



REPUBLIC OF KENYA

IN THE ENVIRONMENT AND LAND COURT

AT MOMBASA

ELC CASE NO. 16 OF 2016

SULEIMAN MOHAMED SAID SULEIMAN

AL-BUSAIDY ALI MOHAMED SAID SULEIMAN

AL-BUSAIDY(Suing as the legal representatives and

the heirs of the estate of the late MOHAMED SAID

SULEIMAN ABLBUSIDY).....PLAINTIFFS

-VERSUS-

SHELL COMPANY OF EAST AFRICA LIMITED

(NOW T/A KENYA SHELL LTD).....1ST DEFENDANT

VIVO ENERGEY KENYA LIMITED.....2ND DEFENDANT

NATIONAL OIL CORPORATION OF

KENYA LIMITED).....3RD DEFENDANT

JUDGEMENT

1. This suit is brought by the plaintiffs against the defendants vide a plaint dated 9th February 2016 seeking judgement to be entered in their favour in the following terms:

(a) A declaration that the 1st defendant is in breach of the lease agreement dated 1st April 1937 and that the said lease be deemed terminated and property reverts back 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 L. R. No. Mombasa/Block XVIII/244 (“the suit property”)

(c) A DECLARATION THAT ANY WAIVER OF CONSENT OBTAINED BY THE 2nd Defendant and subsequent transfer of any lease to the third Defendant was obtained irregularly and fraudulently by concealment of facts and as such null and void.

(d) A declaration that the Defendants whether by themselves or their servants or agents or otherwise howsoever are wrongfully, illegally in occupation of the suit property L. R. No. Mombasa/Block XVIII/244, (“the suit property”) and are accordingly, trespassers on the same.

(e) A declaration that the Defendants whether by themselves or their servants or otherwise howsoever are not entitled to remain on the suit property.

(f) 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.

(g) Eviction order/Vacant possession of the suit property.

(h) General damages for trespass.

(i) General damages for breach of contract.

(j) Costs of this suit together with interest thereon at such rate and for such period of time as this Honourable Court may deem fit to grant.

(k) Any such other or further relief as this Honourable Court may deem appropriate.

2. The 1st & 2nd defendants filed a joint statement of defence dated 14th March 2016. The 3rd defendant filed a defence & counter – claim dated 11th May 2016. All the defendants denied the plaintiffs’ claim and put them to strict proof. In the 3rd defendant’s counter-claim, he raised a claim against the plaintiffs that the plaintiffs’ action when their consent was sought are contrary to section 67 (1) of the Land Act and amounts to unreasonably withholding the consent. The particulars of the unreasonableness set out in paragraph 45 of the counter-claim. The 3rd defendant therefore urges the Court to enter judgement in its favour on the following terms:

(i) A declaration that the plaintiffs’ actions and/or condition in relation to the 3rd Defendant’s application for the Head Lessor’s consent to Transfer of Lease amounts to an unreasonable withholding of the consent.

(ii) A declaration that given the circumstances of the case, it was proper for the 3rd Defendant to seek and obtain a waiver of the Head Lessor’s consent to the Transfer of Lease and that the Registrar acted lawfully in dispensing with the requirement under section 54 (2) of the Land Registration Act No. 3 of 2012.

(iii) In the alternative to prayer (ii) above, the Honourable Court be pleased to waive the requirement for the Head Lessor’s consent and to consequently deem the registration of the Transfer of Lease on 29th July, 2015 as entry number C2 as having been done in accordance with the law.

(iv) Costs of the counter-claim be awarded to the 3rd Defendant against the plaintiffs.

3. The parties complied with the provisions of Order 11 of the Civil Procedure Rules by filing their documents and witnesses statements and consequently the suit was set down for hearing. The plaintiff opened their case on 18th May 2017 with the evidence of **Suleiman Mohamed Said** stating that he lives in both Oman and Lamu. He is a retired civil servant. He adopted his statement dated 18th January 2016 and filed in Court as his evidence. The witness also produced as a bundle in his documents filed on 9.2.2016, 8.6.2016 and 17.6.2016, as Pex 1, 2 & 3 respectively.

