



Mombasa Coffee Limited & another v Kenya Railways Corporation (Environment & Land Case 289 of 2015 & Environment and Land Case Civil Suit 290 of 2015 (Consolidated)) [2023] KEELC 22022 (KLR) (6 November 2023) (Judgment)

Neutral citation: [2023] KEELC 22022 (KLR)

REPUBLIC OF KENYA

**IN THE ENVIRONMENT AND LAND COURT AT MOMBASA
ENVIRONMENT & LAND CASE 289 OF 2015 & ENVIRONMENT
AND LAND CASE CIVIL SUIT 290 OF 2015 (CONSOLIDATED)**

SM KIBUNJA, J

NOVEMBER 6, 2023

BETWEEN

MOMBASA COFFEE LIMITED PLAINTIFF

AND

KENYA RAILWAYS CORPORATION DEFENDANT

AS CONSOLIDATED WITH

ENVIRONMENT AND LAND CASE CIVIL SUIT 290 OF 2015

BETWEEN

BICO LIMITED PLAINTIFF

AND

KENYA RAILWAYS CORPORATION DEFENDANT

JUDGMENT

ELC No. 289 of 2015

1. This suit was instituted vide a plaint dated 6th November 2015 by Mombasa Coffee Limited, the plaintiff, against Kenya Railways Corporation, the defendant. It is the plaintiff's case that it is the registered lessee of all that parcel of land known as Mombasa/Block/1/11 and Mombasa/Block/1/50 situated in Shimanzi for a term of 99 years from 1st January 1920 and 77 years from 1st September 1941 respectively, from the defendant. That it was a term of the lease that the plaintiff would erect go-downs or warehouses on the suit property with railway access on the sidings. The lease imposed a duty upon



the defendant to provide suitable sidings, roads and drains adjacent to and serving the suit property at its costs. That the defendant had provided the sidings, roads and drains to the suit property but in breach of clause 6 and 9 of the lease, it unilaterally allocated the sidings and road to a third party, who has embarked on some construction works thereon, thereby rendering the plaintiff's operations on the suit property as godowns or warehouse inoperative. The plaintiff averred that without the sidings, the suit property is of no use since the sidings provide access to the railway and road for loading and offloading. The plaintiff prayed for judgement against the defendant for:

- a. A declaration that the construction works by the defendant is illegal and in breach of the terms of the lease made between the parties and its consequently null and void.
 - b. A permanent injunction against the defendant prohibiting the defendant, either by itself and/or through its agents, servants, contractors and/or employees from undertaking any construction activities and/or interfering on the sidings adjoining the plaintiff's go downs on Plot Nos. Mombasa/Block/1/11 and Mombasa/Block/1/150.
 - c. A mandatory injunction against the defendant to demolish all structures erected on the sidings adjacent to the plaintiff's Plot Nos. Mombasa/Block/1/11 and Mombasa/Block/1/150.
 - d. Costs of the suit.
 - e. Any other relief this honourable court deems fit to grant.
2. The defendant filed a defence to the plaintiff's case on 17th June 2016 and averred that the plaintiff is registered as the proprietor of Mombasa/Block/1/11 and 150 only as its lessee. The defendant averred that the suit property is a railway siding owned by the defendant and adjoins the properties leased to the plaintiff. Further, the defendant claimed that there has never been any road or drains on the suit property, and that the suit property was meant for loading and unloading cargo for carriage by railway. It was the defendant's case that the railway line had become redundant for over 30 years since the plaintiff and other users had opted to transport their cargo by road. The defendant then allocated the suit property to a third party, pursuant to its powers to lease as provided for under Section 13 (2) (h) of the *Kenya Railways Corporation Act*. The defendant denied that it had blocked access to the plaintiff's properties and averred that the plaintiff has not been using the suit property leaving it idle leading to the rails falling off and vegetation growing over it. Further to that the defendant maintained that the plaintiff's properties have a main entrance facing the main street and is accessible through the adjoining Mozambique, Dar es Salaam and Beira roads. The plaintiff was continuing with its business activities without any interferences from the defendant. The defendant also denied being vicariously liable for the actions of the third-party conducting construction on the suit property and maintained that the plaintiff ought to have sued them instead. The defendant urged the court to find that the plaintiff's case as premature, incompetent, frivolous, vexatious and an abuse of the court process and proceed to dismiss it with costs.

