



CBA Property Holdings Limited v Ahmednsasir Maalim Abdullahi & another (Environment & Land Case E277 of 2020) [2022] KEELC 2564 (KLR) (12 July 2022) (Judgment)

Neutral citation: [2022] KEELC 2564 (KLR)

**REPUBLIC OF KENYA
IN THE ENVIRONMENT AND LAND COURT AT NAIROBI
ENVIRONMENT & LAND CASE E277 OF 2020**

MD MWANGI, J

JULY 12, 2022

BETWEEN

CBA PROPERTY HOLDINGS LIMITED PLAINTIFF

AND

**MUMTAZ ASLAM KHAN T/A AHMEDNASIR, ABDIKADIR & COMPANY
ADVOCATES 1ST DEFENDANT**

AHMEDNSASIR MAALIM ABDULLAHI 2ND DEFENDANT

JUDGMENT

Background

1. The facts of this case are rather straight forward. The parties herein entered into a lease agreement on 26th September 2019. The Defendant leased from the Defendant office space on the 2nd floor of the building known as CBA building on parcel of land L.R. 209/935 in Nairobi, with effect from the 1st July 2019. The lease agreement was for a period of six years, with a provision for monthly rent, payable quarterly in advance on the 1st day of each quarter month.
2. By a notice dated 31st August 2020, the Defendant communicated to the Plaintiff the intention to terminate the tenancy and vacate the leased premises on 31st December 2020.
3. The Plaintiff avers that its lease agreement with the Defendant bound the Defendant to occupy the suit premises until 30th June 2025; therefore, the notice by the Defendant was unlawful and void. It is the Plaintiff's position that the lease with the Defendant did not have a termination clause and was therefore binding upon the Defendant, as the tenant to occupy it for the entire period of the lease.
4. The Plaintiff in its plaint asserts that despite its protestations, the Defendant adamantly insisted on its intention to terminate the lease.



5. This suit was filed on 23rd December 2020 before the expiry of the notice by the Defendant. The Plaintiff sought orders of a permanent injunction to restrain the Defendant from unlawfully terminating the lease dated 26th September 2019 and/or vacating the premises, an order of specific performance compelling the Defendant to perform other contractual obligations under the lease up and until 30th June 2025 and special damages comprising the rent payable from 1st January 2021 up to 30th June 2025.
6. Subsequently, and as it became apparent during the hearing, the Defendant moved out of the suit premises. The Plaintiff therefore dropped its prayers for an order of permanent injunction and specific performance leaving only the claim for special damages of Kshs. 29,597,491.80 and costs of the suit with interest at court rates.

Statement of Defence by the Defendant.

7. In the Amended Statement of defence amended on 18th October 2021, the Defendant denied that it was bound under the lease with the Plaintiff for the entire term of the lease. The Defendant further stated that the lease only provided for monthly rent which was payable quarterly. The Defendant averred that by giving the Plaintiff a 3 months' notice, on its intention to terminate the lease, the Defendant completely discharged its obligations under the lease.
8. The Defendant asserts the fact that the rent was payable quarterly and not as demanded by the Plaintiff; wholly for the entire term of the lease. The notion advanced by the Plaintiff that the lease bound the Defendant to occupy the premises for the entire period of the lease therefore is fallacious. The 3 months' notice was sufficient notice for purposes of termination of the lease.
9. The Defendant further in the statement of defence stated that no landlord can force a tenant to stay in its premises for a particular period whether there is in existence a lease or otherwise.
10. The Defendant denies that the Plaintiff suffered any loss since the entire rent due and owing up to and including the notice period was fully paid.

Testimonies adduced by the Parties.

11. The case proceeded to hearing with each party calling one witness. The Plaintiff called one Collins Kowour, the property Manager of the Plaintiff Company who adopted his witness statement dated 23rd December 2020. He, in his examination in chief and cross-examination maintained the position that the lease between the Plaintiff and the Defendant did not have a termination clause. According to him, the Defendant was bound by the terms of the lease for the entire period of 6 years and did not have the option of early termination of the lease.
12. The Defendant on their part called one Asli Osman, the managing Partner in the Defendants' Law firm. The Defendant's witness too adopted her witness statement dated 9th November 2021. She explained the Defendants' decision to terminate the tenancy with the Plaintiff and why she thought that the notice of three months was sufficient. She affirmed the Defendants' position as stated in the statement of Defence.

Court's Directions

13. Upon close of the hearing, the court directed parties to file and exchange written submissions. Both Parties have complied and the court has had the opportunity to peruse the same.



Issues for Determination

14. As I started by saying at the beginning, the main issue in this case is whether the lease agreement between the parties could be terminated by way of a notice as the Defendant purportedly did. Accordingly, and after a careful scrutiny of the pleadings, the respective testimonies of the witnesses called by the parties and the submissions filed, there are only two issues for determination in this matter, namely:-
- a) Whether the Defendant breached the Lease agreement with the Plaintiff.
 - b) Depending on the finding in (a) above, whether damages are payable to the Plaintiff for breach of contract in form of rent arrears for the entire period of the lease.