4. **PW 1** stated that the first lease was executed by his grandfather Sir Mohamed Said Albusaidy in 1936 and subsequently renewed by their grandmother, Zawana Albusaidy in 1965. Upon the death of their grandmother, their father took over the administration of the estate before he also died in 1989. That after the death of his father, their step mother took over the administration of the estate before passing away around 1999 – 2000. Upon her death, the plaintiffs applied for letters of administration to run the estate. The witness stated further that he would use advocates to dispatch most of the properties that were on lease. He was surprised that the 1st defendant transferred the suit property to the 3rd defendant.

5. It is the plaintiffs’ evidence that National Oil Co-operation of Kenya Ltd on several occasions in 2010, on 19.11.2013 and on 27.10.2014 expressed their interest to purchase the freehold title in respect of the suit premises but which sale did not materialize as the negotiations collapsed. That the 3rd defendant had wrongfully entered and taken possession of the suit property and have wrongfully remained in possession thereof. The witness also stated that the 1st defendant through their nominee the 2nd defendant had fraudulently and irregularly without their consent purported to sell and transfer the lease to the 3rd defendant. That the 2nd defendant also irregularly obtained waiver of consent from the Registrar of Titles on the grounds that the plaintiffs were no longer interested in the suit property nor that they had filed for letters of administration.

6. The plaintiffs stated that they served the 3rd defendant with a notice to vacate vide their letter of 28th May 2015 and to stop further activities on the suit property. Instead the 3rd defendant responded that they would not comply with the said notice. It is the plaintiffs’ case that the 3rd defendant’s occupation of the suit premises is unlawful, illegal and constitutes acts of trespass. The witness stated further that the lease had been forfeited for default of non-payment of ground rents as stated in their advocates’ letters dated 20th May 2010 and 12th July 2010.

7. The witness was cross examined by Mrs Mwangi advocate for the 1st & 2nd defendants and Mr Kongere advocate for the 3rd defendant. Mr Said confirmed the lease was first signed by his great grandfather & Shell (1st Defendant) in 1939 before his grandmother signed the subsequent one in 1965. The property has not been transferred to the beneficiaries. That Pandya & Talati advocates have been their advocates since the 1950s and they are the ones who took out the letters of administration on their behalf. That there was a misunderstanding between the 1st & 3rd defendants to think that plot Nos. 244 and 258 belonged to Pandya. The witness maintained rent for suit property was

not paid to Pandya advocate otherwise he would not have written the letter dated 12.7.2010. He also said there was no communication between the 1st defendant and himself regarding the consent. That if Pandya wrote the letter dated 7.2.2011, the witness cannot tell why he withheld such information from them. That he never sent the letters of administration to the 1st defendant because they never approached him. That the 3rd defendants are on the plot illegally as they did not offer the purchase price the plaintiffs wanted.

8. The witness admitted giving instructions to the firm of Pandya & Talati and Y. A Ali over the suit property. His father died in 1989 and the title presented to the Court is in the name of his father. The certificate of confirmation of grant was issued on 10th October 2013. That he had authority to dispose off the property in 2002. He did not know if the firm of Y. A Ali responded to the letter dated 6th June 2012. He also did not recall the email at page 15 but conceded he may have issued it. The notice to vacate the suit premises was issued by his advocates and it gave 30 days. The witness agreed there is no notice of 6 months served on the 3rd defendant but explained that it was because there was no valid lease between them. That if ground rent was paid to Y. A Ali advocates then he was not informed.

9. In re- examination, the witness stated that their advocates had written in 2010 that the lease had been forfeited hence they could not reply to the letter of 2012. That he has not received any rents from the 1st defendant. Communication about purchase of the suit property began in 2010 and it ended in 2014 when they could not agree on the purchase price. With this evidence, the plaintiffs closed their case.

10. The 1st & 2nd defendants called one witness named **NAOMI NJERI ASSUMANI**. She is the head of legal and company secretary for Vivo Energy (K) Ltd (the 2nd defendant). She joined the employment of the 2nd defendant in 2011. The witness gave a history of how the 1st & 2nd defendants came into Kenya to do business stating that the 1st & 2nd defendants is one and the same and the changes in the name occurred only because there were changes in the shareholding of the 1st Defendant. Ms Naomi adopted her witness statement filed on 18th April 2016 together with the bundle of documents filed in Court on 22nd April 2016 as evidence in support of the 1st and 2nd defendants' case.

