

vi. Cost of the suit and interest.

vii. Any other/further relief that the Honourable court may deem fit to grant

3. Following the filing and service of the Plaint and Summons to enter appearance, the Defendant herein duly entered appearance and thereafter filed a Statement of Defense and Counter-claim dated the 15th July 2013. For coherence, the counterclaim by the Defendant has sought for the following reliefs;

a. Declaration order that the Defendant is the registered owner of half of the suit property known as L.R No. 4275/44 (original number 4275/16/3) and the equitable owner of the other half thereof.

b. Specific performance order that the Plaintiff does execute transfer for the half suit property known as L.R No. 4275/44 (original number 4275/16/3) that she holds by virtue of the assent registered upon the grant on the 14th November 2012 to the Defendant upon payment of the balance and in default the deputy registrar of the honourable court be directed and mandated to execute the same forthwith.

c. Costs of the suit and the counterclaim be awarded to the Defendant.

4. Subsequently, the Plaintiff herein filed a Reply to the Statement of Defense and Defense to the Counter-claim vide the Statement of Defense to counterclaim dated the 30th July 2013; and in respect of which the Plaintiff denied/disputed the claims alluded to and enumerated at the foot of the counterclaim.

5. Contemporaneous with the filing of the suit/ the subject matter herein, Plaintiff also filed an Application dated the 24th June 2013; and in respect of which the Plaintiff sought for various Interlocutory reliefs.

6. However, when the Application came up before Lady Justice P Nyamweya, Judge (as she then was), the Parties recorded a consent on the 6th August 2013; and wherein it was agreed, inter-alia, that the Defendant shall deposit all the rents collected from the suit property with effect from the 6th August 2013 in court pending the hearing and eventual disposal of the Application under reference.

7. Be that as it may and given that the Plaintiff and the Defendant are indeed a sister in law and brother in law respectively, the Parties herein ultimately entered into a consent on the 3rd April 2014; wherein same agreed that both Parties do undertake audit of Accounts through Independent Account/auditors with a view to ascertaining the true state of income emanating from the suit property. Furthermore, the Parties also agreed to have the respective Audit Reports filed with the Honourable court by way of affidavit.

8. On the other hand and premised on the previous consent, the Parties herein further entered into a consent on the 14th July 2014. For good measure, the terms of the consent included, inter-alia, that the Defendant was to remit and or pay to the Plaintiff the half share of the Plaintiff's entitlement of rents in respect of the suit property.

9. Notwithstanding the foregoing, it is also worthy to take cognizance of the fact that vide the consent entered into on the 4th March 2014, the Parties herein also agreed that the suit property shall be separated into two separate titles for each Party, namely, the Plaintiff and the Defendant, respectively.

10. First forward, the Plaintiff and the Defendant herein appeared to have fully settled the dispute between themselves, leaving only the issue of accounts pertaining to the rental income derivable from the suit property and the pro-rata shares of each party. In any event, the issue of the statement of accounts was to be addressed vide the audit reports.

11. Be that as it may and despite substantial lapse of time, both the Plaintiff and the Defendant were unable to agree on the statement of accounts, culminating into an order by this Honourable court dated the 4th May 2022 wherein each party was directed to file own Statement of Accounts.

12. In addition, the Parties were also granted liberty to file written submissions premised and arising from the statement of accounts. Invariably, the Parties thereafter filed what resembled statement of accounts.

Evidence By The Parties

a. Plaintiff's Case

13. Premised on the orders and directions of the Honourable court issued on the 4th May 2022; the Parties herein were granted liberty to file statement of account and thereafter the respective Experts were also at liberty to attend court and testify.

14. Pursuant to the foregoing, the Plaintiff procured the services of an Expert, namely, Paresh Upadhyah, who testified before the court on the 9th February 2023. For good measure, the witness averred that same is a Certified Public Accountant and thus he is authorized and qualified to tender an Accountant's report.

15. Furthermore, the witness also testified that same was instructed and retained by the Plaintiff herein to under take audit of the rental income derivable from the suit property. In this regard, the witness added that same thereafter proceeded to and indeed undertook the designated exercise, in terms of the Letter of instructions.

16. It was the further testimony of the witness that upon undertaking the designated assignment, same swore an affidavit, wherein, same detailed the requisite findings and observations. In this respect, the witness sought to adopt and rely on the affidavit sworn on the 22nd September 2022.

17. On cross examination, the witness confirmed that same is duly qualified and licensed as an Accountant. Further, the witness averred that same is a holder of ICPA(K).

