



REPUBLIC OF KENYA
IN THE ENVIRONMENT AND LAND COURT
AT NAIROBI
MILIMANI LAW COURTS
ELC. CASE NO. 32 OF 2014

DR. SUNIL VINAYAK.....PLAINTIFF

VERSUS

SANTOKH SINGH MOOL SINGH.....1ST DEFENDANT

MANRANJAN SINGH SANTOKH.....2ND DEFENDANT

SARAVPAL SINGH SANTOKH SINGH.....3RD DEFENDANT

JUDGMENT

The Plaintiff's Case

The plaintiff instituted this suit by way of a Plaint dated 4th June 2009 which was amended on 21st January 2014 seeking for Judgment be entered against the Defendants as follows:-

1. A permanent injunction to restrain the defendants by themselves, their servants, agents, employees or auctioneers or otherwise howsoever from levying distress and evicting the plaintiff or the persons referred to in paragraph 8 of the Plaint from L.R. No. 1870/IX/98 (hereinafter referred to as the "suit premises").
2. A declaration that the plaintiff is a protected tenant on the suit premises.
3. The sum of Kshs 40 million plus interest from the date of filing suit until payment in full.
4. General damages.
5. Costs of the suit and interest thereon.
6. Further or any other relief as the court may deem suitable.

In his evidence, the Plaintiff (PW1) testified that he and the 1st defendant entered into an agreement for lease of the suit property in 2003. The 1st defendant had advertised his property in the newspaper through Sparrow Property Service and the agreement was that PW1 would lease the property to carry out the business of dental surgery. PW1 engaged his contractor and architect to assist in designing the property

into a dental surgery unit and since the roof and floor were not in a good state, they decided to demolish and rebuild. He made reference to a lease agreement between him and the 1st – 3rd defendants and informed the court that the understanding was that he would occupy the premises for 11 years at a rent of Kshs 70,000/- and that he would use the premises to run a dental surgery, laboratory, house his staff with a room being left for the defendants to occupy. He contended that the property had a guest wing comprising 2 bedrooms and a kitchen which the defendants indicated they wished to use when they were in Kenya.

In January 2003, PW1 paid rent after occupying the property for three months. He stated that the property was wooden, built on wooden stilts. He made reference to photographs showing the state of the premises before and after he carried out the improvements which he informed the court cost him Kshs 40 million. PW1 stated that after moving into the premises and starting the dental practice, the defendants wanted to increase the rent from the initial Kshs 70,000/- to Kshs 150,000/-. In 2007, PW1 held a meeting with the defendants to extend the lease and the defendants demanded rent of Kshs 450,000/- which he could not afford. It was the evidence of PW1 that whereas there was no clause prohibiting him from subletting, the defendants threatened to evict him prompting him to obtain an injunction. He stated that he was seeking a permanent injunction and other prayers as pleaded.

In cross-examination, PW1 stated that he learnt that the suit property had been advertised from his associate Dr. Popat after which they went to see the premises and in May-June 2002, they met the defendants. The 1st defendant was leaving the country while the 2nd and 3rd defendants were not in the country. There was a lot of renovation to be done to convert the suit premises into a dental surgery. PW1 admitted that his averment that he was to rent the property as a dental surgery, laboratory, housing for his staff and rooms left for the defendants' occupation was not captured in the lease agreement. He stated that the lease which commenced in January 2003 was for 5 1/2 years and was renewable for a similar period and further, that the lease was to expire in 2014. PW1 stated that as at the time he was testifying, there was no lease agreement. He informed the court that the 1st defendant contributed approximately Kshs 2 million which was needed for construction of the laboratory.

He stated that alterations to the drawings were carried out and that the main clinic at the center of the plot had 2 levels while the laboratory had three levels. The 1st defendant was not in the country at the time but that there was a verbal agreement that his daughter would liaise with the plaintiff so she was aware of the alteration. He averred that he had verbal permission to build and that they demolished the old residential house in October/November 2002 when all the defendants were out of the country. PW1 contended that although there was no written agreement for him to build a dental clinic, he was in communication with the defendants who were outside the country through telephone calls and emails. Further, that during the construction period, the 1st and 2nd defendants visited Kenya in 2003 and saw the progress and that the 2nd defendant who was an architect by profession even made suggestions about the construction that was ongoing.