ELC No. 290 of 2015

3. In this suit, Bico Limited, the plaintiff, sued Kenya Railways Corporation, the defendant, through the plaint dated the 6th November 2015. The plaintiff avers that it is the registered lessee of all that parcel of land known as Mombasa/Block/I/305 and Mombasa/Block/I/39 and Mombasa/Block/I/148 situated in Shimanzi. It was a term of the lease that the plaintiff would erect go-downs or warehouses on the suit property with railway access on the sidings. The lease imposed a duty up to the defendant, at its own costs to provide suitable sidings and roads and drains adjacent to and serving the suit property. The defendant was said to have provided the sidings, roads and drains on the suit property until it allocated the construction of sidings to a third party, thereby blocking the plaintiff's



access of the suit property and rendering the plaintiff's operation of its go down inoperative. The plaintiff averred that without the sidings, the suit property is of no use since the sidings provide access to the railway and road for loading and offloading. The plaintiff prayed for judgement against the defendant for:

- a. A declaration that the construction works by the defendant is illegal and in breach of the terms of the lease made between the parties and its consequently null and void.
 - b. A permanent injunction against the defendant prohibiting the defendant, either by itself and/or through its agents, servants, contractors and/or employees from undertaking any construction activities and/or interfering on the sidings adjoining the plaintiff's go downs on Plot Nos. Mombasa/Block/1/305, and Mombasa/Block/1/39 and Mombasa/Block/I/148.
 - c. A mandatory injunction against the defendant to demolish all structures erected on the sidings adjacent to the plaintiff's Plot Nos. Mombasa/Block/1/305, and Mombasa/Block/1/39 and Mombasa/Block/I/148.
 - d. Costs of the suit.
 - e. Any other relief this honourable court deems fit to grant.
4. The defendant filed a defence to the plaintiff's case on 17th June 2016 and averred that the plaintiff is registered as the proprietor of Mombasa/Block/1/39, 158 and 308 only as its lessee. The defendant averred that the suit property is a railway siding owned by the defendant and adjoins the properties leased to the plaintiff. Further, the defendant claimed that there had never been any road or drains on the suit property, and that the suit property was meant for loading and unloading cargo for carriage by railway. It was the defendant's case that the railway line had become redundant for over 30 years since the plaintiff and other users had opted to transport their cargo by road. The defendant then allocated the suit property to a third party, pursuant to its powers to lease as provided for under Section 13 (2) (h) of the *Kenya Railways Corporation Act*. The defendant denied that it had blocked access to the plaintiff's properties and averred that the plaintiff has not been using the suit property leaving it idle leading to the rails falling off and vegetation growing over it. Further to that the defendant maintained that the plaintiff's properties have a main entrance facing the main street and is accessible through the adjoining roads (Mozambique, Dar es Salaam and Beira). The plaintiff was said to have continued with its business activities without any interferences from the defendant. The defendant also denied being vicariously liable for the actions of the third-party conducting construction on the suit property and maintained that the plaintiff ought to have sued them instead. The defendant urged the court to find that the plaintiff's case as premature, incompetent, frivolous, vexatious and an abuse of the court process and proceed to dismiss it with costs.
5. During the hearing, the plaintiff called Ali Ahmed Sheik Ali, a warehouse manager working with Mombasa Coffee Limited, who testified as PW1. He adopted his witness statement recorded on 25th March 2022 and produced the plaintiff's list of documents of the same date filed in both suits. He testified that the plaintiff has leased the suit properties from the plaintiff and has constructed go-downs, which according to him face the road. He testified that they use containers to place their stock on the lorries and then take them to the ship. He told the court that previously, they used the defendant's railway, but it is currently not in operation. He maintained that the defendant had authorized a third party by the name of Grain Bulk Company Limited to construct on the road and sidings thereby blocking access to the suit properties. PW1 contended that Grain Bulk Company Limited are their competitor in the market of exporting tea leaves which by their nature require prompt transportation without delay.