18. Further and in addition, the witness stated that same was duly retained and instructed by the Plaintiff herein to undertake the exercise and that in this respect same utilized various documents, which were availed and supplied to him by the Plaintiff's advocate.

19. Other than the foregoing, the witness pointed out that despite preparing a report, which has since been filed before the court, the same was not signed by him. Instructively, the witness added that the contents of the report are not accurate.

20. With the foregoing evidence, the Plaintiff's case, limited to the question of Expert Evidence, was closed.

b. Defendant's Case

21. Similarly, the Defendant herein also instructed, engaged and retained an Expert for purposes of preparing anAaccounts report. In this case, the Defendant engaged one Joseph Ndungu Njenga, who testified on behalf of the Defendant.

22. It was the testimony of the named witness that same was engaged and retained by the Defendant to undertake audit and thereafter preparation of statement of accounts relating to the suit property.

23. Further and in addition, the witness added that his instructions were however limited to the period between January 2020 up to September 2022 and not otherwise.

24. Other than the foregoing, the witness testified that upon conclusion of the assignment and exercise, same prepared a report which has since been filed with the Honourable court.

25. On cross examination, the witness pointed out that same was not instructed and/or engaged by the Defendant herein. However, the witness pointed out that same was retained and instructed by a Company known as Linkstars Venture Ltd.

26. On the other hand, the witness also testified that even though same prepared the statement of accounts and the report before the court, the report has not been signed by him.

27. On re-examination, the witness reiterated that same did not sign the report which has been filed before the Honourable court.

28. Based on the foregoing, the Defendant's case, limited to the aspect of accounts was similarly closed.

Submissions By The Parties

a. Plaintiff's Submissions:

29. The Plaintiff herein filed two sets of written submissions dated the 27th February 2023 and the 20th March 2023, respectively. Instructively, the Plaintiff has raised two issues for consideration and determination by the Honourable court.

30. Firstly, Learned counsel for the Plaintiff has submitted that arising from the consent entered into by the Parties on the 4th March 2014, the entire suit/dispute between the Parties herein was settled, leaving only the question of rental entitlement, arising from the suit property.

31. In addition, Learned counsel has submitted that subsequent to the entry into and execution of the consent, the Defendant herein paid to and in favor of the Plaintiff the rental arrears up to and including the month of August 2015. Furthermore, the counsel for the Plaintiff has averred that subsequently the Defendant lapsed into default and has never paid any amounts unto the Plaintiff.

32. Secondly, Learned counsel for the Plaintiff has submitted that the Plaintiff herein is lawfully entitled to half of the rental income derivable from the suit property w.e.f August 2015 up to and including the date hereof. In any event, Learned counsel has pointed out that the monthly rental income drivable from the suit property is Kes.189, 980/= Only, and which amounts should be applied/multiplied against the total number of months due and outstanding to date.

33. Arising from the foregoing submissions, Learned counsel for the Plaintiff has therefore submitted that the total amount due, owing and payable amounts to Kes.17, 478, 160/= only.

34. Lastly, Learned counsel for the Plaintiff has submitted that the Plaintiff herein has been denied and deprived the benefits attendant to and arising from the suit property and in particular, her fair share of the rental income. In this regard, Learned counsel for the Plaintiff has thus submitted that the Plaintiff is entitled to Interests on the monies that have been found due and owing.

b. Defendant's Submissions

35. The Defendant herein filed written submissions dated 9th March 2023; and in respect of which the Defendant has raised, highlighted and canvassed three (3) issues for consideration and eventual determination by the Honourable court.

36. Firstly, Learned counsel for the Defendant has conceded and admitted that the Plaintiff herein is entitled to half share of the rental income derived and derivable from the suit property.

37. Nevertheless, Learned counsel for the Defendant has submitted that even though the Plaintiff is entitled to half share of the rental income from the suit property, the Plaintiff's husband, now deceased, had entered into a sale agreement, wherein same covenanted to sale and transfer his share of the suit property to and in favor of the Defendant.

38. Arising from the foregoing, Learned counsel for the Defendant has thus submitted that the Plaintiff herein ought therefore not to lay a claim to the half share derivable from the suit property.

39. Secondly, Learned counsel for the Defendant has submitted that the Plaintiff's Late husband and the Defendant had an agreement whereby the Plaintiff's late husband was tasked to manage shared properties in India, whereas the Defendant was to manage shared properties in Kenya including, inter-alia, the suit property.

