



**Kisia (Suing as the legal representative ad litem of the Estate of James Titus Kisia) v Hamduni & 2 others (Environment & Land Case 218 of 2018) [2024] KEELC 291 (KLR) (31 January 2024) (Judgment)**

Neutral citation: [2024] KEELC 291 (KLR)

**REPUBLIC OF KENYA  
IN THE ENVIRONMENT AND LAND COURT AT MOMBASA  
ENVIRONMENT & LAND CASE 218 OF 2018  
NA MATHEKA, J  
JANUARY 31, 2024**

**BETWEEN**

**DONALD MUINDE KISIA ..... PLAINTIFF  
SUING AS THE LEGAL REPRESENTATIVE AD LITEM OF THE ESTATE OF  
JAMES TITUS KISIA**

**AND**

**HEMED SEIFU HAMDUNI ..... 1<sup>ST</sup> DEFENDANT  
ALI RASHID MBARUK ..... 2<sup>ND</sup> DEFENDANT  
DREAMLINE EXPRESS LIMITED ..... 3<sup>RD</sup> DEFENDANT**

**JUDGMENT**

1. The Plaintiff is the registered proprietor of all that property known as Plot Title Number Mombasa/Block/XVII/450 and the commercial building erected thereon. The Plaintiff avers that he has leased out portions of the suit property to various tenants and the Defendants herein are none of them. The Plaintiff further avers that the Defendants have been illegally occupying shops numbers 2, 3, and 4 situated at the ground floor of the suit premises, since the year 2016 or thereabouts. The Plaintiff avers that the Defendants occupation of the suit premises have been under very unclear circumstances and without any authority or consent of the Plaintiff. The Plaintiff avers that the Defendant's actions are unlawful and the same amount to trespass to property. The Plaintiff now seeks orders for vacant possession of shop numbers 2, 3, 4 and 5 situate on the ground floor of the suit premises. The Plaintiff prays for judgment against the Defendants jointly and severally for;

1. An order of vacant possession shop numbers 2, 3 and 4 situated on the ground floor of the commercial building erected on Plot Title No. Block/XV11/450.



2. Costs of this suit.
2. The Defendant states that the 1<sup>st</sup> and 2<sup>nd</sup> Defendants have never at any material time been in possession or use of the demised suit property. That the 3<sup>rd</sup> Defendant has at all material times been in open possession and use of the demised suit premises with the express and/or implied consent and acquiescence of the Plaintiff Deceased. That the Plaintiff Deceased let out spaces in the suit property to one Said Majid Said sometimes in the year 2010 and on the 22<sup>nd</sup> day of April, 2013 for the use as an office for the transport and related business that have been from the very inception of the tenancies been carried out therein by the 3<sup>rd</sup> Defendant. That the suit premises were let out to Said Majid Said by the Plaintiff with the full knowledge that he is a principal proxy for and/or silent shareholder of the 3<sup>rd</sup> Defendant. That the spaces let out to Said Majid Said in the suit property were 2 and the spaces have since through untoward and culpable actions of the Plaintiff Deceased been grossly altered to the grave prejudice of the 3<sup>rd</sup> Defendant.
3. This court has considered the evidence and submissions therein. PWI testified that the Plaintiff is the registered proprietor of all that property known as Plot Title Number Mombasa/Block/XVII/450 and the commercial building erected thereon (PEX1 is a certified copy of the title deed). The Plaintiff avers that he has leased out portions of the suit property to various tenants and the Defendants herein are none of them. The tenants included Said Majid Said and did not allow them to sublet. The Plaintiff further avers that the 1<sup>st</sup> and 2<sup>nd</sup> Defendants are the Directors of the 3<sup>rd</sup> Defendants and have been illegally occupied shops numbers 2, 3, and 4 situated at the ground floor of the suit premises, since the year 2016 or thereabouts. The Plaintiff avers that the Defendants occupation of the suit premises have been under very unclear circumstances and without any authority or consent of the Plaintiff and have not been paying rent.
4. DW1 the said Said Majid Said testified that he is a principal proxy for and/or silent shareholder of the 3<sup>rd</sup> Defendant. The matters relating to the Deceased's interference with and/or alteration of the let out demised spaces in the suit property form the substratum of the suit filed before the high Court of Kenya in Mombasa being HCC No. 149 of 2014 *Said Majid Said vs James Titus Kisia & Another*. That at all material times during the hearing and determination of the HCC No. 149 of 2014 *Said Majid Said vs James Titus Kisia & Another* it has been manifestly clear that the demised suit premises let out to Said Majid Said are under the possession and use of the 3<sup>rd</sup> Defendant. That the Plaintiff's Deceased's suit is a complete afterthought calculated to frustrate and delay the due and proper determination of the said HCC No. 149 of 2014 *Said Majid Said vs James Titus Kisia & Another* on its proper and full merits.
5. I have perused the further list of documents filed in court and dated 6<sup>th</sup> June 2023 and find copies of lease agreements relating to the suit premises dated 18<sup>th</sup> November 2010 and 22<sup>nd</sup> April 2013. Both are between James Titus Kisia and Said Majid Said. I see no evidence to connect these leases to the defendants. Counsels in this case were also counsels in HCC No. 149 of 2014 *Said Majid Said vs James Titus Kisia & Another* and yet very scanty details have been given of that matter and the status of the same. The proceedings have not been availed neither has the decision. DW1 states in cross examination that he has keys to three shops but was given 5 shops and not three by the court and so he wants five. That the shops are closed and he stopped paying rent. I find this is not only unfair but also unjust on the part of the plaintiff.
6. In the present case however, there was no proof that DW1 was acting as a director, shareholder or proxy for the 3<sup>rd</sup> defendant. It is my finding therefore that the clause 8 of the agreement clearly states that the lessee was not to sublet or part with possession of the leased premises. In the decision of the Court



