



REPUBLIC OF KENYA

IN THE ENVIRONMENT AND LAND COURT AT NAIROBI

ELC CASE NO 140 OF 2003

VINODEEP INVESTMENTS PROPERTY LTD.....PLAINTIFF

=VERSUS=

HENKEL POLYMER COMPANY LIMITED.....1ST DEFENDANT

RUTH N. HENKEL.....2ND DEFENDANT

CAROLINE V. HENKEL.....3RD DEFENDANT

JUDGMENT

Background

1. Through a plaint dated 14/2/2018, the plaintiff, Vinodeep Investments Property Limited, brought this suit against the three defendants, Henkel Polymer Company Limited, Ruth N Henkel and Caroline V Henkel, praying for the following:-

- a) The sum of kshs 2,685,874.20 being the amount of rent in arrears and other charges.*
- b) Damages and mesne profits*
- c) Interest on (a), (b) and (c) at 18% p.a from 1/10/02 until payment in full.*
- d) Costs of this suit*
- e) Interest on (c) above at court rates; and*
- f) Any such other or further relief as this honourable court may deem fit and just to grant*

2. The plaintiff's case is that at all material times, it was the registered proprietor of Land Reference Number 37/88 on which stood a building known as Vinodeep Towers. The property is located on Baricho Road. Pursuant to a lease dated 4/12/1977, it leased to the 1st defendant space on the 2nd floor of the said building (**the suit premises**) for a period of five (5) years and six (6) months from 1/7/1996 to 31/12/2001. By a guarantee dated 4/12/1997, the second and third defendants jointly and severally guaranteed the payment of all dues under the lease and all loses, damages, expenses and costs suffered by the plaintiff pursuant to the lease. During the subsistence of the lease, the first defendant fixed tiles and mazer stones on the floor of the suit premises. At the end of the term, the 1st defendant had fallen into rent arrears of Kshs 1,096,399.90 as at 31/12/2001. The 1st defendant failed to give vacant possession of the suit premises on 31/12/2001 and continued to occupy the premises while relaying the floor. It handed over the premises on 26/4/2012 and gave a written undertaking that in the event the relayed floor cracked it would be responsible for its repairs. On 20/5/2002 the floor began to crack and despite repeated requests, the first defendant failed to repair the floor, thereby forcing the plaintiff to undertake the repair works which it completed on 30/9/2002. Further, the first defendant failed to pay electricity bills amounting to Kshs 14,162.05.

3. Consequently, the plaintiff claims against the defendants the sum of Kshs 2,685,874.20 particularized as follows:

- a) Rent arrears as at 31/12/01 = Kshs 1,096,399.90*
- b) Rent/mesne profits from 01/01/02 to 30/09/02 (when repairs were completed)*

<i>and premises rendered fit for use)</i>	Ksh 2,090,592.00
c) Electricity Bills	Kshs 14,162.05
d) Architect Fees	Kshs 7,080.00
e) Cost of Repairs	Kshs 263,376.00
f) Interest at 18% from 1/09/01 to 30/09/02	Kshs 310,663.65
Total outstanding	Kshs 3,782,273.60
Less sum paid	Kshs 956,399.40
Less deposit paid	Kshs 140,000.00
Total due	<u>Kshs 2,685,874.20</u>

4. The defendants contest the plaintiff's claim through a joint statement of defence dated 14/4/2003 and filed on 15/4/2003. They concede that indeed the material lease was entered into but contest the plaintiff's *locus standi*.

They deny the lessee's obligations as itemized by the plaintiff. They further deny the existence of a guarantee, fixing of tiles and mazera stones on the floor and default in rent payment.

5. In the alternative, the first defendant contends that it entered into negotiations with the plaintiff for an agreement on the take up of the improvements put up by the 1st defendant but the said negotiations were cancelled abruptly without recourse to the first defendant, thereby causing the 1st defendant to remove the said improvements. The 1st defendant contends that the delay in removing the said improvements was occasioned by the plaintiff.

