Shiloah Investment Limited v East Africa Institute of Certified Studies Limited (Civil Suit E005 of 2021) [2023] KEHC 22639 (KLR) (20 September 2023) (Judgment)

Neutral citation: [2023] KEHC 22639 (KLR)

REPUBLIC OF KENYA

IN THE HIGH COURT AT KISUMU

CIVIL SUIT E005 OF 2021

RE ABURILI, J

SEPTEMBER 20, 2023

BETWEEN

SHILOAH INVESTMENT LIMITED ..... PLAINTIFF

AND

EAST AFRICA INSTITUTE OF CERTIFIED STUDIES LIMITED . DEFENDANT

JUDGMENT

Introduction

1. The Plaintiff commenced this suit vide Plaint dated 19th April, 2021 and filed on the 23rd April 2021seeking the following reliefs:

    a. Special Damages

        i. Kshs. 3,819,227 for the space on the 10th floor at Mega Plaza2 measuring approximately 6750 square feet, and finally;

        ii. Auctioneer's costs amounting to Kshs. 522,239/=

        iii. Kshs. 36,342,348 plus VAT, being rental payment and/or mesne profits for the remainder of the lease period of the lease.

    b. Interest on (i), (ii) and (iii) above at court rates.

    c. Clearance of Defendant's utility bills as per meter (s) reading as at January 2019.

    d. Reinstatement of the demised premises to the state it was in at the commencement of the lease, tear and wear only being excepted as per the lease agreement.

    e. In default of (d) the defendant to reimburse the plaintiff the costs thereof.

    f. Costs of the suit.

g. Any other reliefs that this Honourable Court may deem fit to grant.

2. The Plaintiff's case as presented by PW1, Suku Elisha Shawin, was that via a letter of offer dated 25th February 2019, it entered into a lease agreement for the space on the 10th floor at Mega Plaza2 with the defendant for a period of 6 years commencing the 1st May 2019 till 30th March 2025 but that the defendant had been in arrears of rent up to January 2021 to a sum totaling up to Kshs. 3,819,227.

3. Mr. Shawin testified that the agreement was that the defendant would pay rents of Kshs. 405,000 per month from 1.5.2019 to the 30.4.2020, a period of a year, after which the rent would increase annually till the determination of the lease as provided for in the lease agreement.

4. It was the plaintiff's case that after occupying the rental space, the defendant got into arrears and further failed to remit the rent as agreed in the lease agreement and that as at October 2020, the defendant had accumulated arrears of Kshs. 4,452,612

5. The plaintiff averred that upon the default it engaged the services of Auctioneers to proclaim the defendant's goods at a cost to it of Kshs. 522,239 but having sold the proclaimed goods, the auctioneer only recovered Kshs. 46,000 thus leaving a balance of Kshs. 3,773,227 that was unpaid to date.

6. It was the plaintiff's case that it was a part of the lease agreement, Clause 3n, that in the event of determination of the lease prior to the terms created, the defendant would remain liable to the plaintiff for payment of all the rental, service charge and/or any other sum payable under the terms and conditions of the lease and for the entire period of the lease and further that the defendant would pay 2% per month as penalty for the late payment of monies until payment in full.

7. The plaintiff thus averred that the defendant, by its conduct was in breach of the terms and conditions of the lease and as a consequence, the plaintiff had suffered irreparable damages of up to Kshs. 36,342,348 being rental payment for the remainder of the lease period ending on the 30.4.2025.

8. In cross-examination, Mr. Shawin stated that there were specific circumstances under which a tenant could be excused from paying rent. He further stated that the premises were let for the purposes of a college and that though the government closed places as a result of the Covid pandemic, people could still operate with safety measures of sanitization. He stated that they did not offer any rebate during the pandemic period.

9. Mr. Shawin stated that the tenant left the premises after giving notice on the 17.11.2020 and that though he could not tell when the defendant left, he thought it was on January 2021. He further stated that the defendant had paid a deposit on rent of Kshs. 1,518,750 combined with the service charge and that the plaintiff used the deposit to offset part of the rent.

10. It was his testimony in cross-examination that it let out the premises in 2022 to another tenant and further that the plaintiff would calculate the future rent up to the time when a new tenant entered the premises.

