Rimco Oil Company Limited v Jinat Investment Company Limited & another (Environment & Land Case 249 of 2014) [2023] KEELC 18531 (KLR) (6 July 2023) (Judgment)

Neutral citation: [2023] KEELC 18531 (KLR)

REPUBLIC OF KENYA

IN THE ENVIRONMENT AND LAND COURT AT KISII

ENVIRONMENT & LAND CASE 249 OF 2014

M SILA, J

JULY 6, 2023

BETWEEN

RIMCO OIL COMPANY LIMITED ..... PLAINTIFF

AND

JINAT INVESTMENT COMPANY LIMITED ..... 1ST DEFENDANT

VIVO ENERGY KENYA LIMITED ..... 2ND DEFENDANT

JUDGMENT

1. This suit was commenced through a plaint filed on 7 June 2014. In the plaint, the plaintiff has pleaded that the 1st defendant is the leasehold proprietor of the land parcel Kisii Municipality/Block III/77 (the suit property) on which stands a petrol station (the premises). It is pleaded that pursuant to an agreement made on 22 September 2012, the 1st defendant, leased to one Hezron Miyungo T/A Rohemic Petroleum Products (Rohemic) the suit property for a period of five years commencing 1 October 2012. It is pleaded that on 25 October 2013, Rohemic sold to the plaintiff the remainder of the lease for a consideration of Kshs. 5,000,000/= and that the 1st defendant had no objection to this reassignment of lease. It is further pleaded that a lease agreement was drawn by M/S J.O Soire & Co. Advocates *vide* which the 1st defendant leased to the plaintiff the suit premises for a period of 10 years with effect from 1 December 2013. The plaintiff contends that she paid Rohemic the Kshs. 5 million and also paid to the 1st defendant the sum of Kshs. 1, 528,000/= as rent for the period that he had been in occupation. It is pleaded that when the plaintiff took over the premises, he found it unusable and embarked on renovations. However, on 16 June 2014, the 2nd defendant's (Vivo Energy) servants broke the plaintiff's padlocks claiming to be tenants of the 1st defendant and since then the defendants

have restrained the plaintiff from operating on the premises. The plaintiff avers that this action has occasioned him loss and he seeks the following orders :-

a. A declaration that the plaintiff's lease agreement made on 1 December 2013 with regard to the petrol station on the suit property is valid.

b. A permanent injunction restraining the defendants from entering or trespassing or interfering with the plaintiff's use of the petrol station on the suit property.

c. A declaration that any lease agreement between the defendants is illegal and null and void.

d. Kshs.6, 528,000/=

e. Interest on (d) above.

f. Any further relief that the court may deem fit.

g. Costs.

2. The 1st defendant filed defence on 14 July 2014 vide which she admitted that she had a tenancy relationship with Rohemic but denied that the agreement was reduced into writing. She denied having met with the plaintiff, or agreeing to lease the premises to her, or instructing M/s J.O Soire Advocate to draw a lease agreement. She denied receiving the sum of Kshs. 1, 528,000/= as rent from the plaintiff. In the alternative, she pleaded that what she received from the plaintiff was a sum of Kshs. 1, 028,000/ = paid to clear rent arrears owed by Rohemic. She denied that the plaintiff expended money on the premises, but in the alternative, pleaded that if she did, then this was done gratuitously.

3. The 2nd defendant filed a defence on 4 August 2015. She pleaded that the agreements referred to by the plaintiff, dated 22 September 2013 and 25 October 2013, are not capable of enforcing any interest in immovable property. She averred that in March 2014, the 1st defendant approached her and offered to lease the premises and they subsequently entered into a lease agreement registered on 12 May 2014 for a term of 15 years from 1 March 2014. It is pleaded that the 2nd defendant took possession and operated in it. It is pleaded that at the time the lease agreement was entered into, the property was charged to Diamond Trust Bank who gave consent for the lease. The agreements averred by the plaintiff are faulted inter alia for reason that no consent of the chargee was obtained. This defence was amended on 26 March 2018, principally to plead that the 2nd defendant is no longer in possession of the premises. She also reserved the right to claim indemnity from the 1st defendant for breaching the covenant to ensure that she has quiet possession and for representing to her that there was no competing interest over the property.

