



Emerg Investment Limited v Development Bank of Kenya Limited (Environment & Land Case 18 of 2022) [2023] KEELC 18497 (KLR) (4 July 2023) (Judgment)

Neutral citation: [2023] KEELC 18497 (KLR)

**REPUBLIC OF KENYA
IN THE ENVIRONMENT AND LAND COURT AT NAIROBI
ENVIRONMENT & LAND CASE 18 OF 2022**

MD MWANGI, J

JULY 4, 2023

BETWEEN

EMERG INVESTMENT LIMITED PLAINTIFF

AND

DEVELOPMENT BANK OF KENYA LIMITED DEFENDANT

JUDGMENT

Background

1. The Plaintiff and the Defendant entered into a lease agreement dated 29th May 2016 whereby the Plaintiff leased to the Defendant 1800 square feet on the ground floor of the building on the Plaintiff's property known as Title No Nakuru Municipality/Block 9/34 (hereinafter referred to as 'the suit property'). The lease was for a term of 6 years and 6 months from the 1st January 2016 upto and including 30th June 2022. The lease provided for the mode of payment of rent as tabulated at paragraph 5 of the plaint.
2. The Plaintiff's case is that the Defendant did not honour the terms of the lease in that the Defendant failed to make timely rent payments as agreed in the lease agreement and prematurely opted out of the lease without due regard to the prejudice it exposed the Plaintiff to.
3. The Plaintiff avers that vide a letter dated 27th March 2018, the Defendant gave the Plaintiff three (3) months' notice of intention to surrender the leased property. The Plaintiff asserts that it treated the notice by the Defendant as a breach of the agreement and consequently filed a suit in the High Court at Nairobi being Milimani HCCC 179 of 2018. The said case was however, compromised by the parties who recorded a consent order on the payment of the rent arrears owing to the Plaintiff then and the legal costs of Kshs 464,000/-. The consent order also rescinded the Defendant's notice to terminate the lease dated 27th March 2018 thereby reinstating the lease between the parties.



4. The Plaintiff asserts that in spite of the consent order between them, the Defendant once again defaulted in payment of the rent due. The Plaintiff avers that the Defendant is guilty of breach of contract. The Plaintiff states that despite the lease agreement providing expressly for quarterly rent payment in advance, the Defendant failed to honour the payments for the 1st and 2nd quarters of the year 2020. The Defendant actually vide its letter of 25th February 2020 gave the Plaintiff a three (3) months' notice of intention to surrender the leased premises with effect from 25th February 2020.
5. The Plaintiff asserts that the lease did not have a provision for early termination and or surrender. It was a fixed term lease that was to run upto and including 30th June 2022. It is the Plaintiff's case that there was an implied term that in the event of early termination by either party, the party in breach would compensate the other party accordingly.
6. The Plaintiff avers that it duly notified the Defendant that its notice of 25th February 2020 amounted to a breach of the lease and that it would only accept the surrender as repudiation of the contract subject to the Defendant compensating it by paying the sum of Kshs 19,232,877 being the rent for the unexpired term of the lease. The Plaintiff additionally claims the rent arrears for the 1st and 2nd quarter of the year 2020 (included in the computation). The Plaintiff further alleged that the Defendant failed to execute a surrender of lease.
7. The Plaintiff claims the tabulated amount of Kshs 19,232,877 with interest at court rates from the date of filing suit until payment in full; further for an order directing the Defendant to execute the surrender of lease for the suit property and costs of the suit.

Response by the Defendant.

8. The Defendant filed a statement of defence dated 16th July 2020. The Defendant avers that it entered into the lease agreement with the Plaintiff over the suit property in contemplation of opening and operating a branch in Nakuru. However, it later decided not to take possession/occupy the premises or open the branch due to business constraints. The Defendant avers that it duly informed the Plaintiff about the decision.
9. It's the Defendant's case that parties had incorporated the terms of the *Indian Transfer of Property Act* (ITPA), 1882 into the lease agreement but expressly excluded the application of section 108 of the said Act. The Defendant assertion was that the ITPA provided for a number of ways, under section 111, through which the lease of immovable property could be terminated.
10. The Defendant disagreed with the Plaintiff's assertion that the lease agreement could only have been terminated by effluxion of time. The Defendant's position was that it had given the Plaintiff notice to determine the lease through various letters. The lease therefore stood terminated within the meaning of section 111 (h) of the *ITPA*.
11. The Defendant reiterated that the lease between the parties contemplated sooner determination at clause 22 thereof; where the lease preserved the rights of the parties to enter and exit the lease.
12. The Defendant stated that in any event, it never took occupation of any portion of the property under the lease and that the Plaintiff had control and occupation of the suit property at all times. The Plaintiff, according to the Defendant had been using 2000 square feet of the basement of the building for parking of vehicles of its tenants while the Defendant on the other hand did not receive any benefit or credit for the use of the basement by the Plaintiff.
13. At paragraph 14 of the statement of defence, the Defendant insists that there is no consideration flowing from the Plaintiff to the Defendant under the lease and the Plaintiff therefore has no right



in law to bring the suit or make the claim against it. There is therefore no basis whatsoever for the Plaintiff's claim against the Defendant.

