



**REPUBLIC OF KENYA**

**IN THE ENVIRONMENT AND LAND COURT**

**AT MOMBASA**

**ELC NO. 150 OF 2017**

**HAROLD TUVA.....PLAINTIFF**

**-VERSUS-**

**DAVID CHARO KATANA & ANOTHER.....DEFENDANTS**

**JUDGMENT**

***(Suit by plaintiff seeking vacant possession of premises; parties having a lease agreement providing for termination by notice of 3 months; notice of 6 months given; held that plaintiff was entitled to terminate; defendant arguing that he was entitled to damages for the developments; no pleadings seeking any damages thus not an issue that the court can address; judgment given in favour of the plaintiff for vacant possession and a permanent injunction against the defendant and costs)***

1. This suit was commenced through a plaint which was filed on 26 April 2017 against two defendants. The plaintiff pleaded that he is the registered proprietor of the land parcel Plot No. 12787/I/MN (Original No. 1499/2/I/MN). He pleaded that on 1 August 2013 he entered into a lease with the 1<sup>st</sup> defendant over the whole of the premises. He averred that on 1 June 2016, he issued a notice terminating the lease in accordance with the provisions of the lease agreement. He pleaded that the defendant (meaning 1<sup>st</sup> defendant) has however contested the notice and contends to have acquired possession of the suit property through a non-existent sale agreement. The plaintiff further pleaded that the 1<sup>st</sup> defendant has unlawfully sublet the property to the 2<sup>nd</sup> defendant. In the suit, the plaintiff seeks the following orders :-

*(a) a permanent injunction restraining the defendant whether by itself, agents, servants, employees, relatives, or any other person from remaining on or continuing in occupation of all that property known as Plot No. 12787/I/MN (Original No. 1499/2/I/MN).*

*(b) Vacant possession.*

*(c) Costs of the suit and interest thereon at court rates.*

2. The defendants filed a joint statement of defence. It was admitted that the plaintiff is the proprietor of the suit property and that on 1 August 2013, the plaintiff and the 1<sup>st</sup> defendant entered into a lease agreement. It was contended that on 1 June 2016, a third party, FairTreaty Agencies, purported to issue a vacation notice to the defendants. It was denied that the tenancy prohibited sub-leasing. They asserted the right to remain on the property so long as they have not breached the terms thereof.

3. In the course of the proceedings, the 2<sup>nd</sup> defendant died, and the plaintiff withdrew the suit against him. It is also useful to state that on 22 November 2017, an order of injunction was issued against the defendants from the suit property and when the suit proceeded for hearing, the 1<sup>st</sup> defendant, now the only existing defendant, had already moved out of the premises.

4. In his evidence the plaintiff testified that he purchased the suit premises in the year 2001 though he is yet to have it transferred into his name as the seller is now deceased. He testified that the 1<sup>st</sup> defendant approached him to lease the premises as he wanted to build and operate a hotel. He agreed and the 1<sup>st</sup> defendant built a temporary sheltered hotel. No formal lease was drawn until 1 August 2013 with the rent being pegged at Kshs. 10,000/=. He testified that the 1<sup>st</sup> defendant had difficulty in paying rent and he employed Fairtreaty Agency to collect rent on his behalf. Rent was still not being paid and he issued to the 1<sup>st</sup> defendant a notice of 6 months asking him to vacate. He subsequently issued a second notice but the 1<sup>st</sup> defendant never vacated. He added that the 1<sup>st</sup> defendant developed the plot but he never notified him.

5. Cross-examined, he testified that the 1<sup>st</sup> defendant first moved into the premises in the year 2002 when the land was vacant. He continued being in possession until 2013 when the lease was formally drawn. He stated that there was no right to sublet though the subtenant sometimes paid him rent directly. The first notice to vacate was issued on 1 June 2016. The 1<sup>st</sup> defendant claimed to have purchased the plot.

6. On his part, the 1<sup>st</sup> defendant testified that he entered the land in the year 2002 when it was bare and the formal agreement was drawn in 2013. His position was that if he was to be removed, they would need to have a sitting and agree on the value of his improvements, but the plaintiff declined. He therefore engaged his own valuer in October 2016 and a valuation of Kshs 4.6 million was given. He gave the valuation to the plaintiff who did not respond but instead filed this suit. He vacated the premises pursuant to the order of court. He asked that he be paid the cost of the improvements that he has made as noted in the valuation report.

