



REPUBLIC OF KENYA
IN THE ENVIRONMENT AND LAND COURT OF KENYA

AT ELDORET

E & L CASE NO. 162 OF 2016

IMANI HOSPITAL.....1ST PLAINTIFF

CEDAR HOSPITAL LIMITED..... 2ND PLAINTIFF

VERSUS

HASHAM LALJI PROPERTIES LTD DEFENDANT

JUDGMENT

1. The plaintiffs commenced their claim against the defendant through the plaint dated 15th February, 2013 seeking for the following prayers;

- i. **“A declaration that the purported rent distress levied by M/S Eshikhoni Agencies is illegal, unlawful and null and void and that motor vehicle KAN 878S purportedly attached on alleged rent distress be released to the Plaintiffs unconditionally.**
- ii. **The Defendants, their servants, agents and or employees be restrained by way of injunction from interfering with the Plaintiffs enjoyment of tenancy over ELDORET MUNICIPALITY BLOCK 6/115.**
- iii. **A declaration that the purported rent increment (sic) by the Defendant is illegal, unlawful and unenforceable.**
- iv. **Costs and interest.**
- v. **Any other or further relief that the Honourable court may deem fit to grant.”**

2. The defendant opposed the claim through its statement of defence and counter claim dated 15th April, 2013 wherein the following prayers were sought:

- “(i) The claimants' suit against it be dismissed with costs.**
- (ii) Judgment be entered against the defendants to counter-claim for delivery up of the suit premises known as Title Number Eldoret Municipality/Block 6/115.**
- (iii) Judgment be entered against the defendants to counter-claim for mesne profits at the rate of Kshs.160,000, per month less any amounts paid on account during the pendency of the suit.**
- (iv) Costs of the suit and interest at Court rates.”**

3. The plaintiffs filed their reply to the defence and defence to the counter claim dated the 24th April, 2013. They also filed the following documents in support of their claim and in opposition of the defendant's counter claim:

- Plaintiffs' Witness Statement by Jakait Sang'alo dated 15th February, 2013;
- Plaintiffs' List of Witnesses dated 15th February, 2013;
- Plaintiffs' List of Documents dated 15th February, 2013;
- Plaintiffs' List of Issues to be determined by Court dated 14th April, 2014.

4. The defendant on its part filed the following documents in opposition to the plaintiffs' claim and in support of its counter claim:

- Defendant's Witness Statement by Grace Emisiko dated 15th April, 2013; and
- Defendant/Counter Claimant's List of Documents dated 15th April, 2013.

5. That during the hearing on 25th September, 2019, **Charles Jakait Sang'alo**, who described himself as a director with Cedar Hospital that was formerly known as Imani Hospital, testified as **PW1** on behalf of the Plaintiffs. He adopted his statement dated 16th February, 2013 as his evidence in chief. He testified that the defendant, who is the Landlord of the premise occupied by the Plaintiffs, impounded the Plaintiffs' vehicle on the 9th February, 2013 allegedly due to rent arrears, while the Plaintiffs were up to date in the payment of rent. PW1 stated that the Plaintiffs and the Defendant had entered into a Lease Agreement dated 21st August, 2007 for a period of five **[5]** years three **[3]** months which he produced as **Pex 1**. That before the lease expired, the parties had agreed to its renewal and the defendant forwarded the new undated Lease Agreement vide the letter dated 30th August, 2012. He produced the letter as **Pex 2**, and the undated new Lease Agreement as **Pex 3**. That the plaintiffs did not agree with the rent payable under the new lease and instructed their advocates to seek recourse before the Rent Tribunal. The defendant then wrote to the plaintiffs the letter dated 1st November, 2012 stating that the lease has expired, which PW1 produced as **Pex4**. PW1 testified that the Plaintiffs responded to the defendant's letter, through theirs' dated 9th November, 2012 that he produced as **Pex5** and that they have continued to pay rent as is evidenced by a bundle of 28 receipts produced as **Pex6**. PW1 also produced the auctioneers notice of distress and notice of sale as **Pex7** and **Pex8** respectively. PW1 produced a copy of the order issued by the Rent Tribunal dated 6th October, 2014 as **Pex9**. The Plaintiffs pray for the court to order the Defendant to stop disturbing the Plaintiffs' occupation of the suit premises until the tribunal makes a determination of the rent that is payable; that the increased rent be set aside; that the Defendant be made to pay the Plaintiffs' costs, and the Counter Claim do fail as the Plaintiffs are not in arrears on their rent payment. During cross examination, PW1 stated that the 2007 Lease Agreement entered into with the Defendant was for 5years, 3 months. That when the said Lease Agreement was about to expire, the Landlord agreed to renew it but the issue of rent was not agreed upon. PW1 testified that he was in communication with Ashok Mandeli, a director of the defendant, but they did not agree that the rent for the suit premises would be Kshs.160,000.00. PW1 acknowledged that he received the notice to vacate from the Defendant but that they continued to pay rent under the old lease.