40. Further, Learned counsel for the Defendant has submitted that despite the mutual arrangement, the Plaintiff herein who took over the management of the shared properties in India, but has failed to provide accounts and remit the Defendant's share of Earnings. In this regard, Learned counsel has implored the Honourable court that there is need to offset the monies due and owing to the Defendant from the shared properties in India.

41. Thirdly, Learned counsel has submitted that the accounts that were prepared by and on behalf of the Plaintiff herein, do not reflect the correct and accurate statement of accounts as pertains to the rental income derived from the suit property.

42. In any event, Learned counsel has submitted that the statement of accounts filed by the Plaintiff's expert witness were admittedly not based on any actual and verifiable documents, whatsoever. In this regard, learned counsel for the Defendant has therefore contended that the statement of account by the Plaintiff's witness are therefore inaccurate and are therefore devoid of any probative value.

43. To the contrary, Learned counsel for the Defendant has submitted that the Defendant's Expert witness was able to tender and provide accurate Statement of accounts as pertains to and in respect of the suit property. Consequently, counsel has invited the court to adopt and apply the contents of the report by the Defendant's expert witness.

44. Other than the foregoing, Learned counsel for the Defendant has thereafter proceeded to and drawn schedules/appendix which has been attached to and forms part of the written submissions filed before the Honourable court.

Issues for Determination

45. Having reviewed the Pleadings filed by and on behalf of the respective Parties; and having taken into account the entirety of the court record, inclusive of the diverse consent orders which were recorded by

the Honorable court; and upon consideration of the written submissions filed on behalf of the Parties, the following issues do arise and are thus germane for determination;

i. Whether this Honourable court is seized of the requisite mandate and Jurisdiction to entertain and adjudicate upon the claim relating to off-setting of monies derived/derivable from the properties in India.

ii. What is the Pro-rata Quantum of rents due, owing and payable to the Plaintiff herein.

iii. What Reliefs ought to be granted.

Analysis andDetermination

Issue Number 1

Whether this Honourable court is seized of the requisite mandate and Jurisdiction to entertain and adjudicate upon the claim relating to offsetting of monies derived/derivable from the properties in India.

46. The Defendant herein has submitted that during the lifetime of one Mohinder Singh Suri, now deceased, who was the husband of the Plaintiff, same entered into an agreement wherein the deceased agreed to sell and dispose of his half share in the suit property unto the Defendant.

47. On the other hand, the Defendant herein also contended that other than the sale of the half share in the suit property, the Defendant and the deceased also entered into an arrangement whereby the Deceased took over the management of properties in India, which were jointly owned between the deceased and the Defendant herein.

48. For clarity, the Defendant contended that the deceased was to collect the rents and related income from the named properties in India; and thereafter remits the half share thereof to the Defendant.

49. Additionally, it was contended that upon the death of the deceased, the Plaintiff herein took over the management of the properties in India, but same has since failed, neglected and or refused to remit the half share belonging to the Defendant.

50. Consequently and in the premises, the Defendant herein has implored the court to find and hold that the Defendant is entitled to offset the monies due and owing to the Plaintiff as against what the Plaintiff has not remitted to and in favor of the Defendant.

51. Premised on the foregoing position, the Defendant has in the scheduled attached to the submissions contended that subject to offsetting, it is the Plaintiff who is indebted to the Defendant in the sum of Kes.14, 471, 579/= only and not otherwise.

52. Despite the foregoing submissions by and on behalf of the Defendant, it is imperative to recall that the Parties herein entered into a consent wherein all the issues in dispute were resolved and compromised. Invariably, the only issue that remains outstanding was the pro-rata share payable to and in favor of the Plaintiff.

53. My understanding of the clear and explicit terms of the consent dated the 4th of March 2014; was to the effect that the Defendant herein forfeited and/ or relinquished all or any claim, if at all, that was maintainable as against the Plaintiff.

54. In view of the foregoing, it is surprising, nay perplexing for the Defendant now to be heard to submit that same is entitled to a claim of setoff, arising from the properties located in India and which are (sic) being managed by the Plaintiff. Clearly, such a claim is misconceived and otherwise amounts to an afterthought.

55. Notwithstanding the foregoing, it is imperative to underscore that arising from the various consents, the Parties herein forfeited the right to call and tender evidence in respect of any other claim save for the statement of accounts, which were to help the court to determine the quantum of rents payable to the Plaintiff.

