

**REPUBLIC OF KENYA**  
**IN THE ENVIRONMENT AND LAND COURT AT MOMBASA**  
**ELCLC NO. E022 OF 2024**

**ASHWYN SAID SEIF BUSIADY**

**SEIF SAID SEIF AL- BUSIADY**

**ZEIN SAIF SAID AL-BUSIADY [Suing in their capacity as  
Trustees of SEIF BIN SALIM .....  
..... PLAINTIFFS**

**VERSUS**

**JOSPHAT BUKHALA as personal representative of the estate  
of ZACHARIA BUKHALA [Deceased]..... 1<sup>ST</sup>  
DEFENDANT**

**AGRIPINA BUKHALA ..... 2<sup>ND</sup>  
DEFENDANT**

**SYLVESTER BUKHALA..... 3<sup>RD</sup>  
DEFENDANT**

**RONI VICTOR BUKHALA.....4<sup>TH</sup>  
DEFENDANT**

**SCHOLASTICA KHAMETE BUKHALA.....5<sup>TH</sup>  
DEFENDANT**

**ROSETELLER KHABUKWI BUKHALA.....6<sup>TH</sup>  
DEFENDANT**

**ALL THOSE UNKNOWN PERSONS OCCUPYING**

**TITLE NOS MSA/BLOCK XX/200 & MSA XX/201.....7<sup>TH</sup>  
DEFENDANT**

**JUDGMENT**

**A. Plaintiffs' Claim**

1. By a plaint dated 21.03.2024 amended on 26.06.2024 and further amended on 05.11.2024 the plaintiffs sued the defendants seeking the following reliefs:-

- a) *A declaration that the Defendants are in breach of the lease dated 30<sup>th</sup> of June 1947 and that the same be invalidated and the said property and erected buildings thereon reverts to the Plaintiffs.*
- b) *A declaration that the Plaintiffs are entitled to exclusive and unimpeded right of possession and occupation of all that piece of land known as Title Numbers Mombasa/Block XX/200 and Mombasa/Block XX/201 and the erected buildings and hereditaments thereon.*
- c) *A declaration that the Defendants whether by themselves or their servants or agents or otherwise howsoever are wrongfully and illegally in occupation of the suit property Title Numbers Mombasa/Block XX/200 and Mombasa/Block XX/201 and accordingly trespassers on the same.*
- d) *An injunction restraining the Defendants whether by themselves or their servants or agents or otherwise howsoever from remaining or continuing in occupation of the suit property.*
- e) *Vacant possession of the suit property.*
- f) *Mesne profits monthly from 11<sup>th</sup> of March 2024 until possession is delivered.*

- g) Rent arrears in the sum of Kshs1000/= annually from 2017 until possession is delivered up.*
- h) General damages for breach of contract and trespass.*
- i) Interest on [f] [g] and [h] above and*
- j) Costs.*

2. The plaintiffs pleaded that at all material times they were the freehold owners of Parcel Nos. Mombasa Block XX/200 and Mombasa Block XX/201 [the suit properties]. It was pleaded that vide an indenture dated 30.06.1947 the suit properties were leased to one M. A. Khan for a term of 99 years which provided that the lessee would construct buildings thereon which would revert to the owner at the end of the term.

3. The plaintiffs pleaded that on or about 16.05.1973 the said M.A Khan transferred the remainder of the leasehold interest to one Zacharia Bukhala Akalulwa [now deceased] and that the defendants were the beneficiaries or successors of the interest. It was contended for 6 consecutive years the defendants had breached the terms of the lease by failing to pay the agreed annual rent. It was pleaded that the defendants were in further breach by sub-letting the suit properties without the prior-consent of the plaintiffs.

4. It was the plaintiffs' case that upon such default they issued a notice of forfeiture of lease dated 11.09.2013 to the

defendants. It was pleaded that despite expiry of the notice the defendants had failed to hand vacant possession of the suit properties as a result of which they had suffered loss and damage. It was the plaintiffs' case that the refusal by the defendants to vacate the suit properties had made it impossible for them to lease out the properties.

### **B. Defendants' response**

5. The 1<sup>st</sup> - 6<sup>th</sup> defendants [the defendants] filed a defence and counterclaim dated 30.04.2024, amended on 11.07.2024 and further amended on 03.01.2025. By their defence, they admitted being heirs of the estate of the deceased and pleaded that the deceased who was their father had purchased the suit properties. They denied knowledge of any terms in the lease stipulating that any buildings on the suit properties shall revert to the plaintiffs upon expiry of the term.

