



**PBM Nominees Limited v Uchumi Supermarkets Limited (Environment & Land Case 293 of 2018) [2022] KEELC 13373 (KLR) (6 October 2022) (Judgment)**

Neutral citation: [2022] KEELC 13373 (KLR)

**REPUBLIC OF KENYA  
IN THE ENVIRONMENT AND LAND COURT AT NAIROBI  
ENVIRONMENT & LAND CASE 293 OF 2018  
EK WABWOTO, J  
OCTOBER 6, 2022**

**BETWEEN**

**PBM NOMINEES LIMITED ..... PLAINTIFF**

**AND**

**UCHUMI SUPERMARKETS LIMITED ..... DEFENDANT**

**JUDGMENT**

1. This suit was commenced *vide* a plaint dated June 18, 2018 wherein the plaintiff sought the following orders against the defendant: -
  - a. Judgment be entered in favour of the plaintiff against the defendant for the sum of Kshs 147,610,693.20 together with interest thereon accruing at the rate of 2% per month from February 28, 2018 until full payment.
  - b. Costs of this suit plus interest at court rates.
  - c. Any other or further relief that this honourable court may deem fit and just to grant.
2. The defendant entered appearance on July 11, 2018 and filed a statement of defence dated July 23, 2018. In addition, the defendant filed a notice of preliminary objection dated July 12, 2018 objecting to this court's jurisdiction to adjudicate the dispute in this suit.
3. The plaintiff subsequently filed a notice of motion dated July 18, 2018 seeking summary judgment for the claimed sum or in the alternative, judgment for the admitted sum of Kshs 61,304,565.60.
4. The matter came up before my brother Justice B Eboso who heard both the plaintiff's application and the defendant's preliminary objection and delivered a ruling on July 27, 2020 wherein he made the following orders: -
  - a. The defendant's preliminary objection dated July 12, 2018 is dismissed for lack of merit.



- b. Judgment on admission is hereby entered for the plaintiff against the defendant for the sum of Kshs 61,304,565.60
  - c. The rest of the plaintiff's claim shall proceed to trial.
  - d. The plaintiff has leave to forthwith enforce the judgment under order (b) above.
  - e. The plaintiff shall have costs of the preliminary objection and the notice of motion dated July 18, 2018.
5. The suit was then set for hearing and proceeded for trial in respect to plaintiff's claim of Kshs 147,610,693.20 on March 24, 2022 and May 30, 2022 hence the basis for this judgment.

**The Evidence.**

6. The plaintiff's case was heard on March 24, 2022 wherein Atul Shah testified as PW1. During trial he adopted his witness statement dated June 18, 2018. He also adopted the bundle of documents that were on record as part of his evidence in chief. He stated that the outstanding amount sought by the Plaintiff herein is Kshs 86,306,127.60 together with interest thereon accruing at the rate of 2% per month from February 28, 2018 until payment in full.
7. It was also the testimony of Mr Atul Shah that the parties herein executed a sub-lease dated November 25, 2018 which was the premise of the landlord-tenant relationship. It was also his testimony that the defendant had breached the terms of the sublease dated November 25, 2015 and the deed dated December 20, 2017. He made reference to the particulars of the breaches which has been pleaded at paragraph 20 of the plaint dated June 18, 2018 which included the following: -
- a. Failing to make timely rental payments as agreed under clause 3.1.1 of the sub-lease dated November 25, 2015.
  - b. Failing to pay the service charge, utilities and special promotion expenses as provided in the sub-lease.
  - c. Failure to pay interest on the rental amounts as provided under clause 3.1.111 of the sublease dated November 25, 2015.
  - d. Failure to pay the discounted rental payments as agreed in the deed dated December 20, 2017.
  - e. Occupying the leased premises without making rental payments as set out in clause 3.4 of the deed dated December 20, 2017.
  - f. Failure to make the timely instalments as set at in clause 3.3(e) of the deed dated December 20, 2017.
  - g. Failing to issue a bank guarantee for the discounted rental arrears within 14 days as set out in clause 3.3(f) of the deed dated December 20, 2017
  - h. Making the plaintiff execute the deed dated December 20, 2017 while aware that the terms and conditions therein would be blatantly breached.
8. On cross-examination, he stated that the defendant had only made payment of Kshs 20,000,000/- which had been demonstrated by the statement exhibited at page 136 of the plaintiff's bundle of documents.



