REPUBLIC OF KENYA

IN THE ENVIRONMENT AND LAND COURT

AT MOMBASA

ELC NO 135 OF 2012

MILLY GLASS WORKS LIMITED.....PLAINITIFF

VERSUS

KENYA RAILWAYS CORPORATION & ANOTHER.....DEFENDANTS

JUDGMENT

(Plaintiff and 1st defendant having entered into a lease agreement in the year 1980; Lease provided that the term will commence in 1977; Lease providing for right to increase rent after expiry of 30 years; in year 2011, 1st defendant making a demand for increase in rent; plaintiff contesting the increment on argument inter alia that since no increase was affected immediately on expiry of 30 years then the right to increase was waived or extinguished; right to increase rent took effect on expiry of 30 years and could be exercised at any time thereafter; fact that it is not exercised immediately not a waiver and neither does it distinguish the right; there however being an earlier increment before lapse of 30 years which was not contested; right to increase can therefore only take effect 30 years after this increment; there being an order for injunction stopping the lessor/1st defendant from demanding the new rent until disposal of suit; Lessor however demanding the rent which was paid under coercion; this leading to an unjust enrichment; court using its discretionary power to order refund with interest, costs to the plaintiff).

1. This suit was commenced by way of plaint filed on 12 July 2012. The plaintiff is a limited liability company formerly known as Bawazir Glass Works Limited. The 1st defendant is a corporation established by the Kenya Railways Corporation Act, Cap 397, Laws of Kenya. The 2nd defendant is an auctioneer. The 1st defendant is the registered proprietor of the land parcel Mombasa/Block XLVIII/134 (the suit property). Through a lease dated 16 January 1980, the suit property was leased to Kenya Glass Works Limited for a term of 81 years with effect from 1 January 1977 at an annual rent of Kshs. 22,000/=. On 26 April 1993, Kenya Glass Works Limited transferred the lease to Bawazir Glass Works Limited and a certificate of lease was issued on 6 October 2000. The plaintiff avers that it was a term of the lease that the 1st defendant could have a right, at the expiry of each period of 30 years, to raise the annual rent to an amount equivalent to 1/20th part of the unimproved value of the land as at the date of such revision. The plaintiff contends that in breach of the terms of the lease, the 1st defendant, on 1 January 1994, increased the annual rent from Kshs. 22,000/= to Kshs. 146,000/= which is the rent the plaintiff continued paying until December 2011. It is the case of the plaintiff that the annual rent fell due for upwards revision on 1 January 2007 on which date the 1st defendant did not exercise its right under the lease. It is contended that the right to raise rent was thus waived/extinguished when the 1st defendant demanded and accepted from the plaintiff the rent for the 31st year at the subsisting rate. The plaintiff further contends that because of this, the next date of revision of the lease will be after lapse of another 30 years from 2007, thus the year 2037.

2. What prompted this suit is that on 30 September 2011, the 1st defendant informed the plaintiff that it had revised rent from Kshs. 146,000/= to Kshs. 10,200,000/= with effect from 1 January 2012. Subsequently, the 1st defendant appointed the 2nd defendant to demand the new rent. The plaintiff asserts that this increase is contrary to the terms of the lease. In the suit, the plaintiff seeks the following orders (slightly paraphrased for brevity) :-

> *(a) A declaration that the 1st defendant has no right under the terms of the lease dated 16 January 1980 to raise the annual rent payable for the suit property;*
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> *(b) A declaration that the revision of the annual rent for the suit property from Kshs. 146,000/= to Kshs. 10,200,000/= is unlawful, null and void and of no effect;*
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> *(c) An order for a permanent injunction against the defendants to stop them from interfering with the plaintiff's possession of the suit property and restrain them from charging any annual rent higher than Kshs. 146,000/= until 1 January 2037;*
>
> *(d) Costs of and incidental to the suit;*

(e) Any other or further relief deemed fit.

3. The defendant filed defence where it more or less pleaded that it was justified to increase the rent as it did. It denied that its right to increase rent was waived or is extinguished. It pleaded that it could revise rent at any time after expiry of 30 years. There was also pleading that the court had no jurisdiction given the provisions of Section 83 of the Kenya Railways Corporation Act, Cap 397, Laws of Kenya.