6. The defendants denied any breach of the terms of the lease and denied receipt of any notice of forfeiture. They also denied having defaulted in the payment of annual rent for 6 years or at all.

7. By their counterclaim, the defendants pleaded that they were among the registered lessees of the suit properties. They pleaded that the deceased had lawfully purchased the suit properties from the previous owner and that upon the demise of the deceased they continued to pay the monthly rent due until 2016 when the plaintiffs refused to accept the rent.
8. The defendants pleaded that even after presenting a banker's cheque of Kshs17,600/= the plaintiffs refused payment and returned the cheque. It was the defendants' case that the plaintiff had resorted to harassing their tenants on the suit properties. As a result, the defendants sought the following remedies in the counterclaim:-
- a) *A permanent injunction restraining the Plaintiffs, their agents, employees and or goons from trespassing into the 1<sup>st</sup>, 2<sup>nd</sup> and 3<sup>rd</sup> defendants' suit property, harassing and threatening Plaintiffs' tenants with eviction from their business premises in Applicants' commercial buildings situated on Plot No. Mombasa/Block XX/200 and Mombasa/Block XX/201.*
  - b) *A declaration that the 1<sup>st</sup>, 2<sup>nd</sup> and 3<sup>rd</sup> Defendants are the legal tenants of Plot No. Mombasa/Block XX/200 and Mombasa/Block XX/201.*
  - c) *The Plaintiffs be ordered to collect the monthly rent from the 1<sup>st</sup>, 2<sup>nd</sup> and 3<sup>rd</sup> Defendants in respect of Plot*

*No. Mombasa/Block XX/200 and Mombasa/Block XX/201.*

*d) The Plaintiffs pay general damages to the 1<sup>st</sup>, 2<sup>nd</sup> and 3<sup>rd</sup> Defendants.*

*e) Costs of the suit.*

*f) Any or any other relief the court deem fit to issue.*

**C. Plaintiffs' rejoinder**

9. There is no indication on record of the plaintiff having filed a reply to the defence or a defence to the counterclaim.

**D. Trial of the action**

10. At the trial hereof the plaintiffs called 2 witnesses and closed their case. The first witness was Adam Opoka who worked for the plaintiff as a rent officer. He adopted the contents of his witness statement dated 21.03.2024 as his evidence in chief and produced the documents in the plaintiffs' list of documents as exhibits. The second witness was a valuer who produced the valuation reports for the suit properties.

11. On their part, the 1<sup>st</sup> - 6<sup>th</sup> defendants called one witness and closed their case. They called the 1<sup>st</sup> defendant, Josephat Bukhala who adopted his witness statement as his evidence in chief. He also produced the 12 documents in the defendants' list of documents as exhibits.

**E. Directions on submissions.**

12. Upon conclusion of the trial the parties were granted timelines within which to file and exchange their submissions. The record shows that the plaintiffs filed written submissions dated 26.01.2026 and supplementary submissions dated 11.02.2026. On their part, the defendants filed submissions dated 26.01.2026.

**F. Issues for determination.**

13. It is evident from the material on record that the parties did not file an agreed statement of issues for determination. As such, the court shall frame the issues for determination as stipulated under Order 15 rule 2 of the Civil Procedure Rules. Under the said rule, the court may frame issues from any of the following:-

- a) allegations made on oath by the parties, or by any persons present on their behalf, or made by the advocates of such parties;*
- b) allegations made in the pleading or in answers to interrogatories delivered in the suit;*
- c) the contents of documents produced by either party.*

14. The court has perused the pleadings, evidence and documents on record in this matter. The court has noted from the defendants' submissions that they have raised an issue on the capacity of PW1 to testify on behalf of the plaintiffs. This

issue was not raised at the trial but was sneaked into the defendants' submissions in their closing submissions. The court finds that this is not a legitimate way of raising an issue of determination.

