



REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA

AT KISII

CIVIL SUIT NO. 7 OF 2017

**RAMJI MEGHJI GUDKA LIMITED.....PLAINTIFF**

**VERSUS**

**1. DR. ANIL RATILAL TAILOR**

**2. RAM HOSPITAL LIMITED.....DEFENDANT**

**JUDGMENT**

1. The plaintiff has sued the 1<sup>st</sup> and 2<sup>nd</sup> defendants jointly and severally for the payment of Kshs. 37,000,000/- being accumulated and or accrued rent arrears. He also seeks *mense profits w.e.f* from May 2017 until delivery of vacant possession of the suit property plus interest at court rates w.e.f January 2014.

2. As per the plaint dated the 7<sup>th</sup> April 2017, the plaintiff is registered proprietor of L.R. No. KISII Municipality / Block 111/270. That about the year 2000 the plaintiff and the 1<sup>st</sup> defendant entered into a lease agreement whereby the plaintiff leased to the 1<sup>st</sup> defendant the suit property together with the developments and improvements thereon. That by dint of the tenancy agreement the 1<sup>st</sup> defendant who is a doctor by profession entered and took possession. In the year 2010 the 1<sup>st</sup> defendant incorporated the 2<sup>nd</sup> defendant a Limited Liability Company and caused the 2<sup>nd</sup> defendant to assume take over and manage the affairs of the hospital and consequently the 2<sup>nd</sup> defendant entered upon and assumed position of the property. The defendants are jointly in possession of the suit premises. That the defendants have failed or refused to pay the rents and lapsed into defaults since January 2014 save for the sum of 3 million paid in year 2016. That as a result of the said failure to pay rent the plaintiff has been constrained to lodge a Notice to Terminate Tenancy in line with the provisions of Landlord & Tenants (Shops Hotels & Catering Establishment) Act Chapter 301 Laws of Kenya. That the amount continues to accrue at the rate of Kshs1, 000,000 /- per month.

3. The defendants in their joint defence dated the 21<sup>st</sup> June 2017 the defendants admit being the tenants of the plaintiff. They deny being in rent arrears as claimed and that the plaintiff is entitled to *mense profits* as claimed. The defendants aver that the rent payable was 500,000/- and that the plaintiff sought unilaterally to increase rent which the 2<sup>nd</sup> defendant protested. It is averred that the plaintiff was paid the sums of Kshs 12 million on the 19/6/2013, 8.8 million on 2/7/2014 and a further sum of 3.2 million in year 2013 and 300,000/- in year 2016 and that cheques worth 4 million were issued to the plaintiff in January 2017 which the plaintiff has failed to deposit.

4. When the matter come for hearing the plaintiff called one witness. The defendants though served with the hearing date did not attend. Their advocate attended and cross examined the plaintiff's witness. At the hearing the plaintiff's witness Ashwin Ramji Gudka the Managing Director of the plaintiff company reiterated what is the plaint adding that the lease agreement he had with the 1<sup>st</sup> defendant was an oral agreement based on mutual trust. That since their agreement the 1<sup>st</sup> defendant has paid rent irregularly and not on time. He has given the defendants' four Tribunal notices in October 2010, May 2013, January 2015 and October 2016. He gave a breakdown of the rents paid and accrued rent as follows; that as at 2016 from 2014 the outstanding rent was 26 million. When he gave the 1<sup>st</sup> defendant a notice from the Tribunal and served him with an eviction notice the 1<sup>st</sup> defendant gave cheques Nos. 1245,1246,1281,1282, 1313 and 1316. That the accounts should read as follows;

i. Year 2014 amount due was 12 million

ii. Year 2015 amount due was 12 million

iii. Year 2016 amount due was 12 million

iv. Year 2017 amount due was 12 million and

v. Year 2018 amount due is 10 million.

That the defendants did not pay rent of 2014, 2015 and 2016. The 1<sup>st</sup> defendant paid 20 million by EFT leaving a balance of 11 million. He then paid 300,000/- to KRA and gave the cheques. That the 1<sup>st</sup> defendant paid Kshs. 12 million on the 19<sup>th</sup> of June 2013 and on the 2/7/2014 he paid a sum of Kshs. 8.8. Million. He paid amount of Kshs. 3 million. That the problems stated in 2014 he owns a total of Kshs. 55 million but at the time of filing suit the defendants owed him Kshs. 37 million as at April 2017. He also claims **mesne profits** as the defendants have stopped him from lawful earnings. Pw1 produced documents to support his discussions with the 1<sup>st</sup> defendant on the payments made by the defendants.

5. At the close of the plaintiff's case the parties chose not to submit. The issue for determination is whether the plaintiff is entitled to the accrued rent of 37 million plus *mesne profit* as claimed. There is no dispute that the defendants are the plaintiff's tenants. The plaintiff has shown that the rent payable per month was Kshs. 1 million. The defendant did not adduce evidence to support his claim that rent is 500,000/-. The plaintiff has demonstrated that the 1<sup>st</sup> defendant wrote down what the defendants owed at the rate of Kshs one million per month. The court noted that on the 18/12/2012 the defendant acknowledged a balance of 8.8.million. From the note dated 19/6/2013 the 1<sup>st</sup> defendant acknowledged owing Kshs. 31 million up to December 2013. He was to pay 12 million by EFT on the 19/6/2013. This Pw1 acknowledged was paid plus the sum of 300,000/- to KRA. No rent was paid by the defendant after these payments. Pw1 was able to show the amounts paid and the amounting owing as at April 2017 being Kshs. 37 million for accrued rent arrears which the defendants have not paid. I find that the plaintiff is entitled to the said sum.

6. On the plaintiff's claim for *mesne profit* I find as follows; according to Pw1 the plaintiff has been serving notices from the Tribunal on the defendants who are still in occupation. The defendants to avert the said notice paid some rent arrears. *Mesne profits* as per the Black's law dictionary 10<sup>th</sup> edition is defined as follows; "The **profits of an estate received by a tenant in wrongful possession between dates.**" An action for mesne profit as per the said dictionary is defined as a " **A lawsuit seeking damages suffered by a landowner who has succeeded in common law action for ejectment whereby the plaintiff may recover for both the use of the land during the occupation and costs of ejectment.**" In this case there has been no ejectment. There is a letter dated 6<sup>th</sup> October 2016 which states that *Ramji Megji Gudka Ltd issued a notice to ER. Anil Ratilal Tailor T/A Ram Hospital Ltd which was issued to the tenant under the provisions of Cap 301 the Landlord and Tenant ( Shops, Hotel and Catering Establishment) Act expired on 1<sup>st</sup> October 2016 without reference or objection from the Tenant as required under Section 6 (1). That the tenant is not covered by the Act and is supposed to be evicted forthwith.* From Pw1's evidence the defendants have not been evicted. My view is that the plaintiff is not entitled to *mesne profit* as the action for **mesne profits** does not lie unless either the landlord has recovered possession, or the tenants' interest in the land has come to an end.

7. The plaintiff has however on a balance of probabilities proved its claim of accrued rent of Kshs 37 million. I enter judgment for the plaintiff against the defendants jointly and severally in the sum of Kshs. 37 million with interest at court rates from the date of filing suit until payment in full. The plaintiff is also awarded costs of the suit.

Dated signed and delivered this 14<sup>th</sup> day of November 2018

**R.E.OUGO**

**JUDGE**

**In the presence of;**

**Mr. Ochwangi For the Plaintiff**

**Mr. Nyamurongi For the 1<sup>st</sup> and 2<sup>nd</sup> Defendants**

**Ms. Rael Court/ clerk**