4. On 30 May 2018, the 1st defendant amended her defence to refute the above claim of the 2nd defendant.

5. PW-1 was Richard Momoima Onyonka, currently the Senator Kisii, and Director of the plaintiff company. He testified that Mr. Hezron, the proprietor of Rohemic, approached him and asked him whether he can take over the petrol station. He testified that he met both Mr. Hezron and the landlord and the landlord agreed that he could take over the premises. The landlord then sent them to Mr. Soire advocate to draw an agreement. Mr. Soire drew an agreement which he (PW-1) signed and he (Mr. Soire) stated that he would forward a copy to him once it is executed by the landlord. He (PW-1) kept a copy of what he had signed. He proceeded to take over the premises the day next. Mr. Hezron showed him round and he started operations. He however noticed a problem with the quality of fuel, which clients complained had water, and he opted to renovate the station by changing the storage

tanks, pumps, the cabro, infrastructure and to rebrand. He brought workmen from Nairobi and they proceeded to repair the tanks as they saw no need to replace them. When he went to the station the following week, he found the landlord had closed the station, and barely a month later, the 2nd defendant moved in and took possession. He inter alia produced as exhibits an agreement between the plaintiff and Rohemic dated 25 October 2013, a handwritten note written on 3 November 2013 by Dr. Tailor, a director of the 1st defendant, sending him to Mr. Soire, a letter dated 31 January 2014 from his advocates enclosing a banker's cheque for rent, and some cheques which he stated were for payment of rent.

6. Cross-examined, he acknowledged that Clause (d) of the agreement between the plaintiff and Rohemic had a clause that the landlord (Jinat, the 1st defendant) had no objection to the same. There was however no written consent from Jinat. He testified that he had spoken to the landlord and he wrote the note to Mr. Soire. According to him, this note constituted the consent. Mr. Soire drafted the agreement and he signed his part but he never got a copy signed by the landlord. He never obtained registration of the lease. He stated that he was not aware that the property had been charged and he thus did not seek consent from Diamond Trust Bank Limited. He was not aware whether Rohemic had registered her lease. He acknowledged that the draft lease agreement prepared by Mr. Soire was not signed by the landlord. He was not aware that Rohemic had rent arrears at the time he agreed to take over the lease. He denied that he was required to pay some rent arrears before entering into an agreement with the landlord. He explained that the arrangement was for him to pay Rohemic and in turn Rohemic would pay any of his arrears of rent directly to the landlord. He stated that the cheques forwarded to Jinat were cashed. He testified that these were payments made so that his lease becomes effective and he was not clearing any rent arrears on behalf of Rohemic. He paid Rohemic the Kshs. 5 million as agreed. He pointed at the agreement between himself and Rohemic where Kshs. 1.5 million is acknowledged as paid but he did not have documents to demonstrate payment of the balance. He took possession after he had made the deposit to Rohemic. He only operated for a day before stopping and calling in the workmen who were there for about 4 days. It is on completion of the works that he was told that the landlord has barred him from the premises. He claimed that he used about Kshs. 800,000/= in repairs. He explained that his claim for Kshs. 6,528,000/= combines what he paid Rohemic and what he paid the landlord for the lease. He did not display a licence from the Energy Regulatory Commission.

