



**REPUBLIC OF KENYA**

**IN THE ENVIRONMENT AND LAND COURT OF KENYA**

**AT NAKURU**

**ELC NO.246 OF 2015**

**SANTABEN PREMCHAND SHAH.....1<sup>ST</sup> PLAINTIFF**

**KIRANKUMAR GOVINDLAL SHAH .....2<sup>ND</sup> PLAINTIFF**

**KIRIT GOVINDLAL SHAH.....3<sup>RD</sup> PLAINTIFF**

**VERSUS**

**MEYA AGRI-TRADERS LIMITED .....DEFENDANT**

**JUDGMENT**

*(suit by plaintiffs seeking vacant possession of premises they had leased to defendant; plaintiffs asserting that the lease has expired; defendant inter alia challenging the locus standi of the plaintiffs; plaintiffs being previous owners of the premises and having a written lease with defendant; before expiry of the lease, plaintiffs transferring the property and defendant notified of the transfer; defendant advised to now pay rent to new owner a limited liability company owned by plaintiffs; company now being new owner and lessor; plaintiffs as individuals cannot now claim vacant possession or mesne profits; proper plaintiff is the company; suit dismissed).*

1.This suit was commenced by way of a plaint which was filed on 24 April 2013. The plaintiffs have pleaded that by a lease dated 7 February 2008, they leased to the defendant a premises situated in their property Nakuru Municipality Block 5/43, also known as Elgon House, for a term of 5 years and one month. It is averred that the lease commenced on 1 February 2008 and lapsed on 28 February 2013. It is pleaded that the defendant was notified to restore the premises to its pre-contract condition and surrender the same to the plaintiffs but he has refused to do so. It is pleaded that the continued stay of the defendant on the premises has denied the plaintiffs income from persons interested in renting the premises. In the suit, the plaintiffs have asked for the following orders :-

- (a) An eviction order in respect of Elgon House.
- (b) Monthly mesne profits at the rate of Kshs. 500,000/= plus VAT from March 2013 until eviction.
- (c) General Damages for trespass.
- (d) Costs of the suit and interest thereon.
- (e) Such other relief that this Honourable Court may deem just and fit to grant.

2. Upon service, the defendant entered appearance and filed defence. In its defence, the defendant has admitted the lease dated 7 February 2008. It has however denied receipt of any notice to surrender the premises to the plaintiffs. It has pleaded that towards the end of the lease the parties commenced negotiations with a view of reserving the lease. While the parties were negotiating, the lease expired. Anticipating that the negotiations will be fruitful, the defendant deposited into the plaintiffs' bank account the sum of Kshs. 868,608/= being rent for the next quarter after expiry of the lease. It is pleaded that the plaintiffs accepted the said rent and that as a consequence, there is now an implied tenancy. It is pleaded that the nature of the tenancy is now a controlled tenancy and therefore this court has no jurisdiction in this matter. The defendant has thus asked that this suit be dismissed with costs.

3. The 3rd plaintiff, Mr. Kirit Shah, testified on behalf of all plaintiffs. He described himself as the managing director of Elgon House (2010) Limited. He testified that there had been a first lease entered into in the year 2003 for 5 years and 1 month. The same expired on 31 January 2008. There was an option to renew for a further term of 5 years and 1 month which option was exercised. The new lease therefore started running from 1 February 2008 and was to expire on 28 February 2013. His lawyer then wrote to the defendant to negotiate an extension but the defendant did not write back to accept the new conditions. The said letter, dated 20 March 2013, was produced as an exhibit. The offer was to have a new lease at a rent of Kshs. 215,000/= per month. When they did not get any response, they offered the premises to other persons. He testified that on 26 March 2013, the defendant deposited the sum of Kshs. 868,608/= into his account as rent. He drew a cheque to refund this money since according to him, they had not agreed on any lease and they did not consider the defendant their tenant. He stated that the expected rent is Kshs. 100/= per square feet and he asked that the defendant pays the sum of Kshs. 1 Million for every month that he has been in occupation from the date the lease expired.