6. Further, in the alternative, the 1st defendant contends that they handed over the keys on 24/4/2002 and that they returned the premises to its original condition. It adds that the rent payable was duly remitted on or about 31/12/2001 but was rejected by the plaintiff. Lastly, the 1st defendant contends that it engaged M/s Renovators (K) Limited to carry remedial works on the suit premises prior to the expiry of the lease and the works were executed to the satisfaction of the plaintiff and the 1st defendant.

Plaintiff's Evidence

7. The plaintiff called two witnesses. PW1 – Ramji Hirani testified that he was an architect and the plaintiff was his client. In the year 2002 he was engaged by the plaintiff to carry out inspection on the works done on the suit premises by M/s Renovators (K) Limited. He observed various defects and advised on remedial measures contained in a report dated 4/3/2002 which he produced as an exhibit. He further testified that he was invited again in August 2002 to re-inspect the premises and he once more prepared a report dated 10/5/200. He similarly produced his report. He noted in the report dated 10/8/2002 that the workmanship was shoddy and recommended that an experienced builder or contractor be engaged to carry out the repair works.

8. PW 2- Vimal Vinodrai Radia testified that he was a director of Vinodeep Investment Properties Limited. He stated that the 1st defendant was a tenant of the plaintiff and the 2nd and 3rd defendants executed personal guarantees in favour of the plaintiff. He added that soon after taking the suit premises, the 1st defendant did modifications to the suit premises. At the expiry of the lease, the 1st defendant offered to sell its improvements to the plaintiff at Kshs 2,000,000 but the plaintiff declined and requested the 1st defendant to remove its fittings and restore the premises to the same condition in which it was at the commencement of the lease. He stated that the suit premises had been turned into a garden and fish pond and had stones and artificial grass. He further stated that the 1st defendant did not hand over the premises until 26/4/2002 when the keys were handed over without an invitation for a joint inspection. After delivery of the keys, the plaintiff engaged an architect who prepared a report. Subsequently, the plaintiff engaged M/s Samani Construction to do remedial repair works to the premises. The contractor handed the premises to the plaintiff at the end of September 2002.

9. PW 2 testified that from 31/12/2001 when the lease expired to 30/9/2002 when the premises were handed over after the remedial works, the plaintiff had lost out on rent. He further stated that when the 1st defendant left the premises, there were unsettled electricity bills. Lastly, he testified that the plaintiff's claim of Ksh Kshs 2,685,874.20 was detailed in Exhibit No. 12(a) which is a letter dated 20/11/2002 from M/s Ramesh Manek Advocate. The witnesses who testified on behalf of the plaintiff produced Exhibits 1 to 13(a).

Evidence by the Defendants

10. The defendants led evidence by one witness, Caroline V Henkel – DW 1. She testified that she was a director of the 1st defendant and a co-guarantor in respect of the lease. She confirmed that the 1st defendant was a tenant of the plaintiff. Upon commencement of the lease, the 1st defendant undertook refurbishment of the premises to enable it effectively meet its business objectives. The parties were unable to agree on a renewal of the lease and the plaintiff was disinterested in the 1st defendant's fittings. The 1st defendant engaged M/s Renovators (Kenya) Limited who carried out repair works to the 1st defendant's satisfaction. Further, the 1st defendant forwarded rent arrears of Ksh 856,399.40 but the plaintiff declined to accept the money insisting on rent for the period from 1st January 2002 to September 2002.

11. DW 1 testified that although the lease required the 1st defendant to restore the premises to the condition it was in before occupation, that

obligation does not require the 1st defendant to make old premises new. She contended that the 1st defendant made all necessary repairs to the premises prior to handing over the premises. Further, she stated that the keys were handed over to the plaintiff's advocate, Ramesh Manek on or about 25/4/2002. Lastly, she stated that at the time of handover the premises were in a tenable state.