56. Consequently and to the extent that no other piece of evidence was tendered before the Honourable Court, it is difficult to appreciate and comprehend on what basis the Defendant is making a claim pertaining to and concerning (sic) properties that are purported to be jointly owned in India. In any event, no particulars have been supplied.

57. Surely, the Learned counsel for the Defendant cannot purport to create and capture evidence in submissions and purport to utilize same as a basis for making a claim before the Honourable court. Simply put, submissions cannot take the position/ place of evidence as known to Conventional law .

58. In a nutshell, it is imperative to reiterate that a claim before a court of law can only be proven on the basis of evidence. In this respect, the submissions by the Defendant, inclusive of the curious schedules/ appendix attached thereto, are devoid and bereft of probative value.

59. Notably, the Legal position as to whether submissions can take up and supplant evidence was elaborated upon by the Court of Appeal in the case of Daniel Toroitich Arap Moi versus Mwangi Stephen Muriithi & another [2014] eKLR, where the court held thus;

> " We have already found that the 1st respondent failed to discharge his burden of proof of the existence of facts claimed of the companies, what they owned and whether property sales indeed took place, followed by transfers. So what we conclude is that the learned trial judge simply lifted the figure of sh.80,161,720/= from the 1st respondent's submissions and awarded it against the appellant. This was wholly in error. Submissions cannot take the place of evidence. The 1st respondent had failed to prove his claim by evidence. What appeared in submissions could not come to his aid. Such a course only militates against the law and we are unable to countenance it. Submissions are generally parties' "marketing language", each side endeavouring to convince the court that its case is the better one. Submissions, we reiterate, do not constitute evidence at all. Indeed there are many cases decided without hearing submissions but based only on evidence presented. In any event all the 1st respondent would claim and prove as loss could only relate to the shares in the companies and not the properties of the companies".

60. Based on the foregoing analysis, I come to the conclusion that the claim by and on behalf of the Defendant premised on offsetting, inclusive of the claim for kes.14, 471, 579/= only, on the basis of the fictitious appendix/schedule attached to the submissions, is misconceived and Legally untenable.

Issue Number 2

What is the Pro-rata quantum of Rents due, owing and payable to the Plaintiff herein.

61. It is important to state and reiterate that the Parties herein entered into various consents inter-alia the consent of the 4th March 2014, 3rd April 2014 and 14th July 2014, respectively and wherein, the Parties

conceded and acknowledged that the Plaintiff was entitled to half share of the rental income arising from the suit property.

62. Furthermore, the Parties also agreed that to be able to discern the half share due and payable to the Plaintiff, both Parties were ordered and directed to undertake independent audit of the rental income; and thereafter to file their respective reports before the Honourable court.

63. Interestingly, despite the fact the issue of appointment of the independent auditors and the filing of their respective audit reports, was agreed upon by the Parties, the Parties herein played hide and sake, if not, merry-go-round, with the due process of the court and engaged in a plethora of Interlocutory applications, whose net effect camouflaged the only outstanding issue for determination.

64. Nevertheless, it is instructive to point out that ultimately both the Plaintiff and the Defendant engaged their respective Experts, who thereafter undertook (sic) audit of the rental income arising from the suit property and thereafter filed their respective reports.

65. Additionally, it is worth pointing out that the respective Expert witness, retained and engaged by the Parties, thereafter attended court and testified, as pertains to their respective reports.

66. For good measure, the two Expert witnesses were similarly cross examined on the contents of their affidavit, as well as the audit report, that had been prepared and filed/lodged with the Honourable court.

67. Having filed their respective reports, the task of the Honourable court is thus to interrogate same and to ascertain whether the contents of the named reports, are capable of assisting the court in addressing, unravelling and resolving the dispute beforehand.

68. However, I beg to point out that during the cross examination of both Expert witnesses, namely, the one called by the Plaintiff and the Defendant, respectively, same testified and intimated to the court that they had not signed their respective reports.

69. On the other hand, the Expert witness by the Plaintiff indeed went further and conceded that the reason why same had not signed his report was because the contents thereof were not accurate.

70. On behalf of the Defendant, the Expert witness maintained and reiterated that he did not sign his report. However, same could not explain and/or justify his failure/refusal to sign own report.

71. I beg to state that it is the signing and execution of an Expert opinion/report that binds the author thereon. For good measure, the affixation of the signature denotes that the author owns and verifies the contents of the report in question.

72. Consequently, where an expert who prepares and generates a report fails and refuses to sign the report, certainly such a report is deprived and divested of any legitimacy. In short, such a document becomes a mere piece of paper devoid of any meaningful value or otherwise.

