



**REPUBLIC OF KENYA**

**IN THE ENVIRONMENT AND LAND COURT AT NAIROBI**

**ELC CASE NO. 73 OF 2018**

**PAMPA GRILL LIMITED.....1<sup>ST</sup> PLAINTIFF**

**PAMPA CHURASCARIA (UNDER**

**ADMINISTRATION) LIMITED.....2<sup>ND</sup> PLAINTIFF**

**VERSUS**

**NORTH LAKE LIMITED.....1<sup>ST</sup> DEFENDANT**

**BUENA BIZZ LIMITED.....2<sup>ND</sup> DEFENDANT**

**RULING**

The facts giving rise to this suit were set out in detail in my ruling delivered on 11<sup>th</sup> February, 2021. I will reproduce the same here. The 1<sup>st</sup> plaintiff and the 1<sup>st</sup> defendant entered into a lease agreement for a term of five (5) years and three (3) months commencing on 1<sup>st</sup> September, 2012 and terminating on 30<sup>th</sup> November, 2017 in respect of all that parcel of land known as L.R No. 330/352, Nairobi (hereinafter referred to only as “the suit property”). The 1<sup>st</sup> plaintiff leased the suit property from the 1<sup>st</sup> defendant for the purposes of a restaurant business that was operated by the 2<sup>nd</sup> plaintiff. The plaintiffs brought this suit against the defendants through a plaint dated 19<sup>th</sup> February, 2018 which was amended on 13<sup>th</sup> November, 2019. In their amended plaint, the plaintiffs averred that the 1<sup>st</sup> plaintiff incurred expenses to the tune of Kshs. 37,401,998.33 in repairing and renovating the suit property which amount the 1<sup>st</sup> defendant had not refunded to it. The plaintiffs averred that by a letter dated 18<sup>th</sup> September, 2017, the 1<sup>st</sup> defendant informed the 1<sup>st</sup> plaintiff that it did not intend to renew the 1<sup>st</sup> plaintiff’s lease in respect of the suit property upon its expiry on 30<sup>th</sup> November, 2017. The plaintiffs have averred that despite this notice, the 1<sup>st</sup> plaintiff paid to 1<sup>st</sup> defendant a sum of Kshs. 430,691/- on account of rent for the month of December, 2017 which payment was accepted by the 1<sup>st</sup> defendant.

The plaintiffs averred that through a letter dated 7<sup>th</sup> December, 2017, the 2<sup>nd</sup> defendant informed the 1<sup>st</sup> plaintiff through its advocates, Munyalo Muli & Company Advocates that the 2<sup>nd</sup> defendant had entered into a contract with the 1<sup>st</sup> defendant to lease the suit property and had paid rent to the 1<sup>st</sup> defendant for the premises. The plaintiffs averred that through the said letter from its advocates, the 2<sup>nd</sup> defendant demanded possession of the suit property from the plaintiffs. The plaintiffs averred that on or about 4<sup>th</sup> January, 2018, the 1<sup>st</sup> plaintiff paid to the 1<sup>st</sup> defendant a sum of Kshs. 1,292,073/- equivalent to three months’ rent as further security deposit in the expectation that the 1<sup>st</sup> defendant would renew its lease in respect of the suit property.

The plaintiffs averred that on 15<sup>th</sup> January, 2018, the 2<sup>nd</sup> plaintiff filed a suit at the Business Premises Rent Tribunal and obtained an order in Nairobi BPRT Case No. 40 of 2018 (“the tribunal suit”) restraining the 1<sup>st</sup> defendant from interfering with its quiet possession of the suit property pending the inter-partes hearing of an application for injunction that it had filed in the said suit. The plaintiffs averred that on the same date namely, 15<sup>th</sup> January, 2018, the 1<sup>st</sup> defendant moved to the Chief Magistrates Court at Nairobi and irregularly obtained an ex-parte order in Nairobi CMCC No. 9414 of 2017 (“the lower court suit”) for the eviction of the 1<sup>st</sup> plaintiff from the suit property pending the inter-partes hearing of an eviction application that the 1<sup>st</sup> defendant had filed before that court. The plaintiffs averred that on 18<sup>th</sup> January, 2018, Siuma Auctioneers acting on the instructions of the 1<sup>st</sup> defendant executed the said irregular order from the lower court by illegally and irregularly evicting the plaintiffs forcefully from the suit property.