6. That after the plaintiffs closed their case, the defence hearing was scheduled to take place on 12th March 2020, 29th April 2020, 26th October, 2020 and 15th December, 2020 but no witness was availed on all the aforementioned dates. The defendant's case was marked closed on the 15th December, 2020 and directions on filing and exchanging submissions were given.

7. The Plaintiffs' submitted that without recourse to the Business Premises Rent Tribunal, the defendant unilaterally and arbitrarily decided to increase the rent. That the Plaintiffs' failure to sign the Lease Agreement that varied the rent payment terms made them to become protected tenants and therefore the decision to levy distress for rent was illegal and without basis in law as it contravenes **sections 2 and 4 of the Landlord and Tenant (Shop, Hotels and Catering establishments) Act (Cap. 301)**. That the Plaintiffs filed a reference to the BPRT in **Tribunal Case No. 21 of 2013** and that the Defendant's Counter Claim should be dismissed since the same is not supported with evidence.

8. The Defendant submitted that there is no tenancy relationship between the Defendant and the 2nd Plaintiff as the tenancy that once existed and lapsed on 31st October 2012, was between the 1st Plaintiff and the Defendant. That the tenancy between the 1st Plaintiff and the Defendant was not a controlled tenancy as Clause 2 of the Lease Agreement dated 21st August, 2007 (**produced as Pexh 1**) indicated it was for a period of 62 months or 5 years and 2 months. The tenancy agreement aforementioned also contains a provision for termination of tenancy otherwise than for breach of contract in **clause 2 (f)**. That upon the said agreement lapsing, the plaintiffs were served with the requisite notice terminating the tenancy as provided for in **Section 4(4) of Cap 301** that was produced in Court as **Pexh 4**. That PW1 had admitted during cross examination that the said notice was duly served on them. The Defendant argued that there is no need for a Court order to alter the terms of a controlled tenancy as all that is required is a notice in the prescribed form provided in **Section 4 of Cap 301**. That their distress for rent instructions issued to M/S Eshikoni Agencies relate to a rent arrears of Kshs.556, 800.00 under the Lease Agreement dated 21st August, 2007. That under the provisions of **Section 5 of the Distress for Rent Act, Cap 293**, the Defendant was within its right to impound the 1st Plaintiff's motor vehicle registration number KAN 878S as the same was levied within 6 months after the demise of the aforementioned Lease Agreement. The Defendant submitted that clause 2(g) of the Lease Agreement dated 21st August 2007, required the 1st Plaintiff to surrender and hand over the premises at the end of the term, that is, 31st October, 2012 to the Defendant. That when that failed to happen, the Plaintiffs became tenants at sufferance since their continued occupation of the premises was without the landlord's consent or assent.

9. The following are the issues for the court's determinations;

- (i) Whether a protected tenancy exists between the Plaintiffs and the Defendant; and**
- (ii) Whether the rent increment by the Defendant is illegal, unlawful and unenforceable.**

10. The after carefully considering the pleadings by the parties, evidence presented by PW1, and the learned counsel submissions, I have come to the following conclusions;

- a. That **Section 2(1) of the Landlord and Tenant (Shops, Hotels and Catering Establishment) Act, Cap. 301** defines a controlled tenancy as follows: -

“controlled tenancy” means a tenancy of a shop, hotel or catering establishment—

(a) which has not been reduced into writing; or

(b) which has been reduced into writing and which—

(i) is for a period not exceeding five years; or

(ii) contains provision for termination, otherwise than for breach of covenant, within five years from the commencement thereof; or

(iii) relates to premises of a class specified under subsection (2) of this section:

Provided that no tenancy to which the Government, the Community or a local authority is a party, whether as landlord or as tenant, shall be a controlled tenancy.

