Consolidated Bank of Kenya Limited v Taj Mall Limited (Environment & Land Case 269 of 2016) [2023] KEELC 21320 (KLR) (2 November 2023) (Judgment)

Neutral citation: [2023] KEELC 21320 (KLR)

REPUBLIC OF KENYA

IN THE ENVIRONMENT AND LAND COURT AT NAIROBI

ENVIRONMENT & LAND CASE 269 OF 2016

LC KOMINGOI, J

NOVEMBER 2, 2023

BETWEEN

CONSOLIDATED BANK OF KENYA LIMITED ..... PLAINTIFF

AND

TAJ MALL LIMITED ..... DEFENDANT

JUDGMENT

1. The Plaintiff through the Plaint dated 17th March 2016 claims that vide a lease agreement dated 1st June 2011 terminating on 31st June 2017 entered between it and the Defendant, they were entitled to peaceful and quiet possession of units no G21, G22 and G23 at Taj Mall shopping mall erected on LR No. 209/13938 (herein after referred to as "the suit property"). The agreement stipulated that the 1st annual rent was Kshs. 6,592,320 escalating at a compound rate of 7.5% per annum and a service charge of Kshs. 61,040 per month (exclusive of VAT) payable quarterly in advance.

2. On or about 1st October 2015 they learnt that the National Land Commission had ordered for revocation of LR No. 209/13938 as gazetted on 22nd January 2016 vide Legal Notice Vol. CXVIII No. 6. The Plaintiff claimed that this revocation of title ruined the substratum of the lease agreement thereby frustrating it and the parties' relationship stood terminated. The Plaintiff went ahead and issued the Defendant with a termination notice dated 1st December 2015 and sought another premises to relocate to. However, on 5th March 2016 when they tried to vacate the premises, the Defendant denied them exit which undermined their operations and exposed them to the risk of loss of business. The Plaintiff claimed that they tried to have an amicable resolution to the stalemate, but the Defendant was not willing. They therefore prayed for:

    a. A declaration that the Lease Agreement between the Plaintiff and the Defendant has been frustrated and subsequently terminated.

b. An order that the Plaintiff is at liberty to vacate and exit the suit premises known as units number Gs21, Gs22 and Gs23 on LR No. 209/13938.

c. An injunction to restrain the Defendant by itself, agents, servants or employees or any other person or group of persons purporting to act on its behalf from hindering, obstructing, undermining or interfering with the Plaintiff's efforts to vacate the suit premises known as Gs21, Gs22 and Gs23 on LR No. 209/13938 in any manner whatsoever.

d. General damages.

e. Cost of the suit.

f. Interest on (d) and (e) above at court rates.

3. The Defendant in their Amended Defence and Counterclaim dated 12th February 2019 acknowledged that LR No. 209/13938 was an amalgamation of two titles LR No. 7075/13/1 and LR No. 7075/24 where the National Land commission held that LR No. 7075/13/1 had been compulsorily acquired by the Government in 1960 but denied that it had received any notice of intended demolition of the premises. Noting that the Plaintiff was barred by its contractual obligations whose agreement was terminating on 31st May 2017 and any relocation was its own making because it had been assured that its use and occupation of the premises was not under any risk. The Defendant thus opposed the orders sought by the Plaintiff and filed a counterclaim stating that the Plaintiff (now Defendant in the counterclaim) claimed that the Plaintiff breached the contract by failing to remit rent as set out in the lease and vacating the premises earlier than agreed in the lease agreement but eventually gave vacant possession on 17th August 2018. As such, the Defendant (in the Counterclaim) owed the Plaintiff (in the counterclaim) Kshs. 30,661,779.13 as rent arrears and rent due from May 2016 to 16th August 2018. The Plaintiff thus prayed for:

a. Kshs. 14,489,611.90 for rent due upto end of lease term on 31st May 2017;

b. Kshs. 16,172,187.23 for rent due from the 31st May 2017 to 16th August 2018;

c. costs of the counterclaim;

d. Interest on (a) and (b) above at court rates.