73. In ordinary parlance, it would be said that the report/writings thereon, is not worth the value of the paper on which same is written.

74. With the foregoing observation, it is my humble albeit considered view that two Expert Reports, which were tendered and produced before the Honourable court at the foot of the various affidavits sworn by (sic) the Experts, cannot assist the Honourable court in resolving the question of the pro-rata amounts of rents payable to the Plaintiff.

75. Instructively, the place and significance an Expert opinion/report; and the weight to be attached to same, was duly considered and elaborated upon in the case of Elizabeth Kamene Ndolo versus George Matata Ndolo [1996] eKLR, where the court stated and held thus;

> The evidence of P.W. 1 and the report of Munga were, we agree, entitled to proper and careful consideration, the evidence being that of experts but as has been repeatedly held the evidence of experts must be considered along with all other available evidence and it is still the duty of the trial court to decide whether or not it believes the expert and give reasons for its decision. A court cannot simply say"-

76. In short, it is not mandatory and or peremptory that a court of law must take into and apply any set of evidence, merely because the author thereof was/is an expert. Instructively, the court has a discretion in assessing and adopting expert evidence.

77. However in this respect, I have pointed out that what have been touted as Expert opinion is clearly a sheet of papers, devoid and bereft of any meaningful value. Same are worth nothing.

78. Notwithstanding the foregoing, the court is not left without a document to help same compute and ascertain the pro-rata rents payable to the Plaintiff. In this respect, my attention has been drawn to the documents filed by the Defendant himself at the foot of the List dated 15th March 2021; and wherein the Defendant herein tabulated the rents for the years 2015 to 2019 as hereunder;

TABLE

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YEAR

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INCOME

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EXPENSES

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NET INCOME

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2015

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KES.7, 085, 612

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KES.3, 042, 415

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KES.4, 043, 197

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2016

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KES.7, 678, 190

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KES.3, 449, 649

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KES.4, 228, 641

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2017

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KES.7, 421, 639

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KES.3, 746, 282

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KES.3, 657, 357

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2018

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KES.8, 165, 086

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KES.4, 013, 510

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KES.4, 151, 876

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2019

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KES.8, 953, 144

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KES.2, 719, 201

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KES.6, 233, 943

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TOTAL

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KES.39, 303, 671

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KES.16, 972, 057

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KES.22, 337, 614

Divisible as hereunder;

i. Avtar Singh Suri Kes.11, 166, 307/=

ii. Mohinder Singh Share Kes.11, 166, 307/=Share of Mohinder Singh (Mandeep Kaur) (Kes.11, 166, 307/=)

79. Though the schedule attached to the Defendant's List of documents was filed before the court on the 15th March 2021, the schedule does not contain the rental income relative to the years 2020 and the portion of 2021, up to and including March 2021, when same was filed.

80. Despite the foregoing, what I beg to state is that in the absence of any credit worthy evidence, the Honourable court is left with assorted documents, where from the court is called upon to discern what is reasonable, taking into account the totality of the circumstances beforehand.

81. Premised on the foregoing, I propose to proceed on the basis that the net income derivable from the suit property would remain constant for the years 2020, 2021 up to and including to date and that the Table/ Schedule of Rents provided by the Defendant was accurate.

82. Based on the foregoing preposition, which is informed by the schedule that was availed by the Defendant himself and which is therefore chargeable as against the Defendant, the updated table would look as hereunder;

YEAR	INCOME	EXPENSES	NET INCOME
2015	KES.7, 085, 612	KES.3, 042, 415	KES.4, 043, 197
2016	KES.7, 678, 190	KES.3, 449, 649	KES.4, 228, 641
2017	KES.7, 421, 639	KES.3, 746, 282	KES.3, 657, 357
2018	KES.8, 165, 086	KES.4, 013, 510	KES.4, 151, 876
2019	KES.8, 953, 144	KES.2, 719, 201	KES.6, 233, 943
2020	KES.8, 953, 144	KES.2, 719, 201	KES.6, 233, 943
2021	KES.8, 953, 144	KES.2, 719, 201	KES.6, 233, 943
2022	KES.8, 953, 144	KES.2, 719, 201	KES.6, 233, 943
2023	KES. 4,476,572	KES 1,359,600	KES. 3,116,971
TOTAL	KES. 70,639,675	KES. 26,489,260	KES. 44,156,414

83. For the avoidance of doubt, the figures reflected as against the year 2023 have been halved, insofar as the year is in the middle. Consequently, it is proposed that whatever rental income so far derived and/or derivable from the premises amounts to and constitutes half of the annual income.