of Appeal in *Chon Jeuk Suk Kim & another vs E. J. Austin & 2 others* Civil Appeal No. 265 of 2010 (2013) eKLR the court held;

“On the issue of the execution of the lease agreement, there is no dispute that it was executed by the appellants on one part and Austin & Partners. There is a rubber stamp of Austin & Partners Ltd and one signature. The plaint was amended to indicate that Austin & Partners Ltd acted as an agent of the respondents. The law of course allows an agent to execute a binding contract for the principal. However the 1st respondent other than saying that he is a Managing Director of Austin & Partners Ltd and that the 2nd respondent was his wife did not give evidence relating to the agency. He did not even refer to the document or identify the person who signed it. Further he did not disclose directors of the company or the person or persons authorized to sign documents on behalf of the company. No certificate of incorporation was produced in the absence of any concrete evidence agency and due execution by agent was not proved on balance of probabilities.

The learned Judge did not consider this issue which arose from the pleadings in the absence of evidence for valid execution of the document and prove of agency the document is not enforceable as a contract either by the respondents or by the company. [Emphasis added]

7. Be that as it may, Section 3 (1) of the *Trespass Act*, Cap 294 provides that;

“Any person who without reasonable excuse enters, is or remains upon or erects any structure on, or cultivates or tills or grazes stock or permits stock to be on, private land without the consent of the occupier thereof shall be guilty of an offence.”

8. Thus, trespass is an intrusion by a person into the land of another who is in possession and ownership. I find that the defendants are trespassers on the suit premises. The lease agreements produced before me were entered into with DW1 and in any case have since expired. I find no relationship between the plaintiff and the defendants. DW1 confirms that the 3<sup>rd</sup> Defendant is in occupation and he is the proxy and/or silent shareholder. This has not been established in this court. I find that the plaintiff has proved his case on a balance of probabilities and I grant the following orders;

1. An order of vacant possession shop numbers 2, 3 and 4 situated on the ground floor of the commercial building erected on Plot Title No. Block/XV11/450.
2. Costs of this suit to the plaintiff

9. It is so ordered.

**DELIVERED, DATED AND SIGNED AT MOMBASA THIS 31<sup>ST</sup> DAY OF JANUARY 2024.**

**N.A. MATHEKA**

**JUDGE**

