



**REPUBLIC OF KENYA**

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

**ELC CASE NO. 48 OF 2016**

**HUSSEIN ALI BENYOKA ::::::::::::::::::::::::::::::::::: PLAINTIFF**

**VERSUS**

**KAYDEE QUARRY LTD :::::::::::::::::::::::::::::::::::DEFENDANT**

**JUDGEMENT**

By a plaint dated 18<sup>th</sup> February 2916, the plaintiff avers that, at all material times to this suit, he is the legal representative to the Estate of Benyoka Mwakoyo who is the registered owner of two unregistered parcels of land within Kokotoni, Kaliang’ombe Adjudication in Kaloleni. The plaintiff avers and states that vide a lease agreement dated the 19<sup>th</sup> February, 1978, his late father Benyoka Mwakoyo leased two parcels of land being unregistered parcels of land measuring 3.44 acres and 1.5 acres respectively within Kaliang’ombe and Kokotoni Adjudication Section which the defendant has been occupying and using todate for a sum of Ksh. 4,000/= (Four Thousand only) per month. The plaintiff avers and states that the defendants have been occupying the said plot for a sum of Ksh. 4,000/= per annum which sum of money, the plaintiff contends that is on the lower side and wishes the same to be reviewed to be in tandem with the economic realities of the current times. The plaintiff avers and states that the defendants are occupying a parcel of land measuring approximately 4.94 acres within Kaliang’ombe, Kokotoni for a pattry Ksh. 4,000/= per annum. The plaintiff avers and states that the current marked value of the parcels of land would fetch a sum of Ksh. 78,000/= (Seventy eight Thousand only) per month which the defendants are not willing to pay to the plaintiffs. The plaintiff avers and states that the defendants have refused to agree to rent increment so as to enable the plaintiff obtain some economic gain from the two parcels of land. The plaintiff avers and states that the actions of the defendants is in contravention of the Tenancy Agreement between the parties by refusing rent increment as had been agreed between the parties and also refusing to vacate the plots after failing to agree to any rent increments as opposed by the plaintiff despite reaping massive economic gains from the two plots. The plaintiff’s claim against the defendants is vacant possession of the parcel of land they are occupying approximately measuring about 4.94 acres being unregistered plot at Kokotoni within Kaliang’ombe adjudication. The plaintiff prays for:-

- (a) Mandatory Injunction to issue against the defendants from utilizing, quarrying, alienating, selling and or dealing with the unregistered parcel of land forming the lease between the plaintiff and the defendant situated at Kokotoni within Kaliang’ombe Adjudication measuring about 4.94 acres.
- (b) Vacant possession of the unregistered parcel of land being occupied by the defendants at Kokotoni within Kaliang’ombe Adjudication.
- (c) Costs and interest of this suit.

DW1 the defendant stated that, the lease agreement dated 19<sup>th</sup> February, 1978, was entered into with one Stephen Benyoka Mwakoyo, who held himself out to be the registered owner of 1 parcel of land, measuring 3.44 acres, Rabai, Kilifi. The lease agreement dated 12<sup>th</sup> May, 1978 was entered into with one Benyoka Makoya, who at the time, held himself out to be the owner of 1.5 acres of Rabai, Kilifi. It is unclear as to who is the actual registered owner of the property. The defendants have been on site since 1978 and have been paying the agreed rent, since then. Despite request, no confirmation of grant of probate for Stephen Benyoka has been provided to the defendants. The conditions of the lease were set out in writing. The defendant has not contravened any part of the tenancy. No valid grounds for claiming vacant possession have been adduced by the plaintiffs. No notice of forfeiture of lease has ever been issued by the plaintiffs and, therefore, this suit is misconceived, premature and bad in law. Despite numerous meeting being held by the defendants and enquiries made as to the true heirs of Stephen Benyoka and Benyoka Makoya, no information has been forthcoming from the plaintiffs and therefore, the defendants are unsure of whom to pay the rent to. It is notable that rental payments collected from the defendants, have been collected by persons not mentioned in the Grant of Probate.