Analysis and Determination

A. Whether the Defendant Breached the Lease agreement with the Plaintiff

15. The Plaintiff's case is that the lease agreement between them and the Defendant herein, did not have a termination clause. The period for which the lease was to run was 6 years – with effect from 1st July 2020. The Lease agreement was produced as an exhibit by both parties in this case.
16. The Plaintiff's witness attested the said position. I note that the Defendant's witness Asli Osman in her written witness statement dated 9th November 2021 agreed with the Plaintiff's averment that the lease agreement did not contain and/or provide a termination clause. She was nevertheless of the view that the same could validly be terminated by issuance of a three months' notice. At paragraph 3 of the witness statement, the witness stated that;
- 3“The lease agreement did not contain and/or provide a termination clause but provided for a monthly rent payable quarterly in advance on the first day of each quarter month during the term, as such, the same could be terminated by issuing a three months' notice.”
17. Justice Warsame (as he then was) in *Chimanlal Meghji Naya Shah & Another –Vs- Oxford University Press (E.A) Ltd* (2007) eKLR while considering a fixed term lease that did not have a termination clause expressed his view on such a tenancy in the following terms;
- “In my view where there is no termination clause and the lease is terminated before its period of expiry, the situation that obtains is a breach of the contract.”
18. Majanja J, in *Ranji Meghi Gudka Ltd –vs- Kisii University* (2019) eKLR, expressed a similar view that,
- “the fact that the agreement between the parties was for a fixed term of 6 years did not exclude the possibility of termination. It only means that termination would amount to a breach for which the party at fault would have to pay damages.”
19. I am of a similar view as expressed by the learned Judges in the above cited cases. Termination of the lease mid-term was not available to the Defendant in this case. The position advanced by the Defendant only applies to periodic leases as provided for under the Land Act, 2012. At section 57(4), the Act provides that,
- “a periodic tenancy may be terminated by either party giving notice to the other, the length of which shall not be less than the period of the tenancy and shall expire on one of the days on which rent is payable.”



20. The lease between the parties in this case was not a periodic lease. The notice issued by the Defendant therefore from a legal point of view was of no consequence. The Defendant could not validly terminate the lease agreement.
21. I find that the Defendant breached the lease agreement with the Plaintiff.

B. Whether damages are payable to the Plaintiff for breach of contract in form of rent arrears for the entire period of the lease

22. In the above referenced case, *Chimanlal Meghji Naya Shah & Another –vs- Oxford University Press (E.A) Ltd (Supra)*, Justice Warsame went on to hold that;

“where parties are not regulated by their lease agreement as to the nature and mode of notice, if the lease is terminated by either party, then the party offended is entitled to damages for breach of contract. In essence my position is that a lease agreement properly registered is a form of a contract and therefore when there is a default, the terms of breach of a contract aptly applies.”

23. The Plaintiff computes the damages payable as the rent remaining unpaid for the entire period of the lease. The Defendant in response argues that they gave the Plaintiff adequate notice in the circumstances of the tenancy and secondly that the Plaintiff had a duty to mitigate its losses. In other words, the Defendant’s argument is that even if the Plaintiff is entitled to damages for breach of contract, it cannot be for the entire remainder of the term of the lease.

24. I am in agreement with Defendant that though there was breach of contract, the Defendant took the reasonable step of issuing the Defendant a notice. The Plaintiff consequently was entitled to take immediate steps to mitigate its losses.

25. On this aspect, I am guided by the holding on the case of *Consolata Anyango Auma –vs- South Nyanza Sugar Company Ltd* (2015) eKLR where the court stated that,

“As a general principle, the purpose of damages of breach of contract is subject to mitigation of loss, the claimant is to be put as far as possible in the same position he would have been if the breach contained of had not occurred. This is the principle encapsulated in the Latin phrase restitution in integrum.”

26. The measure of damages is in accordance with the rule established in the case of *Hadley –vs- Baxendales* (1854) 9 Exh 341, that the measure of damages is such as may fairly and reasonably be considered arising naturally from the breach itself or such as may be reasonably contemplated by the parties at the time the contract was made and a probable result of such breach.....such damages are not damages at large or general damages but are in the nature of special damages and they must be pleaded and proved.’

27. “In addition to the aforesaid broad principle, the Respondent had a duty to mitigate damage. Viscount Haldane L.C, in *British Westinghouse Electric and manufacturing company –vs- Underground Electric/ Railways Company of London Ltd* (1912) AC 677 summarized the principle as follows;

“The fundamental basis is thus compensation for pecuniary loss naturally flowing from the breach, but this principle is qualified by a second, which imposes on the Plaintiff the duty of taking all reasonable steps to mitigate the loss consequent on the breach and debars him claiming any part of damage which is due to his neglect to take such steps.”