4. Both plaintiff and defendant called one witness each. There is really no dispute over the material facts of the case. The 1st defendant is the owner of the suit premises and entered into the subject lease agreement on 16 January 1980 with the predecessor of the plaintiff. The lease is for 81 years from 1 January 1977. The annual rent noted therein is Kshs. 22,000/=. There is a clause for revision of rent every 30 years. I do not wish to get too deeply into that now, for it is indeed the crux of the matter, and I reserve it for a more thorough analysis a little ahead. On 30 September 2011, the 1st defendant issued notice increasing rent to Kshs. 10,200,000/= per annum which prompted the plaintiff to file this suit. Before the said notice, what the plaintiff was paying as annual rent was Kshs. 146,000/= per annum. According to the plaintiff's witness, this rent of Kshs. 146,000/= commenced sometimes in the year 1997 together with an annual siding railway maintenance fee of Kshs. 73, 200/=. The plaintiff's witness thought that this rent of Kshs. 146,000/= was unlawful, being an increase before lapse of 30 years, but it never contested it and paid it without protest. What the plaintiff contests is the new increase of rent to Kshs. 10,200,000/= made on 30 September 2011. It did emerge in the course of the proceedings that the plaintiff is actually paying this sum of Kshs. 10,200,000/= , the explanation being that the same is being paid out of coercion, despite there being an order of injunction. I need to add that there was a valuation report prepared by the 1st defendant on 3 March 2020, giving the site value as Kshs 204,000,000/= which formed the basis of the claim for the rent of Kshs. 10,200,000/= (i.e 1/20th of site value). It was prepared by the 1st defendant's witness who is employed as a valuer by the 1st defendant though the said report was not produced as an exhibit. The reasoning of the witness was that what is in issue is not the value but the right to increase the rent, and when it fell due, and it was not therefore necessary to produce the report.

5. I invited counsel to file submissions which they did. I have taken these submissions into account. In his submissions, Mr. Gikandi, learned counsel for the plaintiff, inter alia referred me to various authorities regarding the interpretation of contracts. He urged that words must be given their ordinary and natural meaning and further that we must give constructions that favour business common sense. He pointed out that the lease commenced on 1 January 1977 at the rent of Kshs. 22,000/= revisable every 30 years. He submitted that there was a premature exercise of the right to increase rent, in the year 1994, when rent was increased to Kshs. 146,000/=. He submitted that having done so, the 1st defendant had to wait for another 30 years. He calculated 30 years from 1994 which led him to the year 2024. He also faulted the procedure employed to increase the rent. He appreciated that the rent was 1/20th of the unimproved site value and submitted that this first had to be determined after notice to the lessee. He submitted that no notice of such valuation was given to the plaintiff and no opportunity given to the plaintiff to appoint a valuer. He referred to clause 4 of the agreement providing that notice be in writing. He pointed out that no such notice was produced by the 1st defendant. Mr. Gikandi also made a passionate address, that if it is found that the plaintiff ought not to have been paying the sum of Kshs. 10,200,000/= , then an order for refund, with interest, be made, as the court has wide discretion to grant relief. He referred me to various authorities on the discretion of the court all of which I have considered.

6. For the 1st and 2nd defendants, Mr. Karina, learned counsel, revisited the issue of jurisdiction of the court arguing that Section 83 (1) of the Kenya Railways Act, requires exhaustion of other dispute resolution mechanisms (read arbitration) before coming to court. He also submitted that there is no evidence tendered that rent was increased in 1994 from Kshs. 22,000/= to Kshs. 146,000/=. He did not think that the 1997 invoice produced by the plaintiff was sufficient evidence that rent had been increased to Kshs. 146,000/=. He submitted that the burden of proof is on he who purports. He submitted that this issue was also not addressed in the pleadings and submitted that parties are bound by their pleadings. It was his view that rent increment fell due 30 years after the date of the agreement, which is 16 January 1980, and not 30 years after the year 1977, the date of commencement of the lease. Whichever formula, he did not see any fault in the notice to increase rent issued on 30 September 2011, as this was after lapse of 30 years, whether from 1977 or 1980. He submitted that the failure to exercise the right precisely on the date that it fell due did not take away or extinguish the already accrued right. He submitted that there were letters written to the plaintiff on the intended exercise of the right to increase the rent and referred me to a letter dated 19 January 2012 inviting the plaintiff to submit its valuation for consideration. He submitted that this process was not challenged in the plaint.

7. In his replying submissions, Mr. Gikandi wondered why the issue of jurisdiction is being revived again despite there having been various determinations on the same point in other cases. On the increment of rent from January 1994, he submitted that this was pleaded in the plaint and not denied by the defendants.

8. I am thankful to counsel for their very elaborate and illuminating submissions. I have also considered all the authorities they have provided though I may not refer to them directly in my judgment.

9. Before I go too far, let me first deal with the issue of jurisdiction which has been raised by the defendants. I was referred to Section 83 of the Kenya Railways Act, which is drawn as follows :-

83. Compensation

(1) In the exercise of the powers conferred by sections 13, 15, 16 and 17, the Corporation shall do as little damage as possible, and where any person suffers damage no action or suit shall lie but he shall be entitled to such compensation therefor as may be agreed between him and the Corporation or in default of agreement, as may be determined by a single arbitrator appointed by the Chief Justice.