The Lease Agreement between the 1st Plaintiff and the Defendant that was executed on 21st August, 2007 was for a term of 62 months, which translates to Five (5) years and Two (2) months. That lease agreement cannot be lawfully and justifiably be referred to as a protected tenancy envisaged under the foregoing provision.

b. That before the lease expired on 31st October 2012, the Plaintiffs sought to have it renewed and the defendant was amenable to having the lease renewed on new terms as to the rent. That as the parties engaged into protracted negotiations, the Defendant required that the rent per month for the premises be Kshs.160,000.00 plus VAT per month for the first year, to be increased by 10% for every subsequent year, while the Plaintiff on the other hand was of the view that the rent per month remains to be Kshs.93,410.00 inclusive of VAT. The defendant also proposed that the rent be payable per quarter, while the Plaintiff was of the view that the monthly rent ought to be remitted per month as was the case during the subsistence of the expired Lease Agreement. That while the aforementioned issues were yet to be resolved, the Plaintiff continued to be in occupation of the suit premises and to pay Kshs.93,410.00 towards the rent of the premises for a while. That it is obvious from the foregoing that the Plaintiffs found themselves in a holding over tenancy situation, during the period the parties were trying to reach a consensus as to what the monthly rent would be, and when the same should be remitted. That in the case of WONDERLAND CASINO LTD v UNIVERSITY OF NAIROBI [2008] eKLR, the Court quoted Halsbury's Laws of England 4th Edition Vol. 27 pg. 37 on the issue of holding over as follows:

“81. holding over. The tenancy arising by implication in favour of a tenant who holds over after the expiration of his lease and pays rent is only deemed to be on the terms of the old lease in the absence of evidence of a different understanding. The question is one of fact and, in the absence of any facts excluding an implied agreement between the parties to hold upon the terms of the old lease so far as they are applicable to an annual tenancy, the law will imply a new agreement to that effect between them. Where nothing has been said by landlord or tenant with reference to any terms of negotiations after the expiration of the old lease with regard to the terms of a tenancy, it is a question of fact whether there has been a consent by both parties to a continuance of the old tenancy and, if so, upon what terms. The terms may be implied from the parties' relationship, as in the case of a landlord and tenant of an agricultural holding, from the use of certain words, such as the word “demise”, and from the surrounding circumstances existing at the time when the parties consent to the continuance of the tenancy; and what terms are to be implied is in each case an inference of fact. Thus, where there have been negotiations for a letting at an increased rent, and the tenant stays on, it is not a necessary inference that he is liable only for the former rent; although if a different rent has been in fact agreed upon this will not prevent the new tenancy being upon the old terms in other respects.”

That in a holding over tenancy situation, the terms of the newly established tenancy are deemed to be the same as the terms of the expired tenancy in the absence of evidence of a different understanding. The terms of the old Lease Agreement cannot be said to be the ones that still bind the parties to this claim as evidence has been adduced to the effect that the parties were exploring the options of entering into a new Lease Agreement, with new terms as relates to the amount due in rent, and the frequency of the payment of rent. That is evidenced through the copy of the undated Lease Agreement that both sides have alluded to, produced as Pex 3. That I therefore find that there is no need to infer the terms of the old Lease Agreement when the new undated Lease Agreement, that both parties made reference to, stipulates new rent terms. It is irrelevant that the parties have not reached a consensus on the exact rent terms of their continued interactions with each other.

c. That further to the finding above, the Plaintiffs argument that they are protected tenants within a controlled tenancy does not hold water. That in view of the nature of the tenancy relationship between the parties herein, it is probable the Business Premises and Rent Tribunal has no jurisdiction to hear and determine any dispute between the Plaintiffs and the Defendant herein.

d. That the plaintiffs claim that the defendant needed to obtain a court order before instructing the auctioneer to distress for rent, is not supported by the law. That in the case of ROYAL GARDENS HOSPITAL V EBRAHIM OMENYI AMBWERE & ANOTHER [2018] eKLR, the Court made the following observation:

“The principal issue before me is under whose authority distress should be carried out. The Distress for Rent Act and the common law do not require that the same be founded on a court order. Indeed, according to the Halsbury's Laws of England, Third Edition Vol. 12 page 115, leave of court to distrain must be obtained before the right to distrain can be exercised only where the tenancy is controlled and where the tenant is a serviceman not serving under regular engagement or dependents of such as service man. All what is required is that the same be carried out by a

certified bailiff. Certification of bailiffs, according to section 18, is by the court, but that should not be read to mean the bailiff acts upon the court having decreed the levy of distress. All what the bailiff, in Kenyan lingo that would be a court broker or auctioneer, would need are instructions or a warrant from the landlord to carry out the exercise. The warrant or instructions is necessary as it gives the bailiff the right which accrues to a landlord, or the person employing or instructing him, to enter the premises for the purpose of levying distress for rent. Where entry is resisted there may be need to obtain court orders to access the premises and to seize the chattels. It should be emphasized that court action should only be necessary in such circumstances. The only other requirement is that the bailiff serves a notice on tenant of the amounts for which distress is being levied, and the notice should include a computation of authorized fees, charges and expenses. At common law no such notice was necessary as the tenant was presumed to know what was in arrear regarding the property he occupied.”

