



REPUBLIC OF KENYA

IN THE ENVIRONMENT AND LAND COURT AT THIKA

ELC CASE NO.181 OF 2018

(FORMERLY NAIROBI ELC 438 OF 2014)

L. P. HOLDINGS LIMITED.....1ST PLAINTIFF/APPLICANT

FEDHA (MANAGEMENT) LIMITED.....2ND PLAINTIFF/APPLICANT

-VERSUS-

ISAAC NGIGE NJOROGE.....DEFENDANT/RESPONDENT

JUDGEMENT

By a *Plaint* dated 9th April 2014, the Plaintiffs herein sought for the following orders against the Defendant:-

- i. A declaration and order that the Lease to the Defendant by the 1st Plaintiff of Apartment No.506 of the Dhanjay Apartments erected on LR.No.330/797 has been forfeited.*
- ii. An order of eviction of the Defendant from Apartment No.506 of the Dhanjay Apartments erected on LR.No.330/ 797 being the suit premises herein and delivery of vacant possession of the suit premises to the Plaintiffs.*
- iii. Special damages of Kshs.1,833,588/55 as particularized at paragraph 14, together with further interest on the sums set out in paragraph 14 for outstanding Land Rent, Service Charge, electricity and Water Bill (totalling Kshs.1,072,167/75) at the rate of interest set out in paragraph 10 as from 31st August 2013.*
- iv. Any further outstanding sum on account of Land Rent, Service Charge, Electricity and Water Bill and interest thereon at the rate set out in paragraph 10 as from 31st August 2013.*
- v. Mesne profits that have accrued from the date of expiry of the notice stated in paragraph 13 until possession of the apartment is delivered up to the Plaintiffs at the rate of Kshs.50,000/= per month, together with interest thereof at court rates.*
- vi. Costs of the suit.*

In the *Plaint*, the Plaintiffs alleged that the apartments and/or buildings in issue are known as *Dhanjay Apartments* erected on **LR.No.330/797**, and which were formerly owned by *Akiba Loans & Finance Ltd*. They also alleged that the 2nd Plaintiff is the Manager of the said apartments as defined in Clause E of the Lease referred to and described in the pleadings.

It was also averred that by a conveyance dated 13th December 1994, *Akiba Loans & Finances Ltd* conveyed the suit property together with the buildings and improvements erected thereon to *Tala Investments Ltd* which later changed to *L.P Holdings Ltd*. Further, that by a *Lease* dated 7th September 1993, as read together with the indenture dated 10th August 2002, the 1st Plaintiff leased to the Defendant an apartment known as *Apartment No.506 of Dhanjay Apartments* erected on **LR.No.330/797 Nairobi** for the residue of the unexpired term of 99 years from 1st November 1992, subject to annual rent, covenant and conditions contained in the lease.

It was also stated that the fair *letting value* of the apartment is **Kshs.50,000/=per month**. It was the Plaintiffs' further allegations that by virtue of **Clause 5 of the Lease**, the Defendant covenanted with the 1st Plaintiff as *Lessor* and the 2nd Plaintiff as *Manager* to pay all charges and outgoings including but not limited to land, rent, rates, taxes, management fees and utility charges on the days and in the manner set out in the Lease.

That the Defendant has severally during the currency of the Lease fell into arrears on account of **land rent, service charge, utilities and**

other outgoings but despite several *Notices* and or *reminders* and *correspondences*, the Defendant has failed, refused and/or neglected to settle the same. The Plaintiffs alleged that as at **31st August 2013**, the *outstanding amount* was **Kshs.1,833,588/55**. It was also alleged that **Clause No.8** of the said Lease provides for forfeiture of the lease and re-entry into the apartment by the Lessor or Manager where the charges or any of them or any part thereof remains unpaid for **28 days** after becoming due, whether formally demanded or not. Therefore in pursuant to **Clause 8** of the *Lease*, it is fair and just that the Lease be forfeited and the 1st Plaintiff as a Lessor re-enter the apartment.