4. The Plaintiff in its Amended Reply to the Defence and Counterclaim dated 2nd March 2019 reiterated the contents of the Plaint, disputed the Counterclaim and put the Defendant to strict proof. The Plaintiff contested the Counterclaim stating that it implied that: the lease was not subject to termination, the lease could not be frustrated by operation of law, the lease could subsist even after its fundamental terms had been violated; the Plaintiff was entitled to pay rent for a lease that had been frustrated and its substratum fundamentally altered; the Plaintiff was entitled to pay rent for a lease that had been terminated and the Defendant wrongly detained the Plaintiff's property.

5. The Plaintiff went on to state that they had duly paid the contractual rent for the period ending 31st April 2016 which included the period it vacated the suit premises and further deposited Kshs. 14,489,611.90 as security vide an order issued on 31st May 2016 despite the Defendant wrongfully detaining its goods which they released on 16th August 2018. As such, it did not breach the agreement nor did it owe any money to the Defendant and it was an attempt by Defendant to benefit from the wrongful detention of the Plaintiff's goods by claiming for rent during a period when no tenancy relationship existed between them. It added that the Taj Mall building was eventually demolished on 14th September 2018. The Defendant's counterclaim was premised on an illegality, was bad in law and should be dismissed with costs.

Evidence of the Plaintiff

6. The Plaintiff's Legal Manager, Albert Anjichi testified as PW1. He adopted his witness statement as part of his evidence in chief and produced the bundle of documents as exhibits in this case. He stated that the Plaintiff entered into a lease agreement with the Defendant until sometime in September 2015 when the tenancy relationship could no longer subsist following revocation of Title to property LR No 209/13938. The title was revoked by National Land Commission on the ground that part of the land had been compulsorily acquired by the Government in 1960. Following this, they issued a three months termination of lease notice on 1st December 2015 on grounds of frustration. Upon expiry of the notice, the Plaintiff removed some of its assets from the building but other assets were detained by the Defendant hence the filing of this suit. He stated that at the time of the filing of this suit on 18th March 2016, the Plaintiff had met its rental obligations until April 2016 as well as deposited Kshs. 14,489,611.90 as security which was rent payable for May 2016 to 31st May 2017. He went on to state that even after making the deposit, the Defendant did not release the Plaintiff's goods but released them two years later in August 2018 and went on to claim for rent between 31st May 2016 and 17th August 2018 which was unlawful. PW1 stated that the property was eventually demolished.

7. On cross examination he stated that the lease agreement was for six years and did not have a termination clause but the Plaintiff issued the termination notice on the basis that National Land Commission had revoked the Title. He acknowledged that there was correspondence that indicated that National Land Commission would not demolish the suit property adding that on 7th March 2016, the Plaintiff issued a notice that the bank was still operational and there was no notice showing that the bank would be relocated. He confirmed that whereas no demolition had occurred as of May 2017, there were several correspondences between the Plaintiff and the Defendant asking for release of their goods. He also confirmed that prayer a, b, and c of the Plaint had been overtaken by events but prayer d, e and f were still valid.

8. On re-examination PW1 stated that once the title was revoked the property was non-existent and as such the lease was frustrated by operation of law. He reiterated that the Defendant detained some of their goods which were picked up on 17th August 2018 which the Defendant had not disputed and as such they were entitled to general damages.

Evidence of the Defendant

9. The Defendant was represented by its Managing Director Rameshchandra Govind Gorasia who testified as DW1. He adopted his two witness statements as part of his evidence in chief and produced his bundle of documents as his exhibits.

10. On cross examination he confirmed that there was a tenancy agreement between them and the Plaintiff and that title to property LR No. 209/13938 which hosted Taj Mall was revoked vide a letter dated 30th September 2015 by National Land Commission on grounds that it was a public utility. He stated that the decision was erroneous pointing out that they sought court's redress after the building was demolished. He stated that the lease was not frustrated because nothing affected the lease until the time the lease expired adding that there was no document that confirmed the Title had been revoked.