The plaintiffs averred that during the said forceful eviction, some of the plaintiffs’ properties were stolen while others were seriously damaged. The plaintiffs averred that the goods that were stolen and those that were destroyed were valued at Kshs. 11,942,455/-. The plaintiffs averred that their forceful eviction from the suit property was illegal and irregular for various reasons among them that; as at the time of the eviction, there was an existing order issued by the Business Premises Rent Tribunal (“the tribunal”) restraining the 1<sup>st</sup> defendant from interfering with the 2<sup>nd</sup> plaintiff’s occupation of the suit property and that the 1<sup>st</sup> defendant had accepted the rent for the month of

December, 2017 in the sum of Kshs. 430,691/- and a further security deposit in the sum of Kshs. 1,292,073/-. The plaintiffs averred further that as at the time of their eviction, the 1<sup>st</sup> defendant had not refunded to the 1<sup>st</sup> plaintiff a sum of Kshs. 37,401,998.33/- that it had incurred in repairing and renovating the suit property at the commencement of its tenancy and a sum of Kshs. 900,000/- that the 1<sup>st</sup> plaintiff had paid as the first security deposit under the lease that expired. The plaintiffs averred further that the said eviction orders were obtained by the 1<sup>st</sup> defendant from the lower court through misrepresentation and concealment of material facts.

The plaintiffs averred that after their unlawful eviction by the defendants from the suit property using the said orders that the 1<sup>st</sup> defendant had obtained irregularly from the lower court, the 1<sup>st</sup> defendant mischievously and fraudulently withdrew the lower court suit in which it had obtained the said eviction orders without serving the application pursuant to which the said orders had been issued upon the 1<sup>st</sup> plaintiff to enable it defend itself. The plaintiffs averred that the said lower court suit was withdrawn by the 1<sup>st</sup> defendant so as to conceal the illegal and irregular manner in which the said eviction orders were obtained.

The plaintiffs averred that during their forceful eviction from the suit property, some items such as CCTV cameras, safe, generator, power back up, Brazilian Grill and the hoods in steel water tanks remained in the suit property. The plaintiffs averred further that after their forceful eviction, some of their items that included chimneys, wine racks, grill mortars, water pumps, computers, shelves, horse pipe, permanent grill, tents and fixed furniture, DSTV and Zuku dishes, CCTV cameras and safe all valued at Kshs. 3,278, 000/- were converted by the defendants to their own use. The plaintiffs averred further that they lost a lot of items through destruction and theft during the eviction that included; stock at the bar, water, sodas, juices, beers, liqueurs, blended whisky, cognac, malt whisky, Irish whisky, Canadian whisky, American whisky, brandy, aperitifs, gin, vodka, rum, tequila, wines, cigarettes, operating equipment, meat stock in stores and freezer all valued at Kshs. 8,664,455/-. The plaintiffs averred that the total value of their properties that were either converted, destroyed and/or stolen by the defendants was estimated at Kshs. 11, 942,455/-.

The plaintiffs averred further that they suffered loss of profits estimated at Kshs. 61,223,995/- for 2018 financial year. The plaintiffs averred that as a consequence of the 1<sup>st</sup> defendant's breach of the plaintiffs' legitimate expectation that their lease would be renewed and their subsequent illegal forceful eviction from the suit property by the defendants, the plaintiffs had suffered loss, mental anguish, anxiety and had been deprived of their constitutional right to utilize the suit property.

The plaintiffs sought judgment against the defendants for;

- a. Kshs. 37,401,998.33 being the amount incurred by the 1<sup>st</sup> plaintiff in the repairs and renovation of the suit property.
- b. Kshs. 900,000/- being the first security deposit.
- c. Kshs. 430, 691/- being the rent for December, 2017.
- d. Kshs. 1,292,073/- being further security deposit.
- e. Kshs. 61,223,995/- being loss of profits for the year 2018.
- f. Kshs. 11,942,455/- being the value of the goods/assets converted, stolen and/or destroyed or damaged during the illegal eviction.
- g. Interest on the above.
- h. General and punitive damages.
- i. Costs of the suit plus interest.

The defendants were served with Summons to enter appearance and appointed the firm of Masore Nyang'au & Co. Advocates to act for them in the suit. The said firm of advocates did not file a defence to the plaintiffs' claim on behalf of the defendants. The suit was fixed for formal proof and the plaintiffs called three witnesses in proof of their claim against the defendants. Prior to the commencement of the hearing, the court was informed that the defendants' advocates on record had been served and having satisfied itself that service was indeed effected upon the firm of Masore Nyang'au & Co. Advocates, the court allowed the hearing of the matter to proceed the absence of the defendants' advocates notwithstanding. After the close of the plaintiffs' case, the court directed the parties to make closing submissions in writing. The plaintiffs filed their submissions on 24<sup>th</sup> August, 2020 while the defendants did not file submissions.