11. In re-examination, Mr. Shawin testified that the defendant left due to the default in rent payment after distress for rent by the auctioneers who had taken all their items. He further stated that there were no documents attached to the letters written by the defendant to the plaintiff. Mr. Shawin further testified that the plaintiff refused to give the defendant rebate for rent payment as from the onset the defendant failed to pay rent as per the terms of the lease agreement.

12. It was his testimony that prior to levying distress for rent, the defendant had been in arrears from March 2020 to October 2020.

13. The defendant filed an amended statement of defence on the 17th March 2022 and filed the same in July 2022 denying the plaintiff's claim and stating that the lease agreement was frustrated by forces beyond its control by the onset of Corona Virus 19 and therefore the lease was terminated by operation of the law. Mr. Daniel Wakaba Macharia testified on behalf of the defendant. Mr. Macharia testified that as per the lease agreement hew as to pay rent monthly which he did not do and that though he was in default, this did not arise immediately he took possession of the rental premises.

14. Mr. Macharia testified that all learning institutions were closed in March 2020 as a result of the measures undertaken by the government to combat the Corona virus pandemic that included closure of learning institutions that affected its capacity to pay rent as its operations were dependent on payment of school fees by its students.

15. The defendant further averred that following the onset of Covid 19 pandemic and the subsequent closure of schools and places of learning by the government, the rental premises could no longer be used for the purposes that they were let and that the defendant lawfully terminated the lease in accordance with section 65 of the *Land Act* and that the defendant was discharged from the lease. It was the defendant's case that the lease was frustrated by the onset of the Covid 19 pandemic and thus it was discharged from allegations under the lease agreement.

16. It was the defendant's case that the attachment of its tools of trade for auction further crippled its ability to operate as it could not generate any income to offset the accrued balances and further that the rental premises developed life-threatening cracks that made it inhabitable and unfit for occupation thus entitling it to rent suspension.

17. Mr. Macharia testified that in November, the landlord refused to give them a rebate and further that its efforts to reach out to the plaintiff to have an amicable solution to the matter failed and that having obtained a new tenant for the premises, the plaintiff had mitigated its loss. He further testified that the defendant terminated the lease as it had not been open for 8 months due to the pandemic. He admitted that he had not paid any arrears.

18. In cross-examination, Mr. Macharia stated that after signing the letter of offer, he got into the premises two months later as the tiles had not been fixed.

19. The parties agreed to file written submissions.

The Plaintiff's Submissions

20. It was submitted that the defendant was aware as early as on the date of signing the letter of offer that should he breach the agreement or determine the offer; then he would be liable to pay for the entire lease and that despite being aware that the deposit amount as stipulated in the letter of offer was Kshs. 2,667,353 he went ahead to only deposit Kshs. 2,373,777 leaving a deficit of Kshs. 293,576 and thus it was evident that even upon entry the defendant was already in breach of the agreement to deposit the full amount.

21. The plaintiff submitted that the defendant's breach was under the guise that they were suffering financial difficulties as a result of the COVID pandemic which was not the case as they still managed to relocate premises, pay a deposit, set-up and continue to run their business along Oginga Odinga street in Kisumu.

22. It was submitted that the defendant was liable to settle the arrears accumulated during the subsistence of the lease as the same had been contained in the lease agreement validly entered into between the parties herein and as such the parties were bound therein.

23. Reliance was placed on the cases of *Attorney General of Belize et al Vs Belize Telecom Ltd & Anothet* (2009), 1WLR 1980, *National Bank of Kenya Ltd vs. Pipe Plastic Samkolit (K) Ltd* (2002) 2 E.A. 503, (2011) eKLR and *Pius Kimaiyo Langat vs. Co-operative Bank of Kenya Ltd* (2017) eKLR where the courts in all these circumstances held interalia that it was not the business of Courts to rewrite contracts between parties as the parties were bound by the terms of their contracts, unless coercion, fraud or undue influence are pleaded and proved.