6. The defendant called Justin Omoke a property valuer and the defendant's Estate Manager, who testified as DW1. He adopted his witness statement recorded on 13th July 2022 and produced the defendant's list of documents dated 15th July 2022 filed in both suits. He testified that both plaintiffs in ELC No. 289 of 2015 and ELC No. 290 of 2015 were tenants to Kenya Railways at Shimanzi Industrial area where there are godowns. He denied that the defendant had blocked the plaintiffs from accessing their premises and claimed that the blockage of the sidings was not authorized by the defendant. He confirmed through the pictures produced that the plaintiff could access their premises, and that they were using lorries and trucks to transport their goods to and from their premises. He further used the pictures to explain that though the railway has not been used for over 30 years, the plaintiffs' premises were still accessible and have not been blocked by anyone. He added that he was not aware what the lease agreements provided for in terms of siding access, and maintained that though the siding to Dar es Salaam Road and Mozambique Road were closed, the plaintiff could still access the premises and transport their produce through the main road. He reiterated that the railway sidings have not been in use for over 30 years and the defendant has neither closed it nor authorized anyone to close it. He clarified that the defendant are not under instructions to give the sidings to any party. He denied being aware of any interest by a third party carrying out construction works as complained of by the plaintiffs, and accused the plaintiffs of trying to arm-twist the defendant into allocating to them the sidings to the exclusion of everyone else.
7. The court gave directions on filing and exchanging submissions on the 10th May 2024, and 27th July 2023. During the subsequent mention of 25th October 2023 only the counsel for the plaintiff indicated that they had filed their submissions on the day before.
8. The following are the issues for the court's determinations:
 - a. Whether the defendant breached the lease agreements between itself and Mombasa Coffee Limited and or Bico Limited.
 - b. Whether the plaintiffs have established their entitlement to the prayers sought herein.
 - c. Who pays the costs?
9. The court has carefully considered the pleadings by the parties as summarized above, evidence tendered by PW1 and DW1, submissions by the learned counsel and come to the following determinations:
 - a. According to the plaintiffs (Bico Limited and Mombasa Coffee Limited) the defendant failed to provide them with railway sidings for transportation and further they allocated the suit property to a third party who has since blocked the entrances of the suit premises rendering the plaintiffs business inaccessible. The defendant has denied breaching any term of the leases, claiming that the railway sidings have not been in use for over three decades as the plaintiffs and other warehouse owners prefer to use road transport as opposed to railway sidings to transport their goods to and from the go downs. The defendant maintained that the plaintiffs' access to the go-downs was by road where they load and offload their goods with no restriction at all.
 - b. Mombasa Coffee Limited is the holder of the following certificate of leases from Kenya Railways Corporation;
 - i. Title No. Mombasa/Block/I/11 for a term of 99 years from 1st January 1920 dated 29th October 2001.
 - ii. Title No. Mombasa/Block/I/150 for a term of 77 years from 1st September 1941 dated 18th February 2002.



