

REPUBLIC OF KENYA
IN THE ENVIRONMENT AND LAND COURT OF KENYA AT MOMBASA
ELCC NO. E083 OF 2024

JUJA COFFEE EXPORTERS LIMITED
PLAINTIFF

VERSUS

GRAIN BULK HANDLERS LIMITED
DEFENDANT

JUDGEMENT

1. The plaintiff commenced this suit through the plaint dated 19th September 2024, averring inter alia that it was the registered owner of Mombasa/Block I/392suit property, until it was transferred to the defendant on 20th September 2018; that the circumstances leading to the said property's transfer to the defendant and whether the transfer should be set aside is a matter for determination in Mombasa HCCC 10 of 2019; that the plaintiff got to know the property had been transferred to the defendant when it was served with a replying affidavit sworn by Paul K. Chelanga on 27th September 2018, filed in Mombasa HCC 95 OF 2018; that before the transfer, the plaintiff and defendant had entered

into a lease agreement dated 17th July 2007 through which the defendant had leased the suit property for a term of six years, commencing from 1st June 2008, at a monthly rent of Kshs.550,750; that upon expiry of the lease, the defendant refused to give vacant possession of the suit property and remained in occupation without plaintiff's consent until it acquired title; that the period the defendant remained on the said property without title or the plaintiff's consent amounted to trespass, and the plaintiff is entitled to compensation, at market rates; that as the defendant has refused to grant the plaintiff access to the property to carry out rental assessment, the same should be calculated at the rent payable at the time their lease expired, that is Kshs.550,750 plus a ten per cent increment to make it Kshs.605,825 per month; that when the plaintiff demanded vacant possession of the suit property in 2015, the defendant sued it in Mombasa ELC No. 347 of 2015 seeking to compel the plaintiff to sell the land to it, but the suit was struck out vide a ruling delivered on 22nd September 2017; that the plaintiff attempted to file a counterclaim in Mombasa ELC No. 347 of 2015 on the claims subject matter of

this suit, but vide a ruling delivered on 7th June 2021, it was held that a counterclaim could not be filed as the suit had already been struck out; that the defendants actions of filing suit to force it to sell the suit property to it, the subsequent purchase of the property through private treaty to lock out the plaintiff's claim and locking out the plaintiff from the said property is oppressive, vindictive, grossly unfair and the plaintiff seeks general and exemplary damages, as well as mesne profits. The plaintiff therefore seeks for the following prayers:

- a. *"Mesne profits of Kshs.605,825 per month from 1st June 2014 until 20th September 2018.*
- b. *General and exemplary damages.*
- c. *Interest on (a) above at court rate of 14% per annum from 21st September 2018 until payment in full.*
- d. *Interest on (b) above at court rate of 14% per annum from the date of judgment until payment in full.*
- e. *Costs of the suit plus interest at 14% per annum from the date of judgment until payment in full."*

2. The defendant filed its statement of defence dated 8th October 2024, denying the plaintiff's suit and inter alia averred that Mombasa HCCC 10 of 2019 was dismissed for want of prosecution, and thus the defendant remains as the bonafide owner of the suit property; that upon the lease expiring on 30th May 2014, the defendant handed over vacant possession of the suit property, and the alleged trespass and mesne profits does not arise; that the suit property was charged to the National Bank of Kenya and the plaintiff had not sought consent from the bank to lease it to the defendant, and its claim for mesne profits is an illegality; that after expiry of the lease, the parties entered into negotiations where the plaintiff agreed to sell the suit property to the defendant at Kshs.150,000,000 and it paid ten per cent deposit through then then plaintiff's advocates; that the transaction was frustrated by the plaintiff who claimed the property was charged to the bank; that the deposit is still held by the plaintiff and the defendant reserves the right to counter claim it or seek a set off; that the defendant filed Mombasa ELCC No. 347 of 2015 was to compel the plaintiff to specifically perform

the sale transaction, contrary to the claim that it was aimed at forcing the plaintiff to sell the land to it; that the plaintiff had filed a counterclaim for mesne profits in that suit that was dismissed together with the main suit; that the plaintiff lodged an appeal in the Court of Appeal which was pending at the time this suit was filed; that this suit is therefore an abuse of the court process and should be dismissed.

3. During hearing, the plaintiff called Nurein Said, who testified as PW1. He adopted the contents of his statement dated 19th September 2024, as his evidence in chief, and produced the six documents on the list of documents of even date as exhibits. He reiterated their averments on the plaint, and inter alia told the court that the plaintiff was not able to carry out a valuation of the suit property to get the mesne profit or market value; that the defendant never handed over possession of the property after expiry of the lease; that he is not aware of the ten per cent deposit of purchase price being paid to Balala Advocates stating that the said advocates were never appointed as plaintiff's advocates; on cross-examination PW1 stated that he was not aware the land was

charged to National Bank of Kenya, or whether the bank had given consent to lease the land to the defendant; that he was not involved in the day to day running of the plaintiff's affairs as that was done by his sister, Amina Said, the legal officer, who however was no longer with the plaintiff; that he did not have any evidence of the plaintiff asking the defendant to vacate the land after the lease expired on 30th May 2015; that a joint survey identified challenges accessing the suit property which were never addressed to enable the plot be handed over.