24. The plaintiff submitted that the defendant's breach of contract by not paying rent caused the lease to determine prior to its expiry and rendered the defendant liable to pay the landlord for the remainder of the lease period. It was further submitted that in an effort to mitigate its loss, the plaintiff found a tenant who occupied the premises from May 2022 and therefore, the amount owing for the remainder of the lease period was Kshs. 11,110,777.

25. The plaintiff submitted that the defendant was inviting the court to rewrite the contracts as they had not proven how the clause was unconscionable or that they were suffering under a force majeure. Reliance was placed on the case of *Euromec International Limited v Shandong Taikai Power Engineering Company Limited* (Civil Case E527 of 2020) [2021] KEHC 93 (KLR) where the court held that "a court would decline to use the power where a party relied on abstract values of fairness and reasonableness to escape the consequences of a contract. The party who attacked the contract or its enforcement bore the onus to establish the facts."

26. It was submitted that the amount of Kshs. 11,110,777 was due for the remainder of the lease period because it was an amount arrived at prudentially upon the landlord mitigating its losses and getting a tenant to occupy the space in May 2022. Reliance was placed on the case of *African Highland Produce Limited v John Kisorio* [2001] eKLR where the Court captured the duty of the injured party to mitigate their losses and held interalia that "It is the duty of the plaintiff to take all reasonable steps to mitigate the loss he has sustained consequent upon the wrongful act in respect of which he sues, and he cannot claim as damages any sum which is due to his own neglect. The duty arises immediately a plaintiff realizes that an interest of his has been injured by a breach of contract or a tort, and he is then bound to act, as best he may, not only in his own interests but also in those of the defendant."

27. The plaintiff further submitted that contrary to the defendant's assertion that the lease was determined by dint of Section 65 of the *Land Act*, no evidence was led as to the unsuitability of any part of the demised premises for rental and as such this limb of the defendant's defence failed.

28. It was submitted that the despite the defendant claiming that the closure of schools at the onset of the pandemic frustrated the lease and therefore the lease was discharged, the defendant did not elucidate how the contract was frustrated and thus it cannot be assumed that the defendant had no income to meet their obligation to pay rentals as frustration of a contract is a factual issue and therefore the party aiming to rely on it must not only state it but prove it. Reliance was placed on the case of *Showcase Properties Limited v Kenya Commercial Bank Ltd* [2015] eKLR where the Court addressed the doctrine of frustration of contract.

The Defendant's Submissions

29. It was submitted that the sum of rent arrears to be claimed should be Kshs. 2,933,862.40 and not Kshs 3,819,227 as the deposit paid by the defendant of Kshs. 1,518,750 and Kshs. 46,000 being the monies collected by the auctioneer after levying distress for rent were not factored in by the plaintiff.

30. Regarding the Auctioneer's fees of Kshs. 522,239 claimed, it was submitted that in accordance with Rule 7 (c) of the Auctioneer Rules, it is the creditor, in this case the plaintiff, who should pay the

charges and further that as the plaintiff has not paid such charges, it cannot seek indemnity from the defendant.

31. Regarding the claim for Kshs. 36,342,348, The defendant submitted that the Court should take Judicial notice of the outbreak of Covid 19 Pandemic and the closure of learning places by the Kenyan government that requires no proof contrary to the plaintiff's assertions and as set out in section 60 of the *Evidence Act* and thus the lease having been terminated in accordance with the Law, the defendant cannot be bound by what was provided for by the law.

32. It was submitted that the plaintiff failed to lead any evidence to ascertain the claims of having cleared the utility bills as at January 2021 and reinstatement of the premises to the state that they were in at the commencement of the lease.

33. The defendant further submitted that the plaintiff cannot claim for rent for the same premises up to the year 2025 yet it is receiving rent from another tenant.

Analysis and Determination

34. I have considered the pleadings herein by both parties, the evidence adduced during the hearing and submissions filed by both parties as well as the authorities relied on. In my view, the issues for determination are:

    i. Whether the lease agreement was frustrated by circumstances and by law?

    ii. Who is liable for the Auctioneer Fees of Kshs. 522,239?

    iii. What orders should this court grant?