84. Having taken the foregoing into account and applying the mutual position underscored vide the consent dated the 4th March 2014, as read together with the consent of 3rd April 2014, the Plaintiff would be entitled to half of the rental income (net income) derivable from the suit property. In this regard, the net income is divisible by two (2), culminating into the sum of kes.22,078,207/=.

85. Arising from the foregoing formula, I come to the conclusion that the Plaintiff's pro-rata entitlement of rents derivable from the suit property is Kes. 22,078,207/= Only, which is due, owing and payable to the Plaintiff.

86. For good measure, I have chosen to adopt the documents which was filed by and on behalf of the Defendant vide the List dated 15th March 2021 insofar as same is legally binding upon the Defendant, who is the one who filed same before the court and thus sought to adopt and rely on the contends thereof.

87. In addition, it is also imperative to underscore that the documents under reference having been put forth by the Defendant, same is deemed to have contractual and binding effect on the Defendant. In this regard, I propose to derive inspiration from the holding of the court in the case of Kakuta Maimai Hamisi v Peris Pesi Tobiko, Independent Electoral & Boundaries Commission and Returning Officer Kajiado East Constituency [2017]eKLR, where the court stated and held as follows;

> 30. The question is whether the used the phrase "our final fee-note is likely to be" amounts to unequivocal statement of the exact fee that the Client is bound to pay. To constitute a valid and binding agreement for the purposes of section 45 of the *Advocates Act*, it is expressly provides that the same must be in writing

and signed by the client or his agent duly authorized in that behalf. In this case both the two letters are not signed by the Client. Whereas an agreement may be formed by a series of correspondences, the Client has not exhibited any document by which he signalled his acceptance of the proposed fees by the Advocate. In my view for a document to be said to constitute a valid and binding agreement for the purposes of section 45 of the *Advocates Act*, the same must not only be unequivocal that it signifies what the precise final amount is but must be signed by the person to be charged who in this case is the Client. This was the position adopted by Tanui, J in Rajni. K. Somaia v Cannon Assurance (K) Ltd Kisumu HCMA No. 289 of 2003

31. In this case the documents relied upon I am afraid do not meet the threshold for a validly binding agreement so as to bar the Advocate from taxing his costs more so as there is no evidence that the Client accepted the proposal by the Advocate even if it were to be found that the letter dated 20th June, 2013 was a proposal on the final fee. An agreement must contain both an offer and acceptance and where one condition is not satisfied there is no binding agreement.

88. Whereas the foregoing decision underscored the position that a contract can be discerned and implied from a correspondence duly signed by a person; by parity of reasoning, the document filed by the Defendant herein, which informs the formula adopted in the preceding paragraph, very well fits into the parameters of the law.

89. Furthermore, even though special damages must strictly be proved, it is not lost on the court that the nature of proof required of each and every claim arising out of special damages depends on the totality of the evidence available. In this regard, the court must not insist on exactitude, perfection and arithmetical accuracy.

90. Suffice it to point out that there are and will always be instances where common sense, Equity and Social justice, would be called upon to remedy the harshness and injustice, that may arise and/or ensue out of strict and legalistic application and reliance of the law.

91. To this end, I am reminded of the position taken and adopted by the Honourable Court of appeal in the case of Moses Jomo Olengebenv Samson Masea& another [2010] eKLR, where the court held as hereunder;

> As regards the value of the cattle in our view the court was perfectly entitled to accept the oral evidence of the two farmers on the value of their respective herds of cattle, because the law must accord with common sense principle that cattle owners know the value of their toil and that in real life situations, formal valuations of cattle is not a prerequisite to recovering their value in court because the court would be perfectly entitled to rely on the prevailing local value of cattle as per the evidence of the local farmers and the two respondents were such farmers. In some cases such as this, we are of the view that a court of law is entitled to have regard to the local circumstances including the local market values.