11. At the close of the oral testimonies, parties tendered final written submissions.

The Plaintiff's Submissions

12. On whether the Lease Agreement was frustrated on 30th September 2015 as a result of National Land Commission orders to revoke title LR No. 209/13938 and the eventual revocation of the said title,

counsel submitted that title to property was fundamental to the lease and the revocation of title went to the root of the lease citing Tatem Ltd vs Gamboa [1939] 1KB 132. As such, they could not be required to perform on a revoked Title. Counsel also outlined that in the letter dated 30th September 2015 Kenya Urban Roads Authority (KURA) informed the Commission that the construction of Outering road would commence as soon as the road corridor reserve was cleared off encroachment and acquisition of land. Counsel pointed out that Clause 5.3.3 addressed the issue of frustration of lease for reason beyond control of the parties because they had not foreseen revocation of Title citing National Carriers Ltd vs Panalpina (Nothern) Ltd [1981] All ER 161. Counsel also referenced Court of Appeal's cases of Kenya Airways vs Satwant Singh Flora (2013) eKLR which held that "...the doctrine of frustration operates to excuse further performance ... owing to a fundamental change of circumstances beyond control ... of the parties..." and Lucy Njeri Njoroge vs Kalyahe Njoroge [2015] which held that for frustration to exist, the frustrating event cannot arise from default of parties. As well as Halsbury's Laws of England (4th Ed) Vol.9 paragraph 450 and as Halsbury's Laws of England (3rd Ed.) Vol.8 page 1856. Counsel also cited the following cases to buttress the submissions Hirji Mulji vs Cheong Yue Steamship Co. Ltd [1926] AC 497, Metropolitan Water Board vs Dick, Kerr & Co. 116 and Stack Shelf Company Number 16 Ltd and Mathers vs Larsen HC Rotorua CP31/90, 6th March 1991. As such, the lease was frustrated and termination notice was valid.

13. Counsel went on to state that they have regulations which include seeking approval from the Central Bank before change of location or opening a new branch and a six months' notice had to be issued to the Central Bank of its intention to close down. As such, had the Plaintiff acted when they did and waited for time to run out, they would not have adhered to the stipulated guidelines because it took less than a month between issuance of demolition of the said building and when the demolition took place.

14. On whether the lease was subject to termination counsel submitted that while the lease did not have an express termination clause, clause 9 implied that either party could terminate the lease stating that it was also clearly stipulated until expiration of termination of the term which was to allow parties to opt out of the lease before expiry. And that one could be forced to stay in a contract provided they gave sufficient notice referencing: Jomo Kenyatta University of Agriculture and Technology vs Kwanza Estate Ltd [2023] KECA 700 (KLR) (judgement), Rajasthan Breweries Ltd vs The Stroh Brewery Company, Chimanlal Meghji Naya Shah & Another vs Oxford University Press (EA) Ltd (2007) eKLR, Martin Baker Aircraft Co. Ltd vs Canadian Flight Equipment Ltd [1955] 2 Q.B. 556, Staffordshire Area Health Authority vs South Staffordshire Waterworks Co. [1978] 1 WLR 1387 and Plaaskem (Pty) Ltd vs Nippon Africa Chemicals (Pty) Ltd (574/13) [2014] ZASCA 73. As such, it would be unjust for the Plaintiff to be ordered to pay damages for the remainder period of the contract period.

15. On the issue of remaining rent in the counterclaim, counsel submitted that the Defendant did not show that they tried to mitigate loss for the remaining tenancy period by looking for another tenant; the claim for rent for a period ending in 2018 was unmerited because the Defendant refused to allow the Plaintiff pick its things despite having deposited rent for the remaining period as security and was only allowed to pick the said items after the demolition notice was issued. Therefore any rent accrued was as a result of the Defendant's doing it should be dismissed and Plaint allowed with costs to the Plaintiff.