11. She stated that the 1st defendant first signed a lease in 1937 for a period of 99 years effective 1.7.1937 @ annual rent of Ksh 2000. That pursuant to this lease, the 1st defendant constructed a petrol station on the suit property. In 2007, they transferred the lease to 3rd defendant following conditions put to them by the then Finance Minister that they had to sell off 13 of their stations to get approval to acquire interests in **British Petroleum (B. P)**. The petrol station on the suit property is amongst the ones they decided to sell.

12. The witness continued that for the transaction to fall through, they had to obtain the consent of the head lessor. They sought the consent of the landlord but were informed by Pandya & Talati Advocates that the Lessor was deceased and their children were all living abroad. That several tele-conversations were held by the law firms of Pandya & Talati and Y. A Ali over the subject of the Consent but the said advocates were unable to assist. The condition to sell some of their stations was given by the Minister in 2007 and as at 2012 they had not gotten the consent based on information that there were no administrators. The witness stated further that they were advised by their advocates then to obtain waiver from the Land Registrar. Accordingly, through their advocates Majanja & Luseno and Muriu Mungai advocates they made the applications for the waiver on 19th August 2013. The Land Registrar issued the waiver on 20th September 2013.

13. Ms Naomi denied that they gave the Land Registrar false information. She also stated that on receipt of the waiver, they signed the transfers and forwarded to the 3rd defendant. She also denied the averment that the 1st & 2nd defendants were not paying rents. That by the time Y. A Ali wrote the letter in 2010, they were not in occupation of the suit premises. She stated that on 14th December 2007, they paid rates for Kshs 714000. She concluded that they only sold the leasehold interest of the suit property to the 3rd defendant and that they had never been served with any notice to terminate the lease.

14. In cross-examination by Ms Chepkwony advocate for the plaintiffs, the witness answered that the lease term provided that the rates be paid annually. That they have not included the condition from the government requiring them to sell thirteen of their stations in their bundle of documents filed in Court. The 1st defendant gave the 3rd defendant possession in 2008. That prior to 2010, they have not annexed documents seeking consent of the Lessor to transfer. The person referred to in the letter dated 19.8.2013 is not the head lessor. That while giving the waiver, the Registrar relied on the letter dated 2nd September 2013. She was not aware M. S. Suleiman was the administrator of the estate of the head lessor. The transfer between the 3rd defendant and themselves was for a consideration of Kshs 26,000,000= . That the transfer was not registered immediately on receipt of the waiver. She did not know whether the waiver was valid two years after its issuance.

15. On Cross-examination by Mr Kongere advocate, the witness said they never received the 6 months' notice. At page 10, the invoice shows payment received. That the application for waiver preceded the confirmation of the grant. She only became aware of the grant when she was served with the plaintiffs' documents. This marked close of the 1st & 2nd defendants' case.

16. **GLADYS KOLETIT** testified as the 3rd defendants' witness. She adopted her statement dated 26th April 2017 and the documents filed on the same date. Ms Koletit stated that she is the Legal Affairs Manager of the 3rd defendant. She is aware that sometimes in the year 2007, the 3rd defendant entered into an Asset Purchase Agreement with the 1st defendant to acquire specific number of its service stations with the one on the suit property being one of them. The witness stated that they appointed their external advocates at the time Muriu Mungai & Co advocates to represent them and undertake all that was necessary during the transaction.

17. That the 3rd defendant received a letter dated 20.5.2010 drawn by the firm of Y. A Ali & Co Advocates addressed to the 1st defendant stating that they represent the estate of Mohamed Said Suleiman Al-Busaidy and notifying the 1st defendant of forfeiture of the lease for non-payment of the rent. That they responded seeking clarification who between Y. A Ali & Co Advocates and Pandya & Talati represented the plaintiffs. The witness said that they got a reply from Mr Pandya dated 12.7.2010 confirming that Ms Y. A Ali was representing the owners of the suit property. On 2.2.2011, they also wrote to Pandya & Talati requesting for the contacts of the representatives of the estate wherein Mr Pandya wrote back on 7.2.2011 indicating that the children had not taken any interest in the property. On receipt of this reply, the witness said they sought and obtained legal advice from their advocates which they state cannot be disclosed because it is privileged and

confidential communication.