7. Dr. Anil Ratilal Tailor, a director of the 1st defendant, testified on her behalf. His evidence was that he never had any written lease agreement with Rohemic though he allowed the proprietor (Mr. Hezron) to run a petrol station within the suit property. He testified that he paid rent for some time but went into arrears. They had a discussion and Mr. Hezron mentioned that he wants out and wished to sell his business. He agreed but stated that the rent arrears first need to be cleared. Mr. Hezron later came with Hon. Onyonka to his office by which time the two (the plaintiff and Rohemic) already had a written agreement between them. He tried to dissuade Hon. Onyonka from taking over the premises, advising him that a petrol station needs a hands-on person, but Hon. Onyonka stated that he had already committed Kshs. 1.5 million which he cannot recover and it is better that he proceeds with the business. He testified that he told him that he can only get in as tenant after the rent arrears are cleared. He claimed that Hon. Onyonka agreed and undertook to pay him from the money he owed Mr. Hezron. He stated that the rent arrears were Kshs. 1, 392,000/= and that Hon. Onyonka paid Kshs. 500,000/= in cash on account of the accrued rent arrears. He also made two payments in cheque, Kshs. 250,000/= in November 2013 and Kshs. 278,000/= on 14 February 2014. He asserted that these payments were to clear the debt owed by Rohemic and that after these payments, a sum of Kshs. 392, 400/= was still owed. He asserted that no valid agreement was ever entered between the plaintiff and the 1st defendant. On the alleged repairs undertaken by the plaintiff, he stated that he was not aware of them as he was not present, but he doubted if the plaintiff ever occupied the premises. He testified

that since the rent arrears were not paid, the petrol station remained without anyone operating it for about 5 months. He thought that they were losing money and he approached the 2nd defendant to take over the premises which they did. He gave Vivo Energy vacant possession and they operated for some years then left. They left on basis that the business was not doing too well and they were also not happy because of this case. He denied giving the plaintiff consent to lease the premises.

8. Cross-examined, he affirmed that the 1st defendant entered into a lease agreement with Vivo Energy which was executed and registered after consent from the chargee was obtained. The lease was subsequently surrendered and Vivo is no longer in the premises. He testified that Mr. Hezron had operated the station for about 2 years and was paying rent of Kshs. 139,200/= per month inclusive of VAT. He acknowledged that his practice is not to register leases unless it is with the big companies. He acknowledged writing the note dated 30 November 2013 to Mr. Soire, after he had met with Hon. Onyonka and Mr. Hezron, instructing Mr. Soire to draft a lease. He had agreed that Hon. Onyonka could be tenant for two years paying Kshs. 139,000/= and thereafter rent of Kshs. 150,000/= for another two years. He contended that they had agreed that Hon. Onyonka could become tenant after clearing the rent arrears of Mr. Hezron. He acknowledged receiving a draft of the lease agreement to the plaintiff but he did not sign it because the rent arrears owed to Mr. Hezron had not been cleared. He insisted that what Hon. Onyonka paid was cash of Kshs. 500,000/= and the two banker's cheques totaling Kshs. 528,000/=, thus a total of Kshs. 1,028,000/=. He denied receiving a further Kshs. 500,000/= to bring the amount paid to Kshs. 1, 528,000/=. According to him all this was payment for Rohemic's rent arrears and were not payments for a lease. He stated that he would have a problem refunding this sum of Kshs. 1, 028,000/= to the plaintiff as these were rent arrears owed by Rohemic and that the plaintiff was paying on his behalf. He added that the plaintiff never operated in the premises.

9. The 2nd defendant called Mr. Geoffrey Otieno Akoth, the Portfolio and Planning Manager of the 2nd defendant. He testified that they entered into a lease over the premises with the 1st defendant, which lease was registered. They incurred some costs in renovating and branding. They operated on the premises but eventually surrendered the lease. He stated that they left the site because of Health, Safety, Security and Environmental issues owing to operations around the premises considered hazardous (especially a restaurant). Cross-examined, he testified that he was involved in the scouting of the suit property and it was vacant. They made a letter of offer in March 2014 and the lease was entered into in May 2014.

10. With the above evidence, the defendants closed their case.

11. I invited counsel to file written submissions, which they did, and I have taken these into consideration before arriving at my decision.