Plaintiff's Submissions

12. Kelvin Mogeni, counsel for the plaintiff, filed written submissions dated 27/2/2017. He submitted that although the lease was executed between Ms Haven Court Limited and the 1st defendant, there was an Indenture of Assignment registered on 4/2/1998 in favour of the plaintiff, hence the plaintiff became a successor in title and a lessor. Counsel further submitted that the lease stipulated how the rent was to be paid. He added that the lease required the 1st defendant to keep the exterior and interior of the demised premises in clean, good and tenable repair and at the expiry of the term yield up the premises to the plaintiff in such state of repair, order and condition as the same was at the commencement of the term of the lease. Counsel argued that at the expiry of the term, the 1st defendant was in rent arrears of Kshs 1,096,399.90 as at 31/12/2001.

13. Secondly, counsel submitted that at the commencement of the lease, the 1st defendant sought permission to make changes to the premises to give the premises a garden look. On expiry of the lease, the 1st defendant failed to give vacant possession. Secondly, it failed to restore the premises to the state in which the premises were at the commencement of the lease. When the 1st defendant purported to do restorative works, the workmanship was shoddy and poor.

14. Counsel further submitted that clause 5 (8) of the lease obligated the 1st defendant to pay interest at bank rates on any unpaid monies. He added that clause 3(3) required the 1st defendant to pay water and electricity consumed on the demised premises.

15. Lastly, counsel submitted that owing to the 1st defendant's breach, the plaintiff had suffered the loss particularized in the plaint, which included renovating the premises to put it in a tenable state, payment to the architect, loss of rental income for the period from 1/1/2002 to 30/9/2002 and payment to utility service provider. He urged the court to grant the prayers sought in the plaint.

Submissions by the Defendants

16. Mr Deya, counsel for the defendants, submitted that indeed the 1st defendant was a tenant of the plaintiff. He further submitted that indeed the 2nd and 3rd defendants were guarantors but their guarantee was limited to rent and the due performance of the covenants and conditions under the lease. Counsel added that the 1st defendant was under no obligation to pay rent for the period 1/1/2002 to 30/9/2002. He argued that the rent which was outstanding as at 31/12/2001 was paid to the plaintiff hence the 1st defendant had fully discharged its obligations.

17. Secondly, counsel submitted that it is a general principle of law that there shall be implied in every lease a covenant binding the lessee to yield up the demised premises in the same condition as they were at the beginning of the lease except that the lessee shall not be bound to repair damage or restore the premises if the damage or deterioration of the condition is caused by reasonable wear and tear. Counsel contended that the 1st defendant duly made repairs to the demised premises. Mr Deya further submitted that the 1st defendant vacated the suit premises in December 2001.

18. Relying on **Rajan Shah & Partners v Bipic P. Shah (2016) eKLR**, counsel submitted that the claim for *mesne* profits is baseless because the 1st defendant ceased to be in occupation and possession of the suit premises on 31 December 2001. He contended that the 1st defendant was not a trespasser. On the claim for damages, counsel submitted that the 1st defendant made efforts to hand over the premises to no avail.

Determination

19. I have considered the parties' respective pleadings, evidence and submissions. I have also considered the tenor and import of the relevant clauses of the material lease. Similarly, I have considered the relevant legal framework applicable at the time the cause of action arose and the applicable guiding jurisprudential principles. A lot of what the defendants raised through their defence as triable issues have, upon testimony, become common grounds.

20. There is common ground that the lease dated 4/12/1997 though executed by the plaintiff's predecessor in title, M/s Haven Court Limited, duly bound the plaintiff and the 1st defendant herein. Secondly, there is common ground that the instrument of guarantee dated 4/12/1997 bound the 2nd and 3rd defendants. It is however contended by the defendants that the obligations of the guarantors under the said guarantee was limited to the payment of rent and discharge of the lessee's obligations and covenants under the lease. Consequently, three broad issues fall for determination in this suit. The first issue is whether the 1st defendant breached the terms of the material lease relating to payment of rent, restoration of the demised premises to its state as at the time of commencement of the lease, delivery of vacant possession upon expiry of the lease and payment of utility bills in respect of the demised premises. The second broad issue is whether, if there was any breach on part of the 1st defendant, the 2nd and 3rd defendants are liable for the breach. The third issue relates to the appropriate relief, in the event of proof of liability, against any of the defendants.

