



**REPUBLIC OF KENYA**

**IN THE ENVIRONMENT AND LAND COURT**

**MOMBASA**

**ELC CIVIL CASE NO. 104 OF 2013**

**SIMBA CORPORATION LIMITED.....PLAINTIFF**

**VERSUS**

**KENYA RAILWAYS CORPORATION.....1<sup>ST</sup> DEFENDANT**

**PAMELA JOY OUKO T/A**

**SADIQUE ENTERPRISES AUCTIONEERS .....2<sup>ND</sup> DEFENDANT**

**JUDGEMENT**

1. By a plaint dated 22<sup>nd</sup> May 2013, the plaintiff has sued the defendant for:-

*(a) A declaration that the 1<sup>st</sup> defendant has no right under the terms of the lease dated 24<sup>th</sup> April, 1967 to raise the annual rent payable for the parcel of land known as Mombasa/Block XLVIII/114 until 1<sup>st</sup> January 2026.*

*(b) A declaration that the revision of the annual rent for the parcel of land known as Title No. Mombasa/Block XLVIII/114 from Shs.27000.00 to Kshs.2,815,720.00 or Kshs.1,900,000.00 is unlawful, null and void and of no effect.*

*(c) An order for a permanent injunction against the defendants, their servants, employees, officers and/or agents restraining them from interfering in any manner howsoever with the plaintiff's quiet and peaceful possession of the suit property and in particular restraining them until 1<sup>st</sup> January 2026 from charging the plaintiff an annual rent higher than Kshs.27,000.00 and for levying distress of taking any levying distress or taking any other action for the recovery of any higher amount.*

*(d) Costs of an incidental to this suit.*

*(e) Any other or further relief that this honourable court may deem fit to award*

2. Together with the plaint the plaintiff filed a notice of motion dated 22<sup>nd</sup> May 2013 seeking orders of injunction against the 1<sup>st</sup> defendant. Interim orders were granted on 2<sup>nd</sup> October 2013 pending the hearing and determination of this suit.

3. Upon being served with copies of plaint and summons to enter appearance, the 1<sup>st</sup> defendant entered appearance and filed a statement of defence dated 20<sup>th</sup> March 2014.

4. PW1, Anderson Nandi Owuor, a Senior Legal Counsel for the plaintiff told the court that by a lease dated 24<sup>th</sup> April 1967 which was extended to 2<sup>nd</sup> July 1968, the 1<sup>st</sup> defendant, through its predecessor, the General Manager of East African Railways and Harbours Administration, leased the property known as Mombasa/Block XLVIII/114 hereinafter referred to as ("**the suit property**") to Keshavlal Premji Patel and Kanjibhai Premji Patel ("**the original lessees**"). The lease was for a term of eighty one (81) years and 1 month from 1<sup>st</sup> December 1966 at an annual rent of Kshs.3,105/-. On or about 14<sup>th</sup> March 1974, the suit property was transferred to K Boat Services Limited herein after referred to as ("**the immediate former Lessee**"). The annual rent payable by the immediate former lessee was Kshs.27,000 per annum. By a transfer of lease dated 7<sup>th</sup> October 2008, the leasehold interest in the suit property was transferred to the plaintiff and a certificate of lease issued to the plaintiff on 13<sup>th</sup> October 2008. The 1<sup>st</sup> defendant gave its consent to the transfer of the lease to the plaintiff. The plaintiff has been paying Kshs.27,000/- as rent to the 1<sup>st</sup> defendant from 2009 to date. Further that Simba Colt Motors Limited and Simba Corporation Limited are one and the same entity.

5. By a letter dated 24<sup>th</sup> February 2011 and addressed to the plaintiff by the 1<sup>st</sup> defendant, the latter purported to unilaterally value the suit property at Kshs.56,314,350/- and consequently increased the annual rent for the suit property from Kshs.27,000 to Kshs.2,815,720/- with effect from 1<sup>st</sup> January 2011. The purported notice of valuation and rent increment dated 13<sup>th</sup> October 2010 was illegal, void and incapable of conferring any right upon the 1<sup>st</sup> defendant to charge or otherwise recover from the plaintiff the annual rent of Kshs.2,815,720 or any other amount greater than Kshs.27,000 per annum. The plaintiff attempted to negotiate with the 1<sup>st</sup> defendant on the rent increment but the 1<sup>st</sup> defendant was uncooperative and instead instructed the 2<sup>nd</sup> defendant to issue a demand letter dated 29<sup>th</sup> June 2012 demanding the sum of Kshs.1,998,303/- in which the 2<sup>nd</sup> defendant threatened to evict the plaintiff from the suit property.