It was the evidence of PW1 that after the construction, he sublet to other tenants although the same was not stated in the lease agreement. He informed the court that he had 4 sub tenants namely Aberdare Safari Hotels, Eurodent Laboratories, Kibo Safaris, In-solutions and a retired lawyer who was occupying the room under his authority. He stated that Nishi was running part of their business and that a studio flat was one of his staff houses. He contended that the sub-letting commenced in 2004 and that the sub tenants were paying approximately Kshs 500,000/- in rent per month. He averred that the defendants got 50% of the income from the dental laboratory. While making reference to a lease agreement with Eurodent Laboratory, PW1 stated that although he referred to himself as the lessor, he was not the registered lessor.

PW1 made reference to minutes of site meetings held between himself and the structural engineer and contended that the defendants were not in the country. It was the plaintiff who gave instructions to the contractor to demolish the old house on the suit property. He averred that he spent around Kshs 40 million to put up the buildings. He however did not have receipts for the same in court. He averred that the main contractor was Reha contractors and that he also had electrical engineers and interior designers. PW1 contended that he was not forced to take up the premises and maintained that it was not possible to use

the premises as a dental surgery in the state that it was. He stated that he paid land rent but did not have the receipts for the same in court.

It was the evidence of PW1 that the 11 year lease was not registered and therefore that he was a protected tenant. He contended that the whole building collapsed when they commenced renovations in 2002. The defendants were not in the country at the time. The renovations were on the old house. He contended that according to the agreement, the outhouse would be the defendants' residence when they were in Kenya. PW1 demolished the outhouse too and averred that if the defendants were in Kenya, they would not have a place to live in. The evidence of PW1 was that when they were building, the 1st defendants' daughter was called upon to take up any of the apartments and she chose the house they were living in. PW1 reiterated that he sought the defendant's daughter's permission to demolish although the same was not in writing. PW1 did not pay rent in the first year although he had the defendants' account number in Bank of Baroda Sarit Center. The plaintiff's evidence was that he paid rent to the aforesaid account for three months and stopped payment until the construction was completed.

The plaintiff contended that the rent from his subtenants was now down to Kshs 250,000/- since some sub-tenants had stopped payment due to harassment from the defendants. He stated that save for the rent from the laboratory which 50% was shared with the defendants, rent from the other tenants amounting to Kshs 150,000/- was not shared.

In re-examination, PW1 averred that the lease was for 11 years. He stated that the rent from the laboratory was shared 50% with the defendants. He contended that there was nothing on the lease stopping him from subletting. His evidence was that when they started the construction of the lab, the old house had an out flowing sewer which was very unhygienic for a medical facility and that they had no option but to pull down the whole building and put up a new sewer.

The plaintiff's 2nd witness (PW2) was Hardeep Singh Rehal, a director of Rehal Construction Company which constructed the dental clinic, staff rooms and clinic. He was appointed by the plaintiff who also paid him. PW2 stated that the suit premises had an old house which had no foundation and could not support a clinic. Renovations of the old house were commenced in July 2002 at an initial price of Kshs 5.5million. He stated that they renovated 1 house and constructed a 1st and 2nd floor together with the parking and driving area. Constructions were carried out on the right and left corners of the plot which were empty.

The evidence of PW2 was that the old house where PW1 was planning to put up a clinic was removed because there was a hollow area under the floor. A decision to demolish the house was made on 7th October 2002 after discussions and a new quotation was issued on 31st December 2002. PW2 informed the court that they added an underground tank and stair case as well as a generator room at a cost of Kshs 50,000/-. PW2 raised a quotation for windows at Kshs 1,132,000/- and electrical works at Kshs 2,564,700/-. He contended that other extra works costed Kshs 1 million while the kitchenette in Block A flat No. 2 where the 1st defendant was living cost Kshs 4.5 million. PW1 met Mr. Assi and his daughter whom he also met during the construction.

