



**REPUBLIC OF KENYA**

**IN THE ENVIRONMENT AND LAND COURT**

**AT MOMBASA**

**ELC NO 112 OF 2015**

**SADRU NANJI.....PLAINTIFF**

**VERSUS**

**AL NASHIR DHANJI.....DEFENDANT**

**JUDGMENT**

1. By a plaint dated 25<sup>th</sup> May 2015 and amended on 23<sup>rd</sup> March 2016, the plaintiff claims to be the owner of leasehold interest in Flat Number 5, Block K on PLOT NUMBER 407 SECTION XI MOMBASA ISLAND (hereinafter referred to as the suit premises) which belongs to a society known as Jubilee Building Cooperative Society Limited where the plaintiff is a member. The plaintiff states that on 17<sup>th</sup> June 2009, the defendant who knew that the plaintiff was the owner of the suit premises obtained an order from the **Rent Restriction Tribunal in case No. 115 of 2008 (Alnashir Dhanji –v- Zarim S. Rajan & 2 Others)** permitting him to break open the suit premises to regain access and authorizing the OCS Makupa Police Station to enforce the Order. The plaintiff further states that the defendant knew that the order was illegal and incompetent as the plaintiff had not been served and that the tribunal had no jurisdiction to enforce its own orders or to authorize the police to enforce any order. That the defendant after regaining possession of the premises with the assistance of the police remained in possession to date although he does not reside therein.

2. The plaintiff states that together with Jubilee Building Co-operative Society Limited as Applicants filed Mombasa High Court Misc. Civil Application No. 446 of 2009 (J.R) against the Rent Restriction Tribunal and the Defendant, and the High Court in its judgment quashed the decision of the tribunal given on 17/6/2009 and prohibited the tribunal from enforcing or executing or purporting to enforce or execute the orders it gave on 17/6/2009. That the High Court also awarded costs of those proceedings to the applicants.

3. The plaintiff states that in spite of having lost the judicial review proceedings, the defendant has refused to remove his movables from the suit premises and to hand over vacant possession to the plaintiff. That by a demand letter dated 16/4/2015, the plaintiff demanded that the defendant should hand over vacant possession of the premises and to pay various sums demanded therein, but the defendant refused to comply. The plaintiff states that although the defendant does not reside in the suit premises, the plaintiff cannot take possession because he is apprehensive that the defendant may call the police and because the defendant still has furniture inside. The plaintiff avers that by reason of the matters stated hereinabove, the plaintiff has suffered loss and damage, which despite demand, the defendant has refused to settle.

4. The plaintiff's claim against the defendant is for orders as follows:

**a. Judgment against the defendant for Kshs.3,009,870.00 as at 30/5/2015.**

**b. Judgment against the defendant for Kshs.266,248.60 being renovation charges.**

**c. Judgment against the defendant for further mesne profits at Kshs.40,000.00 per month from 1.6.2015 until the suit premises are handed over to the plaintiff in habitable condition.**

**d. Further service charge at Kshs. 3,900.00 per month from 1.6.2015 until the suit premises are handed over in habitable condition.**

**e. Interest on all sums due to be paid at court rates from each date that the sums fell due and payable.**

**f. A declaration that the plaintiff did not lease or sublease the suit premises to the defendant and that the defendant has been a trespasser on the suit premises.**

**g. An order of eviction to evict the Defendant from the suit premises by removing the defendant's goods, furniture and other**

movables therefrom.