The Defendant's submissions

16. Counsel summarised the case and submitted on the following issues for determination.

17. On whether the lease agreement entered on 1st June 2011 was frustrated by revocation of the Defendant's Title counsel submitted that the issue of revocation was merely a communication from

the National Land Commission (NLC) to the Registrar as per Section 14 (5), (6) and (7) of the *National Land Commission Act*. Adding that the Chief Land Registrar addressed the communication stating that the impugned Title was charged to Shelter Afrique and would put a restriction stopping any transactions and that there was also a letter addressed to it by National Land Commission dated 11th March 2016 confirming that Taj Shopping Mall building would not be affected by the road construction and would not be demolished.

18. He also submitted that the Defendant had contested the NLC's decision on grounds that it was an innocent purchaser for value without notice. And that vide a letter dated 11th March 2016 to the Plaintiff, the Defendant undertook to take any responsibility for loss that would be incurred by the Plaintiff arising from demolition of the building without notice. He pointed out that it was until 16th August 2018 when a notice for demolition was published which was a year after the expected end of the lease period of 31st May 2017. As such, the Plaintiff acted from speculation. Therefore, the contract was not frustrated as claimed but was breached citing Banking Insurance & Finance Union vs Kenya Bankers Association [2021] eKLR and Halsbury's Laws of England, Vol. 9(1) 4th edition page 897 on the doctrine of frustration. "... the effect of frustration is to discharge the parties from further liability under the contract, the doctrine must not therefore be lightly invoked but must be kept within very narrow limits and ought not be extended..."

19. On the issue of breach of contract by failure to remit rent as set out in the agreement and vacating the premises prematurely, counsel submitted that from the summary given in the forgoing paragraphs, the Plaintiff had no legal basis to vacate the premises nor fail to pay rent and as such breached the lease agreement by failing to perform a primary obligation. Counsel made reference to Black's Law Dictionary 9th Edition page 213 on the definition of breach of contract; Court of Appeal cases of: Mwangi vs Kiiru [1987] eKLR and Raytheon Aircraft Credit Corporation & Another vs Air Al-Faraj Ltd [2005] eKLR and the following High Court cases: Dormakaba Ltd vs Architectural Supplies Kenya Ltd KEHC 210 (KLR), Jadiel Gikunda Ambutu vs Nyaki Farmers Cooperative Society [2022] eKLR and TransMara Sugar Co. Ltd & Another vs Ben Kangwaya Ayiemba & Another [2020] eKLR.

20. Further counsel submitted that the Defendant had proved that there was breach of contract and was thus entitled to the counterclaim together with costs as prayed. He submitted that it was undeniable that the Defendant had legitimate expectation of rent payment till end of the lease term on 31st May 2017 adding that, the Defendant could not use the space until 17th August 2018 when the Plaintiff yielded possession. He concluded by submitting that the Plaintiffs suit should be dismissed with costs because it had not proved its case and how it was entitled to the order of general damages.

Analysis and Determination

21. I have considered the pleadings, the evidence on record, the rival submissions and the authorities cited. The issues for determination are:

    i. Whether the lease agreement dated 1st June 2011 was frustrated due to revocation of Title for LR No. 209/ 13938 by National Land Commission vide the letter dated 30th September 2015; if so, is the plaintiff entitled to the reliefs sought?

    ii. Whether the lease agreement dated 1st June 2011 was breached by the Plaintiff's failure to remit rent and/or vacating the premises.

    iii. Is the Defendant entitled to the Prayers in the counter claim?

    iv. Who should bear costs of the suit?