Further that despite *Demand* and *Notice of intention to sue* having been given to the Defendant, he has *refused, ignored and or neglected to vacate* the said apartment or pay up the outstanding amount with interest. The Plaintiffs urged the Court to allow their claim.

Despite having been served with *Summons to enter Appearance* and file *Defence* as per the *Affidavit of Service* of **Elijah K. Chepkwony**, the *Process Server*, the Defendant failed to enter appearance nor file *Defence* and *interlocutory Judgement* was entered against him on **13th August 2014**. Thereafter the matter proceeded for formal proof on **23rd September 2015**.

Plaintiff's Case

PW1 – Abraham Muriuki Munene, the Director of the 1st Plaintiff and 2nd Plaintiff gave evidence and adopted fully his *witness statement* that was dated **9th April 2014**. He also produced the list of documents as exhibits in court.

He reiterated the contents of the *Plaint* and testified that the Defendant entered into a *Lease* with 1st Plaintiff in respect of **Dhanjay Apartments, off Gitanga Road, Nairobi** being **Apartment No.506 on LR.No.330/797**. He further reiterated that the Defendant was supposed to pay all the outgoings, for services provided to the apartment such as security, electricity and general maintenance of the property. The said lease was entered on **7th September 1993**, between **Akiba Loans & Finances Ltd.** who later sold the property to **Tala Investments Ltd** and later **Tala Investments Ltd** *changed* its name to **L.P Holdings**, the 1st Plaintiff herein. The 2nd Plaintiff was the *manager* of the apartments.

He testified that the Defendant has not been paying for the outgoings despite occupying **Apartment No.506**. He further testified that the Defendant owes the Plaintiffs the amount as stated in the *Plaint* and the said calculation was at **31st August 2013**. Despite sending *Statutory Notice* to the Defendant, he failed to honour the same and thus this suit. He also testified that the arrears attracted interest under **Clause 5 of the Lease**. He urged the Court to admit the schedule of the calculated arrears as hearing evidence in court. It was also his evidence that the Defendant is still in the apartment although the Plaintiffs have disconnected the water and electricity but still the Defendant has refused to pay the arrears. He urged the Court to allow their claim.

After the close of *viva voce* evidence, the Court directed the Plaintiff to file *written submissions* within a period of **30 days** and matter was to be mentioned on **17th November 2015** for a *Judgement* date. However, this matter was later mentioned before me on **13th October 2016**, when **M/S Metto** holding brief for **Mr. Mwaniki** for the Plaintiff informed the court that the submissions were not ready. The Court set another mention date for **1st December 2016** to fix a *Judgement* date. However that was the last I saw of this file until **19th June 2018**, when it was placed before me a year after my transfer from **Milimani ELC** and thus the delay in writing this Judgement.

Though the matter is not opposed, the Plaintiffs are the ones who have alleged and they had a duty to call sufficient evidence and prove their case on the required standard of balance of probabilities. See **Section 107 & 109** of the *Evidence Act* which states:-

(107) (1)“Whoever desires any court to give judgment as to any legal right or liability dependent on the existence of facts which he asserts must prove that those facts exist”.

(2) When a person is bound to prove the existence of any fact it is said that the burden of proof lies on that person.

109. The burden of proof as to any particular fact lies on the person who wishes the court to believe in its existence, unless it is provided by any law that the proof of that fact shall lie on any particular person.

From the available evidence, it is not in doubt that indeed the suit property was initially owned by **Akiba Loans & Finances Ltd** as is evident from the *conveyance* dated **15th December 1994**. It is also not in doubt that through the said *conveyance*, **Akiba Loans & Finances Ltd** conveyed the property **LR.No.330/797** to **Tala Investments Ltd** for a sum of **Kshs.3,800,000/=**. It is also not in doubt that prior to the conveyance of the property to **Tala Investments Ltd**, **Akiba Loans & Finances Ltd** had entered into a *Lease Agreement* with **Fedha Management Ltd**, the 2nd Plaintiff herein and the said **Fedha Management** was to manage the apartments known as **Dhanjay Apartments** which were erected on the property owned by **Akiba Loans & Finances Ltd**.