92. Additionally, the point that proof of special damages is also dependent on the totality of the circumstances of the case, was also highlighted and amplified in the case of John Richard Okuku Oloo v South Nyanza Sugar Co Ltd [2013] eKLR, where the court of appeal stated and held thus;

> " ...the degree and certainty must necessarily depend on the circumstances and the nature of the act complained of.
>
> In the Jivanji case (supra) a decision of this court differently constituted, it was held that the degree of certainty and particularity depends on the nature of the acts complained of. The following passage which partly quotes Coast Bus Service Limited v Murunga & others Nairobi CA No.192 of 1992 (ur) appears in the Jivanji case.
>
> "It is now trite law that special damages must first be pleaded and then strictly proved. There is a long line of authorities to that effect and if any were required, we would cite those of Kampala City Council v Nakaye [1972]ea 446, Ouma v Nairobi City Council [1976] KLR 297 and the latest decision of this Court on this point which appears to be Eldama Ravine Distributors Limited and another v. Chebon Civil Appeal Number 22 of 1991 (ur). In the latest case, Cockor JA who dealt with the issue of special damages said in his judgment:
>
> "It has time and again been held by the courts in Kenya that a claim for each particular type of special damage must be pleaded. In Ouma v. Nairobi City Council [1976] KLR 304 after stressing the need for a plaintiff in order to succeed on a claim for specified damages. Chesoni J quoted in support the following passage from Bowen LJ's judgment at 532 - 533 in Ratcliffe v. Evans [1892]QB 524, an English leading case of pleading and proof of damage.
>
> "The character of the acts themselves which produce the damage, and the circumstances under which those acts are done, must regulate the degree of certainty and particularity with which the damage done ought to be stated and proved. As much certainty and particularity must be insisted on, both in pleading and proof of damage, as is reasonable, having regard to the circumstances and to the nature of the acts themselves by which the damages is done. To insist upon less would be to relax old and intelligible principles. To insists upon more would be the vainest pedantry."

93. Furthermore, the Court of Appeal in the case of J. Friedman v Njoro Industries [1954] 21 EACA 172 observed and stated thus :-

> "....there is no obligation on a trial judge who is in possession of all material facts to enable him to make a fair assessment of the damages to order an enquiry in regard thereto..."

94. For coherence, while elaborating the position that a wrongdoer ought not to escape liability merely because the evidence before the court does not meet the threshold anticipated and envisioned in proof of special damages, the court stated the following in the case of John Richard Okuku Oloo (supra):

> " It was held by the Court of Appeal in England in the case of Chaplin Hicks [1911]KB 786 that the existence of a contingency which is depended on the volition of a third person does not necessary render the damages of a breach of contract incapble of assessment.
>
> The following passage appears in the judgment of Vaughan Williams, LJ in the Chaplin case:
>
> "Then it is said that the questions which might arise in the minds of the judges are so numerous that it is impossible to say that the case is one in which it was possible to apply the doctrine of averages at a;;.I do not agree with the contention that, if certainty is impossible of attainment, the damages for a breach of contract are unassessable. I agree, however,

that damages might be so unassessable that the doctrine for averages would be inapplicable because the necessary figures for working upon would not be forthcoming; there are several decisions, which I need not deal with, to that effect. I only wish to deny with emphasis that, because precision cannot be arrived at, the jury has no function in the assessment of damages."

Vaughan Williams, LJ goes on to state, and we fully agree, that the fact that damages cannot be assessed with certainty does not relieve the wrongdoer of the necessary of paying damages for his breach of contract.

95. In a nutshell, the Doctrine and the law of averages, which I have adopted and applied in computing the pro-rata rental income for the years 2020, 2021, 2022 and half of 2023, respectively, accords within common sense, equity and social justice, the latter two, which have attained constitutional anchorage. See Article 10(2) of *the Constitution*, 2010.

Issue Number 3

What Reliefs ought to be granted

96. Whilst discussing issue number two (2), which was enumerated and discussed herein before, I have elaborated upon the position that the Plaintiff is no doubt entitled to the pro-rata rental income derivable from the suit property. For good measure, the benchmark/yardstick upon which to reckon the rental income payable to and in favor of the Plaintiff has been elaborately explained and expounded.

97. Other than the pro-rata rents that are due and payable to and in favor of the Plaintiff, there is also the question of denial and deprivation of the benefits that the Plaintiff ought to have partaken of and benefited from as a result of the rental income, but which was unlawfully withheld by the Defendant herein.

98. In this respect, the question that does arise is whether the Plaintiff herein is entitled to interest on the monies that have been found due, owing and payable. To mind, where one has been deprived of his/her entitlement to money, such a person is entitled to indemnity on account of Interest, to address and cover the diminished value of money overtime.