6. PW1 produced the documents in the plaintiff's bundle of documents as exhibit p1 – P24 respectively.

7. PW2 Joan Gathoni Waweru a valuer with Knight Frank Valuers told the court she and her colleague did a valuation on the suit premises for the year between 1996 and 2017. She produced the valuation report as exhibit p25.

8. The 1<sup>st</sup> defendant called one witness.

9. DW1, Justine Oyagi Omoke, adopted his witness statement dated 3<sup>rd</sup> August 2016. He also relied on the 1<sup>st</sup> defendant's list of documents, which were produced as exhibits D1 to D4 respectively. He told the court that the 1<sup>st</sup> defendant desired to increase the annual rent because there exists an agreement which provides for the said increment. He further told the court that the plaintiff has not complied with the terms of the agreement, including paying rent late hence attracting penalties. He prays that the plaintiff's suit be dismissed with costs.

10. At the end of the trial, the parties tendered written submissions.

#### **The Plaintiff's submissions**

11. The 1<sup>st</sup> defendant has wrongly interpreted section 87 of the Kenya Railways Corporation Act. It has relied on the case of **Republic vs Kenya Railways & Another Exparte Involatte Wacike Siboe [2014] eKLR**. The act of leasing properties is purely a commercial and/or contractual issue not envisaged under Section 87 of the Act. It has also put forward the case of **Kenya Bus Services Limited & Another vs Minister for Transport & 2 Others [2012] eKLR**.

The plaintiff duly issued the said statutory notice and it only became necessary to file this suit before the 30 days period lapsed because the defendants were about to evict the plaintiff from the suit property and levy distress on the plaintiff's goods in order to recover the increased rent. It has also relied on the case of **The Law Society of Kenya vs Kenya Revenue Authority & Another [2017] Eklr**. The 1<sup>st</sup> defendant should have raised the objection at the earliest opportunity.

12. The 1<sup>st</sup> defendant increased the annual rent from Kshs.3105/- to Kshs.27,000. This is what the plaintiff has been paying. This is not disputed. By a notice dated 13<sup>th</sup> October 2010, the 1<sup>st</sup> defendant purported to unilaterally increase the annual rent payable from Kshs.27,000 to Kshs.2,815,720.00 with effect from 1<sup>st</sup> January 2011. It has also put forward the case of **National Bank of Kenya Ltd vs Pipe Plastic Smkolit (K) Ltd & Another [2001] eKLR**.

13. The 1<sup>st</sup> defendant waived its right to raise the rent in the year 1996 at the expiration of the first 30 years. It has relied on the case of **Serah Njeru Mwobi vs John Kimani Njoroge [2013] eKLR**. The 1<sup>st</sup> defendant's unlawful action of attempting to review the rent in the year 2010 is prejudicial to the plaintiff as the rent is supposed to be assessed on unimproved value of the property at the time when the right to raise the rent falls due. In this case at the expiry of the first period of 30 years. The 1<sup>st</sup> defendant rent assessment is without any basis, it is illegal, null and void. The notice of rent increment ought to be declared void and illegal.

14. The plaintiff prays that the 1<sup>st</sup> defendant objection be found to be unmerited and that the plaintiff has proved it's case on a balance of probabilities against the 1<sup>st</sup> defendant.

#### **The 1<sup>st</sup> defendant's submissions**

15. The plaintiff's suit is premature and incompetent as it violates the mandatory provisions of Section 87(a) of the Kenya Railways Cooperation Act. The failure by the plaintiff to comply with the above provisions is fatal to its case. It has put forward the case of **Peter Nzioka Mani & Another vs Kenya Railways Corporation [2012] eKLR**. The appearance of an increment was not an increment at all but the annual rent inclusive of penalties for late payment. The 1<sup>st</sup> defendant's contractual right to increase rent was never extinguished because clause 2(a) of the lease agreement did not require that the rent increment be undertaken precisely on the 30<sup>th</sup> year of the lease agreement.

16. The plaintiff cannot claim estoppel as against the defendant but to the contrary the plaintiff is estopped from denying that the defendant's right to review the rent was intact as demonstrated by the plaintiff's letters on record. The plaintiff is not entitled to enforce the lease agreement as it has been in breach of the terms and conditions. It has put forward the cases of **Kenya Breweries Limited & Another vs Washington O. Okeyo [2002] Eklr; Aziz vs Bhalia Brothers Ltd [2001] 1EA**. It prays that the plaintiff's suit be dismissed with costs.