**h. A mandatory injunction compelling the defendant to open the suit premises for purposes of inspection to enable the plaintiff to quantify and plead special damages for repairs and in default the court be pleased to issue an order to the court bailiff to break open the doors for that purpose and the costs of replacing the locks and/or doors be paid by the defendant.**

**i. Costs of this suit.**

5. In his evidence, the plaintiff relied on and adopted his witness statement dated 25/5/15 which basically reiterated the facts as contained in the amended plaint. The plaintiff produced the list and bundle of documents filed on 27/5/2015 as p.exhibits 1-9. These are (1) copy of the transfer form duly approved by Jubilee Building Cooperative Society Ltd for Flat No. 5, Block K on Plot No. 407 MI in favour of the plaintiff, (2) copy of order of the Rent Restriction Tribunal given on 17/6/09 in Tribunal Case NO. 115 of 2008; (3) copy of judgment in High Court Misc. Civil Application No.446 of 2009 (JR) dated 30/3/15; (4) copy of order issued on 7/4/15 in High Court Misc. Civil Application NO.446 of 2009; (5) copy of demand letter dated 16/4/15; (6) copy of defendants submissions in Judicial Review proceedings; (7) copy of the plaint in Tribunal case No.115 of 2008; (8) copy of replying affidavit sworn by the defendant in Judicial Review proceedings; and (9) copy of the affidavit sworn by Gulshan Alibhai in Judicial Review proceedings. The plaintiff also produced the valuation report by Maina Chege & Co. for assessment of repairs as p.exhibit 10. The plaintiff testified that he carried out the repairs and spent about Kshs. 10,000,000.00 but claims the sum of Kshs.266, 350.00 shown in the valuation report.

6. The plaintiff was put to cross-examination by Mr. Otieno learned counsel for the defendant. He answered that he owned the suit premises having bought it from Shamar Tarmohamed who had a power of attorney after carrying out due diligence. That he sued the defendant because he had the keys to the premises. He stated that the land belongs to Jubilee Cooperative Society's Limited and he bought the leasehold premises in the year 2009. The plaintiff stated that he was aware there was a case going on at the Rent Restriction Tribunal and confirmed that there was contestation over the property. He however stated that he filed Judicial Review Misc. Civil Application No. 446 of 2009 and was granted orders quashing the orders and proceedings of the Tribunal. He agreed that the defendant was a tenant in the suit premises since 1987 and that in the year 2009, there was no one in the suit premises though it was locked. He denied that the claim for mesne profits is far-fetched. The plaintiff confirmed that the keys to the premises have been handed over to him, and that is why he carried out some repairs. He however clarified that was after the High Court decision. He confirmed knowing the previous owner of the suit premises who is since deceased and who had given a power of attorney to the person who sold him the property and got transfer from Jubilee Building Cooperative Society Ltd. The plaintiff stated that the defendant was not in the premises but had locked it.

7. When re-examined by Mr. Kinyua, learned counsel for the plaintiff, the plaintiff stated that there were 48 flats on one plot, and that Jubilee Building Cooperative Society consented to the sale agreement of the suit premises. He confirmed that he got the keys from Mr. Kinyua advocate.

8. The defendant, in opposing the suit filed his amended statement of defence dated 20<sup>th</sup> January, 2017. The defendant states that he rented the suit premises in April 1987 from Mrs. Kassamali Tarmohamed at a monthly rent of Kshs.1,500.00 which was later raised to Kshs.2,500.00. That when both the landlady and her husband died, in 1999 the suit premises was taken over by their granddaughter one Narmin Karmali who collected the rent until the year 2004 when she migrated to Canada without notifying the defendant whom to pay rent to. That subsequently in or about the year 2005, one Shamsher Tarmohamed approached the defendant and informed him that the suit property had since been bequeathed to his two sisters, Zavin Rajan and Yasmin B. Jamal who were based in Canada and that he was their agent authorized to collect rent. The defendant states that due to the conflicting interest and or ownership of the suit property, and acting on his advocate's advise, he refused to pay any rents to Mr. Shamsher Tarmohamed from the year 2004- 2007. That in October 2007, the said Mr. Tarmohamed through his advocates instructed auctioneers who without notice and accompanied by two armed policemen invaded the suit premises and demanded payment of rent arrears due prompting the defendant to pay the same under duress to avoid threatened eviction by force.