9. In re-examination by his counsel he clarified that save for the Kshs 20,000,000/- that had been paid, the amount of Kshs 86,306,127.60 plus interest therein accruing at the rate of 2% per month from February 28, 2018 was still outstanding.

### **The Defendant's case.**

10. The defendant's case proceeded for hearing on May 30, 2022 upon which Duncan Mwangi testified as DW1 and the sole defendant's witness. He adopted his witness statement dated March 30, 2022 and produced defendant's list and bundle of documents dated May 31, 2021 which was marked as D Exhibit 1 to 6.
11. On cross-examination by counsel for the plaintiff, he stated the following: -
- i. That a demand letter dated October 19, 2017 was sent to the defendant seeking an amount of Kshs 103,004,368.20
  - ii. That a proclamation had been made for Kshs 103,004,368.20 on November 3, 2017.
  - iii. That Wambugu and Muriuki Advocates had wrote a letter to the plaintiff's advocates on record dated December 6, 2017. The contents which was an admission on the debt owned and a proposal on the payment plan for the amount owed.
  - iv. That the defendant was a party to the deed of acknowledgment of debt, agreement to settle arrears and agreement for surrender of lease in the event of default dated December 20, 2017. Under clause 3(h) it provides for the entire rent arrears amount of Kshs 139,703,163.20 which was to accrue interest at the lease until payment in full, time being of the essence.
  - v. That the defendant signed a property hand over report dated March 21, 2018 where the defendant admitted it would be liable to pay the plaintiff. The amount incurred to repair the premises for any damages suffered.
  - vi. That an amount of Kshs 20,000,000/- which had been paid had already been factored into the plaintiff's statement.
12. When re-examined, he stated that it is not in dispute that the defendant has not settled the outstanding amount but what is in dispute is the issue of reconciliation of the pending balances which has not been done because the defendant has not received any invoices raised by the plaintiff after they had signed the hand over report. He also stated that the defendant has been experiencing financial difficulties and that's why the payment had not been paid.
13. After the close of the oral testimonies, both parties were directed to file and exchange their written submissions. The plaintiff filed its written submissions dated June 30, 2022 through the firm of Macharia Mwangi and Njeru Advocates while the defendant's submissions were not on record at the time of preparing this judgment.

### **Plaintiff's submissions**

14. Counsel for the plaintiff outlined three issues for determination by the court in his written submissions. These included the following: -
- i. Whether there was breach of the agreement?
  - ii. Whether the plaintiff is entitled to the reliefs sought?
  - iii. Who should bear the costs of the suit?



15. On whether there was breach of the agreement by the defendant, counsel submitted that the defendant had breached the sublease dated November 25, 2015 and deed dated December 20, 2017. It was also submitted that from the evidence that was adduced, the defendant had failed to regularize their rent account with the plaintiff to an extent that the tenant was in default and in arrears of Kshs 48,568,746.70 as at August 5, 2016 which was evident as demonstrated at page 52 of the plaintiff's bundle of documents.
16. Counsel also submitted that the facts of the breach of agreement by the defendant were well particularized in paragraph 20 of the plaint. Counsel relied on the case of *Attorney General of Belize et al v Belize Telecom Ltd & Another* (2009), 1 WLR 1980 at page 1993, citing Lord person in *Trollope Colls Ltd v North West Metropolitan Regional Hospital Board* (1973) 1 WLR 601 at 609 where it was held as follows:-
- “The court does not make a contract for the parties. The court will not even improve the contract which the parties have made for themselves. If the express terms are perfectly clear and from ambiguity, there is no choice to be made between different meanings. The clear terms must be applied even if the court thinks some other terms could have been more suitable.”
17. On whether the plaintiff is entitled to the reliefs sought herein, counsel submitted that the plaintiff has proved that there was indeed breach by the defendant herein by way of documents, quotation and invoices included in the bundle from exhibits and demonstrated its loses of Kshs 147,610,693.20. Counsel cited the case of *International Aircraft Group SA v Airway Limited* (2020) eKLR in support of this position.
18. On the issue of interest, counsel submitted that clause 4.1.1 of the deed dated December 20, 2017 provided that the tenant shall pay interest at the rate set out in the lease from the date of default. Reference was made to the case of *National Bank of Kenya Ltd v Peter Nyakundi & Another* (2006) eKLR where the court of Appeal held
- “.....This provision(section 26) is understood to be applicable only where the parties to the dispute have not by their agreement, fixed the rate of interest payable. If by their agreement parties have fixed the rate of interest payable, then the court has no discretion in the matter and must enforce the agreed rate unless it is shown in the usual way either that the agreed rate is illegal or unconsiderable or fraudulent.”
19. On costs counsel submitted that failure or neglect of the defendant to settle the rent arrears is what necessitated the filing of this suit therefore the defendant should pay the plaintiff's costs.