4. In cross-examination, he testified inter alia that they had a joint advocate with the defendant, Mr. Ndeke Gatumu. They held a meeting which culminated in the letter dated 20 March 2012 written by Mr. Gatumu. In the letter, the defendant was being offered the premises at Kshs. 215,000/= per month plus VAT payable quarterly. He denied that the sum of Kshs. 868,608/= represented three months rent plus VAT. In the letter, there was also a request to surrender a store which was never surrendered by the defendant. He testified that there was a letter of offer sent to the defendant but the defendant never signed it. He stated that if there was an agreement, then Mr. Gatumu would have drawn the lease. It was normal for the lease to be drawn after the defendant was already in the premises which is what happened in the lease that commenced in the year 2008. Generally, he had no problem with the defendant as a tenant, his only quarrel being that the defendant was not paying land rates and land rents which was contained in the lease.

5. He testified that in the year 2008, the premises was held by himself, his aunt and his brother. They later registered a company, Elgon House (2010) Limited and transferred the property to the company in the year 2010. In the year 2010, they communicated to the defendant that the new owner of the premises is now the company. He denied that they therefore have no capacity to sue. In re-examination, he stated that he is a director of Elgon House (2010) Limited.

6. In its defence, the defendant called Mr. Daniel Munywoki Ngunia, its managing director as its witness. He testified that the company first had a lease with the plaintiffs in the year 2003. This lease expired in the year 2008. They then entered into a new lease which expired on 28 February 2013. In the year 2010, he got information from the agents of the landlord that the property was now vested in a limited liability company by name of Elgon (2010) Limited. It is PW-1 who gave him this information. From the date of notification, he started paying rent to Elgon House (2010) Limited. Thereafter, he commenced negotiations for a new lease. According to him, negotiations were with Elgon House (2010) Limited. Negotiations were being done through Mr. Gatumu who was both his lawyer and the lawyer for Elgon House (2010) Limited. He testified that they orally reached an agreement with Mr. Kirit and Mr. Arun who were representing Elgon House (2010) Limited. After the agreement, Mr. Gatumu wrote to him the letter dated 20 March 2012 which referred to a meeting held on 15 March 2012. He received the letter and orally advised Mr. Gatumu to draw the lease according to its terms. To him, the letter was a final letter which did not need an acceptance or rejection. The rent noted was Kshs. 215,000/= exclusive of tax which he stated was what they had agreed.

7. On 26 March 2013, he received notification from Mr. Gatumu that the lease was due to expire on 28 February 2013 and that he was required to move out. The notice was from Elgon House (2010) Limited. He was shocked by this letter, which only came two days to the expiry of the lease and he did not move out. On 1 March 2013, he found his premises locked by PW-1 but he proceeded to break the padlocks. His advocate then wrote a letter of complaint which was produced as an exhibit. He also talked to Mr. Gatumu who informed him that the owners of the premises had flatly refused to renew the lease. All the same, he prepared a cheque for Kshs. 868,608/= being 3 months rent and VAT. He deposited the cheque into the account of Elgon House (2010) Limited. This money was refunded and he was then served with summons. He testified that the rent of Kshs. 215,000/= was reasonable rent. He stated that they are ready to pay whatever rent may be assessed by a valuer. He testified that he runs a multi-million business in the premises which supports many people. He is currently developing a plot to move his business which will be ready in about a year and a half. He testified that his business can move after this period or else the same will be destroyed. He stated that the defendant's landlord is Elgon House (2010) Limited and that the plaintiffs have no locus standi.

8. In cross-examination, he testified inter alia that the first lease of 2003 had rent of Kshs. 70,000/= with annual increments. The second lease of 2008 had rent of Kshs. 130,000/= again with annual increments. These were negotiated rents and not based on any valuation. In the lease of 2008, the landlords were the three plaintiffs. There was no renewal clause on this second lease. He agreed that the Kshs. 868,068/= that he drew as quarterly rent was more than Kshs. 215,000/= per month plus VAT. Since his money was rejected, he has not been paying rent.

9. With the above evidence the defendant closed its case. I thereafter invited counsels to make written submissions which they did. However, when I retired to write the judgment, I felt that a critical bit of evidence was missing, since I had no proof of who was receiving rent for the premises. I invited parties to call additional evidence on this matter.