17. I have considered the pleadings, the evidence on record, the written submissions made on behalf of the parties and the authorities cited. The issues for determination are:-

*(i) Whether the plaint dated 22<sup>nd</sup> May 2013 is premature and incompetent for violating Section 8(a) of the Kenya Railways*

**Corporation Act.**

- (ii) Whether the 1<sup>st</sup> defendant's failure to increase rent after the first 30 years denies it the right to review rent in the year 2010.**
- (iii) Whether the 1<sup>st</sup> defendant's notice of rent increment dated 13<sup>th</sup> October 2010 is illegal and/or unlawful.**
- (iv) Whether the plaintiff is entitled to the prayers sought.**

18. Section 87(a) of the Kenya Railways Corporation Act provides that:-

***“Where any action or other legal proceeding is commenced against the corporation for any act done in pursuance or execution or intended execution, if this Act or any public duty or authority or in respect of any alleged neglect or default in the execution of this Act or of any such duty or authority, the following provisions shall have effect:-***

***(a) The action or legal proceedings shall not be commenced against the corporation until at least one month after written notice containing particulars of the claim, and of intention to commence the action or legal proceedings, has been served upon the managing director by the plaintiff or his agent, and .....***

***(b) .....***

The above provision is set in mandatory terms. The plaintiff has admitted that it commenced these proceedings before the expiry of the thirty (30) days. In the case of **Peter Nzioka Mani & Another vs Kenya Railways Corporation [2012] e KLR**, Mwera J held thus:-

***“Accordingly, the plaintiffs were challenging the act of the defendant done in execution or pursuance of what it deems fit, it can or should do under the tenancy agreements, namely, increase rent. In this court's view, the plaintiffs were obliged to observe and comply with Section 87(a) by issuing and serving the notice thereunder on the defendant first, to last thirty (30) days before commencing the action.....so all in all the plaintiffs were aware of the need to comply with section 87(a) of the Act. They did not comply. The conclusion in these proceedings is that the plaintiffs' suit is premature and thus incompetent”.***

I am guided by the above authority in finding that the suit herein is premature and incompetent. The plaintiff has not given a reasonable justification for their action. The same is struck out.

19. I will however go ahead and determine the other issues, notwithstanding the above finding. The 1<sup>st</sup> defendant's right was not extinguished by its failure to increase rent after the first thirty (30) years. When cross examined by the 1<sup>st</sup> defendant's counsel PW1 Andrew Nandi Owuor admitted that the rent payable on the 1<sup>st</sup> of January of each year. He also admitted that the appearance of an increment was not increment at all but annual rent inclusive of penalties for late payment. I find that nothing prevented the 1<sup>st</sup> defendant from increasing rent even after the expiry of the first thirty years. I have gone through the several correspondences between the plaintiff and the 1<sup>st</sup> defendant. The plaintiff itself was aware that the right to increase had never been waived or extinguished.

20. PW2, John Gathoni Waweru produced a valuation report of the suit property as exhibit P25. When cross examined by Mr. Sitonik for the 1<sup>st</sup> defendant she told the court that she got information from the lands office but that the evidence is not attached to the report.

21. DW1 Justine Oyugi Omoke told the court that the 1<sup>st</sup> defendant did a valuation before increasing the rent. That it had professional valuers who would do internal valuation. This evidence was not challenged by the plaintiff. I find that the 1<sup>st</sup> defendant notice of rent increment dated 13<sup>th</sup> October 2010 is not illegal and/or unlawful.

22. It appears to me that the plaintiff does not dispute that rent should be increased but that the rent is excessive. The 1<sup>st</sup> defendant's assertion that it has professional valuers has not been challenged. The plaintiff has not demonstrated that the assessment was done wrongly. It admits that the suit premises are in a prime industrial area. I find that it has failed to demonstrate that it is paying rent regularly. I find that it has failed to prove its case on a balance of probabilities as against the defendants. It is not entitled to the prayers sought in the plaint. Accordingly the plaintiff's suit is dismissed with costs to the 1<sup>st</sup> defendant.

It is so ordered.

**Dated and signed in Nairobi on this .....day of October 2019.**

.....

**L. KOMINGOI**

**JUDGE**

Dated, signed and delivered in Mombasa on this 7<sup>th</sup> day of November 2019

.....

**C. YANO**

**JUDGE**

**In the presence of:-**

.....Advocate for the Plaintiff

.....Advocate for the Defendants

.....Court Assistant