That even though the defendant did not tender any evidence in this case, it is clear that it did not require a court order to enlist the services of M/S Eshikoni Agencies to distress for rent.

e. That the instant claim does not relate to a controlled tenancy where a statutory regime intervenes to regulate the manner in which rent is increased. That the lease agreement dated the 21st August, 2007 was self-regulating in terms of how to end the relationship, and its renewal as can be seen in clauses 2(f) and (g), which provided as follows;

“f). The tenancy is terminable by either party giving two-months calendar notice in writing or otherwise by mutual agreement between all parties concerned.

g). Upon expiry of the lease period, the tenant shall surrender and hand over the premises to the landlord provided always that should the tenant prefer to renew the tenancy it shall be free to negotiate with the landlord new terms and conditions including new rent payable for the extended period.”

That the parties to the lease agreement dated the 21st August, 2007 were Imani Hospital (1st plaintiff), and Hasham Lalji Properties Limited (defendant) only. That it follows that Cedar Hospital Limited (2nd plaintiff) was not a party, and it was therefore without legal basis to make any claim under it. That from the evidence tendered by PW1, it is obvious that the tenant engaged the landlord to negotiate for renewal of the lease agreement in accordance with clause 2(g), during the lifespan of the 2007 lease agreement. That is confirmed by the defendant’s letter to the 1st plaintiff dated the 30th August, 2012 produced as Pex.2, and the testimony of PW1, who among others testified that;

“The lease agreement was coming to an end. The defendant and I agreed on a renewal and they drew a renewal lease agreement whose contents we did not agree with.... The lease of 2007 was for five years three months. Before it expired, we sought from the landlord for extension of the lease, which was agreed but we did not agree with the rent. I know Ashok Mandari as part of the defendant’s establishment. I have communicated with him on phone. We did not agree that we pay Ksh,160,000 per month After getting the new lease I went to the defendant and we discussed directly.

The notice was issued but we continued in occupation and making monthly payment through the defendant’s bank account.”

That from the evidence availed to the court, there is no difficulty in coming to the finding that the defendant had communicated to the Plaintiff its intentions to increase the monthly rent of the suit premises from Kshs,93,410.00 to Kshs.160,000.00 plus VAT vide the undated Lease Agreement and the letter dated 30th August, 2012 produced as Pex3 and Pex2 respectively. The Plaintiff’s attempts to persuade the defendant to allow them to continue paying a monthly rent of Kshs.93,410 did not bear any fruit. That the defendant’s final decision on the matter was communicated to the plaintiff through its notice to vacate dated the 1st November, 2012 whose receipt PW1 acknowledged through his testimony. That as the disagreement on the renewal of the lease was fundamental as relates to the rent of the premises, the Plaintiff was obligated to pay all the arrears of rent, if any, and to vacate the suit premises as demanded by the defendant through the said notice.

f. That the 2007 Lease Agreement foresaw a situation where the lease agreement may be renewed, but on new terms and conditions, and it specifically points out the fact that the rent payable may be varied for the extended period. Clause 2(g) of the Lease Agreement dated on 21st August, 2007 provides that upon expiry of the lease period the tenant shall surrender and hand over the premises to the landlord provided always that should the tenant prefer to renew the tenancy it shall be free to negotiate with the landlord new terms and conditions including new rent payable for the extended period. The manner in which the aforementioned clause is phrased does not seem to suggest that the Landlord is inclined to agree with whatever proposal the tenant may advance, since in the event that the parties fail to agree, the tenant is at liberty to surrender and handover the suit premises to the landlord upon the expiry of the term of the lease. That it is unconscionable for the Plaintiffs to insist on maintaining the monthly rent and the payment terms of the old Lease Agreement in full awareness of the fact that the Defendant desired to increase the rent and to cause the rent to be paid quarterly. The Defendant being the rightful proprietor of suit premises was well within his rights to seek during the renewal discussions to increase the rent. The plaintiff was also entitled to propose to retain the old rent or seek a lower one. That the moment the negotiations failed, and the 2007 agreement expired by effluxion of time, the tenant’s option was to vacate as agreed under clause 2(f) of the lease agreement.