35. Before turning to the issues for determination, it is worth noting that the burden of proof in Civil cases is on a balance of probability. In *Evans Nyakwana v Cleophas Bwana Ongaro* (2015) eKLR it was held that:

> " As a general preposition the legal burden of proof lies upon the party who invokes the aid of the law and substantially asserts the affirmative of the issue. That is the purport of Section 107(i) of the *Evidence Act*, Chapter 80 Laws of Kenya. Furthermore, the evidential burden... is cast upon any party, the burden of proving any particular fact which he desires the court to believe in its existence. That is captured in Section 109 and 112 of law that proof of that fact shall lie on any particular person...The appellant did not discharge that burden and as Section 108 of the *Evidence Act* provides the burden lies in that person who would fail if no evidence at all were given as either side."

36. The question as to what amounts to proof on a balance of probabilities was discussed by Kimaru, J in *William Kabogo Gitau vs. George Thuo & 2 Others* [2010] 1 KLR 526 as follows:

> " In ordinary civil cases, a case may be determined in favour of a party who persuades the court that the allegations he has pleaded in his case are more likely than not to be what took place. In percentage terms, a party who is able to establish his case to a percentage of 51% as opposed to 49% of the opposing party is said to have established his case on a balance of probabilities. He has established that it is probable than not that the allegations that he made occurred."

37. In *Palace Investment Ltd vs. Geoffrey Kariuki Mwenda & Another* (2015) eKLR, the judges of Appeal held that:

> " Denning J. in Miller Vs Minister of Pensions (1947) 2 ALL ER 372 discussing the burden of proof had this to say; -
>
> > "That degree is well settled. It must carry a reasonable degree of probability, but not so high as is required in a criminal case. If the evidence is such that the tribunal can say; we think it more probable than not; the burden is discharged, but if the probability are equal it is not. This burden on a balance of preponderance of probabilities means a win, however narrow. A draw is not enough. So in any case in which a tribunal cannot decide one way or the other which evidence to accept, where both parties...are equally (un)convincing, the party bearing the burden of proof will loose, because the requisite standard will not have been attained."
>
> Therefore, on Whether the lease agreement was frustrated by circumstances and the law

38. From the evidence on record, it is clear and uncontroverted that by a lease agreement dated 25th February 2019, the plaintiff entered into a lease agreement for the space on the 10th floor at Mega Plaza2 with the defendant for a period of 6 years commencing the 1st May 2019 till 30th March 2025 but that the defendant had been in arrears of rent up to January 2021 to a sum totaling up to Kshs. 3,819,227.

39. It is settled law that parties are bound by the terms of their contracts and that it is not the business of courts to rewrite contracts between parties. See Pius Kimaiyo Langat versus Co-operative Bank of Kenya Ltd [2017] eKLR. Further, parties should be ready to live with the consequences of agreements that they enter into since equity does not ordinarily allow a party to escape from a bad bargain. See *National Bank of Kenya Ltd versus Pipe Plastic Samkolit (K) Ltd & another* [2011] eKLR. 12.

40. However, the defendant attributed its failure to uphold the lease to the government directive issued in March 2020 due to the Covid-19 pandemic that led to closure of all learning institutions.

41. The principles of the doctrine of frustration have been restated time and again. In *Five Forty Aviation Limited v Erwan Lanoe* [2019] eKLR, the Court of Appeal restated the principles as follows:

> "....the doctrine of frustration operates to excuse further performance where it appears from the nature of the contract and the surrounding circumstances that the parties have contracted on the basis that some fundamental thing or state of things will continue to exist, or that some particular person will continue to be available, or that some future event which forms the foundation of the contract will take place, and before breach performance becomes impossible or only possible in a very different way to that contemplated without default of either party and owing to a fundamental change of circumstances beyond the control and original contemplation of the parties. The mere fact that a contract has been rendered more onerous does not of itself give rise to frustration.(See also Halsbury's Laws of England (3rd Edition) Volume 8 page 185(i), on the doctrine of frustration para 320) and Davis Contractors Ltd versus FAREHAM U.D.C. [1956] A.C.696 for the observations inter alia that:"Frustration occurs whenever the law recognizes that, without the default of either party a contractual obligation has become incapable of being performed because, the circumstances in which the performance is called for would render it a thing radically different from that which was undertaken by the contract..."