14. The Defendants position is that even if there was a breach, the Plaintiff was under obligation to mitigate its losses. It was incumbent upon the Plaintiff to take all necessary steps to find a tenant once the Defendant notified it of its intentions to terminate the lease.
15. In regard to the prayer that the Defendant be ordered to sign a surrender of the lease, the Defendant avers that it had offered to sign and surrender the lease since the year 2017. This suit, according to the Defendant was therefore unnecessary. The Defendant therefore prays for the dismissal of the Plaintiff's suit with costs.
16. The Plaintiff replied to the Defendant's statement of defence asserting that the ITPA, 1882 was repealed and therefore non-existent by the time the parties entered into the lease agreement and its provisions cannot be binding upon them. The Plaintiff further averred that the lease agreement was in conformity with the provisions of the Land Registration Act, 2012 and the Land Act, 2012.
17. On the assertion that the Plaintiff was bound to mitigate losses, the Plaintiff's answer was that it was not under obligation to find a new tenant as the lease with the Defendant was still subsisting. Further that the Defendant had in its letter of 25th February 2020 proposed to look for a new tenant on behalf of the Plaintiff but it did not show the efforts it had undertaken towards the same.
18. The Plaintiff insists that the Defendant had freely entered into the lease agreement agreeing to the terms thereof and was therefore bound by them.

Evidence adduced.

19. This case proceeded to hearing with each party calling one witness. The witnesses affirmed the pleadings filed by their respective sides.

Court's directions

20. Upon close of the hearing, the court directed parties to file written submissions. They complied and the court has had the opportunity to read the submissions which now form part of the court's record.

Issues for determination.

21. From the pleadings, the evidence adduced by the witnesses and the submissions by the parties, it is clear that there is no dispute about the existence of the lease agreement. Both parties acknowledge the agreement which they duly executed. The issues for determination in this court's opinion are as follows: -
 - a. Whether the lease agreement was subject to the provision of the Indian Transfer of Property Act, 1882.
 - b. Whether there was breach of contract on the part of the defendant by its action of terminating the lease before lapse of the term of 6 years and 6 months.
 - c. Whether the Plaintiff is entitled to the orders sought.
 - d. What orders should issue on costs.



Analysis and Determination

A. Whether the agreement was subject to the provisions of the Indian Transfer of Property Act, 1882

22. As pointed out earlier, the Defendant asserts that the lease agreement had incorporated the provisions of the Indian Transfer of Property Act, 1882. It therefore argued that the provisions of the said law were applicable in as far as the termination of the lease agreement was concerned. The Plaintiff's rejoinder was that by the time of entering into the lease agreement, the said law had been repealed and its provisions cannot therefore be binding upon the parties.
23. The lease agreement between the Plaintiff and the Defendant is dated 29th May 2016.
24. Article 68 of Kenya Constitution, 2010 commanded parliament to revise, consolidate and rationalize existing land laws. Parliament indeed went ahead to enact new land laws, namely the Land Act, the Land Registration Act, the National Land Commission Act and the Environment Land Court Act while at the same time repealing various Acts including the Indian Transfer of Property Act, 1882, the Government Land Act, the Registration of Titles Act, The Registered Land Act, the Wayleaves Act and the Land Acquisition Act.
25. The averment by the Plaintiff that the Indian Transfer of Property Act had been repealed at the time of making the lease agreement is therefore correct. The Land Registration Act that wholly repealed the Indian Transfer of Property Act, 1882 was assented to on 27th April 2012 and came into operation on 2nd May 2012.
26. 'Repeal' means that the Indian Transfer of Property Act, 1882 was rescinded or revoked. It therefore ceased to have the force of the law from the date that the Land Registration Act came into operation.
27. The court's finding is that the provisions of the repealed Indian Transfer of Property Act, 1882 had no force of law by the date the lease agreement was made.

b. Whether there was breach of contract on the part of the defendant by its action of terminating the lease before lapse of the term of 6 years and 6 months.

28. The Plaintiffs' case is that the lease agreement between it and the Defendant did not have an early termination clause – it was to run its full course. The Defendant while agreeing that the lease was for a term of 6 years and 6 months argued that there was an implied term or contemplation that it could be terminated by way of a notice, particularly in terms of the provisions of the Indian Transfer of Property Act, 1882.
29. The lease agreement was exhibited in this case. I have carefully perused it and find no 'early termination clause' in the lease. I have further already made a finding to the effect that the provisions of the Indian Transfer of Property Act, 1882 are not applicable as the law had already been repealed by the Land Registration Act of 2012.
30. In the case of CBA Property v Ahmednasir Nairobi ELCC E277 of 2020 (Judgement), this court while considering a fixed term lease without a termination clause made reference to the decision by Warsame J (as he then was) in the case of Chimanlal Meghji Naya Shah & another v Oxford University Press (E.A.) Ltd (2007) eKLR. The learned Judge in that case held that in a lease where there was no termination clause and the lease is terminated before its expiry, 'the situation that obtains is a breach of contract.'