18. The witness continued that on 15.2.2012, their said advocates made contact with Y. A Ali seeking head lessor's consent to facilitate the transfer and made follow ups via several emails. It is the 3rd defendant's contention that they never received any response to their correspondences neither was the consent of the head lessor given thus forcing them to apply for exemption under section 54 (2) of the Land Registration Act on 19th August 2013. The Land Registrar agreed to dispense with the requirement vide his letter dated 20.9.2013. The 3rd defendant believes that the plaintiffs unreasonably withheld the consent because of the reasons set out in paragraph 24 of Ms Koletit's statement. The witness also stated that they have not refused to pay rent but are able and willing to pay provided the plaintiffs confirm in writing the identity and details of the person authorized to receive such rent.

19. In cross-examination, Ms Koletit said they took possession of the suit premises in 2008. That there was a provision requiring consent of the head lessor but she did not know if there was any consent obtained. That it was the responsibility of the 2nd defendant to obtain the consent. As at 2008 there was no consent but it was being pursued. The witness denied contacting the owner's advocates for purposes of purchasing the freehold interest. She was not aware the lease was forfeited in 2010. She agreed they have not been paying rents because they do not know who to pay to. In re- examination, the witness said the letter dated 7.11.2012 was to reach the plaintiffs through Pandya & Talati. That they would have been paying rent had they been served with the letters of administration which letters was only served with the demand note.

20. The second witness of the 3rd defendant hereinafter referred to as 'DW 3' was **JOHN KIBARA**. He adopted as his evidence his statement dated 26th April 2017. He was the 3rd defendant's Territory Manager – Mombasa between the years 2008 – 2012 and said he was personally involved in the attempts to purchase the freehold interest over the suit property. That during the purchase of plot No. MSA/Block XVII/258 Pandya & Talati advocates indicated that he was representing the owners of the suit property. In paragraph 7 of his statement, Mr Kibara stated that Mr Pandya informed him vide his letter dated 3rd December 2010 that the two sons of the owner of the suit property had been appointed as administrators but that they lived in Oman. The witness also stated that he requested for a copy of the title deed but was never supplied with any until September 2012.

21. Mr Kibara stated further that in February 2012, he received a letter from Y. A Ali Advocates informing them that the person dealing with the estate of the deceased lives in Lamu but had not gotten an opportunity to come to Mombasa to discuss the offer price. On 23rd September 2013, he called Mr Suleiman (1st plaintiff) and confirmed he lives in Lamu. That the 1st plaintiff claimed he was unaware that the 3rd defendant was on the suit property and demanded to be paid Kshs 7,500,000 for him to consent to the transfer of the lease & demanded a purchase price of Kshs 40,000,000= . DW 3 said he asked Mr Suleiman to put this offer in writing for the 3rd defendant to consider. That during this process, the 3rd defendant tried to get a copy of the letters of administration authorizing the 1st plaintiff to act on behalf of the estate of his father but they found none. That this evidence was only availed to them with the demand letter of 15th June 2015. It's Mr Kibara's evidence that the 3rd defendant made an offer to the plaintiffs to purchase the suit property for the sum of Ksh 30,000= which offer was rejected. That the 3rd defendant therefore made a decision to proceed with the transfer of lease and deal with issue of purchase of the free hold interest later.

22. In cross-examination, he confirmed that the 7 Million was not for the purchase of the freehold interest but for being in the premises without the plaintiff's permission. At page 10, as at 2012, the witness said he knew the plaintiff was the administrator. He was not in charge of the transfer of lease. That he never informed his team that he was in contact with the plaintiff. The negotiations were never concluded. When he joined NOCK in 2008, the petrol station was already on the suit property. His role was to identify the plaintiffs. In re-examination, on the email at page 18, Mr Kibara stated that the plaintiffs had created an impression that they had agreed on the figures of Kshs 40 Million & 7.5 Million. He therefore wrote the email to clarify this position. That the letter dated 7th November 2012 was requesting the plaintiffs for the details of seller including authorization to act but the same was never submitted. The 3rd defendant also closed their case with this evidence.