PW2 made reference to a valuation for the construction dated 15th April 2004 in the plaintiff's bundle of documents and contended that on 15th April 2004, he was paid Kshs 22,700,000/- less Kshs 300,000/-. He stated that in total, they were paid Kshs 32,000,000/-. His witness statement dated 12th January 2013 was adopted as part of his evidence.

In cross examination, PW2 stated that he had a masters degree in chemistry and law. He had experience in construction but had no qualification. Although he knew the suit property belonged to the 1st defendant, he was given the instructions to construct by the plaintiff in July 2002. The instructions were to demolish the old house whose foundation was very weak. PW2 did not have with him the plaintiff's written instructions to carry out the demolition. He admitted that most of his quotations were not on his letter head and further, that he did not issue any invoices. PW2 was paid Kshs 35million and he did not have with him the receipts he issued upon payment.

In further evidence, PW2 stated that his signature and the clients' signature were on the quotations. The alterations on his quotations were done after negotiations and the client would only sign after they were in agreement. He averred that they sub-contracted Yogi Plumbers and received payment on their behalf. He contended that Alvik Prestige Ltd did the fixture fittings and that their payment of Kshs 2.9 million also passed through him. He contended that his work was questioned on case no. 893 of 2010.

In re-examination, PW2 stated that suit no. 893 of 2010 where he was DW2 was dismissed. He met the 1st defendant in 2002 and further that the 1st defendant's daughter used to enquire about the progress of the works. He stated that some of his quotations were not on his letter head and had no signatures. He reiterated that Yogi Plumbers and Alvik Interiors were his sub-contractors and that before they got paid, he had to approve their work.

The last plaintiff's witness (PW3) was Teja Singh Kundhi, a valuation surveyor who was instructed by the plaintiff. His instructions were to give the current market value of the suit property with a separate value for the improvements. The permanent improvements for the main double storey (wing 8) had a ground and 1st floor. There was also a wing consisting of ground floor, 1st, 2nd and 3rd floors where duplexes were. Both wings were 17,000 square feet and that in 2003, the average construction cost per square feet was Kshs 2350 and vacant land at the time was valued at Kshs 40 million. He averred that at the time of giving his testimony, the construction cost per square feet was Kshs 6,000/- while land in the area was valued at Kshs 300 million.

PW3 stated that as at the time of giving evidence, the suit premises, which was ½ an acre in size, was valued at Kshs 150 million while the improvements thereon were valued at Kshs 100 million being Kshs 6000 x 17,000 square feet and therefore, that the market value was Kshs 250,000,000/-. He stated that the land value in 2003 for half an acre was Kshs 20million and that the improvements were valued at Kshs 40 million being Kshs 2350 x 17,000 square feet. He produced the valuation report as PExh 7.

In cross-examination, PW3 stated that he received verbal instructions from the plaintiff. He did not conduct an official search before carrying out the valuation. He contended that the information under clause "general" in his report was provided by the plaintiff. His report did not specify the date of inspection which was also the date of valuation. PW3 did not find any tenants in the suit premises and had no knowledge of the sub-tenants. He contended that he was instructed that the whole complex was finished in 2003 and he calculated the whole cost to Kshs 40 million. He contended that Kshs 40 million was the land value per acre. He had no comparable and used his valuations for banks and insurance companies. His evidence was that the improvement value of the whole building valued at Kshs 100 million was high than the land value. He contended that there was no depreciation value in property since the value keeps going up.

In re-examination, PW3 stated that he used their old records to do the valuation. He contended that at the time, the actual construction cost was Kshs 2600/- multiplied by 17,000 amounting to Kshs 39 million. He maintained that he did not need drawings because everything was on the ground.

Defence case

The defendants filed a statement of defence and counterclaim dated 24th July 2009 where they denied entering into an agreement with the plaintiff which allowed the plaintiff possession of the suit premises for a period of 11 years. They contended that parties entered into an agreement putting the plaintiff in possession of the suit premises for a period of 5 years and 6 months. The defendants denied granting the plaintiff consent to make any structural adjustments, demolish or otherwise tamper with the suit premises. The defendants further denied granting the plaintiff consent to commence construction or incur the purported expenditure of Kshs 40 million. In their counterclaim, the defendants have sought the following orders:-

1. That the plaintiff's suit be dismissed.
2. That the plaintiff be ordered to give vacant possession of the suit premises.