The court fixed the matter for judgment on 11<sup>th</sup> February, 2021. While perusing the file for the purposes of preparing the judgment, the court noted from the record that on 26<sup>th</sup> April, 2018, the firm of W.G. Wambugu & Co. Advocates had filed a notice of change of advocates dated 25<sup>th</sup> April, 2018 through which the said firm took over the conduct of the defendants' case from the firm of Masore Nyang'au & Co. Advocates. It was not clear to the court from the record whether the plaintiff's advocates had been served with a notice of change of advocates by the firm of W.G. Wambugu & Co. Advocates.

The court was not aware of this notice of change of advocates until it started the process of preparing the judgment. It also appeared that even the advocates for the plaintiffs were not aware of this fact. This is because all the affidavits of service on record showed that the said advocates were all along serving the firm of Masore Nyang'au & Co. Advocates on behalf of the defendants. It was the said law firm that was served with the amended plaint, a hearing notice and submissions filed in the matter.

Due to lack of clarity regarding the defendants' representation, the court felt that it was not safe to proceed with the writing of the judgment

that it had reserved. The court felt that if it was true that it was the firm of W.G. Wambugu & Co. Advocates that was on record for the defendants and that the plaintiffs' advocates had been informed of this change of advocates, then the hearing of the suit that took place on the basis that the defendants were represented by the firm of Masore Nyang'au & Co. Advocates would be irregular and liable to be set aside.

Due to the foregoing, the court made an order on 11<sup>th</sup> February, 2021 inviting the firm of Mutua, Nyongesa & Muthoka Advocates for the plaintiffs and, Masore Nyang'au & Co. Advocates and W.G. Wambugu & Co. Advocates on behalf of the defendants to address the court on the issue of representation of the defendants in this matter after which the court would give further directions regarding the pending judgment.

Pursuant to the said order, Mr. Makokha of Mutua, Nyongesa & Muthoka Advocates, Mr. Nyangau of Masore Nyang'au & Co. Advocates and Mrs. Wambugu of W.G. Wambugu & Co. Advocates before me on 17<sup>th</sup> March, 2021 and addressed the court at length on the issue of the defendants' representation.

Mr. Nyangau told the court that after the court delivered its ruling on the plaintiff's application for injunction on 12<sup>th</sup> April, 2018, he disagreed with the defendants on whether or not an appeal should be filed against the said decision. Mr. Nyangau stated that due to that disagreement, the defendants withdrew instructions from his firm and decided to instruct the firm of W.G. Wambugu & Co. Advocates to represent them in the matter. He stated that the firm of W.G. Wambugu & Co. Advocates filed and served upon his firm a notice of change of advocates after which his firm ceased to act for the defendants although he held on to the defendants' file due to non-payment of legal fees.

On her part, Mrs. Wambugu confirmed what Mr. Nyangau told the court. She confirmed that her firm filed a notice of change of advocates in 2018. She stated that since she had not received the defendants' file from the firm of Masore Nyang'au & Co. Advocates, she thought that she had not taken over the conduct of the matter. Mrs. Wambugu told the court that on that belief, her firm filed another notice of change of advocates on 1<sup>st</sup> October, 2020 which is the same day that she appeared before the court with Mr. Nyangau when the court was to reserve a judgment date for the matter. Mrs. Wambugu told the court that it was her firm that was acting for the defendants and not the firm of Masore Nyang'au & Co. Advocates and that her firm should have been served with all court proceedings from the time the firm came on record in the matter.

In response, Mr. Makokha submitted that as far of the plaintiffs were concerned, the advocates on record for the defendants were Masore Nyang'au & Co. Advocates. Mr. Makokha contended that the firms of Masore Nyang'au & Co. Advocates and W.G. Wambugu & Co. Advocates were playing tricks. He pointed out that the firm of W.G. Wambugu & Co. Advocates had in fact filed an application to arrest the pending judgment and to have the suit heard a fresh. Mr. Makokha claimed that the notice of change of advocates by the firm of W.G. Wambugu & Co. Advocates was back dated and sneaked in the court file. He submitted that the said notice did not comply with the provisions of Order 9 rules 5 and 6 of the Civil Procedure Rules.

Mr. Makokha submitted that since the said notice of change of advocates was not served upon his firm, the firm of Masore Nyang'au & Co. Advocates was deemed to be still on record for the defendants. He urged the court to go ahead and write the pending judgment contending that the said notice of change was filed to prepare a basis for the setting aside the pending judgment.