42. Earlier on in the case of *Charles Mwirigi Miriti vs Thananga Tea Growers Sacco Ltd* [2014] eKLR, the Court of Appeal, considering the doctrine of frustration of an agreement, revisited the multi-factorial approach set out in Halsbury's Laws of England, Vol 1. 9(1), 4th edition at paragraph 897 as follows:

> "As subsequently developed, the doctrine of frustration operates to excuse from further performance where: (1) it appears from the nature of the contract and the surrounding circumstances that the parties have contracted on the basis that some fundamental thing or state of things will continue to exist, or that some particular person will continue to be available, or that some future event which forms the basis of the contract will take place; and (2) before breach, an event in relation to the matter stipulated in head (1) above renders performance impossible or only possible in a very different way from that contemplated. This assessment has been said to require a 'multi-factorial' approach. Five propositions have been set out as the essence of the doctrine. First, the doctrine of frustration has evolved to mitigate the rigour of the common law's insistence on literal performance of absolute promises so as to give effect to the demands of justice. Secondly, the effect of frustration is to discharge the parties from further liability under the contract, the doctrine must not therefore be lightly invoked but must be kept within very narrow limits and ought not to be extended. Thirdly, the effect of frustration is to bring the contract to an end forthwith, without more and automatically. Fourthly, the essence of frustration is that it should not be due to the act or election of the party seeking to rely upon it, but due to some outside event or extraneous change of situation. Fifthly, that event must take place without blame or fault on the side of the party seeking to rely upon it; nor does the mere fact that a contract has become more onerous allow such a plea."

43. Taking into account the guiding principles of the doctrine of frustration, it is important to evaluate the evidence to ascertain whether the defendant contributed to the frustration. It is not disputed that the parties entered into the impugned lease agreement on the 27th February 2019, for a period of 6 years commencing the 1st May 2019 till 30th March 2025.

44. Both parties are in agreement that there was an order of closure of institutions by the government following the onset of the Covid pandemic. However, the plaintiff argues that the defendant was still able to operate his business following the sanitization measures issued by the government and as it had moved to a different location whereas where it operated from. The defendant asserts that it was not able to carry out any business during this period.

45. The important question therefore, is whether the frustration was foreseeable in the circumstance.

46. Ewan Mckendrick's, *Contract Law*, eighth edition, Par 14, 15 Page 251, sets out what constitutes a foreseeable event as follows:

> "An event is foreseeable and will prevent frustration of the contract only where it is one which 'any person of ordinary intelligence would regard as likely to occur' (see Treitel, 2007, para. 19-078, and contrast Hall 1984). In other words, the question would appear to be one of fact and degree and much will depend on the extent to which the event in question was foreseeable by the parties. As Rix LJ stated in The Sea Angel [2007] EWCA Civ 547, [2007] 2 Lloyd's Rep 517, [127], 'the less that an event, in its type and its impact, is foreseeable, the more likely it is to be a factor which, depending on other factors in the case may lead on to frustration.'"

47. This court takes cognizance of the government mandated lockdown that affected all institutions in this country and the effect that that lockdown had on all businesses. Like all other institutions of learning, the defendant was affected by the lockdown and subsequently closed its doors. It is therefore not disputed that for a period of time, the defendant was rendered unable to use the property subject of the lease agreement and was therefore, not generating any income from the intended purpose of the contract.

48. Consequently, I find and hold that the Covid 19 pandemic was a force majeure event that caused the defendant undue difficulty in continuing with the lease agreement in accordance with its purpose and making the payments thereupon agreed.

49. The pandemic was no secret, and the plaintiff was aware of the government directive to close schools and universities. Therefore, to require performance in the face of such unforeseen and unavoidable circumstances, not caused by any acts and/or omission on the part of the defendant is absurd, unfair, and unjust.

50. It is also evident from the evidence presented before this court that there were efforts from the defendant to discuss future modes of payment of rent, which efforts were rejected by the plaintiff, who admitted that this was because of the defendant's past failure to uphold the lease agreement and subsequently, the defendant moved out of the lease premise after giving Notice to vacate dated 17.11.2020.

51. In the circumstances, therefore, I find that this court would be in error in condemning the defendant to make rental payments for the entire duration of the lease, when it was no longer using or benefiting from the premises, due to forces beyond its control.