(2) Nothing in this section shall be construed as entitling any person to compensation—

(a) for any damage suffered unless he would have been entitled thereto otherwise than under the provisions of this section; or

(b) for any damage suffered as a result of the user of any works authorized under this Act unless such damage results from

negligence in such user.

10. In his submissions, Mr. Karina submitted that where a statute provides for a procedure for resolving disputes, that procedure ought to be strictly followed before a party can approach the court for redress. He referred me to the Court of Appeal decision in *Mavumbo Ranch vs National Land Commission & 3 Others (2019) eKLR*. I have no problem with that general position which I indeed appreciate to be the law. But I am not convinced that in this matter, the 1st defendant can point at Section 83 for relief. As far as I can see, Section 83 restricts itself to compensation for damage suffered by the acts or omissions of the Corporation. These, in my view, would cover torts, and not contracts. My interpretation is not new and was indeed the position taken in three decisions referred to me by Mr. Gikandi, being *Peter Nzioka Mani & Another vs Kenya Railways Corporation (2012) eKLR*; *Ali Yislam Hariz vs Kenya Railways Corporation (2012) eKLR*; and *Ubah Ismail Mohamed vs Gapco Kenya Limited & Kenya Railways Corporation (2019) eKLR*. What is in issue in this case has nothing to do with damage caused by the acts or omissions of the 1st defendant. The matter herein concerns the interpretation of a contract relating to a lease. I am therefore of the view that this court has jurisdiction and I will proceed to determine the matter.

11. What is in dispute is the legality of the 1st defendant's notice to increase rent, issued on 30 September 2011, increasing the rent to the sum of Kshs. 10,200,000/= per annum. The basis for the increase is hinged on Clause 2 (a) of the lease agreement dated 16 January 1980 entered into between the plaintiff's predecessor in title and the 1st defendant. It is agreed that it is the said lease that governs the relationship of the parties herein. The said Clause 2 (a) is drawn as follows :-

2(a) That the Lessor shall have the right at the expiration of each period of thirty years to raise the annual rent to a figure equivalent to one-twentieth part of the unimproved value of the land at the date of such revision.

12. The above words need to be given their plain and natural meaning and I find no problem or complication in interpreting them. In fact, I need not torture my mind on the interpretation. It simply means that once thirty years lapse, there is a right to increase rent. Period.

13. Having said that, there are of course certain ambiguities that are not addressed by the said clause. The first, is when to start counting the 30 years. Is the first 30 years from 1 January 1977 when the lease term of 81 years started running or is to be counted from 16 January 1980 when the agreement was signed ? My view is that contracts start running from the date of execution, and unless it was made clear that the 30 years start running from 1 January 1977, then in my opinion, the 30 years will need to commence from the date the contract was signed, which is 16 January 1980. All these terms in the written agreement commenced after the contract was signed, and not before, including this clause on revision of rent. Thus, in absence of an elaboration in the contract, the 30 years would start running from the date the contract was signed, which is 16 January 1980. I will demonstrate why this is the only meaning that can be given to Clause 2 (a). Let us assume that this contract was signed in 2008 (being 30 years after 1977) and it still provided for a term of 81 years from 1977. If the rent in this 2008 contract was specified to be Kshs. 22,000/= then it is this Kshs. 22,000/= that would be payable, unless the contract specified, expressly, that the Kshs. 22,000/= would be considered to have started running in 1977 and has expired at the time that the contract is being signed. The other terms in the agreement would also only have been enforceable from the time the contract was signed, and not before, for indeed, there would be no contract to enforce before the same is executed. That is why I hold the view that in absence of an express explanation, then the 30 years would start running from the time the contract was executed. Being of the above view, 30 years started running from 16 January 1980. The correct date for review would thus be 16 January 2010 or after.

14. The next question that I will answer is what if there is no exercise of the right to review rent at the point of expiry of the 30 years? In the plaint, the plaintiff seemed to argue that if rent was not increased at the time that the 30 year period lapsed, then the right to increase the rent is extinguished or considered waived, and the lessor would need to wait for another 30 years to so increase the rent. I don't agree with this interpretation, and with respect, I in fact find that argument to be absurd if not incredulous. Unless there was an express term to that effect, it follows that the lessor could increase rent at any time after lapse of 30 years. It is only that the new rent would take effect from the time that it was increased. Before the increase, the lessee would benefit from paying the old rent. There is no other reasonable way to interpret this right to increase rent. Once 30 years lapsed, the lessee had to prepare himself for the possibility of an increase in rent. If the lessor chose to wait for some time before increasing the rent, that would be well and good, but the right would still remain active and would not be considered as extinguished. To me, the interpretation is simple and I need not belabour it.