In a rejoinder, Mr. Nyangau submitted that his firm having been served with a notice of change of advocates had no business continuing to represent the defendants in this matter. On her part, Mrs. Wambugu submitted that she was ready and willing to be investigated regarding the alleged backdating and sneaking in documents in the court file. Mrs. Wambugu submitted that her firm did not only file a notice of change of advocates but also filed a notice of appeal against the ruling of the court in the injunction application on the same day. She urged the court to make a finding that the firm of W.G. Wambugu & Co. Advocates was properly on record and to give appropriate directions.

I have considered the submissions by counsels on the issue of representation of the defendants in this suit. The issue is whether it is the firm of Masore Nyang'au & Co. Advocates or W.G. Wambugu & Co. Advocates which is on record for the defendants in the suit. I believe that the answer is found in Order 9 of the Civil Procedure Rules. Order 9 rules 5 and 6 of the Civil Procedure Rules provide as follows:

**[Order 9, rule 5.] Change of advocate.**

**5. A party suing or defending by an advocate shall be at liberty to change his advocate in any cause or matter, without an order for that purpose, but unless and until notice of any change of advocate is filed in the court in which such cause or matter is proceeding and served in accordance with rule 6, the former advocate shall, subject to rules 12 and 13 be considered the advocate of the party until the final conclusion of the cause or matter, including any review or appeal.**

**[Order 9, rule 6.] Service of notice of change of advocate.**

**6. The party giving the notice shall serve on every other party to the cause or matter (not being a party in default as to entry of appearance) and on the former advocate a copy of the notice endorsed with a memorandum stating that the notice has been duly filed in the appropriate court (naming it).**

It is not in dispute that the firm of Masore Nyang'au & Co. Advocates was appointed by the defendants to act for them in this suit on 28<sup>th</sup> February, 2018 soon after this suit was filed and the firm filed in court a notice of appointment of advocates on the same date. From the foregoing provisions of the Civil Procedure Rules, the defendants had a right to change advocates. Order 9 rule 5 of the Civil Procedure Rules provides that until a party changing advocates has filed in court and served a notice of change of advocates on the other parties to the suit, the former advocate shall be considered to be the advocate for the party until the conclusion of the matter including a review or appeal.

From the court record, the firm of W.G. Wambugu & Co. Advocates filed a notice in court on 26<sup>th</sup> April, 2018 to the effect that the defendants had changed their advocates and appointed the firm of W.G. Wambugu & Co. Advocates to act for them in place of Masore

Nyang'au & Co. Advocates. On the face of the said notice of change of advocates, it is indicated that the same was to be served upon the firm of Masore Nyang'au & Co. Advocates as the advocates previously acting for the defendants and Mutua Nyongesa & Muthoka Advocates who are on record for the plaintiffs.

From the submissions that were made before me, it is not in dispute that while the said notice was served upon the firm of Masore Nyang'au & Co. Advocates, the plaintiff's advocates, Mutua Nyongesa & Muthoka advocates were not served. It follows therefore that pursuant to Order 9 rule 5 of the Civil Procedure Rules, the firm of Masore Nyang'au & Co. Advocates remained on record as the advocates for the defendants as far as the plaintiffs were concerned. Even as at the time the advocates for the parties appeared before me, there was no indication that an attempt had been made by the firm of W. G. Wambugu & Co. Advocates to serve of a notice of change of advocate upon the plaintiffs' advocates.

In view of the clear provisions of Order 9 rules 5 and 6 of the Civil Procedure Rules which were put in place for orderly conduct of court proceedings, I have no discretion in the matter. It is my finding therefore that as at the time this suit was heard and a judgment reserved, the firm of advocates that was lawfully on record for the defendants was Masore Nyang'au & Co. Advocates and not W. G. Wambugu & Co. Advocates. Since the firm of Masore Nyang'au & Co. Advocates was duly served with the hearing and mention notices together with the closing submissions, the proceedings of the court were regular and no reason exists why the court should not deliver the judgment that was reserved herein.

In conclusion, I hereby order that the judgment pending in this matter shall be delivered on 10<sup>th</sup> June, 2021 at 9.00am.

**DELIVERED AND DATED AT NAIROBI THIS 15TH DAY OF APRIL 2021**

**S. OKONG'O**

**JUDGE**

**Ruling delivered virtually through Microsoft Teams Video Conferencing Platform in the presence of:**

Mr. Makokha for the Plaintiffs

Mr. Nyangau and Mrs. Wambugu for the Defendants

Ms. Ms. C. Nyokabi-Court Assistant