9. The defendant states that having been shaken by the conduct of Mr. Tarmohamed, he moved to the Rent Restriction Tribunal at Mombasa vide Suit No. 115 of 2008 in which he sued his landladies and as were known to him and obtained interim orders. That on 31/3/09 when the Tribunal proceedings were ongoing, the plaintiff herein showed up claiming ownership of the suit premises and was directed to formally file his papers but the plaintiff opted to file Mombasa High Court Judicial Review Application No. 446 of 2009 where he obtained orders of status quo on 29.9.09 meaning that neither of the parties could access the suit property until the matter was determined as the defendant had already moved out of the premises in August 2008. The defendant states that he was not informed nor notified by his landlord of change of ownership of the suit property to anyone, including the plaintiff herein. It is the defendant's contention that the plaintiff has never been his landlord and is a complete stranger to him.

10. The defendant states that on 17/9/09, the Tribunal confirmed the interim orders against the defendant's landlords and the defendant obtained vacant possession. It is his contention that when he moved to obtain vacant possession against the landlords, the relevant court order was lawful and enforceable as the same had neither been discharged, varied or set aside. That the order of 17/6/09 had been issued by a legally constituted tribunal with competent jurisdiction. The defendant states that he cannot tell for sure whether the plaintiff is indeed the lawful owner of the suit premises.

11. The defendant states that the Judicial Review proceedings brought by the plaintiff sought to quash orders of 17/6/09 made by a competent, legally constituted tribunal which defended its actions in the proceedings and not by the defendant. That the court in the judicial review proceedings did not canvass the issues of whether the defendant was a legal tenant or not; did not reach a finding as to ownership of the suit property; did not determine the rights and obligations of the defendant and the plaintiff vis-à-vis the suit property; and did not order the defendant to vacate the suit property in favour of the plaintiff or at all. The defendant denies having received the letter dated 16/4/15 requiring him to vacate the suit premises and or hand over vacant possession. The defendant denies that he is entitled to compensate the plaintiff for the loss and damage as claimed in the amended plaint arguing he has neither been the plaintiff's tenant nor his licensee in the suit premises. The defendant avers that there is and has never been any contractual relationship between him and the plaintiff to warrant the present claim by the plaintiff against the defendant. The defendant added that he is willing to hand over vacant possession to the plaintiff as he does not have any proprietary interest in it. The defendant avers that the only reason the suit property is still boarded up is by virtue of the

orders of status quo issued at the leave stage of the Judicial review application by the plaintiff, and which orders were issued when the defendant was not resident in the suit premises and then he could not return therein lest he be cited for contempt by the court.

12. The defendant testified and adopted his witness statement filed on 22/6/15 as his evidence. The same reiterates the contents of the defence. He stated that he became a tenant in the suit premises and left on 8.8.08 due to harassment. He stated that he went to the tribunal because there was no clear owner and that for about two years, he paid rent to the tribunal. That the plaintiff filed this suit when he had left the premises. The defendant produced the documents in his list and bundle of documents as D.exhibits 1-5.

13. The defendant was put to cross-examination by Mr. Kinyua advocate for the plaintiff. He confirmed that in his list of documents, there is a letter dated 25/4/07 from Gikandi & Co. Advocates to the defendant. That he did not pay a deposit because when he went to Jubilee Building Cooperative Society Ltd, he was told not to pay because there was no owner. He confirmed signing a replying affidavit on 28/4/10. He admitted having not appealed against the judgment of the High Court in the judicial review application which quashed the orders of the tribunal. He admitted leaving some of his belongings in the suit premises when he left on 8.8.08. That he had already left by September, 2009 but had not given the keys to anybody. That there was an arbitration in their community in which the sum of Kshs. 309,000.00 which was to be divided into three, adding that the plaintiff refused to pay his share of Kshs.100,000.00. The defendant still believes the suit premises does not belong to the plaintiff, adding that it should go to the Unclaimed Assets Agency. He admitted he gave out the keys to the plaintiff's advocate on 30/6/15 pursuant to a consent made on 29/6/15. He stated that he obtained an order from the tribunal to break open the house with police assistance because the plaintiff had locked it. The defendant admitted that the premises were still in his hands because he was paying rent up to November, 2009 and his property was still inside. He stated that he knew the flats were built on land belonging to Jubilee Building Cooperative Society Limited, adding that he was not a shareholder of that company. That the owners were shareholders. He agreed that the company charges service charge to meet certain expenses.