This court has carefully considered the evidence and the submissions therein. PW1 testified that, the he is the legal representative to the Estate of Benyoka Mwakoyo who is the registered owner of two unregistered parcels of land within Kokotoni, Kaliang’ombe Adjudication in Kaloleni. (PEX2 is the grant of letters of administration).The plaintiff avers and states that vide a lease agreement dated the 19<sup>th</sup> February, 1978, his late father Benyoka Mwakoyo leased two parcels of land being unregistered parcels of land measuring 3.44 acres and 1.5 acres respectively within Kaliang’ombe and Kokotoni Adjudication Section which the defendant has been occupying and using todate for a sum of Ksh. 4,000/= (Four thousand only) per month (PEX 7 is the lease agreement). Stephen Benyoka was his older brother but not the owner of the

land. The plaintiff avers and states that the defendants have refused to agree to rent increment so as to enable the plaintiff obtain some economic gain from the two parcels of land (PEx1 is the demand letter). DW1 the defendant testified that they did receive the demand letter but did not know who to pay. They admit that the current lease value of the land is Kshs 146,000/= per annum as per their valuation. I find the defence frivolous and I reject it. **In the case of Margaret Njeru Muiruri v Bank of Baroda(K) Ltd CA 282 of 2004** the Court of Appeal stated the principle that;

**“ a court of law cannot rewrite a contract with regard to interest as the parties are bound by the terms of their contract”**

The Court of Appeal also stated;

**“ Nevertheless courts have never been shy to interfere with or refuse to enforce contracts which are unconscionable, unfair or oppressive due to the procedural abuse during formation of the contract, or due to contract terms that are unreasonably favourable to one party and would preclude meaningful choice for the other party....”**

Taking into account the above principles it is not in dispute that, there exists a lease agreement dated the 19<sup>th</sup> February, 1978, between the plaintiff's late father Benyoka Mwakoyo and the defendant where he leased two parcels of land being unregistered parcels of land measuring 3.44 acres and 1.5 acres respectively within Kaliang'ombe and Kokotoni Adjudication Section which the defendant has been occupying and using to date for a sum of Ksh. 4,000/= (Four thousand only) per month. Indeed the defendant admits that this is not the current value of the leased land. I find that, a sum of Ksh. 4,000/= per annum is grossly on the lower side and the same ought to have been reviewed and mutually agreed to be in tandem with the economic realities of the current times.

The Court of Appeal also supported those principles in the case of **Kenya Commercial Finance Co. Ltd v Ngeny & Another (2002) 1 KLR** where it stated;

*“The court will not interfere where parties have contracted on arms length basis. However, by its equitable jurisdiction, this court will set aside any bargain which is harsh, unconscionable and oppressive or where having agreed to certain terms and conditions thereafter imposes additional terms upon other party. Equity can intervene to relieve that party of such conditions.”*

In the instant case, I am satisfied that the plaintiff is the legal representative of the Estate of Benyoka Mwakoyo who is the registered owner of two unregistered parcels of land within Kokotoni, Kaliang'ombe Adjudication in Kaloleni. I find in the instant case the terms of the lease are not only **unconscionable, unfair and oppressive and the contract terms are unreasonably favourable to the defendant and cannot be allowed to stand. I find that the plaintiff has proved his case on a balance of probabilities and I grant the following orders;**

1. Mandatory Injunction to issue against the defendants from utilizing, quarrying, alienating, selling and or dealing with the unregistered parcel of land forming the lease between the plaintiff and the defendant situated at Kokotoni within Kaliang'ombe Adjudication measuring about 4.94 acres.
2. Vacant possession of the unregistered parcel of land being occupied by the defendants at Kokotoni within Kaliang'ombe Adjudication.
3. Costs of this suit to the plaintiff.

Orders accordingly.

**DELIVERED, DATED AND SIGNED AT KAKAMEGA IN OPEN COURT THIS 29<sup>TH</sup> DAY OF MARCH 2019.**

**N.A. MATHEKA**

**JUDGE**