3. Such further orders as the court may think fit and just.

The 1st defendant (DW1) stated that he lived in England. His witness statement dated 1st July 2013 was adopted as part of his evidence. He stated that the plaintiff went to see him and contended that the property was perfect for him without the need for modification. He and the plaintiff agreed on rent of Kshs 70,000/-. DW1 made reference to a lease in his bundle of documents and contended that the term was 5 1/2 years. He averred that the building was in good condition with a good garden and that the plaintiff never complained that the building was bad.

He further informed the court that the plaintiff informed him he needed a laboratory and that on 28th June 2002, he gave Kshs 2,010,000/- for the plaintiff to build a laboratory outside. He said that the plaintiff was aware that he was leaving the country on 29th June 2002. DW1 informed the court that he did not allow the plaintiff to demolish the house and that his contribution was for the laboratory. His evidence was that the plaintiff only showed him drawings for the laboratory. He was very surprised and shocked to see the building at the opening ceremony because the plaintiff had built a big house without his permission and they decided to send the plaintiff a new lease agreement.

The evidence of DW3 was that the plaintiff never asked him for money for the construction and reiterated that he never agreed to have a new structure constructed. He averred that the plaintiff was passing off as the landlord and had 8 sub-tenants whose rent he never shared with him. He contended that the agreement with the plaintiff expired on 31st December 2012 and averred that he wanted back his land and his bungalow. DW1 stated that he would not refund the plaintiff the Kshs 40 million since he built without his permission and had been receiving rent for 11 years. He informed the court that the plaintiff could demolish the building and reiterated that he wanted his house back and the garden. His evidence was that he never visited the site and that after leaving the country, he returned after 2 years. He informed the court that he never gave his daughter permission to manage the property.

DW1 denied knowledge on whether the lease was registered and contended that the lease was for a 5 1/2 year renewable term. He averred that although there was no clause against subletting, the plaintiff should not have sublet. He stated that the lease agreement was signed and witnessed in England. He stated that according to the lease agreement, the plaintiff should not have been in the suit property. He denied knowledge of an unsigned lease in the plaintiff's bundle of documents and averred that he disputed clauses 1(a) and (b) which authorized the plaintiff to pull down the old building and to erect a new building at a cost of Kshs 40 million. DW1 informed the court that as at the time of testifying, the plaintiff had not paid rent of Kshs 150,000/- for two years. He averred that when in Nairobi, he stayed in wing A of the suit premises where he never paid rent because it was his property. He informed the court that he wanted to keep the developments.

In re-examination, DW1 stated that he and his son signed a lease dated 1st January 2003 in the plaintiff's bundle of documents. He contended that in the said lease document, there was no provision allowing the plaintiff to sublet the premises. He reiterated that he never gave consent to the plaintiff to demolish and rebuild the premises and denied issuing oral or written authority to his daughter to deal with the plaintiff. The evidence of DW1 was that he would sell the suit property to the highest bidder. He averred that he was never shown any receipts for the Kshs 40 million expenditure.

The 3rd defendant (DW2) testified as the last defence witness. He lived in the United Kingdom and met the plaintiff for the 1st time during the opening ceremony on 17th July 2000. He averred that they were sent the lease agreement to let out the main house as it was. He averred that there were three separate structures comprising the main house, an outhouse and a car pot. The main house had 4 bedrooms, kitchen and lobby and that in the lease agreement, there was no permission allowing the plaintiff to demolish the main house and build a 2 storey building. He contended that the property was viewed by Dr. Popat who negotiated with his father, the 1st defendant, and indicated that the accommodation was more than enough.