21. Under clause 2(5) (e) of the lease, the monthly rent payable for the remainder of the term after the fourth year of the lease was Kshs 232,288. Under clause 2(5), the said rent was payable quarterly in advance free of any deductions whatsoever. It was the plaintiff's contention that at the end of the term of the lease, the 1st defendant was in rent arrears of relating to the period 9/9/2001 to 31/12/2002. The defendant contested this contention. However, a scrutiny of the defendant's exhibits confirms that indeed the arrears were there. In a letter dated 8/2/2002 by H. R.W Henkel to the Management of Vinodeep Towers, the 1st defendant wrote thus:

RE: SECOND FLOOR OVERDUE RENT FROM SEPTEMBER – DECEMBER 2001

Attached please find the final settlement of four months' rent to the end of the lease as at 31st December 2001. Also attached is the handing over official letter to be duly signed an acceptance of the final settlement.

Yours faithfully

HRW Henkel (MR)

EXECUTIVE CHAIRMAN

22. The above letter is one among other documents which confirm that the 1st defendant has not been candid in its response to the plaintiff's allegation that it failed to pay rent for the last four months of the term. The above rent was to be paid at the beginning of the last quarter. This letter is evidence that the rent was not paid in advance and therefore the 1st defendant was in breach of clause 2(5) which required it to pay rent quarterly in advance.

23. The 1st defendant admits that they changed the character of the demised premises to meet their business needs. Among the features they created were a garden, fish ponds, mazera stone floor and artificial grass. At the end of the lease, the 1st defendant hoped to sell off these fixtures to the plaintiff or to the subsequent tenant. The plaintiff was disinterested and there was no tenant ready to take them. From the 3rd defendant's evidence, the keys to the demised premises were handed over on 26/4/2001. The plaintiff contends that the restorative works were shoddy and poorly executed and it had to engage another contractor to redo the works. Clause 3(5) of the lease required the 1st defendant to restore the demised premises to the same condition as at the commencement of the lease. The restorative obligation was to be discharged within the subsistence of the lease. From the 3rd defendant's evidence, the 1st defendant was not able to discharge that obligation within the period of subsistence of the lease.

24. Likewise, delivery of vacant possession was supposed to have happened on the last day of the term which was 31/12/2001. This did not happen. From the 3rd defendant's evidence, the keys to the premises were handed over to the plaintiff's advocate on 26/4/2001.

25. The plaintiff led evidence to the effect that the 1st defendant left behind unpaid utility bills amounting to Kshs 14,162.05. This evidence was not controverted in any way. Failure to pay utility bills was a breach of clause 3(3) of the lease.

26. The totality of the above analysis is that there is proof on a balance of probability that the 1st defendant breached the lease in the manner outlined above.

27. The second broad issue relates to the liability of the 2nd and 3rd defendants as guarantors of the 1st defendant. Clauses 1 and 2 of the guarantee provided as follows:

1. In consideration of the Company having granted to Henkel Poymere Company Limited (herein called HPCL) lease dated 1996 for a term of 5 years and 6 months from 1.7.1996 of ALL THAT area of floor space on the second floor of the building situated on Land Reference number 37/88 (Original Number 37/2/23) Nairobi and more particularly described in the said lease at the joint and several requests of the Guarantors made to the Company the Guarantor hereby JOINTLY AND SEVERALLY guarantee to the Company the payment by HPCL of the rent reserved and all sum payable by HPCL UNDER THE SAID Lease and the due performance and observance by HPCL of all the provisions and conditions of the said lease and in the event of any default by the HPCL, the Guarantors hereby JOINTLY AND SEVERALLY COVENANT AND AGREE with the Company to pay the said rent and any sum becoming due to the Company from HPLC under the said lease and all losses damages expenses and costs suffered by the Company as a result of non-payment or breach or non-performance of non-observance by HPCL of any of the provisions and condition of the said lease.

2. The guarantee aforesaid shall not be discharged by the death or bankruptcy of the Guarantors or any other nor by any time or indulgence granted by the Company to the HPCL.