15. The court is thus of the view that the following are the main issues for determination herein:-

- a) *Whether the defendants were in breach of the lease and indenture.*
- b) *Whether the defendants were served with notice of forfeiture.*
- c) *Whether the plaintiffs were in breach of the terms of the lease.*
- d) *Whether the plaintiffs are entitled to the reliefs sought in the suit.*
- e) *Whether the defendants are entitled to the reliefs sought in the counterclaim.*
- f) *Who shall bear costs of the action.*

#### **G. Analysis and determination.**

- (a) **Whether the defendants were in breach of the terms of the lease and indenture.**

16. The court has considered the material and submissions on record. The plaintiffs submitted that the defendants were in breach of the terms of the lease for two reasons. First, that the defendants had failed to pay ground rent for 6 years.

Second, that they had sub-let the suit properties to third parties without obtaining their consent.

17. It was the plaintiffs' case that in breach of the terms of the lease, the defendants had failed to pay the annual ground rent for 6 consecutive years in consequence whereof they issued a notice of forfeiture dated 11.09.2023. The relevant clause of the Indenture stipulated, *inter alia*, that;

*"..... to hold the same unto the tenant for a term of Ninety nine years from the 1<sup>st</sup> day of May One Thousand Nine Hundred and Forty Seven yielding and paying therefor the annual rent of Kshs1000/= [Shillings one thousand] in advance on the 1<sup>st</sup> day of May in each year the first payment in respect of the year 1947 shall be made on the 1<sup>st</sup> day of May 1947 and thereafter on the 1<sup>st</sup> day of May in each year AND the tenant for himself and his assigns and to the tenant that obligations [except any which shall become discharged by complete performed] may continue throughout the terms thereby created hereby covenants with the trustees as follows:-*

*1. The tenant to pay the rent reserved without deduction whatsoever at the time and in the manner aforesaid ....."*

18. Although the defendants denied default in payment of the reserved rent there is adequate material on record to show

that they did. First, the defendants sought to pay the arrears of Kshs 6000/= and when payment was declined they prepared a banker's cheque for Kshs 17,600/= in 2013 which was also declined and returned by the plaintiffs' advocates. If the defendants were not in arrears as claimed then why they did they seek to pay a cheque of Kshs17,600/= in 2013?

19. The terms of the indenture were clear that the annual rent was payable in advance on the 1<sup>st</sup> day of each year with effect from May 1947 for the remainder of the term. The obligation was not to pay annually in arrears or several years in arrears. The plaintiffs were not legally obligated to accept annual rent in arrears for tenants who were 6 years in arrears.

20. The court is thus satisfied that the defendants were in breach of the terms of the lease and indenture. The court does not agree that the plaintiffs were the ones in breach by refusing to accept the annual ground rent of Kshs 1000/=. The correspondence exchanged between the plaintiffs' advocates and the defendants' advocates clearly confirms the defendants' default. No wonder the defendants were unable to produce any evidence of payment of annual rent for the 6 years of default between 2016 and 2022.

21. The plaintiffs also contended that the defendants were in breach of clause 9 of the indenture by sub-letting the suit properties to third parties without the prior consent in writing of the trustees. The said clause stipulated as follows:

*“Not to transfer or assign, underlet or part with the possession of the land hereby demised or any part thereof without the previous consent of the Trustees had and obtained which consent however shall not be unreasonably withheld”*

22. There is no doubt from the material on record that the suit properties were let out to sub-tenants by the defendants. There are some valuation reports on record to that effect. The defendants, through DW1, also conceded as much as the trial.

23. During the cross-examination of DW1 by the plaintiffs' advocate he stated thus:

*“..... it is true that we have sub-let the properties to tenants. We do not need a licence from your client to sub-let....”*

24. The court is thus satisfied that the defendants were clearly in breach of clause 9 of the indenture which prohibited sub-letting without the prior consent of the plaintiffs. However, since the notice of forfeiture dated 11.09.2023 was based solely on breach of clause 1 on payment of annual rent the

court shall not base its decision on breach of clause 9 on sub-letting.