12. From the plaint, it will be observed that the plaintiff has sought various orders. Whether or not he is entitled to these, gravitates on the question whether he had a valid lease agreement with the 1st defendant, who is the owner of the suit premises. The position of the plaintiff is that she did enter into a lease agreement and made payments in respect of rent but the 1st defendant refutes this. The 1st defendant further asserts that whatever payments were made by the plaintiff were made to clear the rent arrears of the previous tenant, Mr. Hezron T/A Rohemic, and because these were never cleared then no lease was entered into.

13. My view is that there was an intention to enter into a lease agreement but this intention was never crystalised and no lease agreement was ever entered between the plaintiff and the 1st defendant. It is common ground that Hon. Onyonka, as representative of the plaintiff, and Dr. Tailor, as representative of the 1st defendant, did hold a meeting and it was tentatively agreed that the plaintiff could become

tenant of the 1st defendant. This is what culminated in Dr. Tailor writing the note dated 30 November 2013 to Mr. Soire Advocate. That note is written on Dr. Tailor's own letterhead and it states as follows :-

> " Mr. Soire,
>
> We have agreed with Richard Onyonka.
>
> 1. 139000 per month rent for 2 yrs.
>
> 2. 150000 per month after 2 yrs with 5% increment every year
>
> Thank you
>
> (signed)."

14. First, this note was never written on the 1st defendant's letterhead but on the personal letterhead of Dr. Tailor. Secondly, I am not persuaded that the 1st defendant could be bound into a lease which she has not executed. What happened is that Mr. Soire drafted the lease which was signed by the plaintiff but was never signed by the 1st defendant. The plaintiff cannot purport that it entered into a lease when the lease instrument was never signed. One can argue that it is not a must that the lease be in writing and parties can have a landlord tenant relationship without there being an instrument in writing. Indeed in his submissions, Mr. Ochoki, learned counsel for the plaintiff offered authorities to demonstrate that a contract can be implied by the conduct of the parties. I agree with this. However, in such instance, if it is a question of implying a tenancy, it must be demonstrated that there were rent payments made and acknowledged, and possession given, and that the parties have consensus ad idem that there would be a landlord/tenant relationship. There should be absolutely no ambiguity that the parties operate on the basis of a landlord and tenant relationship. In the case at hand, I am not persuaded that the facts demonstrate that there was absolutely no ambiguity on whether or not the plaintiff is tenant of the 1st defendant.

15. First, I have no evidence that the 1st defendant actually put the plaintiff into possession. The fact that the plaintiff took possession was challenged and I really have no tangible evidence that the plaintiff ever operated the petrol station as claimed. There is no receipt book displayed to show that fuel was sold and no document to support the alleged repairs said to have been undertaken. No person came forth to corroborate the contention of the plaintiff that she was ever in possession.

16. Secondly, I have no receipt or acknowledgment that the 1st defendant received any money affirming that the money is being received as rent. No receipt or any other sort of written acknowledgement was displayed by the plaintiff from the 1st defendant indicating that money has been received as rent. Thirdly, it is doubtful whether the parties had a meeting of minds on the tenancy of the plaintiff. The evidence adduced demonstrates that there was no consensus ad idem, or a meeting of minds. Whereas the plaintiff thought that he had a lease and was paying rent, the 1st defendant thought that whatever money was being received was money for clearing the rent arrears of the previous tenant. If ever there had been a meeting of minds, then, given that the 1st defendant had already instructed Mr. Soire to draw a lease, the 1st defendant would have proceeded to execute the written lease agreement. The fact that the lease was never executed informs one that there was an issue that was pending and the 1st defendant was not yet ready to lease the premises to the plaintiff. Neither can the plaintiff point at the agreement between himself and Rohemic to assert that the 1st defendant had consented to him taking over the premises from Rohemic, for the simple reason that the 1st defendant was never a party to that agreement. She cannot be bound by a contract that she is not privy to. As far as I can discern,

the parties were operating at cross-purposes with one party believing that she has a lease and the other party believing that it is previous rent arrears being cleared before a lease can be entered into.