15. The next issue is, what happens if the rent is increased before the lapse of 30 years ? The lease does not contemplate an increase before lapse of 30 years, but if the lessor increases the rent, and there is no complaint raised, then it has to be considered that the lessee has waived his right to contest the new rent, and that this is now the rent that is payable. It would of course be a breach of the lease agreement, but as in all other contracts, the right to contest a breach has a limitation period. The general limitation period in contracts is 6 years. If no issue was raised within the 6 years, then it would have to be considered that the lessee has acquiesced to this new rent and this is what is payable. The next natural question is, what then is the effect of such increase to the 30 year rule ? The effect is that a new term of 30 years will start running immediately there is an increase in rent which is not contested by the lessee. This is because the right to increase rent kicks in only after expiry of 30 years and not before. If the lessor chose to increase rent early, then he has to wait until the lapse of the 30 years of such increase. He cannot now turn back the clock so that time starts running before the date of such increase, otherwise the effect will be that he is increasing rent more than once in 30 years. The intention of the parties is that rent be increased after 30 years lapse and not before.

16. The other relevant question in our case, is the manner in which the 1/20th of the value of the land was to be determined, for that was what was to constitute rent. Again, there is a lacuna, for the contract does not specify how this is to be done, yet the rent hinges on this value. It would have been preferable if the parties had set out how the value of the land was to be determined so that there is no ambiguity. I would assume, however, that if the lessor indicates a value and it is not contested by the lessee, then this would constitute the basis for the rent. But if the same is contested, then a mechanism for the resolution of the dispute will have to be resorted to so that this is settled. Bar an express term in the agreement, I would assert that a lessee would have every right to contest the valuation of the lessor.

17. So how do all my above findings impact on the case before me ?

18. It is apparent that there was an increase in rent from Kshs. 22,000/= to Kshs. 146,000/=. In the plaint, at paragraph 9, it is pleaded that this increase took effect from 1 January 1994. I have perused the defence and the contents of paragraph 9 are not denied. There is however

variance between this pleading in paragraph 9 of the plaint and the evidence of the plaintiff's witness, who in his statement, stated that the increase in rent was "with effect from the year 1997 or thereabouts." The only evidence tendered on this increase of rent was an invoice of January 1997, which provides as part of its particulars, that the annual rent for the suit property is Kshs. 146,000/=. The 1st defendant did not adduce any evidence on when the rent increase to Kshs. 146,000/= took place. It only acknowledged that the last rent before the proposed increment in the letter of 30 September 2011 was the sum of Kshs. 146,000/=. In this instance, since the plaintiff stands to benefit from time, I will proceed to bind it to its pleadings, which is that the rent was last increased on 1 January 1994. From my earlier analysis, the right to revise rent would be 30 years from the last increment, and that in our case, will be 30 years from January 1994, which will be January 2024. The lessor therefore had no right to demand for an increment in rent in the year 2011 for 30 years had not lapsed since its last increment.

19. That should be the end of the matter but it is apparent that the 1st defendant has been demanding the sum of Kshs. 10,200,000/= from the plaintiff and the plaintiff is paying this sum, clearly under coercion. This demand for the sum of Kshs. 10,200,000/= is to me illegal and in breach of the order of this court issued on 14 March 2013 which order was in fact issued pursuant to a consent between the plaintiff and the 1st defendant. That order is to the effect that pending the hearing and determination of the suit, the plaintiff would pay the undisputed contractual rent, and in addition, the 1st defendant was barred from recovering the disputed annual rent. Now, I wonder why, despite the clear terms of the said orders, the 1st defendant continued to demand the sum of Kshs. 10,200,000/= from the plaintiff. There is clearly an unjust enrichment which I am unable to close my eyes to. I will use my wide discretion to order the 1st defendant to refund to the plaintiff all sums paid which exceed the annual amount of Kshs. 146,000/= per year. That sum must be refunded forthwith and each instalment paid will attract interest from the time that it was paid at court rates until settlement in full.

20. The only issue left is costs. They will follow the event. Costs to the plaintiff payable by the 1st defendant. There will be no orders as to costs for or against the 2nd defendant for she was an agent of the 1st defendant.

21. Judgment accordingly.

DATED AND DELIVERED THIS 4TH DAY OF NOVEMBER 2021.

JUSTICE MUNYAO SILA

JUDGE, ENVIRONMENT AND LAND COURT

AT MOMBASA

Delivered in the presence of:

Mr Gikandi for the plaintiff

Mr Karina for the defendant

Court Assistant; Wilson Rabong'o