23. The plaintiffs and the 3rd defendant have put in their detailed and well researched written submissions that I have spared time to read. In both submissions, the advocates framed issues for determination and which I find to be apt and adopt. The issues raised for determination are:

- (1) Whether the plaintiffs had letter of administration.**
- (2) Whether the 1937 lease was terminated.**
- (3) Whether the 1st & 2nd defendants lawfully transferred the lease to the 3rd defendant.**
- (4) Whether the plaintiffs unreasonably withheld the consent to transfer the lease.**
- (5) Whether the 3rd defendant is guilty of trespass thus the plaintiffs are entitled to damages.**
- (6)(a) Are the plaintiffs entitled to the orders in the plaint?**

or

- (b) Is the 3rd defendant entitled to judgment as per the counter-claim?**

24. The issue of the plaintiffs being the administrators of the estate of Mohamed Said Suleiman Al-Busaidy in my view is not contested.

The discontent which I deduce from the evidence and pleadings of the defendants is that the plaintiffs never communicated or expressed their capacity of administration until the time of the demand notice was issued by Ms Chepkowny & Associates which time was after the happening of the events complained of. From their documents produced, the plaintiffs were appointed as administrators of the estate of their father Mohamed on 14th June 2002 and the grant confirmed on 10th October 2013.

25. From the evidence on record before the filing of this suit, the estate of Mohamed Said was represented by the law firms of Pandya & Talat advocates and Ms Y. A. Ali & Co advocates. The plaintiff did not lead any evidence that they gave copies of the letters of administration de-Bonis-non or the Certificate of Grant to their previous advocates for onward transmission to any of the defendants. Secondly evidence was led by the 3rd defendant that though they had direct physical contact and requested to be supplied with copies of their legal documents giving the 1st plaintiff authority to act on behalf of the estate none was supplied. The evidence is contained in the letters exchanged and dated 8th July 2010, 8th February 2011 and 19th March 2012. For these reasons outlined, it is my finding that the plaintiffs are the administrators of the estate of Mohamed Said Suleiman – deceased and copies of their documents concerning their administration were only made available to the defendants in the year 2015.

26. The 2nd issue is whether the 1937 lease was terminated. The lease document was produced as Pex 1. It is dated 1st April 1937 & made between Sir Ali bin Salim El-Busaid Knight of the most excellent order of the British Empire as the Landlord and the Shell Company (of East Africa) Ltd (and its successors & assigns) a company incorporated in Great Britain and carrying on business in E. Africa as the Tenant. The rent was agreed at Kshs 2000 p.a payable every year in advance for a period of 99 years from 1st July 1936. It was also a term of the lease that the Tenant to pay during the said term rates, taxes, assessments and outgoings now or hereafter imposed on or in respect of the said premises by any government, municipal or other authority. It was also a term of the lease that the Tenant would not assign the lease without the consent of the landlord in writing which consent shall not be unreasonable withheld. If the rent is not paid and remains unpaid for the space of 3 months or if the tenant is guilty of any breach of the covenants, the Landlord after DUE NOTICE OF A PERIOD OF NOT LESS THAN SIX MONTHS may re-enter the whole or any part of the said premises in the name of the whole and thereupon the TERM hereby granted shall cease and determine without prejudice to the remedies of the landlord for any antecedent breach.

27. The plaintiffs accuse the 1st and the 2nd defendants for breaching the lease on two accounts. The first is on account of non-payment of rent as and when they fell due. The 2nd account is because the 1st and 2nd defendants assigned the lease to the 3rd defendant without the consent of the head lessor. That a declaration be made that the waiver of the consent obtained by the 2nd defendant was irregular, and fraudulently obtained by concealment of facts and as such null and void.

28. Was the rent paid by the 1st & 2nd defendants? I will not question payment of the rents by the 3rd defendant because in their defence filed and on the evidence of Gladys Koletit it was clear that they have not been paying rent for the suit premises from the time they took possession stating that they did not know who to pay to (contents of paragraph 31 of her witness statement as well as her evidence given under oath). On the part of the 1st & 2nd defendants, they filed documents at pages 10 – 12 which comprises invoice from the municipal council of Mombasa dated 20th December 2007. As at this date, the rates owing is given as **Kshs Six Hundred Fifty Three Thousand Three Hundred Thirty Eight Shillings and Forty Eight Cents (653,338.48)** covering the periods 1985 to 2008 all years inclusive. The 1st and 2nd defendants paid the outstanding rates on the same date of 20th December 2007 vide a cheque No 519322 and were issued with a receipt by the Municipal Council of Mombasa for the sum of **Kshs 714539** via receipt **No. 000035272**.

