



**REPUBLIC OF KENYA**  
**IN THE HIGH COURT OF KENYA AT NAIROBI**  
**COMMERCIAL & ADMIRALTY DIVISION**  
**CIVIL SUIT MISC. NO.277 OF 2013**

**KANYAKI ENTERPRISES LTD.....PLAINTIFF**

**VERSUS**

**CITY CARTECH LTD ENTERPRISES.....DEFENDANT**

**JUDGEMENT**

1. Through a Plaint filed on 13<sup>th</sup> July 2000, the Plaintiff seeks the following prayers against the Defendant:-

- a) An Order for vacant possession
- b) An Order that the Defendant re-decorate and repair the premises upon vacating.
- c) In the alternative to (b) above an order that the Defendant pays to the Plaintiff the costs of redecorating and repairing the premises the amount of which shall be formally proved by the Plaintiff.
- d) An order for payment of the Plaintiff's advocate's legal fee for drawing the lease inclusive of VAT totaling Ksh.10,350/=.
- e) An Order that the Defendant do pay to the Plaintiff mesne profits at the monthly rate of Shs.20,000/=per month or such other rate as this court shall determine from 1<sup>st</sup> May, 1999 until handling over vacant possession of the premises duly repaired and redecorated.
- f) Costs of this suit.
- g) Such other or further relief as this Honourable Court may deem fit and just to grant.

2. The basis of that claim is set out in the body of the Plaint in which the Plaintiff averred that it was at all material times the registered owner of LR.No.209/11532 and erected thereon is a building known as Drywood House.

3. By a written agreement of 19<sup>th</sup> January 1994, the Plaintiff and Defendant agreed that the Defendant would lease from the Plaintiff a premise on the property. Although a lease was drawn and sent to the Defendant, the Defendant did not sign it.

4. In the drawn lease, the term of lease was 5 years 3 months from 1<sup>st</sup> February 1994 and a monthly rent of Kshs.10,000/=.
5. The contention of the Plaintiff is that the lease expired on 31<sup>st</sup> April 1994 but despite repeated requests, the Defendant refused, failed and/or neglected to hand over vacant possession of the premises.
6. In its Defence, the Defendant avers that it paid a refundable goodwill of Kshs.460,000/= which the Plaintiff has declined to make. Secondly that the Defendant is a month to month tenant and cannot be evicted from the premises except by an Order of the Business Premises Rent Tribunal.
7. The Defence also denies that the Plaintiff is the owner of the said property as it had reverted back to the City Council of Nairobi.
8. Raised as a counterclaim is an allegation by the Defendant that the Plaintiff failed to repair the premises and the Defendant was obliged to repair and renovate the same. The Defendant claims costs of Repairs and Renovations undertaken on the premises and Goodwill paid.
9. The Defendant did not turn up at the hearing and only the Plaintiff gave evidence.
10. He reiterated the contents of the Plaint. Shown to Court was a lease of 99 years from 1.2.1991 in favour of Kanyaki Enterprise Limited (The Plaintiff) from the Government of Kenya. The title was issued under the provisions of the now repealed Registration of Titles Act. (Chapter 281 Laws of Kenya).
11. Also shown to the Court was a Letter of Intent dated 19.1.94 which read as follows:-

19.1.94

City Cartech Enterprises Ltd

P.O. Box 59354

NAIROBI

Dear Sir

RE;LETTER OF INTENT L.R.NO.11532 MADARAKA SHOPPING CENTRE  
NAIROBI

Following our to-days discussion between you and the undersigned we wish to confirm that the above premises will be let to you on the following terms and conditions:-

LESSORS: MESSRS KANYAKI ENTERPRISES LIMITED

P.O. BOX 51812

NAIROBI

LESSEE: CITY CARTECH ENTERPRISES LTD

P.O BOX 59354

NAIROBI

TERM LEASE: 5 years 3 months.

RENT: Kshs. 10,000/= per month

PAYMENT: Monthly in advance for the first 3 months ie. February 1994 to April thereafter quarterly in advance.

LEASE: The lease will be drawn by our Lawyers M/C Ramesh Manek and the cost incurred therein plus stamp duty shall be on the account of the tenant.

Would you kindly confirm your acceptance of the above terms and conditions by countersigning below where provided and returning the three copies of this letter to us for further action.

Yours faithfully

For KANYAKI ENTERPRISES LIMITED

*Signed*

KARUME J. KIGURU

DIRECTOR

We confirm the above terms and conditions are acceptable to Us.

(Signature): LESSEE.....DATE. 20//1/94

LESSOR:.....DATE. 19/1/94

12. Mr. John Karume testifying for the Plaintiff, told Court that although execution of a formal lease was not followed through, the Defendant took possession and only vacated the premises on 10<sup>th</sup> September 2005. That the Defendant was to vacate the suit premises in 1994 but it continued to stay without the permission of the landlord. That from 1994 onwards the Plaintiff did not pay rent.