4. The defendant called Joseph Mwellla, who testified as DW1, and adopted his statement dated 16th October 2024, as his evidence in chief. He also produced the six documents on the list of documents dated 22nd October 2024, and inter alia stated that he was party to the transactions leading to the dispute and that the plaintiff was being represented by one Amina; that the defendant handed over possession of the suit property on 2nd July 2014 to Amina upon expiry of the lease on 30th May 2014, in accordance with the notice in the letter dated 1st July 2014, but had no documentary evidence to

confirm it; that the suit property was a warehouse where they stored their grains, and that they removed their grains and repainted the same before handing over; that the plaintiff did not make any further demand after the handing over; that he could not confirm whether plot Mombasa/Block 1/497 or the silos thereon noted on the joint surveyors' report that stated the suit property could not be accessed because of the silos on the said land, belonged to the defendant; that the surveyors' report had been prepared during the negotiations for sale of the suit property, and had agreed to buy the land at Kshs.150 million and paid Balala Advocates Kshs.15 million as stakeholder's deposit; that the defendant later learnt the suit property was charged to National Bank of Kenya, and it was nominated by one Bakhresa to buy the suit property at Kshs.230M; that Balala Advocates were acting for Bakhresa, but the Kshs.15 million was paid to the said advocates on instructions of the plaintiff; he denied that the defendant had remained on the suit property after the lapse of the lease on 30th May 2014.

5. The learned counsel for the plaintiff and defendant filed their submissions dated 13th August 2025 and 8th August 2025 respectively, which the court has considered.

6. The following are the issues for the court's determinations:

a. *Whether the defendant handed over the suit property to the plaintiff after the expiry of the lease on 30th May 2014.*

b. *Whether the plaintiff is entitled to mesne profits from the defendant from 1st June 2014 to 20th September 2018.*

a) *Whether the plaintiff is entitled to damages and interests.*

b) *Who bears the costs of the suit?*

7. The court has carefully considered the parties' pleadings, oral and documentary testimonies by PW1 and DW1, submissions by the learned counsel, superior courts decisions cited thereon and come to the following determinations:

a. *Section 2 of the Civil Procedure Act chapter 21 of Laws of Kenya provides as follows:*

"Mesne profits, in relation to property, means those profits which the person in wrongful possession of

such property actually received or might with ordinary diligence have received therefrom, together with interest on such profits, but does not include profits due to improvements made by the person in wrongful possession.”

In the case of Heptulla Bros Ltd versus Jambhai Jeshangbhai Thakore [1957] E A 358 Briggs J A expounded on mesne profits and held (at page 362) that:

“..but when damages are sought for trespass by a former licensee whose licence has been lawfully determined, I know of no rule that the damages must be only such as would have been payable as mesne profits if the licensee had been a tenant.”

Mesne profits is a tortious claim arising out of trespass by a tenant and is subject to limitation of time. Section 4 (1) of the Limitations of Actions Act chapter 22 of Laws of Kenya requires actions based on contracts, tort and certain other actions to be commenced within six years from the date the cause of action arose. Sub-rule (2) thereof provides that *“An action founded on tort may not*

be brought after the end of three years from the date on which the cause of action accrued.”

- b. The plaintiff’s position is that the defendant did not give vacant possession of the suit property after the lease expired on 30th May 2014. That the defendant was therefore a trespasser on the suit property after 30th May 2014, and the therefore should be ordered to pay the plaintiff mesne profits from 1st June 2014 until 20th September 2018, when it became the registered owner of the property. From the legal provision above, the plaintiff was obligated to lodge his claim before the lapse of three years from 20th September 2018, being the date defendant acquired ownership of the suit property. The continuing trespass the plaintiff complained off lasted from 1st June 2014 to 19th September 2018, and three years from that last day lapsed on or about 19th September 2021, which is the last date of the three years after the cause of action accrued. The plaintiff should therefore, have filed his claim based on the said trespass by or before 19th September 2021, but did not

do so, until 19th September 2024. See Canas Property versus KL Television Services Ltd (1970) All ER 79. This suit is therefore statute time barred.

c. The plaintiff confirmed finding out about the defendant becoming the registered owner of the suit property upon being served with a replying affidavit sworn by one Paul K. Chelanga on 27th November 2018, which is about six years before this suit was filed. The plaintiff therefore knew of the defendant legal title to the suit property as far back as 2018, but did not file this claim within the prescribed time of three years, and no extension of time was sought or obtained before filing.

d. The plaintiff confirmed having initially lodged its claim based on trespass as a counterclaim in ELC No. 347 of 2015. The counterclaim sought for among others vacant possession of the suit property; eviction order in the alternative; mesne profits at Kshs.550,750 per month from 1st July 2014 until payment in full; general damages for trespass of Kshs.6,609,000 being the equivalent of one year's rent; interests and costs. The counterclaim

and the main suit were reportedly, struck out/dismissed. The defendant has pleaded and testified through DW1 that the plaintiff filed an appeal against the order dismissing the counterclaim that was still pending when this suit was filed. The plaintiff has not disputed that averment and evidence and the court finds the filing of this suit on the same issues pending determination before the Court of Appeal is not only *sub judice*, but also an abuse of the court process.

- e. Pursuant to *section 27* of the Civil Procedure Act, chapter 21 of Laws of Kenya, costs follow the event unless where there are good cause to order otherwise. In this instance, as the plaintiff has failed in proving its claim against the defendant, I find no reason to depart from that rule, and the defendant is entitled to costs.
8. From the foregoing conclusions, the court finds the plaintiff has failed to discharge its duty of proving its case against the defendant on a balance of probabilities, and orders as follows:
- a. That the plaintiff's suit is dismissed in its entirety.*
 - b. The plaintiff to bear the costs of the suit.*

Orders accordingly.

DATED, SIGNED AND VIRTUALLY DELIVERED ON THIS 22ND DAY OF OCTOBER 2025.

S. M. Kibunja, J.
ELC MOMBASA.

PLAINTIFF : M/s Nyaranda for Gikandi

DEFENDANT : Mr. Busieka

KALEKYE-COURT ASSISTANT.

S. M. Kibunja, J.
ELC MOMBASA.