29. The 1st & 2nd defendants thus settled the rates due to the municipal authority over 10 years later contrary to the terms of the lease document. On rents due to the Landlord, Ms Naomi Asumani – the 1st and 2nd defendant's witness said she is the legal and company secretary of the 2nd defendant. That the 2nd defendant is the successor in title of the 1st defendant having changed its name due to changes in the shareholding of the 1st defendant. She produced as an exhibit her bundle of documents filed in Court on 22nd April 2016. This bundle only had the receipt for payment of rates (in arrears) and nothing concerning rents. In their statement of defence filed on 14th March 2015 at paragraph 15, they pleaded that the plaintiffs had no rights over the suit property that would result in the plaintiffs suffering loss and damage. In paragraph 20, they denied being in breach of the lease as they paid for the rents and rates for the period they were in occupation. Their own documents however showed they paid rates only during the time they were assigning the lease to the 3rd defendant. They have not shown the Court that the rents were paid on time or at all. The upshot of this is my finding that indeed there is a breach committed by the 1st, 2nd & 3rd defendants as they failed to pay rent in advance as was dictated by the lease and therefore the rights to terminate the lease accrued to the plaintiffs.

30. The defendants argued that the lease was not terminated as the notice period required under the lease document was not served. The 1st & 2nd defendants denied receiving any such notice. According to the lease document, it required the Landlord to serve a notice of not less than six months. By a letter dated 20th May 2010, Y. A. Ali advocate wrote to the 1st defendant informing them of the Landlord's intention to re-enter the premises immediately because of non-payment of rent for the period 1989 -2010. There was a rider in the letter thus

“Take note all arrears of ground rent are payable at our offices which rent shall be accepted on without prejudice.”

And in another letter dated 12th July 2010 drawn by Pandya & Talat which letter referred to a previous one dated 7.7.2010 (both are contained at pages 12 – 15 of the 3rd defendants documents), the advocates informed the tenant that they were in breach of the terms of the lease hence the Landlord had acquired the right to re-enter the suit premises.

31. Ms Ali's letters were acknowledged by the 3rd defendant who said it was forwarded to them by the 1st defendant. It is therefore not true if the 1st and 2nd defendants are denying being served with any notice by the plaintiffs. Vide their letter dated 8th July 2010, the 3rd defendant stated that they had paid outstanding rents for 2005, 2006 and 2007 to Pandya & Talati who they thought was the trustee of the lessor. The copy of the letter forwarding the rents to Pandya & Talati was not included by either of the defendants in their bundles of

documents filed in Court. The letters from Pandya & Talati mentioned in paragraph 30 have been produced by the 3rd defendant confirming receipt of the same. Secondly this Court did not understand why the 3rd defendant was the one stating that they had paid rents for the period 2005 – 2007 yet it is their evidence they took occupation in 2008. It again conflicts the 3rd defendant's position that they did not pay rent because they did not know who to pay the rent to yet they had Ms Y. A Ali's letter informing them of her authority to receive rent on behalf of the owners of the suit property.

32. Be that as it may, the notice served was not for the period provided in the lease and the Lessor did not re-enter the suit premises. Subsequently in 2012 onwards there ensued negotiations between the 1st plaintiff and the 3rd defendant for the purchase of the free hold interest of the suit property. These negotiations later collapsed and on 27th May 2015 the plaintiffs through their present advocates Ms Chepkowny & Associates issued fresh demands asking the 3rd defendant to vacate the suit property within 30 days of the date of receipt of the letter. The letter was stamped received on 28.5.2015 by the 3rd defendant. The demand letter accused the 3rd defendant of entering the suit property and remaining therein without the consent of the plaintiffs.

33. My comments on the case referred to by the 3rd defendant on the issue of re-entry is as hereunder. In the case of **Aroko vs Ngotho & Another (1991) eKLR**, the Court in holding No 2 said *thus "section 52 (2) of RLA makes it absolutely clear that the Landlord's acceptance of rent after the expiry of the notice to vacate should be taken as evidence of his consent to continued occupation by the tenant."* In this instance, there was no proof of rent paid from May 2010 when the 1st notice was issued to date. In holding No 4 stating that a landlord cannot peaceably re-enter the premises when the tenant is still in occupation unless he files an action within the meaning of section 56 (2) of the Registered Land Act (repealed). The plaintiffs herein have done so by the filing of this suit. This case thus supports the plaintiffs' case.