99. Without belaboring the importance of Interest, I beg to reiterate the holding of the Court of Appeal in the case of Highway Furniture Mart Limited versus Permanent Secretary Office of The President & another [2006] eKLR, where the court stated and held thus;

> " In Gulam Husein v French Somaliland Shipping Co. Ltd [1959] EA 25 the predecessor of this Court while referring to section 34 of Indian Code of Civil Procedure which is in pari materia with section 26 of the *Civil Procedure Act* said, obiter:
>
> "Section 34 of the Indian code was considered by the Privy Council in the case of Bengal Magpur Railway Co. v Ruttanji Ramji 1938 AIR PC & 67 and it was indicated by their Lordships that the section has no application to interest prior to date of the suit, which is a matter of substantive law. It was also indicated that the power conferred is to order interest upon the principal sum adjudged from the date of suit to the date of the decree but from that date to the date of payment it may be ordered to be paid upon the aggregate of the principal and interest as at the date of the decree".

100. Premised on the foregoing, it is my considered opinion and position that the Plaintiff herein is entitled to Interest on the various amounts of rental income, which were due and payable unto her on annual basis.

101. Consequently and in this respect, the balance that was due in the year 2015 shall attract interest at 14% per annum (being the applicable court rates) and the same position shall apply mutatis mutandis for the rest of the years, as captured in the table alluded to in paragraph 81 hereof.

102. Finally, the Parties herein had agreed by consent that the title of the suit property shall be split into two with one half thereon being transferred and registered in the name of the Plaintiff. Instructively, that was the agreement at the foot of the consent dated 4th March 2014. See clause 4 of the said consent.

103. Based on the foregoing and to avert further acrimony and unnecessary Applications before the Honourable court including the application dated 25th April 2023; it is imperative, just and expedient that the Defendant does execute the relevant transfer instrument as well as the scheme of sub-division in respect of L.R No. 4273/44, Riverside Drive, Nairobi, to facilitate the subdivision thereof.

104. For the avoidance of doubt, the Defendant be and is hereby directed to execute the requisite subdivision scheme and conveyance instruments in accordance with the terms of the consent order dated 4th March 2014 within 60 days from the date hereof.

Final Disposition

105. Having calibrated upon the diverse issues which were enumerated in the body of the Judgment herein, it is now appropriate to bring the judgment to closure by proclaiming the final and dispositive orders.

106. Consequently and in the premises, I enter judgment for the Plaintiff on the following terms;

i. The Plaintiff is entitled to payment of the sum of kes.22,078,207/= only on Account of pro-rata rental income reckoned up to and including June 2023.

ii. Interests be and is hereby awarded at 14% per annum (Court rates), applicable against the amounts due, owing and payable to the Plaintiff on annual basis in accordance with the table alluded to in paragraph 81 hereof. For the avoidance of doubt, the interest shall be applied against the amounts stipulated to be due on annual basis w.e.f 2015

iii. The Plaintiff's entitlement to half of the Rental income shall continue for as long as the rents shall be collected by the Defendant herein, who is hereby ordered and directed to ensure that the pro-rata share is timeously and promptly released/remitted to the Plaintiff.

iv. The Title of the suit property shall be sub-divided and/or separated into two for each party, namely, the Plaintiff and the Defendant respectively in accordance with the consent recorded on the 4th March 2014.

v. To facilitate compliance and effectuation of clause (iv), the Defendant shall forthwith and not latter than 60 days from the date hereof execute the subdivision scheme and all the instruments of conveyance pertaining to and in respect of L.R No. 4273/44, Riverside Drive, Nairobi.

vi. The Plaintiff shall be responsible for payment of the Professional fees/ expenses, if any due to the Physical Planning Department, the Survey Department as well as the registration fees on registration.

vii. In default by the Defendant to execute, inter-alia, the subdivision scheme and the requisite Instrument of conveyance within the stipulated 60 days period; the Deputy Registrar of this Honourable court shall proceed to execute same on behalf of the Defendant, subject to proof of service of the decree herein on the Defendant.

viii. The Application dated 25th April 2023, which sought for an order to direct the Deputy Registrar to execute the sub-division Scheme over and in respect of the suit property, in lieu of the Defendant be and is hereby terminated.

ix. Costs of the suit be and are hereby awarded to the Plaintiff.

107. It is so ordered.

DATED, SIGNED AND DELIVERED AT NAIROBI THIS 7TH DAY OF JUNE 2023.

OGUTTU MBOYA,

JUDGE.

In the Presence of;

Benson Court Assistant

Mr. E M Kamau for Mr. Goswami for the Plaintiff.

Mr. Brian Moturi for the Defendant