**(b) Whether the defendants were served with notice of forfeiture.**

25. Although the defendants denied in their amended defence and counterclaim that a notice of forfeiture was served, DW1 conceded at the trial that such notice was received and that they responded to it through their advocates on record. During cross-examination by the plaintiffs' advocate DW1 stated thus:

*"..... Yes, it is true that my lawyer responded to the notice of forfeiture. It is true that we forwarded a cheque for arrears in response....."*

26. Indeed, the material on record shows that vide a letter dated 06.10.2023 the defendants' advocates responded as follows:-

*Dear Sir,*

*RE: OBJECTION TO NOTICE OF FORFEITURE OF LEASE IN RESPECT OF BUILDING ON PLOT NO. MSA/BLOCK XX/200 & 201*

*We refer to your letter dated 11<sup>th</sup> September 2023 distributed to our clients' tenants by your office.*

*Note that it is unprofessional for you to write to my clients' tenants directly.*

*If you have any issues with our clients kindly stop involving the tenants.*

*We forwarded our clients' ground rent of Kshs17,600/= by a banker's cheque which you returned to us.*

*We have firm instructions to demand from you which we hereby do that you stop harassing or intimidating our clients together with their tenants.*

*Take notice that the seven [7] days' notice for rent payment to the Tribunal has expired today. In this regard our clients are in the process of applying for an order to deposit the ground rent with the Business Rent Tribunal.*

*Yours faithfully*

*For J.K. Mwarandu & Co.*

27. The court is thus satisfied that the defendants were duly served with a notice of forfeiture to which they responded in writing in a fairly unorthodox manner. The court is satisfied that a 6 months' notice of forfeiture was duly given in accordance with the terms of the indenture.

**(c) Whether the plaintiffs were in breach of the terms of the leave.**

28. This issue was raised by the defendants in their counterclaim. They contended that the defendants were the ones who had refused to accept the annual rent hence they were the ones in breach of the lease. It was the defendants' case that the plaintiffs had refused to accept the annual rent because they

wanted to increase the rent or to lease out the suit properties to third parties who could pay more.

29. There was no credible evidence tendered at the trial to demonstrate that the defendants had tendered payment for each of the 6 years and that in every year the plaintiffs had declined payment. Not a single letter, email or text message was tendered by the defendant to demonstrate that they protested at the plaintiffs' alleged refusal. If indeed, the plaintiffs had refused to accept payment for 6 consecutive years then why did they go ahead to prepare a cheque for Kshs17,600/= in 2023? The defendants did not even raise the issue of refusal in their letter dated 13.08.2023 forwarding the cheque.

30. In their forwarding letter dated 13.08.2023 signed by DW1 he stated thus:-

*Dear Sir,*

*RE: PAYMENT OF LAND FEES MSA/XX/200 & MSA/XX/201  
ZAKARIA BUKHALA AKALULWA.*

*We regret to inform you that your client Mzee Zakaria Bukhala Akalulwa who was the proprietor of the premises on plot Nos. xx/200 & 201 passed on and the beneficiaries are in the process of finalizing succession process.*

*We thank you most sincerely for your continued support to late mzee Zakaria Bukhala Akalulwa for all those many years. We apologize for any inconvenience caused due to nonpayment. Kindly accord us the same cooperation from now on because we have received the file containing payment receipts up to 2016 and other lease documents.*

31. It is thus clear that the defendants did not attribute their default to the alleged refusal by the plaintiffs to accept the rent but to the demise of their late father. They apologized for any inconvenience caused and promised to be compliant from that point henceforth. The court is satisfied that the defendants have failed to demonstrate any breach on the part of the plaintiffs. As indicated before, the breach was on the part of the defendants only.

**(d) Whether the plaintiffs are entitled to the reliefs sought in the suit.**

32. The court has found and held that the defendants were in breach of the terms of the lease and indenture. The court has found that a notice forfeiture was duly served. It is clear from the terms of the indenture that the lessor could invoke the remedy of forfeiture and issue the relevant notice if the

annual rent remained unpaid for at least 3 months after the due date.

33. In the case of *National Oil Corporation vs Al-Busiady and 3 Others* [Civil Appeal No 77 of 2018] [2022] KECA 79 [KLR] [4 February 2022] [Judgement] the Court of Appeal dealt with the effect of issuance of a notice of forfeiture for breach of terms and conditions of a lease. At paragraph 41 of the said judgment the court held as follows:

*“As regards the issue of whether the lease had expired or not, it is a term of the lease that the landlord was to issue a 6 months’ Notice to the tenant to vacate if they wanted to re-enter the premises but the appellant, 3rd and 4th respondents denied ever receiving the same. As stated above, from the response from the appellant in the letter dated 8th July, 2010, we are satisfied that the appellant was given the requisite 6 months’ Notice of the 1st and 2nd respondents’ intention to re-enter the property. Accordingly, by the time the 3rd and 4th respondents applied for the waiver, in 2013, the lease had already terminated. We are therefore in agreement with the learned Judge’s finding to that effect.”*

34. The court is of the view that having proved their claim against the defendants on a balance of probabilities the plaintiffs are entitled to the relief’s sought in the suit. However, they are

not entitled to “general damages” for a breach of contract. The court takes the view that any injury which may arise out of breach of contract is usually quantifiable and ought to be quantified and pleaded as such. It would be a rare case where general damages may be awarded for breach of contract.