34. From the foregoing evidence, I come to the conclusion that indeed a notice to terminate the lease was served by the letter of 20th May 2010 & 12th July 2010 and the reason for the termination was given. The notice served in my view complied with the provisions of section 58 of the Registered Land Act Cap 300 (repealed) paraphrased by the 3rd defendant in page 5 of their submissions (currently the provision of section 75 of the Land Act). It is also my view that if the defendants were unhappy with the duration of the notice served not having complied with the time lines given under the lease then nothing stopped them from challenging that notice. Neither of them challenged that notice nor did they remedy their position by settling the due rents. Even in the 3rd defendant's counter-claim no reference is made about the validity of the notice. **My finding to the second issue is that the 1937 lease was indeed terminated as a result of breach on the part of the lessee and that breach is for non-payment of rent of which the Landlord duly notified them.**

35. The 3rd issue is whether the plaintiffs unreasonably withheld the consent to assign the lease. In its counter-claim, the 3rd defendant set out the reasons why he thought the consent was unreasonably withheld. At paragraph 41, the 3rd defendant pleaded that sometimes in 2012 or thereabouts the firm of Y. A Ali presented themselves as acting for the legal representatives of the estate of the late Mohamed Said Suleiman upon which the 3rd defendant sought for the delivery of the consent. That Ms Y. A Ali promised to deliver the executed consent by the proprietor/head lessor but none was delivered. The 3rd defendant also pleaded to holding several meetings with the 1st & 2nd Defendants as well as the 1st plaintiff with the aim of securing the consent. Since the 1st plaintiff did not have at the time certificate of confirmed grant. This resulted in their seeking waiver from the Land Registrar.

36. The 1st and 2nd defendant pleaded in paragraph 9 of their defence that they were required to obtain the consent prior to transferring the remainder of the term of the lease to the 3rd defendant. This is indeed true as per the terms I summarized in paragraph 26 of this judgment and the lease document produced. In paragraph 10, the 1st & 2nd defendants pleaded that they were not able to obtain this consent the heirs of Mohamed Said Suleiman Al Busaidy had not taken any steps to procure the appointment of legal representative.

37. The assignment was done towards the end of 2007. I presume this to be so since the 3rd defendant has stated they took possession and occupation in 2008. The consent was to be obtained prior to the assignment. The 1st and 2nd defendants has not shown this Court by way of correspondence or otherwise that prior to the assignment, they sought consent of the Landlord through the firm of Pandya & Talati then acting for the estate. The letter dated 7th February 2011 and 6.6.2012 by Pandya & Talati which they have put reliance on was written after the assignment. The 1st & 2nd defendants did not invite Ms Y. A Ali to come and corroborate their evidence that indeed there was any request made for obtaining of the consent prior to the assignment. In the circumstance of the evidence presented by the 1st & 2nd defendants, I find there was no request for consent made prior to the assignment that the plaintiffs would be blamed for unreasonably withholding or that proof was made that obtaining the consent would involve incurring of a lot of costs as envisaged in the Act.

38. Lastly on the issue of withholding consent, it is in evidence that the waiver was obtained on 20th September 2013. The letter dated 2nd February 2011 by the 3rd defendant at page 16 of their documents asked Ms Pandya & Talati for contacts of the legal representatives so that the 3rd defendant would contact them directly. Ms Pandya replied on 7.2.11 stating it would take years before anyone is appointed as the legal representative of the estate of Mohamed and it was impractical for Mrs Pandya to wait indefinitely before her plot was purchased stating that **"the market is rising."** The 3rd defendant also exhibited two letters dated 15.2.2012 and 19.3.2012 and several emails sent to Y. A Ali advocates during the year 2012 seeking if they could assist them obtain consent from the head lessor to transfer the lease (pages 19 – 34 of their documents). It appears Ms Y. A Ali did not respond to these letters since no reply is annexed by either the plaintiffs or the 3rd defendant. The 1st plaintiff in his evidence averred that no response was made to these letters and the emails because the lease had already terminated but this was not in writing.