22. It is not in dispute that LR No. 7075/13/1 which had been amalgamated with LR No. 7075/24 to form LR No. 209/13938 being the land hosting the Defendant was recommended for revocation on grounds that it was a road reserve which was compulsorily acquired by the Government in 1960. The said Letter dated 30th September 2015 reads:

> "The Commission through a letter dated 14th June 2013 received a complaint from Kenya Urban Roads Authority (KURA) requesting the Commission... to determine their legality... KURA contends that the parcels lie on a road reserve and hence their titles ought to be revoked.
>
> ...
>
> Pursuant thereto, the Commission finds as follows:
>
> 1. That the portion where LR No. 209/13938 is currently located, was acquired by the Government in 1960...
>
> In view of the foregoing the Commission orders as follows:
>
> 1. That because the property was compulsorily acquired for road expansion the same is a public utility land and should be revoked.
> 2. That the amalgamation of LR No. 7075/13/1 and LR No. 7075/24 to form LR No. 209/13938 is revoked/ cancelled.
>
> ....
>
> 5. That LR No. 7075/24 remains vested in Taj mall and LR No. 7075/13/1 is vested in the Nairobi County Government for road expansion."

23. Following this, the Plaintiff vide a letter dated 12th October 2015 sought to find out from the Defendant if they could treat the lease as frustrated. The Defendant through their letter dated 22nd October 2015 responded stating that the lease had not been frustrated and they were taking appropriate legal advice with a view of challenging the decision of the National Land Commission.

24. On 1st December 2015 the Plaintiff wrote another letter to the Defendant stating:

> "... a closer look at the letter by the Registrar we note that he is limited on acting on the instructions of the National Land Commission because he does not have the procedure of implementation. This then implies that in the event he is furnished with a court order he will proceed to effect the orders made by the Commissioner. In essence the registrar implied accepted the substance of the NLC letter and only questioned the procedure of implementation.
>
> Kindly note that due to the nature of the business our clients are involved in and the strict threshold they are expected to maintain by the Central Bank of Kenya it is of utmost importance that they can establish that their premises are founded on a title whose integrity has not/ or will not be put to question and one that is considered substantially fit for the purposes of the business...
>
> It is with all the reasons stated hereinabove that we consider that the Lease has been constructively frustrated and our clients shall vacate the said premises in the next three months from the date of this notice."

25. There are more correspondence between the parties contesting the issue of termination of lease on the ground of frustration. It is noted that on 11th March 2016, the Defendant wrote to the Plaintiff stating:

> " The choices open to your client and as supported by our previous correspondences are:
>
> a. If your client wishes to move out of the premises then they have to first pay to our clients, the full amounts due under the lease till expiry of the lease term;
>
> b. Your client can continue to carry on business at the premises and pay rent in the normal manner they have been paying. Our client undertakes that, in case of demolition of the building without notice, they will take responsibility for any loss incurred by your client arising therefrom, the projected extent of which your client may advise."

26. The Defendant contested the issue of frustration stating that the Plaintiff vacated the premises in a rush thus breaching the contract because it took more than two years for the suit premises to be demolished. And by the time it was demolished, the term of the lease agreement would have already lapsed had the Plaintiff not vacated. The Court of Appeal Oindi Zaippeline & 39 others v Karatina University & another [2015] eKLR explained frustration as follows: "... Frustration is the occurrence of an intervening event or change of circumstances so fundamental as to be regarded by law as striking at the root of the agreement, and as entirely beyond what was contemplated by the parties when they entered into the agreement..."

27. Agreements are typically entered into with the intention of a fixed duration and their obligations being adhered to as spelt out. However, life can be unpredictable and unforeseen circumstances can sometimes make it impossible or unreasonable for either party to continue with the agreement. At times, the events may make the terms of the agreement radically different or impossible to continue with its performance.

28. The plaintiff argued that the revocation of the Title affected the substratum of the agreement and they could not wait for the title to be revoked due to their nature of business. It should be noted that the building was eventually demolished.

