



**REPUBLIC OF KENYA**

**IN THE ENVIRONMENT AND LAND COURT**

**AT MALINDI**

**ELC CIVIL CASE NO. 43 OF 2009**

**ANTHONY ASHLEY BURCH.....PLAINTIFF/APPLICANT**

**VERSUS**

**SAMPAT T/A KILIFI ENTERPRISES.....DEFENDANT/RESPONDENT**

**JUDGMENT**

**BACKGROUND**

1. By a Complaint dated 20<sup>th</sup> April 2009, as amended on 8<sup>th</sup> March 2011 Anthony Ashley Burch (the Plaintiff) prays for Judgment against the Defendant described therein as Mr. Sampat Trading as Kilifi Enterprises, for: -

- a) Vacant possession of the suit premises.*
- b) Kshs 1,388,810.40 –rent arrears plus mesne profits from 1<sup>st</sup> March 2009 till vacant possession (is) given.*
- c) Costs and incidentals to this suit.*
- d) Interest thereon at Court rates.*

2. The Plaintiff's prayers arise from his contention that at all times material to this suit, he was the Landlord while the Defendant was his tenant at Plot No. LR 1705/22 situated within Kilifi District. The Plaintiff avers that while the Defendant was required to pay a monthly rent of Kshs 15,000/- for the said premises, he has failed and/or neglected to do so since January 2004.

3. The Plaintiff further asserts that as a result of the Defendant's default in paying the rent due, the Plaintiff had issued him with a notice dated 12<sup>th</sup> January 2009 requiring him to vacate the suit premises. The Defendant has however refused and/or neglected to do so hence the institution of this suit and the orders sought herein.

4. But in his Statement of Defence and Counter Claim dated and filed herein on 8<sup>th</sup> June 2009 as amended on 4<sup>th</sup> April 2011 the Defendant denies owing the Plaintiff the sum claimed on account of rent arrears. On the contrary, he avers that he had been paying rent of Kshs 15,000/- until March 2005 when it was mutually agreed by the parties that all sums incurred by the Defendant on all the developments and renovations carried out on the suit property would be refunded or converted to rent payments. It is the Defendant's case that the renovations undertaken during the relevant period were to the tune of Kshs 4,244,515/-

5. By way of Counter Claim, the Defendant asserts that he had with the consent of the Plaintiff carried out extensive renovation and landscaping works on the suit property in the sum of Kshs 4,244,515/- on the understanding that the Plaintiff would refund the same and/or convert it into rent payments but the Plaintiff has to-date neglected and or refused to do so.

6. Accordingly, the Defendant claims from the Plaintiff the sum of Kshs 4,244,515/- on account of the said developments and renovations.

7. At the trial herein however, the Defendant failed to turn up in Court and his Counter Claim was dismissed for want of prosecution on 9<sup>th</sup> October 2018.

**THE PLAINTIFF'S CASE**

8. The Plaintiff called one witness in support of their case.

9. Testifying as PW1 in his case the Plaintiff told the Court that he owns the suit property, the same having been given to him as a gift by his mother after his father who originally owned it passed away. PW1 told the Court that the Defendant herein became a tenant to the suit property during the life time of his father but there was never a tenancy agreement between his family and the Defendant.

10. PW1 took the Court through various correspondences made between his late father and the Defendant in regard to the payment of rent and renovations of the suit property. He testified that he took over the premises in 2005 during which time he tried to have the Defendant execute a lease but the Defendant did not agree with the contents thereof.

11. PW1 told the Court that since 2005, he had never received any rent from the Defendant and that notices issued to him to vacate the property have been ignored by the Defendant. He further testified that he first heard about the Defendant's claim for developments and renovations done to the premises when the Defendant filed his Defence and Counter Claim.

### **ANALYSIS AND DETERMINATION**

12. I have considered the pleadings filed herein as well as the testimony of the Plaintiff who gave his testimony before my brother the Honourable Justice Angote. I have also considered the Submissions filed herein by the Learned Advocates for the Plaintiff. The Defendant did not file any submissions.