14. On being re-examined by Mr. Otieno advocate for the defendant, the defendant stated that he left the property on 8/8/08 when the plaintiff had not come to the picture. That he paid the sum of Kshs.309,000.00 to Gikandi & Co Advocates. That the consent indicated he had no interest and that there was no owner to the property. That he had no further interest when Jubilee Building Cooperative Society Limited told him that they could not transfer as there was no owner.

15. In the plaintiff's submissions filed on 2<sup>nd</sup> October 2019, Ms. Kinyua Muyaa & Co. Advocates summarized the case as pleaded and referred to the documents produced. The plaintiff's counsel submitted that the defendant was in possession of the suit premises and refused to pay rent and service charge and to give up vacant possession to the plaintiff. That the plaintiff could not recover the property in which the defendant had regained possession and left his property and went with the keys. Counsel submitted that the plaintiff has proved his case and urged the court to grant the prayers sought which includes monetary claim totaling to Kshs.3,320, 128.60 together with costs and interest.

16. In the defendant's submissions filed on 15<sup>th</sup> October, 2019, the firm of Oloo & Chatur Advocates for the defendant submitted that the plaintiff's case is misplaced as no relationship can be ascertained between the plaintiff and the defendant. That the defendant never laid claim of ownership on the suit property. Relying on the case of **Kenya Hotel Properties Limited –v- Willesden Investments Limited (2009) eKLR**, the defendant's counsel submitted that there was no evidence that the plaintiff is the owner of the property upon which the claim for mesne profits is based. It was further submitted that the basis of the amount of mesne profits claimed has not been proffered before the court and the sources of the figures shown cannot be verified. Counsel also cited the case of **John Mithamo Njika –v- Kellen Ndagala Nguumiri (2015)eKLR** and submitted that the suit must fail. Counsel submitted that the defendant paid rent when he was in occupation of the Suit premises until August 2008 and that at no time was he a trespasser. The defendant prayed for the plaintiff's suit to be dismissed with costs.

17. The court had carefully considered the evidence on record and the submissions made. The issues that call for determination are:

- i. Whether or not the plaintiff is the owner of the suit premises.**
- ii. Whether or not the defendant was a trespasser on the suit premises.**
- iii. Whether or not the plaintiff is entitled to the reliefs sought in the amended plaint.**
- iv. The costs of the suit.**

18. The plaintiff has tendered documentary evidence to show that he purchased the suit premises on 12<sup>th</sup> March 2009. The plaintiff produced the transfer dated 12<sup>th</sup> March 2009. From the material placed before me, there is no dispute that the suit premises belonged to the plaintiff from 12<sup>th</sup> March 2009 when he purchased it and the same was transferred to him. The defendant or anyone else has not laid claim of ownership on the suit premises. I therefore find that the plaintiff is the owner of the suit premises.

19. On the second issue as to whether or not the defendant was a trespasser on the suit premises, the evidence on record shows that the defendant was in possession as at 12<sup>th</sup> March 2009. The evidence indicates that the defendant rented the suit premises in 1987 from the previous owners. It appears that the defendant defaulted in payment of rent, prompting the then landlords, and the landlords or auctioneers in October 2007 who demanded payment of rent arrears and also threatened to evict the defendant. The evidence on record indicates that the defendant moved to the Rent Restriction Tribunal at Mombasa vide case No. 115 of 2008 wherein he sued the landlords, and obtained interim orders. When the tribunal proceedings were ongoing, the plaintiff on 31<sup>st</sup> March 2009 showed up, claiming ownership of the suit premises. Nonetheless, the tribunal on 17<sup>th</sup> June 2009 ruled in favor of the defendant who then retained vacant possession of the suit premises. The evidence on record shows that whereas the plaintiff was directed by the Tribunal to formally file his papers to state his claim, the plaintiff opted to file Mombasa Judicial Review Application No. 446 of 2009 in which by judgment given on 20<sup>th</sup> March 2015, the High Court quashed the ruling and orders of the Tribunal given on 17/6/09 and prohibited the Tribunal from enforcing those orders. From the demand letter dated 16/4/15, the plaintiff demanded that the defendant should hand over vacant possession of the premises and to pay the various sums demanded therein. In my considered view, prior to 16/4/15 when the plaintiff formally demanded that the defendant hands over

