



**REPUBLIC OF KENYA**

**IN THE ENVIRONMENT AND LAND COURT AT MOMBASA**

**ELC CASE NO. 151 OF 2019**

**MAYFAIR ESTABLISHMENTS LIMITED.....PLAINTIFF**

**VERSUS**

**STEPHEN MBUGUA KIHANYA.....DEFENDANT**

**JUDGMENT**

1. By a plaint dated 20<sup>th</sup> August, 2019 and filed on 21<sup>st</sup> August 2019 the plaintiff claims to be the registered owner of all that piece of land known as MOMBASA/BLOCK X/103 measuring 0.328 acres (hereinafter referred to as “the suit property”) having purchased the same in or about November 2011 from Ismail Ahmeddali Chakera (represented by his Attorney , Amarbai Amirali Ismail) who was the personal representative of Fazleabbas Alibhai Dara, the then registered owner of the property. The plaintiff states that sometime on or about 15<sup>th</sup> March 1948, the then registered proprietors of the suit property granted a lease to Violet Essie Shipley for a term of 99 years with effect from 1<sup>st</sup> February 1948 at annual rent of Kshs.480.00 payable in two monthly installment in advance on the 1<sup>st</sup> day of July in each year. That the lease of the suit property was subsequently transferred to various persons, the last of whom was the defendant herein who acquired the lease from Ulrich Hohenberger and his wife Susan Wanjiku on 10<sup>th</sup> December 1987. That the lease was transferred to the defendant with the same terms and conditions as the original lease.

2. The plaintiff states that it was a term of the original lease and as transferred to the defendant that the lessee must pay rent reserved when the same falls due (whether demanded or not) and if the rent remained unpaid for three months from the date appointed for payment, the lease shall determine and the lessor shall re-enter and repossess the property. The plaintiff avers that from the date it purchased the suit property and became the freehold title holder and lessor, the plaintiff was entitled to receive the lease rent from the defendant while the rates were to be paid by the defendant to the County Government of Mombasa. It is the plaintiff’s case that despite knowing that the suit property had been acquired by the plaintiff, the defendant declined to pay rent to the plaintiff when the same became due or at all. The Plaintiff avers that non-payment of rent and rates is fundamental breach of the terms of the lease by the defendant which entitles the plaintiff to terminate the lease and to repossess and re-enter the suit property.

3. The plaintiff prays for judgment against the defendant for:

- 1. A declaration that the defendant is in breach of the terms and covenants of the lease granted to the defendant over the suit property known as MOMBASA/BLOCK X/103.**
- 2. The lease registered in favour of Stephen Mbugua Kihanya over property known as MOMBASA/BLOCK X/103 be and is hereby revoked and cancelled.**
- 3. The Land Registrar, Mombasa to register the revocation of the lease of Stephen Mbugua Kihanya over property known as MOMBASA/BLOCK X/103.**
- 4. An order be and is hereby issued directed at the defendant, his family, agents, tenant, assign or any person authorized by or acting for him to vacate the suit property known as MOMBASA/BLOCK X/103 within 14 days of this order in default of which the plaintiff be at liberty to evict them.**
- 5. An order be and is hereby issued permitting the plaintiff to enter and take possession of the suit property known as MOMBASA/BLOCK X/103.**
- 6. Costs of the suit.**
- 7. Any other and further relief this court may deem just to grant.**

4. The defendant was served with summons to enter appearance but failed to do so. Upon request by the plaintiff, interlocutory judgment was

entered against the defendant on 4<sup>th</sup> October, 2019. The suit proceeded for formal proof on 26<sup>th</sup> November 2019 when the plaintiff called one witness.

5. Mr. Ifran Azad Kara Badrudin who is a director of the plaintiff company and who testified on behalf of the plaintiff reiterated the averments in the plaint and adopted his witness statement dated 20<sup>th</sup> August 2019. He added that the plaintiff issued a demand for payment of rent from the defendant, but the defendant failed to pay. That there was also demand for payment for rates which the defendant was supposed to pay to the County Government of Mombasa. Instead, the defendant forwarded a cheque for Kshs.3,840 to the plaintiff which the plaintiff returned as rates are payable to the County Government not to the plaintiff. He stated that to date the defendant has not paid the outstanding rent from the year 2012 upto 2017. The witness produced the Resolution to file suit; Title Deed for MOMBASA/BLOCK X/103; Transfer of lease dated 10<sup>th</sup> December, 1987; Indenture dated 15<sup>th</sup> March 1948; Search dated 31<sup>st</sup> July 2018; Search dated 25<sup>th</sup> July 2019; Transfer dated 1<sup>st</sup> November 2011; Property Rates Statement dated 13<sup>th</sup> December, 2017; letter dated 1<sup>st</sup> December, 2017; letter dated 30<sup>th</sup> October 2018 and letter dated 1<sup>st</sup> March 2019 as P.exhibits 1 to 11 respectively. The plaintiff further produced a letter dated 16<sup>th</sup> October, 2019 and cheque No.008756 dated 15<sup>th</sup> October 2019 as P.exhibits 12 and 13 respectively. The witness urged the court to grant the plaintiff the reliefs sought in the plaint.

6. I have considered the pleadings and the evidence on record. The defendant did not defend the suit. The plaintiff's title over the suit property is therefore not challenged. The plaintiff produced a title deed for the property as conclusive evidence that indeed it owns the property. The plaintiff also produced search dated 31<sup>st</sup> July 2018 which confirmed that the plaintiff is the absolute proprietor of the suit property.

7. From the evidence on record, it is clear that the defendant holds a leasehold interest in the property having acquired the same from Mrs. Violet Essie Shipley in 1987. The plaintiff produced the transfer of lease dated 10<sup>th</sup> December 1987 and the indenture dated 15<sup>th</sup> March 1948. Clause 1 and 2 of the lease provided that the lessee is to pay the rent reserved without any deduction and to pay all rates.

8. In his evidence, the plaintiff's witness stated that the defendant had not been paying rent and rates from 2012 to the time of filing the suit. The assertions were supported by property rates statement dated 13<sup>th</sup> December 2017 which indicated the defendant was in default. By failing to pay the rent and rates, it is clear that the defendant breached the terms of the lease. Clause 13 of the lease agreement is also clear if default is made in the performance or observance of any of the covenants, conditions or agreement on the part of the lessee, it shall be lawful for the lessor to re-enter and re-possess the suit premises.

9. The plaintiff's evidence has not been challenged and on the basis of the unchallenged evidence, I am satisfied that the plaintiff has proved its case on a balance of probabilities. In the end, I hereby enter judgment for the plaintiff against the defendant in terms of prayers 1, 2, 3, 4, 5 and 6 of the plaint.

Orders accordingly

**DATED, SIGNED and DELIVERED at MOMBASA this 12<sup>th</sup> day of March 2020.**

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**C.K. YANO**

**JUDGE**

**IN THE PRESENCE OF:**

No appearance for the plaintiff

No appearance for the defendant

Yumna Court Assistant

**C.K. YANO**

**JUDGE**