13. From the material placed before me, it is apparent that the Plaintiff is the registered owner of the suit property. That property was originally owned by the Plaintiff's parents. Upon the death of the Plaintiff's parents, the property vested on his brother one Colin Roger Burch who would by a conveyance dated 21<sup>st</sup> February 2005 transfer the same to the Plaintiff.

14. It was not denied that the Defendant took possession of the suit property as a tenant sometime in 1989 during the lifetime of the Plaintiff's father. As it were, there was no tenancy agreement executed between the parties. From a perusal of a bundle of correspondence between the Plaintiff's family and the Defendant, it is evident that the Defendant made payment of the rent on a monthly basis.

15. At paragraph 4 of the Amended Defence and Counter Claim, the Defendant admits that he was a rent paying tenant in the suit premises when he avers as follows: -

*"4. In the alternative and without prejudice to what is stated herein above the Defendant avers that he entered into the suit premises as a tenant when the same was in a severely dilapidated condition and had been paying rent in the sum of Kshs 15,000/- per month until March 2005 when it was mutually agreed with the Plaintiff's brother one Colin Rodger Burch who was the registered owner of the suit premises until 21/2/2005 that all the costs in the sum of Kshs 4,244,515/- incurred by the Defendant on all developments and renovations carried out on the above property which renovations and developments were undertaken by the Defendant with due consent of the Plaintiff's parents John and Jean Burch(now deceased) and subsequently with the Plaintiff's brother one Colin Rodger Burch would be refunded or alternatively converted into rent payments which to date the Plaintiff has not effected."*

16. Given the nature of the monthly payments, the Defendant qualifies to be a periodic tenant of the suit premises. From the said Paragraph 4 of the Amended Statement of Defence and Counter Claim, it is also clear that the Defendant has not paid rent since the year 2005 on the purport that he entered into a mutual agreement with the Plaintiff's family that the costs he had incurred in renovating the premises be refunded and/or converted into rent. He puts those costs at Kshs 4,244,515/-

17. According to the Plaintiff however, no such agreement was entered into between his family and the Defendant. In support of his case, the Plaintiff has produced numerous correspondences between his family and the Defendant. A perusal thereof does not reveal anywhere where there was an agreement between the family and the Defendant that the alleged renovations carried out of the premises would be refunded or converted to rent. Indeed, the Defendant has not produced anything to demonstrate that indeed he incurred the said amount in renovation and/or when those renovations were done and what they entailed.

18. Despite the fact that he was served with a notice to vacate the premises on 12<sup>th</sup> January 2009, the Defendant remains thereon to-date. Under Section 57(4) of the Land Act, a periodic tenancy may be terminated by either party giving notice to the other, the length of which shall be not less than the period of the tenancy and shall expire on one of the days on which rent is payable.

19. The Plaintiff has produced in his bundle of documents (at page 84) a copy of the Notice of termination dated 12<sup>th</sup> January 2009. The Defendant has not denied receipt of that notice. He however remains in possession to-date. Section 60(1) of the Land Act provides as follows: -

***"If a lessee remains in possession of land without the consent of the lessor after the lease has been terminated or the term of the lease has expired, all the obligations of the lessee under the lease continue in force until such a time as the lessee ceases to be in possession of the land."***

20. Accordingly, I am satisfied that there was an obligation upon the Defendant to continue paying rent to the Plaintiff for the period he remained in possession. I am also satisfied that the plaintiff is entitled to mesne profits as he was wrongfully deprived of his property from October 2009.

21. In the circumstances of this case and given the period this matter has taken, I am in agreement with the Plaintiff that an escalation of the rent at 10% per annum from October 2009 to-date would sufficiently compensate the Plaintiff for the loss incurred.

22. Accordingly, Judgment is hereby entered for the Plaintiff as against the Defendant as follows: -

*a) The Defendant to yield vacant possession of the suit premises forthwith.*

*b) The Defendant to pay the sum of Kshs 1,388,810.40/- being rent arrears as at January 2011.*

*c) The Defendant to pay the rent due from February 2011 with an annual increment of 10% per annum until vacant possession is given.*

*d) The Defendant shall also pay the costs of this suit to the Plaintiff.*

Dated, signed and delivered at Malindi this 20<sup>th</sup> day of September, 2019.

J.O. OLOLA

JUDGE