### **The Defendant's submissions.**

20. I have not seen on record the submissions by the defendant at the time of preparation of this judgment. Nevertheless, the court is still obligated to consider the pleadings and evidence tendered in delivering its judgment herein.

### **Analysis and Determination**

21. The court has considered the cases put forward by the plaintiff and the defendant, the written submissions by the plaintiff and the authorities referred to therein and wishes to adopt the issues for determination that were outlined by the plaintiff in their submissions. This includes the following: -



- i. Whether there was breach of agreement.
  - ii. Whether the plaintiff is entitled to the reliefs sought.
  - iii. Who should bear the costs of the suit.
22. On whether or not there was a breach of agreement, from the testimony that was tendered by PW1, it is evident that the defendant breached the sublease dated November 25, 2015 and the deed dated December 20, 2017. The Plaintiff witness was also able to tender evidence and prove that indeed there was breach and all the particulars of breach that were pleaded at paragraph 20 of the plaint were proven. In view of the foregoing, it is the finding of this court that there is irrefutable evidence that indeed the defendant acted in breach of the sublease dated November 25, 2015 and the deed executed on the December 20, 2017.
23. The plaintiff has sought for judgment against the defendant for Kshs 86,306,127.60 together with interest thereon accruing at the rate of 2% per month from February 28, 2018 until payment in full.
24. From the evidence that was tendered, the initial amount sought was Kshs 147,610,693.20 of which the plaintiff already obtained judgment on admission of Kshs 61,304,565.60 leaving the balance of Kshs 86,306,127.60. During the hearing, the defendant's witness admitted that indeed the said amount of money was due to the Plaintiff but the same was yet to be settled because they had not received invoices from the plaintiff and neither were they yet to reconcile the same. He also stated that the defendant was in financial crisis and hence the reason why the same was pending. While I have considered this defence, the same cannot be a defence that can dislodge the plaintiff's claim since there was enough material evidence confirming that the said amount was yet to be settled.
25. It is also the finding of the court that the plaintiff was able to prove its case to the required standard and hence entitled to the prayers sought.
26. For the above reasons, I have no option but to enter judgment for the plaintiff for the sum of Ksh 86,306,127.60 together with interest thereon accruing at the rate of 2% per month from February 28, 2018 until payment in full.
27. On costs of the suit, since the plaintiff is the successful litigant, it is awarded costs and interest of which interest on costs shall apply from the date of this judgment until payment in full.

#### **Final orders**

28. In the end, the court makes the following disposal orders:
- a. Judgment is entered in favour of the plaintiff against the defendant for the sum of Ksh 86,306,127.60 together with interest thereon accruing at the rate of 2% per month from the February 28, 2018.
  - b. Costs of the suit plus interest at court rates from the date hereof until payment in full.

**DATED, SIGNED AND DELIVERED VIRTUALLY AT NAIROBI THIS 6TH DAY OF OCTOBER 2022**

**E.K. WABWOTO**

**JUDGE**

**In the Presence of: -**

**Mr. Kimani for the Plaintiff.**



**N/A for the Defendant.**

**Court Assistants; Caroline Nafuna and Philomena Mwangi.**

**E.K. WABWOTO**

**JUDGE**