31. Majanja J in *Ranji Meghji Gudka v Kisi University* (2019) eKLR expressed a similar view holding that termination (before expiry of the fixed period), would amount to a breach 'for which the party at fault, would have to pay damages'.
32. Guided by the above decisions, I find that the Defendant in this case breached the lease agreement (contract) with the Plaintiff.

c. Whether the Plaintiff is entitled to the orders sought.

33. In the case cited above, *Chimanlal Meghji Naya Shah & another v Oxford University Press (E.A.) Ltd (supra)*, Warsame J pronounced that, "the party offended is entitled to damages for breach of contract."
34. The Plaintiff claims compensation for the entire unexpired period of the lease – totaling to Kshs 19, 232,877/- with interest at court rates from the date of filing suit until payment in full. Further, for an order directing the Defendant to execute the surrender of the lease.
35. The Defendant in response to the claim by the Plaintiff argues that even if the Plaintiff were entitled to damages, it was obligated to mitigate the losses; in other words, it cannot be entitled to rent for the entire period of the lease.
36. I agree with the Defendant's submissions on mitigation of losses. The Plaintiff was obligated to take all reasonable steps to mitigate the losses consequent to the breach of contract by the Defendant upon the Defendant notifying its intentions to discontinue the lease. The Plaintiff could not just sit pretty waiting to reap a windfall in form of compensation from the Defendant.
37. The Court of Appeal in the case of *African Highland Produce Ltd v John Kisorio* (2001) eKLR, enumerated the guiding principles of law in mitigation of losses in the following terms: -
 - i. It is the duty of the Plaintiff to take all reasonable steps to mitigate the loss he has sustained and he (therefore) cannot claim any sum which is due to his neglect.
 - ii. The duty arises immediately the Plaintiff realizes that an interest of his has been injured by a breach of contract or tort.
 - iii. The question of what is reasonable for a Plaintiff to do in mitigation of his damages is not a question of law, but one of fact in the circumstances of each particular case, the burden of proof being upon the Defendant.
38. I must state that there is no scientific formula for calculating such damages. The court in the case of *Caltex Oil (Kenya) Ltd v Evanson Njiiri Wanjibia* (2017) eKLR, held that in calculating the damages, in such circumstances, the court should take a reasonable approach.
39. My responsibility then is to determine what is reasonable in the circumstances of this case having in mind the duty on the part of the Plaintiff to mitigate its losses.
40. The Defendant's position was that it gave the Plaintiff a reasonable notice. Further that the Plaintiff was to blame for over pricing the suit premises, far above the prevailing market price. The Plaintiff in response alleged that it could not lease the premises to a third party since the lease with the Defendant was subsisting and the Defendant had not signed the deed of surrender.
41. Considering all the circumstances of this case, and taking judicial notice of the Covid-19 pandemic that hit the country and the world at large in the year 2020, I am of the considered view that an award of compensation equivalent to the rent payable for 12 months after the lapse of the notice by the Defendant would be fair, reasonable and adequate compensation for the Plaintiff for breach of the



lease by the Defendant. With reasonable efforts, the Plaintiff should have secured a new tenant within the said period of 12 months. As a way of mitigating its loss the Plaintiff should have even considered letting the suit property at a lower amount of rent as a way of mitigating its losses.

42. The court takes cognizance that the rent stipulated was exclusive of VAT at 16%.
43. Accordingly, the plaintiff's claim is allowed as follows: -
 - a. Rent (unpaid) for January 2020 to April 2020 at Kshs 2,083,332/-
 - b. Rent for 1 years from May 2020 (after expiry of the notice by the Defendant) to April 2021 at Kshs 6,406,246/-
 - c. VAT at 16% on (a) and (b) above - Kshs 1,358,332.48Total = Kshs 9,847,910.48
44. It is apparent from the evidence adduced that the Defendant had paid a deposit of Kshs 1,170,000.00. This amount will be deducted from the above computation. This leaves a balance of Kshs 8,677,910.48/-
45. Judgment will therefore be awarded to the Plaintiff against the Defendant for the sum of Kshs 8,677,910.48/-.
46. On interest, the court directs that the same will be payable on the amount awarded to the Plaintiff at court rates from the date of this judgment until payment in full.
47. Regarding the prayer that the Defendant be directed to execute the Deed of surrender, that is already overtaken by events since the lease period has already lapsed.
48. The court further grants the Plaintiff the costs of this suit.

Final disposition.

49. The conclusion is that, the Plaintiff's claim against the Defendant is allowed for the sum of Kshs 8,677,910.48/- (inclusive of VAT) with interest at court rates from the date of this judgment until payment in full.
 50. The Plaintiff too is awarded the costs of this suit.
- It is so ordered.

DATED, SIGNED AND DELIVERED AT NAIROBI THIS 4TH DAY OF JULY 2023.

M.D. MWANGI

JUDGE

In the virtual presence of:

Ms. Kimorna for the Plaintiff (holding brief for Bundotich)

Mr. Nyboma for the Defendant.

Court Assistant – Yvette.