39. The defendants stated that being unable to receive any response regarding the consent, they applied for waiver from the Land Registrar on 19th August 2013 under the provisions of section 54 (2) of the Land Registration Act. Going by the correspondences sent to Y. A Ali advocates and given the fact that the plaintiffs have admitted that Y. A Ali was their advocate, I do find the need for applying for waiver may have arisen in the circumstances of the case. I say so because even if the plaintiffs held the view that the lease had terminated, they ought to have communicated this to the 3rd defendant who was seeking the same. Their failure to respond to the correspondences sent out and not

denied to have been received amounts to withholding the information consent. However the waiver obtained is of no legal consequence as the same was obtained after the lease had expired and after the 1st & 2nd defendants parted with possession of the suit premises contrary to the terms of the lease. Secondly the 3rd defendant is the one who sent the various correspondences to plaintiffs' advocate upon which basis for apply for apply for the waiver would have arisen. Yet the 3rd defendant was not a party to the lease. Therefore the 1st & the 2nd defendants did not establish a background to be entitled to the waiver if at all.

40. The facts of the case of **Mnazi Moja Estates Ltd vs Ambalal Purshottan Mistry & 5 others (1986) eKLR** are quite distinguishable from the instant case. I say so because in the Mnazi case, the issue of whether the consent was unreasonably withheld was determined after hearing both parties. In the instant case, the defendants did not bring any suit against the owners of the suit land and therefore no Court finding was made over the same. Further in the judgement of **Gachuhi Ag JA** at page 8 highlighted by the 3rd defendant these were the words of the learned Judge, **"The tenant is bound to ask for the consent before he assigns even though it could not be properly refused, and to give the landlord a reasonable time in which to consider the matter. If through forgetfulness he omits to do so, he becomes liable to forfeiture."** (underline mine for emphasis). The 1st & 2nd defendants have not shown that they applied for the consent before the assignment in 2008. This made a ground for forfeiture as per this case law.

41. The decision of Angote J. in the case of **Mohamed Abdalla Shikely & 8 others vs Mohamed Abdalla Salim (2014) eKLR** at paragraph 27 stated that what trespass is as an unauthorized or unlawful entry upon the land. First it was a ruling made on an interlocutory stage not after parties have been heard such as this case. In the Mohamed case, the defendant was given consent to erect structures on the plaintiffs' land on condition of getting approvals of the local authority. The municipal council approved the defendants' structures. The Judge found that the initial entry on the suit property did not amount to trespass in view of the admission by the plaintiffs that it was by their father's consent. In the case before Court, the initial entry of the 3rd defendant was not with the consent of the plaintiff but that of the 1st & 2nd defendants. However that entry had to be upon obtaining of their consent which was not the case. The 3rd defendant reliance on this case does not aid them.

42. Is the 3rd defendant a trespasser on the suit premises? My answer is yes since no valid lease was transferred whether in 2007 or in 2015 when the transfer of lease was registered. The reasons for holding so are already explained in the body of the judgement. Are the plaintiffs entitled to the prayers sought in the plaint? **I am also satisfied that the plaintiffs have proved their case and are entitled to the prayers (a) – (g) of the plaint as against the defendants jointly & severally.** In terms of prayer (h) & (i) I find they are entitled to damages that **I do assess as mesne profits of the unpaid rent due for the period there has been default together with interest at Court rates from date of filing of this suit till payment in full. The period of default was not clearly proved so this Court shall adopt the base period to be from the year 1985 using the dates of the invoice from the municipal council (pgs 10-12 of 1st & 2nd Defendants documents) showing the years the rates were outstanding and which were subsequently paid by the 2nd defendant. The costs of the suit is also awarded to the plaintiffs.**

43. **In light of my finding in favour of the plaintiffs, I find no merit in the 3rd defendant's counter-claim and hereby dismiss it with no order as to costs. I make a further order that since the 3rd defendant is currently operating its business in the suit premises, I do give them 120 days to vacate. In default and after expiry of the 120 days, the plaintiffs are at liberty to evict them using lawful means.**

Dated, signed & delivered at Mombasa this 22nd March 2018

A. OMOLLO

JUDGE