29. Courts have made several pronouncements on the doctrine of frustration. Most recently, the Court of Appeal in Jomo Kenyatta University of Agriculture and Technology v Kwanza Estate Limited [2023] KECA 700 (KLR) rendered itself as follows:

> " The principles of the doctrine of frustration have been restated time and again. In Five Forty Aviation Limited v Erwan Lanoe [2019] eKLR, this Court restated the principles as follows:"....the doctrine of frustration operates to excuse further performance where it appears from the nature of the contract and the surrounding circumstances that the parties have contracted on the basis that some fundamental thing or state of things will continue to exist... "Frustration occurs whenever the law recognizes that, without the default of either party a contractual obligation has become incapable of being performed because, the circumstances in which the performance is called for would render it a thing radically different from that which was undertaken by the contract..."
>
> ...
>
> Again, in the case of Charles Mwirigi Miriti vs Thananga Tea Growers Sacco Ltd [2014] eKLR, to which the appellant referred us, this Court differently constituted, considering

the doctrine of frustration of an agreement, revisited the multi-factorial approach set out in Halsbury's Laws of England, Vol 1. 9(1), 4th edition at paragraph 897 as follows:

"... Five propositions have been set out as the essence of the doctrine. First, the doctrine of frustration has evolved to mitigate the rigour of the common law's insistence on literal performance of absolute promises so as to give effect to the demands of justice. Secondly, the effect of frustration is to discharge the parties from further liability under the contract, the doctrine must not therefore be lightly invoked but must be kept within very narrow limits and ought not to be extended. Thirdly, the effect of frustration is to bring the contract to an end forthwith, without more and automatically. Fourthly, the essence of frustration is that it should not be due to the act or election of the party seeking to rely upon it, but due to some outside event or extraneous change of situation. Fifthly, that event must take place without blame or fault on the side of the party seeking to rely upon it; nor does the mere fact that a contract has become more onerous allow such a plea."

30. In this case, did revocation of the Defendant's Title alter or make it impossible for the lease agreement to be accomplished? The lease agreement was entered into with the belief that there was sanctity of Title. Therefore, the moment this sanctity was questioned, it affected everything thereon. If the tree has no roots, where would the branches anchor? The answer is no. In this scenario it was no one's fault that the agreement could not be executed as stipulated. This court finds that revocation of Title affected the substratum of the lease. As such the ingredients for the doctrine of frustration as outlined in the aforementioned case have been fulfilled.

31. I find that the Defendant's counterclaim fails. It follows that it is not entitled to the prayers sought.

32. This Court was not guided on the quantum of damages and I decline to award any.

33. The Supreme Court of Kenya in Attorney General v Zinj Limited [2021] KESC 23 (KLR) held:

> "It is a trite principle of law, that any injury or loss suffered by a person either through a tortious act, omission or breach of contract, attracts redress in a court of law. The redress includes an award of damages to the extent possible as may be determined by the court... In case of general damages, a court of law exercises discretion guided by the circumstances of each case."

34. Even though the court has already pronounced itself and made a determination on the issue, I find it is important to address an issue that was raised by Defendant. The Defendant argued that the lease agreement could not be terminated because there was no termination clause. This court found the following clauses on termination Clause 1.1.25: Termination of the Term means expiration or sooner determination of the term and Clause 9: If after the tenant has vacated the demised premises on the expiration or termination of the term... This means that even if there was no express termination clause, parties were alive to the fact that termination of the agreement was possible because one cannot be bound infinitely. And the right to terminate an agreement is available to all parties, regardless of a termination clause as long as certain conditions have been adhered to and the termination is within the legal requirements.

35. I find that the plaintiff has proved its case on a balance of probabilities as against the defendant. Accordingly, I enter judgment in its favour as follows;

    a. That Kshs. 14,489,611.90 deposited as security in the Advocates joint account be released to the Plaintiff.

b. Costs of the suit and interest.

DATED, SIGNED AND DELIVERED VIRTUALLY AT KAJIADO THIS 2ND DAY OF NOVEMBER 2023.

L. KOMINGOI

JUDGE.

In The Presence Of:

Ms. Wangui for the Plaintiff.

Mr. Thiga for the Defendant.