52. That being said, both parties are in agreement that the defendant paid a deposit of rent and service charge of Kshs. 2,373,777 as was evidenced in the statement of account page 1 in the entries for the 8th March 2019 leaving a deficit of Kshs. 293,576.

53. The upshot of the above is that the defendant owes the plaintiff as follows

    Rent Owing Accrued Kshs. 3,819,227

    Balance on Deposit Kshs. 293,576

    Total Kshs. 4,112,803

    Less Deposit on Rent & Service Charge Kshs. 2,373,777

    Net Total owed to the plaintiff by the defendant is Kshs. 1,739,026

    On Who is liable for the Auctioneers Fees of Kshs. 522,239

54. The plaintiff pleaded that it engaged the services of Auctioneers to proclaim the defendant's goods at a cost to it of Kshs. 522,239 and that after selling the proclaimed goods, the auctioneer only recovered Kshs. 46,000 and as such, the defendant was liable for the same.

55. On its part, the defendant asserted that under the Auctioneer Rules, the plaintiff was liable to settle the auctioneer's fees.

56. The Auctioneers Rules, 1997 at Section 7 provides that:

    Payment of auctioneer's charges

    A debtor shall pay the charges of the auctioneer unless—

(a) that debtor cannot be found; or

(b) he has no goods upon which execution can be levied; or

(c) the sale of proceeds are insufficient to cover the charges, in which cases the creditor shall pay the charges or the deficiency thereof.

57. The general rule is that the auctioneer recovers his charges from the judgment debtor unless the circumstances fall within rule 7 in which case the judgment creditor is called upon to pay the charges. For purposes of this case, the conditions in rule 7(a) and (b) were not applicable but rule 7 (c) is applicable. Accordingly, I find and hold that it was upon the plaintiff to settle the auctioneer fees, if any and as may be proven by the auctioneers through a taxation process.

58. As regards the clearance of utility bills as per meter (s) reading as at January 2021, this court observes that no evidence has been adduced to prove that indeed, the said meters had run up a bill of a certain amount as at January 2021 especially considering that the lease premises were subsequently occupied by a new tenant. The very cardinal principle of evidence is that he who alleges must proof. The plaintiff has not substantiated his claim under this heading and therefore the claim for utility bills which are not even specified is denied.

59. Regarding the prayers (d) and (e) that deal with reinstatement of the demised premises to the state that they were in prior to commencement of the lease agreement or in the alternative reimbursement of the plaintiff of the costs thereof, this court notes that normally, the courts grant the order for restoration to the original state prior to commencement of the lease.

60. However, in the instant case, to make such an order would be to act in vain as the same is overtaken by events given the plaintiff's testimony that the premises have been occupied by a new tenant.

61. In addition, the court notes that the plaintiff seeks costs of the restoration but did not plead the specific amount yet this is a special damage that must not only be specifically pleaded, but must also be strictly proved on a balance of probabilities. No amendment to the plaint was sought and obtained to specify the special damages and there is no evidence adduced by the plaintiff subsequently in these proceedings on the costs of restoration of the demised premises. My view is that the plaintiff ought to have adduced such evidence as to prove the costs of restoration failure to which the court is left in limbo and is restrained to pluck an arbitrary figure to cover the said costs. These prayers also fail.

62. Turning to costs of the suit, costs are at the discretion of the court, and follow the event. The plaintiff is partially successful in its claim but considering the huge sums of money claimed and what this court has found to be proved to be due and owing, and as the defendant had paid deposit for rent in advance which was in custody of the plaintiff, I find that it is in the interest of justice to order that each party shall bear their own costs of this suit.

63. In the end, I enter Judgment for the plaintiff against the defendant in the sum of Kshs. 1,739,026 and dismiss all the other claims as presented. Each party to bear their own costs of the suit.

64. Mention before the Deputy Registrar on 31/10/2023 for decree to be drawn and to confirm settlement of decree for closure of the file.

65. I so order.

DATED, SIGNED AND DELIVERED AT KISUMU THIS 20TH DAY OF SEPTEMBER, 2023

R.E. ABURILI

JUDGE