Further, it is not in doubt that after **Akiba Loans & Finances Ltd** conveyed the property to **Tala Investments Ltd**, the said **Tala Investments Ltd** changed its name to **L.P. Holdings Ltd.** as is evident from the *Certificate of change of name* issued on **6th October 2003**.

Further from the *Lease* dated **7th September 1993**, **Apartment No.506** was leased to **Henry Chasia** as the owner and as the owner, **Henry Chasia** had obligations as stipulated in **Clause No.5** to *pay charges, outgoings and service charges among other obligations*.

However, it is apparent that vide an *indenture* made on **10th August 2004**, the said **Henry Chasia** the owner or Vendor of **Apartment No.506** sold the same to **Isaac Ngugi Njoroge**, the Defendant herein. Therefore **Isaac Ngugi Njoroge** took over all the obligations that were being undertaken by **Henry Chasia**.

The Plaintiffs have alleged that after the said purchase, the Defendant refused to abide by the obligations contained in the Lease and has

refused to pay for *electricity, service charge* and *other outgoings*. That despite *Demand* and *Notice of Intention to Sue*, the Defendant has failed to honour his obligations.

The Defendant did not file his Defence and so the Plaintiffs' evidence is not controverted. *Clause 8:1.2* of the *Lease* dated *7th September 1993* stated that in case of breach by the owner of any covenant or other terms of this Lease, the Company or the Manager may re-enter the Apartment at any time and the term will absolutely cease.

Thereafter the Company shall forfeit and repossess the Apartment and grant a fresh Lease. This is as per *Clause No.8:1.3*. The Defendant did not enter appearance nor file his Defence to controvert or challenge the Plaintiff's evidence. This Court will find no reasons to doubt the Plaintiff's evidence.

Having now carefully considered the available evidence, the Court finds that the *Plaintiffs have proved their case on the required standard of balance of Probabilities*. *Consequently, the Court enters Judgement for the Plaintiffs against the Defendant herein in terms of:-*

i. A declaration and order that the Lease to the Defendant by the 1st Plaintiff of Apartment No.506 of the Dhanjay Apartments erected on LR.No.330/797 has been forfeited.

ii. An order of eviction of the Defendant from Apartment No.506 of the Dhanjay Apartments erected on LR.No.330/ 797 being the suit premises herein and delivery of vacant possession of the suit premises to the Plaintiffs.

iii. Special damages of Kshs.1,833,588/55 as particularized at paragraph 14, together with further interest on the sums set out in paragraph 14 for outstanding Land Rent, Service Charge, electricity and Water Bill (totaling Kshs.1,072,167/75) at the rate of interest set out in paragraph 10 as from 31st August 2013.

iv. Any further outstanding sum on account of Land Rent, Service Charge, Electricity and Water Bill and interest at the rate set out in paragraph 10 above as from 31st August 2013 to the date of vacation.

v. Mesne profits that have accrued from the date of expiry of the notice stated in paragraph 13 until possession of the apartment is delivered up to the Plaintiffs at the rate of Kshs.50,000/= per month, together with interest thereof at court rates.

vi. Costs of the suit.

It is so ordered.

Dated, Signed and Delivered at Thika this 28th day of September 2018.

L. GACHERU

JUDGE

28/9/2018

In the presence of

Mr. Waweru holding brief for Mr. Gichagi for Plaintiffs

No appearance for Defendant

Lucy - Court clerk

L. GACHERU

JUDGE

Court – Judgement read in open court in the presence of the above stated advocate and absence of the Defendant.

L. GACHERU

JUDGE

28/9/2018