13. The Court has considered the pleadings, short testimony of Mr. Karume and the submissions filed in Court. This is my view of the matter.

14. The agreement to lease the property was the Letter of Intent dated 19.1.1994. The term of the lease was spelt out as 5 years 3 months and the rent was Kshs.10,000/= per month. A lease was to be drawn, perhaps towards the fulfillment of the Provisions of Section 40 of The Repealed Registration of Titles Act. The Section provides:

“When any land is intended to be leased for any term exceeding twelve months, the proprietor, or if the proprietor is a minor or of unsound mind the guardian, next friend or other person appointed by the court to act on behalf of the minor or person of unsound mind in the matter, shall execute a lease in form H in the First Schedule, and every such instrument shall, for description of the land intended to be dealt with, refer to the grant or certificate of title of the land, or shall give such other description as may be necessary to identify the land:

Provided that no lease for the period above specified shall be valid unless registered”.  
(*emphasis mine*)

Although drawn, the lease was neither executed by the Tenant nor registered under statute. However possession was granted.

15. In the submissions filed in Court, there is an admission by the Landlord that the Tenant was granted possession over the suit property after the Defendant paid rent of Kshs.240,000/=.

16. Whilst no lease as required by the law was registered, I accept the submissions by Counsel for the Plaintiff that the letter of Intent operated as a contract interpartes (see **Civil Appeal No.265 of 2010 Chon Jeuk Suk Kim & Another vs. E.J Austin & 2 others [2013] eKLR**). This Court therefore holds that from 19<sup>th</sup> February 1994 to 18<sup>th</sup> May 1999, the Defendant was a Tenant at a monthly rent of Ksh.10,000/=.

17. Further as the Defendant had only paid rent of Kshs. 240,000/= for 24 months, rent for the period 19<sup>th</sup> February 1996 up to 18<sup>th</sup> May 1999 remained unpaid. The unpaid rent is for a period of 39 months and is Kshs.390,000/=. This is due and payable to the Plaintiff.

18. What was the nature of occupation after 19<sup>th</sup> February 1999 when the Tenancy expired? There is evidence that the Tenant held over without the permission of the Landlord and without paying rent. The provisions of Section 116 of the Transfer of Property Act were therefore inapplicable. The Section provides:-

“If a lessee or underlessee of property remains in possession thereof after the determination of the lease granted to the lessee, and the lessor or his legal representative accepts rent from the lessee or underlessee, or otherwise assents to his continuing in possession, the lease is, in the absence of an agreement to the contrary, renewed from year to year, or from month to month, according to the purpose for which the property is leased, as specified in section 106”.

19. Henceforth the Defendant was a Tenant in sufferance. Halsbury’s Laws of England (4<sup>th</sup> Edition) says this of Tenancy in Sufferance;

“A person who enters on land by a lawful title and, after his title has ended, continues in possession without statutory authority and without obtaining the consent of the person then entitled, is said to be a tenant at sufferance”.

(See my decision in **Janendra Raichand Shah & 2 others vs. Mistry Walji Navan Mulji [2014] eKLR**). And remained so upto 10<sup>th</sup> September 2005 when it vacated the suit premises. For the period 18<sup>th</sup> February 1999 upto 10<sup>th</sup> September 2005, mesne profits are payable to the Plaintiff.

20. The witness for the landlord told Court that the landlord had plans to redevelop the property but gave no evidence in support thereof. In the circumstances, an appropriate measure for damages for mesne profits would be reasonable rent during the period of wrongful occupation. And the Plaintiff should not be unhappy with the approach proposed by Court as its own Counsel referred this Court to John Murphy in ‘Street on Tort’ (12<sup>th</sup> Edition) at page 29 where the Author stated,

“The measure of damages for wrongful occupying of land (mesne profits) is generally assessed in terms of the reasonable rental value of the land during the time of the Defendant occupying”

21. The Plaintiff proposed reasonable rental income to be Kshs.60,000/= per month. But what was the basis? Mr. Karume in his testimony said that the current tenant pays Kshs.60,000/=. This was not however backed by a valuation or documentary evidence it was indeed the current rent.

22. I am afraid that in the absence of such proof, the Court will adopt the rent of Kshs.10,000/= that subsisted at the time of the Tenancy.

23. The period of Occupation in sufferance is 79 months, odd. The rent for this period (and therefore the mesne profits) is Kshs.790,000/=.

24. Judgement is entered for the Plaintiff as follows:-

a) Unpaid rent of Ksh.390,000/= with interest thereon at Court rates from the date of filing suit until payment in full.

b) Mesne profits of Kshs.790,000 with interest thereon at Court rates from the date of this Judgment until payment in full.

c) The Plaintiff will have costs of the suit.

**Dated, Signed and Delivered in Court at Nairobi this 10<sup>th</sup> day of**

**November, 2016.**

**F. TUIYOTT**

**JUDGE**

**PRESENT;**

Githome for Plaintiff

N/a Defendant

Alex - Court clerk