vacant possession of the suit premises, the defendant could not be termed as a trespasser. However, the defendant became a trespasser after the plaintiff issued him with the letter dated 16/4/15 asking him to give vacant possession.

20. The next issue to consider is whether the plaintiff is entitled to the reliefs sought. The plaintiff is claiming mesne profits at the rate of Kshs.40,000 per month from July 2009 to 29/6/2015 when the plaintiff regained possession pursuant to the consent Order recorded on 29/6/15. The plaintiff is also claiming service charge and renovation charges. There is no dispute that the defendant was in possession of the suit premises until 29/6/15 when he gave up vacant possession. The defendant's contention that he left on 8/8.08 cannot be true. There is no doubt that the plaintiff, as owner of the suit premises, was entitled to mesne profits. In my view, the only issue to determine is the amount of mesne profits payable. The plaintiff is claiming for mesne profits at the rate of kshs.40,000 per month from July 2009 to June 2015. However I am in agreement with the defendant's submission that the basis of the sum claimed of Kshs.40,000.00 has not been proffered by the plaintiff. The plaintiff has not laid the basis for arriving at the claimed figure of Kshs.40,000.00 per month. No evidence has been given by the plaintiff to justify the sum of Kshs.40,000.00 per month. The evidence on record shows that the defendant was paying a monthly rent of Kshs. 1,500 which was later raised to Kshs.2,500. This was an increment of about 66.66%. It is my view that the rent payable could not have remained at the sum of kshs.2,500. It is logical to conclude that over time, the rent payable could have been increased. Going by the percentage of about 66.66% for the rent between 1987 and 2008 which raised the figure from kshs.1,500 per month to Kshs 2,500 per month, I will apply a figure of 70% increment of the last rent of Kshs.2,500 per month. It is therefore my view that a sum of Kshs. 4,250 per month for the relevant period would be reasonable mesne profits payable by the defendant to the plaintiff. Further the defendant has not disputed that the suit premises are situated in a gated community with shared and common services as stated by the plaintiff. I am therefore satisfied that the plaintiff is justified and has proved his claim for payment of service charge at the claimed rate of Kshs.3,910 per month. The plaintiff has also produced documentary evidence to support his claim of renovation charges of Kshs. 266,348.60. The court finds that the same is payable.

21. The upshot of this is that this court is satisfied that the plaintiff has proved his case against the defendant on a balance of probabilities. Accordingly, judgment is entered for the plaintiff against the defendant as follows:

**a. Mesne profit at the rate of Kshs.4,250 per month from July 2009 to June 2015.....Kshs.301,750.00**

**b. Service charge from April 2009 to June 2015 at the rate of Kshs.3,910 per month...Kshs.213,780.00**

**c. Renovation charges.....Kshs.266,348.60**

**d. Costs of the suit.**

**e. Interest on (a), (b), (c) and (d) above.**

**DATED, SIGNED and DELIVERED at MOMBASA this 10<sup>th</sup> day of February, 2020.**

\_\_\_\_\_  
**C.K. YANO**

**JUDGE**

**IN THE PRESENCE OF:**

Muturi for plaintiff

Furaha holding brief for Otieno for defendant

Yumna Court Assistant

**C.K. YANO**

**JUDGE**