28. The Plaintiff in its supplementary submissions urges the court to take judicial notice that the early termination of the lease happened during the corona pandemic period and that during that period, the uptake of new tenancy space has been low in the market.
29. The Defendant in their submissions have made reference to a number of authorities on the issue of assessment of the damages and mitigation of loss but have not come up with a specific figure. They made reference to the case of the *African Highland Produce Ltd –vs- John Kisorio* (2001) eKLR, where the Court of Appeal held that the guiding principles of law in mitigation are as follows;-
- i. It is the duty of the Plaintiff to take all reasonable steps to mitigate the loss he has sustained consequent upon the wrongful act he sues and he cannot claim as damages any sum which is due to his own neglect.
 - ii. The duty arises immediately a Plaintiff realized that an interest of his has been injured by a breach of contract or a 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.
30. In the case of *Caltex Oil (Kenya) Ltd –vs- Evanson Njiiri Wanjibia* (2017) eKLR, the court held that “in calculating damages in such circumstances, the court must take a reasonable approach. Unjust enrichment is always frowned upon by the court. There is also the expectation by the law that the aggrieved party must mitigate its loss and not fold its hands and expect to reap a windfall by way of an award of damages by the court.”
31. This Court’s responsibility then is to determine what is reasonable in the circumstances of this case putting into consideration the Plaintiff’s responsibility to mitigate its losses. It is not an easy task.
32. The general rule for the assessment of such damages was reviewed by the Supreme Court of Canada in *Keneric Tractor Sales Ltd. v. Langille* (1987), 43 D.L.R. (4th) 171 at p. 181 (S.C.C.). In that decision Madame Justice Wilson for the Court stated:
- “The general rules for the assessment of damages for breach of contract is that the award should put the plaintiff in the position he would have been in had the defendant fully performed his contractual obligations. This principle is qualified by the doctrine of remoteness. As Baron Anderson stated in *Hadley v. Baxendale*:
- ‘Where two parties have made a contract which one of them has broken, the damages which the other party ought to receive in respect of such breach of contract should be such as may fairly and reasonably be considered either arising naturally, i.e., according to the usual course of things, from such breach of contract itself, or such as may reasonably be supposed to have been in the contemplation of both parties, at the time they made the contract, as the probable result of the breach of it. The general rule is, of course, further qualified by the injured party’s duty to mitigate its damages.’”
33. The Defendant besides submitting on the need for mitigation of loss does not state any specific figure that should be awarded to the Plaintiff. The Plaintiff on its part seeks the entire rent payable for the whole term of the lease.



34. As at the date of the hearing of the case, the court was told that the premises were still unoccupied; the Plaintiff was yet to find another tenant. The Plaintiff did not however show what steps they had taken to look for another tenant as a way of mitigating their losses. The Defendant blames the Plaintiff for keeping the premises locked and preventing them from collecting their properties despite them clearly communicating to the Plaintiff their intention to vacate the premises. It is the Defendant's submission that that was the reason why they could not get a new tenant anyway.
35. Considering all the circumstances in this case, it would be unconscionable for the Plaintiff to be awarded the rent for the entire period of the lease. This court is of the considered view that an award of rent payable for 12 months only i.e. for the year 2021 would be fair, reasonable and adequate compensation to the Plaintiff for the breach of contract by the Defendant. With reasonable diligence, the Plaintiff should have secured a new tenant within one year despite the prevailing covid – 19 situation at the time.
36. Accordingly the court awards the Plaintiff a sum of Kshs 5,735,733/= made up as follows:-

For the year 2021, the rent payable is as per the schedule on page 2 of the Lease Agreement in (a) and (b)

Therefore, the rent is;

From 1st January, 2021 to 30th June, 2021 @ Kshs. 459,594 per month

Total amount payable is therefore Kshs. 459,594 x 6

= Kshs 2,757,564/=

From 1st July, 2021 to 31st December, 2021 @ Kshs. 496,361.50 per month

Total amount payable is Kshs. 496,361.50 x 6

= Kshs 2,978,169/=

Grand total amount payable is Kshs. 5,735,733/=

However, subject to clause 2(b) of the lease agreement which provides;

“.....to pay to the landlord and thereafter maintain during the duration of the lease a deposit which means the sum equivalent to one quarter's rent and service charge (less deposit currently held) as security for the performance by the Tenant of the Tenant's obligations under this lease. Upon expiring or determination of the term and after delivery up of the premises in proper condition refund the deposit without interest thereon.....”

37. Therefore, the amount payable is Kshs 5,735,733/= less the deposit held by the Landlord. During the hearing, the Defendant's witness testified that the Plaintiff was holding a deposit of Kshs. 3,000,00/-. This testimony was not contradicted by the Plaintiff. Accordingly, the net amount payable to the Plaintiff after deduction will be Kshs. 2,735,733/- with interest at court rates from the date of filing suit.
38. The Plaintiff is also awarded the costs of the suit.
- It is so ordered.

DATED, SIGNED AND DELIVERED AT NAIROBI THIS 12TH DAY OF JULY 2022

M.D MWANGI



JUDGE

In the Virtual Presence of:-

Mr. Njuguna for the Plaintiff

Ms. Rono h/b for Mr. Ondati for the Defendant

Court Assistant: Hilda

M.D. MWANGI

JUDGE