10. Mr. Ngunia was recalled and he testified that initially, the property was owned by the plaintiffs. On 21 December 2011, he received a letter dated 20 December 2011, from M/s Sheth & Wathigo Advocates forwarding a letter dated 9 November 2011 which letter was informing him that there is a change of the landlord to Elgon House (2010) Ltd. The letter further stated that the company will continue honouring the lease. Subsequently, rent was paid to Elgon House (2010) Ltd and all invoices were raised in the name of Elgon House (2010) Ltd. Henceforth, rent was paid to Elgon House (2010) Ltd. He produced the invoices and cheques for rent paid to Elgon House (2010) Ltd.

11. On his part, Mr. Kirit Shah in his further evidence, inter alia stated that they wrote the letter dated 9 November 2011 because they wanted Elgon House (2010) Ltd to be collecting rent. He stated that ownership of the premises was not by virtue of this letter transferred to Elgon House (2010) Ltd. He testified that vacant possession was to be given to the former owners of the premises. He refuted that there was a landlord/tenant relationship between Elgon House (2010) Ltd and the defendant.

12. In his submissions, Mr. Karanja learned counsel for the defendant argued that the plaintiffs have no locus standi. He pointed out that Mr. Shah in his evidence stated that ownership of the property was transferred to Elgon House (2010) Ltd in the year 2010. He submitted that it is Elgon House (2010) Ltd which has capacity to sue and not the plaintiffs. He also submitted that an offer for renewal of the lease was made and accepted vide the letter dated 20 March 2012. He submitted that since the new lease was never reduced into writing, the tenancy is a controlled tenancy pursuant to Section 2 of The Landlord and Tenant, Shops, Hotels and Catering Establishments Act, Cap 301, Laws of Kenya. He finally closed his submissions by stating that the plaintiffs are not entitled to the orders sought.

13. On her part, Ms. Mugweru, learned counsel for the plaintiffs, inter alia submitted that the issue whether the plaintiffs have locus standi is a new issue which was not raised by the defendant in its pleadings. She submitted that parties are bound by their pleadings. She submitted that the defendant could not be privy to the arrangements between the plaintiffs and Elgon House (2010) Ltd and that payment of rent to Elgon House (2010) Ltd did not vitiate the contract between the plaintiffs and the defendant. She submitted that the lease agreement between the plaintiffs and the defendant was still in force. She further

submitted that the defendant never had a lease with Elgon House (2010) Ltd and that it was a term of the lease that vacant possession be given to the plaintiffs. She submitted that the lessors who are the plaintiffs have locus standi in the suit. She submitted that the defendant's continued stay after expiry of the lease amounted to trespass and an expropriation of the plaintiff's income. She submitted that there was no further tenancy once the written lease expired.

14. I have considered the matter.

15. It is not in doubt that the parties herein had a lease agreement first entered into in the year 2003. That lease expired and a second lease commencing 1 February 2008 was entered into. This lease was to be for a term of 5 years and 1 month. The lessors in this lease are noted to be Santaben Premchand Shah, Mr. Kirankumar Govindlal Shah and Kirit Govindlal Shah. They are the plaintiffs in this matter. The lessee was of course the defendant company. I have seen that the rent payable was Kshs. 130,000/= per month and thereafter rent to be increased by 20% after every two years.

16. Before I go very far, it has been raised that the plaintiffs have no locus standi to sue the defendant since they hold no lease and they are not the owners of the suit premises. If I am to uphold this argument, then there will be no need of determining any other issue for the suit will automatically fail. Ms. Mugweru of course tried to argue that this is a new issue that was never raised in the pleading. It is indeed true that the issue of locus was not raised in the defence. However, locus standi is a point of law, which can be raised at any time and does not have to be pleaded. A party can at any stage of the proceedings question whether the other party in the suit is properly before the court. It does not matter whether such was raised in the pleadings. If this was not the case, then a court will be forced to pronounce judgment to persons who are clearly strangers. What if the correct persons now appear in court? This of course will lead to an absurd result and an embarrassment to the administration of justice.

17. Locus has been raised, and in my view properly so, and I will proceed to determine whether the plaintiffs have locus standi to sue.

18. There is of course no question that the lease executed in the year 2008 was executed by the plaintiffs as lessors. It does appear that sometimes in 2010 or so, the suit premises changed hands from the plaintiffs to Elgon House (2010) Ltd. That was indeed admitted by the plaintiff's witness, Mr. Kirit Shah. It is the plaintiffs who promoted and formed this company, a fact which is clearly revealed in the letter dated 9 November 2011, written by Arun Shah and Kirit Shah.