7. Both Mr. Maundu, learned counsel for the plaintiff, and Mr. Makau, learned counsel for the 1<sup>st</sup> defendant made oral submissions. They both agreed that the relationship of the parties is contained in the lease agreement. Mr. Maundu inter alia referred me to the ruling on the application for injunction and pointed out that the court found that the 1<sup>st</sup> defendant was in breach of the agreement inter alia for developing the land without consent. Counsel did not see how the defendant could make a claim for Kshs. 4.6 million since it is not mentioned in the defence and there is also no counterclaim. He was of opinion that these are special damages which cannot be granted unless pleaded. On his part, Mr. Makau submitted that the orders of injunction were issued on a temporary basis pending hearing of the suit. He conceded that there is no counterclaim. He submitted that the alternative is to have the 1<sup>st</sup> defendant reinstated back into the premises. On the claim that the 1<sup>st</sup> defendant constructed without consent of the plaintiff, he submitted that the 1<sup>st</sup> defendant did a lot since the year 2002 without any complaint being raised by the plaintiff. He submitted that the only complaint was based on rent. He asked that the plaintiff's suit be dismissed with costs.

8. I have considered all the above. There is consensus that the 1<sup>st</sup> defendant entered the premises sometimes in the year 2002 without there being any formal agreement. On 1 August 2013, the parties formalised their agreement and it is this agreement which contains the terms and conditions of their engagement. I am aware that when dealing with the application for injunction, the court (Komingoi J) made some pronouncements regarding that agreement. Although Mr. Maundu referred me to the same, they are not binding on me, since they were made for the sole purpose of determining the application for injunction. Upon hearing a matter on its merits, the court is now supposed to make its final pronouncement based on its independent assessment of the evidence tendered.

9. I have gone through the tenancy agreement. It is actually a brief agreement and as far as I can see, it is only clauses 4 and 14 which are relevant to us. They provide as follows :-.

*(4) Tenancy is in perpetuity unless parties agree mutually to terminate it by giving the other party three months' notice or three months' rent in lieu of Notice, upon which the Tenant shall be adequately compensated for development or improvement made to the premises by the Tenant.*

*(14) Upon termination of the tenancy of lease agreement in line with clause (3) above (must have meant clause 4 because clause 3 only sets the rent payable at Kshs. 10,000/=) the parties may mutually appoint a Valuer to assess and/or value the cost of the business premises and/or structure with a view to compensate the Tenant for the cost incurred but such compensation shall exclude the land on which the structure stands.*

10. One of the core issues argued by the parties is whether the landlord had a right to terminate the tenancy. On this point, Clause 4 above is operative. It states that the tenancy is in perpetuity (I am assuming that to mean that it continues without a term) but terminable with either party giving a 3 month notice or 3 months rent in lieu thereof. It follows therefore, that the tenancy, though regarded to be "in perpetuity" was actually terminable by notice. In other words, it was not a tenancy that was endless or one that would last forever. There is notice issued on 1 June 2016 on behalf of the landlord by Fairtreaty Agencies. That notice refers to clause 4 of the agreement and gives the 1<sup>st</sup> defendant 6 months to vacate the premises. The 1<sup>st</sup> defendant does not deny that he received this notice. He in fact replied to it and claimed to have purchased the suit premises through the agreement of 1 August 2013. This letter was responded to with the 1<sup>st</sup> defendant being challenged to produce such sale agreement. None was availed, and in my view, the fact remains that the agreement of 1 August 2013 was a tenancy and not a sale agreement. There was a reminder issued on 20 December 2016 to the 1<sup>st</sup> defendant to vacate the premises by 31 December 2016. This clearly was not complied with thus this suit for vacant possession.

11. The defendant appears to contend that he has a right to remain in possession as he has not been compensated for the developments. I don't think that there is a right to remain in possession, though there may be a right to compensation for the developments made. I am unable to go into that issue since there was no pleading for compensation for the improvements made. That, if permissible, may have to be sorted out in other proceedings but not in this suit. I in fact do not want to say anything on that lest I prejudice any subsequent proceedings. For the record, I have not addressed myself on any right of compensation for the developments.

12. As I have demonstrated above, the landlord had a right to terminate and he could do so upon giving a 3 month notice. The 1<sup>st</sup> defendant was given a notice period that even went beyond the 3 months. He cannot therefore be heard to complain. It follows that the plaintiff properly exercised his right to terminate the lease and is entitled to vacant possession of the premises. He is also entitled to the prayer for an order of permanent injunction against the 1<sup>st</sup> defendant. I therefore allow prayers (a) and (b) of the plaint. The only issue left is costs. I award the plaintiff the costs of this suit as against the 1<sup>st</sup> defendant.

13. Judgment accordingly.

**DATED AND DELIVERED THIS 3RD DAY OF NOVEMBER 2021.**

**JUSTICE MUNYAO SILA**

**JUDGE, ENVIRONMENT AND LAND COURT**

**AT MOMBASA**