DW2 stated that the outhouse was for their use at all times. He averred that there was no mention of the

car port area and that he learnt of the drawing dated 22nd December 2003 referring to the car port area during the opening ceremony. According to DW2, the plaintiff wanted to build a laboratory and his father (PW1) authorized a 20ft by 20ft structure. He said further that the plaintiff informed them that he needed their signature for change of user on 17th January 2009. He averred that the owners of the suit premises had no knowledge of the change of user from residential to commercial use only. He made reference to an undated lease agreement in the plaintiff's bundle and contended that the same was not valid since there was no 40 million expenses on the suit property. He informed the court that their advocate Mr. Jowhal had indicated that he was not the drawer of the said lease. The evidence of DW2 was that he was totally shocked and devastated during the opening ceremony since the accommodation provided for them was on 2nd floor in a 1 bedroomed flat and that 5 of them were living in the flat at the time.

DW2 stated that he did not know how much rent the plaintiff was collecting from the 6-7 subtenants. He contended that he expected the rent to be in excess of Kshs 500,000/- per month amounting to approximately 70 million. He stated that they had not been shown any receipts to show that the plaintiff had spent Kshs 40 million. DW2 stated that they were in agreement for the plaintiff to continue with his business in January 2009 and the plaintiff was to surrender all the subleases. He contended that his father wanted 50% rent from the huge structure.

DW2 stated that PW3 visited the premises on 7th January 2009 and indicated that he wanted to carry out a survey on behalf of the plaintiff. He averred that the house was well maintained subject to minor repairs when it was handed over to the plaintiff. It was not dilapidated and was fully furnished. He denied that the plaintiff was entitled to the injunction stating that they were the registered owners of the suit premises. He contended that they had not been given anything to show that Kshs 40 million was spent on the suit premises and further that no document from the relevant authorities had been supplied to them.

In cross-examination, DW2 stated that he left for England on 4th April 1976. He met the plaintiff on 17th April 2004. The lease agreement was negotiated by his father (PW1) in 2002. The lease they signed was sent to them by the plaintiff. He made minor alterations in respect to rent increase. The rent was Kshs 70,000/- and the issue of subletting was not included on the lease which did not also prohibit subletting. He averred that although he was not there during the negotiations in June 2002, his evidence was not hearsay. The amount of Kshs 2,010,000/- was given on 28th June 2002 after the lease.

He averred that after the opening ceremony, he wrote a letter dated 22nd September 2008 to the plaintiff indicating that the commencement of new rent of Kshs 150,000/- was on 1st January 2005. The plaintiff contended that paragraph 12 of the said letter indicating that the rent for the second term would be Kshs 375,000/- was not captured in the lease document of 2003. He contended that they were only shown a document showing construction of the laboratory and not the whole structure. He averred that there was no formal lease in place and that what they had was a lease agreement. He averred that they did not want more rent or subtenants in the premises. He had no evidence to support his averment that the plaintiff was collecting rent of Kshs 500,000/- from the sub tenants.

In re-examination, DW2 stated that they were not in Kenya on 1st January 2003 and that he was not aware of the construction that was going on. He averred that the lease agreement had no provision for subletting. That after the 2004 lease, they agreed on a rent of Kshs 240,000/- which was negotiated and rent of Kshs 150,000/- agreed upon. His evidence marked the close of the defence case.

Submissions

The plaintiff in submissions dated 16th March 2016 made reference to section 32 of the Registration of Titles Act (repealed) and submitted that the document of 1st January 2003 was unregistered and therefore ineffectual at passing an interest in land. He submitted that due to want of registration, the tenancy between the parties falls in the definition of a controlled tenancy which has not been reduced into writing under section 2 of the Landlord and Tenant (Shops, Hotels and Catering Establishments) Act.