35. The court is also not satisfied that the claim for mesne profits is awardable because it was not pleaded with particularity in the amended plaint or further amended plaint. A claim for mesne profits is quantifiable hence the same should be quantified and pleaded with particularity. It is not sufficient for a claimant to produce valuation reports before court and claim for mesne profits without having first pleaded the claim with particularity.

36. The court finds the plaintiffs claim for arrears of annual rent with effect from 2017 until the date of delivery of possession a bit strange. If the plaintiffs issued a notice of forfeiture in September 2023 then they would be entitled to the annual rent for the arrears of 6 years plus the period up to the date on which the notice of forfeiture took effect. Since the notice of forfeiture was issued in September 2023 it took effect at the end of March 2024 before the next annual rent became

due on 1<sup>st</sup> May 2024. Thus, the plaintiffs would be entitled to rent arrears up to the year 2023 after which the plaintiffs should have sought mesne profits. The plaintiffs shall therefore be awarded arrears of Kshs7000/= only to cover the period between 2017 and 2023.

**(e) Whether the defendants are entitled to the reliefs sought in the counterclaim.**

37. The court has found and held that the defendants have failed to prove their counterclaim to the required standard. It would, therefore, follow that the defendants are not entitled to the reliefs sought in the counterclaim, or any one of them.

**(f) Who shall bear the costs of the action.**

38. Although the costs of an action or proceeding are at the discretion of the court, the general rule is that costs shall follow the event in accordance with the proviso to *Section 27 of the Civil Procedure Act (Cap 21)*. A successful party should ordinarily be awarded the costs of an action unless the court, for good reason, directs otherwise. See *Hussein Janmohamed & Sons -vs- Twentsche Overseas Trading Co. Ltd [1967] EA 287*. The court finds no good reason why the successful litigants should not be awarded costs of the action. As a

consequence, the plaintiffs shall be awarded costs of both the suit and the counterclaim.

#### **H. Conclusion and disposal orders.**

39. The upshot of the foregoing is that the court finds that the plaintiffs have proved their claim against the defendants on a balance of probabilities. The court has also found that the defendants have failed to prove their counterclaim against the plaintiffs to the required standard. As a result, the court makes the following orders for disposal of both the suit and the counterclaim.

*a) Judgment is hereby entered for the plaintiffs against the 1<sup>st</sup> - 6<sup>th</sup> defendants in the following terms only:-*

*(i) A declaration is hereby made that the defendants are in breach of the lease and indenture dated 30.06.1947 hence the same shall be forfeited together with the buildings erected on Mombasa/Block XX/200 & 201.*

*(ii) A declaration is hereby made that the plaintiffs are entitled be exclusive of Mombasa/Block XX/200 & 201 together with all the buildings erected thereon.*

*(iii) The 1<sup>st</sup> - 6<sup>th</sup> defendants shall pay the outstanding rent arrears of Kshs7000/= for the year between 2017 and 2023.*

- (iv) *The 1<sup>st</sup> - 6<sup>th</sup> defendants either by themselves, their servants, agents and tenants shall hand vacant possession of the suit properties and the buildings thereon within 60 days from the date hereof in default of which they shall be forcibly evicted.*
- (v) *The plaintiffs claim against the 7<sup>th</sup> defendant is hereby declined.*
- b) *The defendants' counterclaim is hereby dismissed in its entirety.*
- c) *The plaintiffs are hereby awarded costs of the suit and the counterclaim.*

It is so decided.

**Judgment dated and signed at Mombasa and delivered** virtually via Microsoft Teams on this **19<sup>th</sup> day of March, 2026.**

.....  
**Y. M. ANGIMA**  
**JUDGE**

In the presence of:

Court assistant Gillian

Ms Mulongo for the plaintiffs

Ms Nyaga for the 1<sup>st</sup> to 6<sup>th</sup> defendants

No appearance for the 7<sup>th</sup> defendant