



**REPUBLIC OF KENYA**  
**IN THE ENVIRONMENT AND LAND COURT AT NAIROBI**  
**ELC CASE NO. 272 OF 2014**  
**NATIONAL HOUSING CORPORATION..... PLAINTIFF**  
**VERSUS**  
**DEBORA ONGOLE.....DEFENDANT**

**JUDGMENT**

The plaintiff brought this suit by way of a plaint dated 10<sup>th</sup> December 2010. The plaintiff averred that it is the registered owner of a leasehold interest from the Government of Kenya in all that parcel of land known as LR No. 25980 which has several flats. House No. MF 45J (herein after referred to as “the suit property”) forms part of the said flats. The plaintiff averred that the suit property was leased to the defendant at a monthly rent of Kshs 9,870/-. The plaintiff averred that sometimes in the year 2005, the plaintiff offered the suit property for sale to the defendant at a purchase price of Kshs 2,100,000/-. The plaintiff averred that the defendant declined to accept the offer but continued to occupy the suit property as a mere licensee with no proprietary interest whatsoever therein. The plaintiff averred that although the defendant had refused to accept the plaintiff’s offer to purchase the suit property and continued to occupy the same, the defendant had failed to pay rent as and when the same fell due with the result that the defendant was in rent arrears to the tune of Kshs.383,000/- as at June 2010. The plaintiff sought the following reliefs against the defendant:

1. Vacant possession of the suit property or in the alternative, an order for eviction of the defendant from the suit property at the defendant’s costs.
2. Mesne profits of Kshs 9,780/- per month from July 2010 till payment in full.
3. Rent arrears of Kshs 383,453/- as at 21<sup>st</sup> June 2010.
4. Interest on mesne profits and rent arrears at court rates from the date of filing suit until payment in full.
5. Costs of the suit plus interest at court rates.

The defendant failed to enter appearance and pursuant to a request for judgment dated 7<sup>th</sup> September 2011, interlocutory judgment was entered in favour of the plaintiff against the defendant on 16<sup>th</sup> September 2011. The suit was thereafter fixed for formal proof on 18<sup>th</sup> December 2014 when Joash Onguko (PW1) gave evidence on behalf of the plaintiff. PW1 stated that; the defendant was a tenant of the plaintiff on the suit property. In the year 2005, the plaintiff offered the suit property to the defendant for sale but the defendant did not accept the offer. The suit property was offered to the defendant at Kshs 2,100,000/-. He produced the plaintiff’s bundle of documents dated 28<sup>th</sup> November 2013 as PExh. 1.

PW1 stated further that the defendant was in arrears of rent. He produced a statement showing the defendant's rent arrears as PExh. 2. He told the court that monthly rent was reviewed from Kshs. 4,800/- to Kshs. 9,800/-. He was however not aware whether the rent increment had been communicated to the defendant. He contended that the defendant had previously acknowledged the arrears of rent claimed by the plaintiff.

After the close of the plaintiff's case, the plaintiff made closing submissions in writing. The same was filed in court on 3<sup>rd</sup> February 2015. In its submission dated 28<sup>th</sup> January 2015, the plaintiff argued that the principles for granting vacant possession are similar to those which the court applies while considering claims for mandatory injunction. The plaintiff restated the principles for granting mandatory injunction as set out in Vol 24 Halsbury's Laws of England, 4<sup>th</sup> edition para 948. The plaintiff submitted that it is clear in this case that the defendant is trying to steal a march against the plaintiff.

The plaintiff submitted that the defendant had continued to reside on the suit property even after her failure to purchase the same and had also failed to pay rent for the same timeously. The plaintiff urged the court to find that the defendant is a trespasser on the suit property and allow the prayer for vacant possession sought. The plaintiff relied on the definition of mesne profits as stated in Strouds Judicial Dictionary 4<sup>th</sup> Edition Vol 3. Further reliance was placed on the case of Inverugie Investments Ltd vs. Hackett (1995)3 All ER 842 cited in Kenya Hotel Properties Ltd vs. Willesden Investments Ltd(2009)eKLR. The plaintiff submitted that the defendant had trespassed on the suit property from July 2010 to date and as such, the claim for mesne profits was well founded.