17. Having said that, I see no basis for the 1st defendant asserting that what the plaintiff was paying was rent arrears of the previous tenant. There is no document in writing that what the plaintiff was paying was rent arrears and nothing has been exhibited to support the preposition that the obligation of the previous tenant to pay rent arrears was ever transferred to the plaintiff. The 1st defendant did not call Mr. Hezron to support this position and the oral evidence of Dr. Tailor, that it was agreed that the plaintiff would pay rent arrears of the previous tenant, is completely unsupported. Given that position, the 1st defendant cannot be heard to claim that what the plaintiff was paying was rent arrears. As I have stated in the preceding paragraph, my view of the matter is that the parties were operating at cross-purposes.

18. The plaintiff has of course lodged a claim for Kshs. 6,528,000/=. His breakdown of this is that he is entitled to be paid by the 1st defendant the sum of Kshs. 5 million that he paid to Mr. Hezron and a further amount of Kshs. 1, 528,000/= that he paid the 1st defendant in respect of rent. There is no basis upon which the plaintiff can claim the sum of Kshs. 5 million that he paid to Mr. Hezron T/A Rohemic. I already pointed out earlier that the 1st defendant was not privy to the agreement that was entered into between the plaintiff and Rohemic and I have no instrument which demonstrates that the 1st defendant was to shoulder any liability on account of that agreement in the event that the plaintiff never took possession of the premises. I am afraid that this court cannot demand that the 1st defendant bears the burden of a third party. However, given that I have held that the parties never had a lease agreement, and there is no evidence that the plaintiff was to pay any rent arrears on behalf of Rohemic, then there would be no basis for the 1st defendant keeping the sum of Kshs. 1, 028,000/= which she admits receiving from the plaintiff. The plaintiff of course contends that she directly paid the sum of Kshs. 1, 528,000/= but there is no proof of this. In fact, if it is not that Dr. Tailor admitted that he received the sum of Kshs. 500,000/= in addition to the two cheques totaling Kshs. 528,000/= the only proof would have been for the sum contained in these two cheques. It is Dr. Tailor who disclosed that he had received Kshs. 500,000/= in cash and I have no reason to doubt his honesty for he could as well have denied receiving this sum and there would have been no proof to the contrary. Given that no tenancy agreement was ever entered into between the plaintiff and 1st defendant, and given that there is no proof that the plaintiff was to pay any rent arrears, it would be an unjust enrichment to allow the 1st defendant keep this sum of Kshs. 1, 028,000/= for it would be money received without anything being given in return whatsoever. I am thus persuaded to enter judgment for the plaintiff against the 1st defendant for the sum of Kshs. 1, 028,000/= to attract interest at court rates from the time of filing this suit till payment in full.

19. It will be seen from the foregoing that I find no merit in the plaintiff's prayers for a declaration that there was a valid lease agreement between herself and the 1st defendant and I am unable to issue any order of injunction as sought. On the lease between the 1st defendant and the 2nd defendant, I see no problem at all. The premises was vacant without a tenant and the 1st defendant had every right to enter into a lease agreement with the 2nd defendant which is precisely what was done.

20. There is the little issue of the claim by the 2nd defendant against the 1st defendant but this was never pursued and in fact the witness of the 2nd defendant did testify that the lease was voluntarily surrendered. I believe the parties abandoned this and I need not make any orders on it.

21. I think I have dealt with all issues save for costs. I have found that the parties were at cross-purposes and mistaken. In those circumstances, I will make no orders as to costs. Each party to bear his/her own costs of this suit. It follows that the only order I have made is for refund to the plaintiff by the

1st defendant of the sum of Kshs. 1, 028,000/= with interest at court rates from the time of filing suit till settlement in full.

22. Judgment accordingly.

DATED AND DELIVERED AT KISII THIS 6TH DAY OF JULY 2023

JUSTICE MUNYAO SILA

JUDGE, ENVIRONMENT AND LAND COURT