28. A reading of the guarantee reveals that the 2nd and 3rd defendants jointly and severally guaranteed the payment of rent and the due performance and observance by the lessee of all the provisions and conditions of the lease. Payment of rent, restoration of the demised premises to their original state, delivery of vacant possession and payment of utility bills formed part and parcel of the provisions and conditions of the lease and were therefore guaranteed by the 2nd and 3rd defendants. Consequently, my finding on this issue is that the 2nd and 3rd defendants are liable as guarantors in respect of the breaches outlined in the preceding paragraphs.

29. I now turn to the question relating to the appropriate relief available in the circumstances. The plaintiff particularized its claim as follows:

a) Rent arrears as at 31/12/01 = Kshs 1,096,399.90

b) Rent/mesne profits from 01/01/02 to

30/09/02 (when repairs were completed

and premises rendered fit for use) Ksh 2,090,592.00

c) Electricity Bills Kshs 14,162.05

d) Architect Fees Kshs 7,080.00

<i>e) Cost of Repairs</i>	<i>Kshs 263,376.00</i>
<i>f) Interest at 18% from 1/09/01 to 30/09/02 Kshs</i>	<i>310,663.65</i>
Total outstanding	Kshs 3,782,273.60
Less paid	Kshs 956,399.40
Deposit paid	Kshs 140,000.00
Total due	<u>Kshs 2,685,874.20</u>

30. The defendants contest the claim for rent/*mesne* profits for the period 01/1/2012 to 30/9/2002 on the ground that they were not in occupation of the suit premises. I do not agree with the defendants on that stand because it was the duty of the 1st defendant to restore the suit premises to their original state and hand over the premises on 31/12/2001. They did not restore the premises and they did not hand over the premises on 31/12/2001. Eventually, they handed over the keys on 26/4/2002. Their restorative works were confirmed to be shoddy and poorly executed. The premises were eventually restored by a contractor engaged by the plaintiff and handed over to the plaintiff at the end of September 2002. The only evidence presented to the court in relation to the restorative works is that of PW1. That evidence is uncontroverted and it confirms that proper restorative works were eventually executed by a contractor engaged by the plaintiff.

31. Consequently, it is my finding that the defendants are liable to pay the plaintiff the equivalent of rent for the period 1/1/2002 to 30/9/2002. They are also liable to pay items (c), (d) and (e). There is however no basis for the interest rate of 18%. Clause 5(8) of the lease provided for interest at bank rates but did not specify the bank whose rate was to be applied. No evidence was led to justify the interest rate of 18%. In the absence of a contractual basis, the 18% interest will not be awarded. Interest will however be awarded at court rate from the date of filing suit.

Disposal Orders

32. In light of the foregoing, Judgment is hereby entered in favour of the plaintiff against the defendants jointly and severally in the following terms:

<i>a) Rent areas as at 31/12/2001</i>	<i>Kshs 1,096,399.90</i>	
<i>b) Equivalent of rent for the period</i>		
<i>1/1/2001 to 30/9/2002</i>	<i>Kshs 2,090,592.00</i>	
<i>c) Utility Bills</i>	<i>Kshs 14,162.05</i>	
<i>d) Architect Fees</i>	<i>Kshs 7,080.00</i>	
<i>e) Costs of Repairs</i>	<i>Kshs <u>263,376.00</u></i>	
		3,471,609.90
<i>Less deposit paid</i>	<i>Kshs 140,000.00</i>	
<i>Less sum paid</i>	<i>Kshs 956,399.40</i>	
<i>Net Award</i>	<i><u>Ksh 2,375,210.50</u></i>	

f) Interest on the net award from the date of filing suit.

g) Costs of the suit

33. Consequently, in summary final judgment is entered in favour of the plaintiff against the defendants jointly and severally for:

- Kshs 2,375,210.50*
- Interest on (a) above from date of filing suit*
- Costs of the suit.*

DATED, SIGNED AND DELIVERED AT NAIROBI ON THIS 9TH DAY OF OCTOBER 2018.

B M EBOSO

JUDGE

In the presence of:-

.....Advocate for the plaintiff

.....Advocate for the defendant

June Nafula - Court Clerk