The plaintiff submitted further that it had proved its claim against the defendant for rent arrears. The plaintiff submitted that it had produced in evidence among others, a house purchasing clearance form dated 21<sup>st</sup> June 2010 showing that as at that date, the defendant had fallen into rent arrears amounting to Kshs 383,453/-. The plaintiff submitted that prior to the institution of this suit, the defendant had acknowledged being in rent arrears and that, the statement of account it had produced showed that the defendant was in rent arrears of Kshs. 778,699/-. The court was urged to make a finding that the defendant's continuous occupation of the suit property without timely payment of rent and accrued rent arrears amounts to great injustice. In support of this submission, the court was referred to the case of Nabro Properties Ltd vs. Sky Structures & 2 others (2002)2KLR 299 for the proposition that there was a recognized and established maxim of law that no man shall take advantage of his own wrong.

What this court needs to determine is whether the plaintiff is entitled to the reliefs sought. The defendant did not file a statement of defence and did not tender any evidence at the trial. The averments of fact set out in the plaint are therefore uncontroverted. The plaintiff produced evidence showing that it was the owner of the suit property. The plaintiff's assertion that it has erected flats on the property where house No. MF 45J which was leased to the defendant is situated is not disputed. The plaintiff produced evidence showing that the defendant was allocated the suit property as her residence on 9<sup>th</sup> June 1995 on a rental basis. The plaintiff led evidence that it had offered the suit property to the defendant for sale at Kshs 2,100,000/- on a priority basis since the defendant was an existing tenant which offer, it withdrew through a letter dated 27<sup>th</sup> August 2009 due to the defendant's failure to meet the conditions for the offer. The plaintiff also led evidence that the suit property was leased to the defendant at a monthly rent of Kshs 9,870/- and that the defendant failed to pay rent as and when it fell due. The defendant was said to have accumulated rent arrears of Kshs 383,453/- as at June 2010. The plaintiff placed before the court as evidence various letters written by the defendant in which she admitted being in rent arrears and sought time to clear the arrears. The plaintiff also produced in evidence a rent debtor statement showing that as at 1<sup>st</sup> December 2014, the defendant was in arrears to the tune of Kshs 778,699/-. I am satisfied from the evidence on record that the plaintiff has proved its claim for rent arrears in the sum of Kshs 383,453/-.

The plaintiff also sought mesne profits at the rate of Kshs 9,870/- per month from July 2010 till payment in full and vacant possession. In the Court of Appeal case of Kenya Hotel Properties Limited vs. Willesden Investments Limited (supra) the court described mesne profits as damages for trespass. It is common ground that the defendant was at all material times the plaintiff's tenant. For the plaintiff to obtain possession of the suit property from the defendant, the plaintiff was under obligation to terminate

the defendant's tenancy and demand vacant possession of the property. The plaintiff placed no evidence before the court showing that it indeed terminated the defendant's tenancy. I do not think that the offer that the plaintiff made to the defendant to purchase the suit property was deemed as a termination of the defendant's tenancy. In any event, the offer was not accepted. The rent debtor statement produced by the plaintiff in evidence shows that the plaintiff continued to demand rent from the defendant who continued to pay the same to the plaintiff up to 5<sup>th</sup> November 2014, several years after the filing of this suit. As a monthly tenant, the defendant's tenancy could only be terminated with a month's notice. There is no evidence of such notice before the court. As I have stated above, mesne profits can only be claimed from a trespasser. Since the defendant's tenancy was not terminated by the plaintiff, the defendant cannot be said to be a trespasser on the suit property. It is my finding therefore that the plaintiff is not entitled to its claim for mesne profits. The plaintiff is also not entitled to possession of the suit property having failed to terminate the defendant's lease.

I have noted further that the plaint which was filed herein although dated 10<sup>th</sup> December 2010 is not signed. I have agonized a great deal over this omission on the part of the plaintiff. I have considered whether the suit can be saved by sections 1A, 1B and 3A of the Civil Procedure Act and Article 159 (2) (d) of the Constitution of Kenya. The conclusion which I have arrived at is that a plaint which is not signed is fatally defective for all intents and purposes. If the plaint on record is the same one which was served upon the defendant then the defendant was within her right to ignore the same as there was not competent suit against her. It is no wonder that the defendant did not enter appearance.

In the absence of a competent suit, I am unable to enter judgment for the plaintiff for the rent arrears which the plaintiff has proved to be due and payable by the defendant. In the circumstances of this case, the order that commends itself to me is to strike out the suit which I hereby do. I make no order as to costs.

**Delivered and Dated at Nairobi this 17<sup>th</sup> day of February, 2017.**

**S. OKONG'O,**

**JUDGE.**

**In the presence of:-**

Mr. Kimanu for Plaintiff

N/A for Defendant

Kajuju Court Assistant