19. The defendant, through the same letter, was asked to now be paying rent to Elgon House (2010) Ltd. This letter also states that *"your existing lease will be honoured by the new company on same terms and conditions."*

20. To me, it does appear that from this point in time, the plaintiffs were relinquishing their interest in the suit premises. They were clearly pointing out that the new owner of the premises and the new lessor was Elgon House (2010) Ltd. This was essentially a notice to the defendant that the plaintiffs are no longer the owners of the premises and all issues dealing with the lease now rest with Elgon House (2010) Ltd. This fact comes out in other correspondences between the parties. In the letter dated 20 March 2012, written to the defendant by M/s Sheth & Wathigo Advocates, it is written that *"the undersigned (Mr. Gatumu of the said law firm) had a meeting with Mr. Kirit, one of the directors of the Lessor in our chambers. After a lengthy discussion, the Lessors have asked us to write to you and state their position to the effect that they will be willing to renew the Lease for a further 5 years and 3 months at the rate of Kshs. 215,000/= per month subject ...(some conditions spelt out)..."*

21. There is also a letter written to the defendant by M/s Sheth & Wathigo Advocates on 26 February 2013. The title of the letter notes the lessor as Elgon House (2010) Ltd. The purpose of the letter was to notify the defendant that its lease expires on 28 February 2013. That letter is copied to Elgon House (2010) Ltd (Attention Mr. Kirit).

22. These correspondences point to the fact that the lessor of the premises was no longer the plaintiffs but

the entity known as Elgon House (2010) Ltd.

23. Apart from the correspondences, invoices for rent after January 2012, were raised in the name of Elgon House (2010) Ltd. Rent in the form of cheques was paid to Elgon House (2010) Ltd. Never is there any indication that Elgon House (2010) Ltd were acting as mere agents of the plaintiffs. They were indeed now the new owner of the premises and now the new lessor. The plaintiffs could not at this point in time, after 2012, demand rent from the defendant. They couldn't because they were no longer owners of the suit premises, and not being owners nor assignees of Elgon House (2010) Ltd, they could not claim to be the landlords of the defendant. I do not see how the defendant could have sued the plaintiffs over the lease in the event that there were some terms which were not being complied with. In the same vein, I do not see how the plaintiffs herein can now sue the defendant over the same lease which they ceded interest to Elgon House (2010) Ltd.

24. Following the case of *Salomon vs Salomon, (1897) AC 78* the entity known as Elgon House (2010) Ltd is separate from the plaintiffs. The plaintiffs cannot claim to be Elgon House (2010) Ltd just as much as Elgon House (2010) Ltd cannot claim to be the plaintiffs.

25. I do not see how the plaintiffs herein can sue for vacant possession or for rent which has accrued from the time the formal lease entered into in the year 2008 expired. From January 2012, they ceased being the landlords of the plaintiff. They also ceased being owners of the suit premises. Assuming that they had sold the property to a completely different entity that they had no shares in, would they have come to court to sue for rent and vacant possession ? Clearly not. Even the new owners would not have allowed that unless they had assigned some rights to the former owners. That is the exact scenario that has played out here. In my view, the only entity which can sue for vacant possession and which can sue for any rent or mesne profits is Elgon House (2010) Ltd and not the plaintiffs.

26. The plaintiffs have no locus standi to sue in this matter. Given this position, it is not necessary for me to go into the other issues raised for if I address them, I may prejudice any future suit that may be filed by the party with locus standi.

27. For the above reasons, the plaintiffs' suit against the defendant is hereby dismissed with costs.

28. It is so ordered.

**Dated, signed and delivered in open court at Nakuru this 30<sup>th</sup> day of March 2017.**

**MUNYAO SILA**

**JUDGE**

**ENVIRONMENT & LAND COURT**

**AT NAKURU**

**In presence of :-**

Ms. Mugweru for the plaintiff

Mr. Kahigah for the defendant

Court Assistant: Nelima

**MUNYAO SILA**

**JUDGE**

**ENVIRONMENT & LAND COURT**

**AT NAKURU**