g. That the rent increment demanded by the defendant as evidenced in the undated and unsigned lease agreement is legal, lawful and enforceable. When the Plaintiffs continued to occupy the suit premises, their obligation to pay monthly rent of Kshs.160,000.00 to the Defendant continued to run from the date when the old lease lapsed on 31st October, 2012 up until the point when the Plaintiffs hands over possession of the suit premises back to the Defendant. That **during hearing, PW1 produced a bundle of 28 receipts to**

show that the tenant has been paying the rent by depositing it in the defendant's bank account. That I have scrutinized the said receipts and their details are as set out here below;

<u>RECEIPT NO</u>	<u>DATE</u>	<u>AMOUNT</u>
1.	03.11.2012	93,410
2.	04.01.2013	93,410
3.	04.02.2013	93,410
4.	02.03.2013	93,410
5.	02.04.2013	93,410
6.	02.05.2013	93,410
7.	03.06.2013	93,410
8.	03.07.2013	93,410
9.	01.08.2013	93,410
10.	04.09.2013	93,410
11.	01.10.2013	102,751
12.	05.11.2013	102,751
13.	30.11.2013	102,751
14.	04.01.2014	102,751
15.	03.02.2014	102,751
16.	04.03.2014	102,751
17.	03.04.2014	102,751
18.	05.05.2014	102,751
19.	03.06.2014	102,751
20.	03.07.2014	102,751
21.	04.08.2014	102,751
22.	04.09.2014	102,751
23.	03.10.2014	102,751
24.	05.11.2014	102,751
25.	05.12.2014	102,751
26.	05.01.2015	102,751
27.	02.02.2015	102,751
28.	05.03.2015	<u>102,751</u>
	TOTAL	- <u>2,783,618</u>

That I take it that PW1 did not have any other rent payment receipts that he did not produce when he testified on the 25th September 2019. That from the 1st November 2012, when the plaintiff was expected to vacate from the premises, to the 25th September 2019, when PW1 testified, is a period of over seven (7) years. That the expected rent by that date, even at the old rate of Ksh.93,410 and without including annual increment and VAT totals over Ksh.7,846,440. That when calculated at the rate of Ksh.160,000 per month that is in the undated lease agreement, the total must be even higher, and much higher when the annual increment and VAT is included. That approximately eight (8) years and ten (10) months have gone by since the 2007 lease agreement expired on the 31st October, 2012. That as only payment of Kshs.2,733,618 has been proved by the Plaintiffs, they are definitely not up to date in the payment of Kshs.93,410.00 per month throughout the aforementioned period. That if that was the case the Plaintiffs would have tendered evidence in that regard.

h. That from the foregoing, I find that the defendant was in order in asking for increased rent for the suit premises during the renewal discussions. That the defendant is also justified to seek for increased rent as per the undated lease agreement for the period that the Plaintiffs extended their stay on the suit premises, until they give vacant possession back to the defendant.

i. That as the defendant did not avail evidence in support of the counterclaim, their pleadings remain mere allegations which cannot be the basis of a finding in their favour.

11. That flowing from the foregoing, the Court finds and orders as follows:

(a) That as the plaintiffs have failed to prove their claim against the defendant to the standard required by the law of balance of probabilities, their claim is hereby dismissed with costs.

(b) That the defendant's counterclaim also fails as no evidence in support thereof was adduced. That however, I find this an appropriate case for each party to bear their own costs in respect of the defendant's counterclaim notwithstanding the provision of **Section 27 of the Civil Procedure Act, Chapter 21 of Laws of Kenya.**

It is so ordered.

DATED AND DELIVERED VIRTUALLY THIS 29TH DAY OF SEPTEMBER, 2021

S. M. KIBUNJA

ENVIRONMENT AND LAND COURT JUDGE

IN THE PRESENCE OF:

PLAINTIFFS: ABSENT

DEFENDANT: ABSENT

COUNSEL: MR. KETER FOR MWINAMO FOR PLAINTIFF AND

MR. LAGAT FOR KORIR FOR DEFENDANT

CHRISTINE: COURT ASSISTANT