- c. Bico Limited is the holder of the following certificate of leases from Kenya Railways Corporation;
- i. Title No. Mombasa/Block/I/305 for a term of 88 years from 1st August 1959 dated 29th August 2013.
 - ii. Title No. Mombasa/Block/I/39 for a term of 61 years from 1st January 1986 dated 4th July 1990.
 - iii. Title No. Mombasa/Block/I/148 for a term of 74 years from 1st November 1973 dated 11th March 1987.
- d. Mombasa Coffee Limited has averred that clause 6 of their agreement of lease with the defendant stated that they are to use the suit premises for go-down or warehouse purposes only which would require railway access and facilities. Further to that clause 9 provided that within 6 months from the commencement of the term the defendant's general manager shall provide suitable sidings, roads and drains adjacent to and serving the suit premises without additional costs to itself. I have perused the lease agreement for Plot No. Mombasa/Block/I/150 dated 17th January 1942 indeed provides for the said clauses i.e clauses 6 and 9 as stated by Mombasa Coffee Limited. However, this lease agreement was for a term of 77 years and 4 months running from 1st September 1941 to 31st December 2018. There is no lease agreement availed in respect of Plot No. Mombasa/Block/I/11.
- e. It has not been disputed that the suit premises were leased by the plaintiffs to be used as go-downs from the 1970s from the defendants. At the time the plaintiffs were leasing the suit premises from the defendant, the mode of transporting their goods was mainly through the railway lines hence making the sidings a lifeline for their operations. Over time this changed and the railway lines became non-operational either from their lack of usage or simply neglect by the defendant.
- f. The defendant stated that the railway network has been redesigned and rerouted and that it has no plans to operate railway services on the suit premises. The plaintiffs are well aware that the defendant now operates the modern railway network commonly referred to as Standard Gauge Railway (SGR) which operates a different route which does not require the suit property. Further to that the plaintiffs have not demonstrated to the court that there is a third party on the suit property constructing on the railway sidings. The plaintiffs only mentioned the alleged name of the third party who is said to be obstructing their entrance to the suit premises during cross-examination. The plaintiffs have claimed that the third party is a direct competitor in their area of business and it is unfair for the defendant to have granted them access to the railway sidings. However, the plaintiffs have not adduced any evidence of the same, it is therefore difficult for the court to comprehend the presence of a third party in the suit premises when the same has not been proved. No explanation has been tendered as to why the third party whose actions seem to be the basis of the plaintiffs' complaints was not joined in the suits.
- g. The court would also like to point out that the obligation from the defendant to provide suitable sidings, roads and drains was to be met within six months from the commencement of the term of the lease. The leases herein were signed in the 1970s over 50 years ago and hence this obligation was to be met then. The plaintiff was well aware of the fact that the railway had become unworkable hence the construction of SGR which is now operational. Further to that the plaintiffs have not denied that they have been accessing the suit property through the road network for the time that the railway line has not been in operation. Additionally, it is evident



that some of the long-term leases between the plaintiffs and the defendant that have already lapsed and the plaintiffs have not demonstrated that the same have been extended or renewed.

- h. The plaintiffs despite itemizing various lease agreements between themselves and the defendant, which are said to have been breached or violated by the defendant, little has been established to support the claims. It was incumbent upon the plaintiffs to lay before the court evidence of such breaches, as the burden of proving such breaches laid on the shoulders of the plaintiff and not the defendant. This is in line with the provisions of Sections of 107, 108 and 112 of the Evidence Act Chapter 80 Laws of Kenya, which provide as hereunder;

“ 107.

- (1) Whoever desires any court to give judgment as to any legal right or liability dependent on the existence of facts which he asserts must prove that those facts exist.
- (2) When a person is bound to prove the existence of any fact it is said that the burden of proof lies on that person.”

“ 108. The burden of proof in a suit or proceeding lies on that person who would fail if no evidence at all were given on either side.”

“ 112. In civil proceedings, when any fact is especially within the knowledge of any party to those proceedings, the burden of proving or disproving that fact is upon him.”

- i. It is the findings of this court that the plaintiffs have failed to avail and provide credible and sufficient evidence to support their claim of breach of lease by the defendant. It has been demonstrated by the defendant that the railway lines as established during the commencement of the leases are no longer in operation and have since been replaced by the SGR. The plaintiffs have not denied the fact that they can access the suit premises by road as pictures have been shown of their trucks and lorries accessing the warehouses by road. The plaintiffs have therefore failed to prove their case to the standard required of a balance of probabilities against the defendant in their respective suits.
- j. Section 27 of the Civil Procedure Act chapter 21 of the Laws of Kenya, provides that costs shall follow the events unless for good cause otherwise ordered. In the two suits, I find no good cause having been established to deviate from that edict and the defendant is awarded costs in both suits.

10. In the upshot of the foregoing determinations, the court finds and orders as follows:

- a. That the plaintiff's suit in ELC No. 289 of 2015 is hereby dismissed with costs.
- b. That the plaintiff's suit in ELC No. 290 of 2015 is also hereby dismissed with costs.

It is so ordered.

DATED AND VIRTUALLY DELIVERED ON THIS 6TH DAY OF DECEMBER 2023.

S. M. KIBUNJA, J.

ELC MOMBASA.

In The Presence Of:



Plaintiffs : Mr. Mohamed.

Defendant : Mr Karina.

Wilson – Court Assistant.

S. M. KIBUNJA, J.

ELC MOMBASA.