Counsel for the plaintiff submitted that the plaintiff's business was within the definition of a shop under the Act since the dental clinic was for purposes of rendering services for money or money's worth. In support of this submission, the plaintiff relied on the cases of **Panesar vs. Balbir (1972) EA 208, Nyamonthe Company Ltd vs. James Gachara (2015) eKLR, A-One auto Services Ltd vs. Jayantilal O. Kantaria (2015) eKLR.**

In the alternative, the plaintiff submitted that without prejudice to his submissions on controlled tenancy, under section 32(2) of the Registration of Titles Act (repealed) an unregistered instrument shall operate like a contract. Reliance was placed on the cases of **Bachelor's Bakery Ltd vs. Westlands Securities Ltd (1982) KLR 366** where it was held that an unregistered lease was a valid contract between the parties. Counsel argued that the document of 1st January 2003 was a contract between the parties within the meaning of section 3(3) of the Law of Contract Act and that the conditions of a future lease under section 61 of the Land Act were therefore applicable. Counsel submitted that under section 61(2), a future agreement had no effect unless registered and therefore that the tenancy between the parties herein was controlled.

While referring to page 93 of his bundle of documents, the plaintiff contended that it was indicative of the parties intentions. Counsel argued that the 1st defendant had in his testimony confirmed the lease as their document and that his only contention was that it was not signed. It is the plaintiff's submission that the defendants had failed to discharge the burden of proving that the said document was drawn by their advocate S.S Jowhal in accordance with section 108 of the Evidence Act. The court was referred to the case of **Stephen Wasike Wakhu & another vs. Security Express Ltd (2006) eKLR** for the proposition that he who alleges must prove.

In further submission, the plaintiff contended that it was not in dispute that the suit premises needed structural adjustments and repairs and that the defendants even contributed Kshs 2,100,000/-. Further, that it was not disputed that the plaintiff constructed a major building and what was in dispute is what parties agreed upon. Counsel submitted that by their conduct, the defendants expressly or impliedly consented and endorsed the plaintiff's construction and that for the court to discern the intention of the parties, the substance of the agreements and the conduct of parties must be considered.

The plaintiff made reference to the testimony adduced in court and contended that the 1st defendant's daughter by the name Moni observed the construction of the premises. It was submitted that there was no evidence to show that from the time the defendants became fully aware of the construction, they reacted negative or raised complaints about the same. The plaintiff referred to the 3rd defendant's letter dated 22nd September 2008 where reference to the construction was made and submitted that the 3rd defendant knew about the scale of the building during construction which was prior to the year 2004.

Counsel argued that the defendants conveyed to the plaintiff a promise to allow him construct a building which was duly constructed and therefore, that the defendants were estopped by proprietary and equitable estoppel and that it would be unconscionable for the court to allow the defendants to act in a manner inconsistent with the arrangement that they entered into with the plaintiff. Reliance was placed on the case of **Chase International Investment Corporation & another vs. Laxman Keshra & 3 others (1978)eKLR** where the court cited with approval the case of **Fibrosa Spolka Akcyjna vs. Fairbairn Lawson Combe Barbour Ltd(1943)AC 62** where it was stated that any civilized system of law is bound to provide remedies for cases of unjust enrichment or unjust benefits which remedies are generally different from the remedies in tort or contract and are known as quasi-contract or restitution.

Counsel for the plaintiff stated that PW2 testified that in total he was paid Kshs 35,285,000/- and that the said figures though disputed were known to the 3rd defendant as stated in his letter of 22nd September 2008. Further that a valuation report produced by PW3 showed that the construction greatly improved the value of the suit premises in favour of the defendants. It was contended that the defendants did not call their own valuer and that the testimony of PW3 was therefore acceptable before the court. Reference to the case of **Kimotho vs. Kenya Commercial Bank (2003)1EA 108** was made for the proposition that where a party fails to call a witness whom he would have been reasonably expected to call, an inference

will be made that the said person's evidence would not have helped the party's case.

Reliance was further placed on Halsbury's Laws of England 3rd Ed. Vol. 15 para 344 for the submission that where a party has by his words or conduct made a promise or assurance which is intended to affect the legal relations between the parties and which promise is acted upon, the one who gave the promise cannot be allowed to revert to their previous legal relations as if the promise or assurance had not been made. Lastly, it was submitted that the defendant's counterclaim dated 24th July 2009 seeking an order for vacant possession was not prosecuted during the hearing and was therefore liable for dismissal with costs.

The defendants in their submissions dated 7th April 2016 submitted that the plaintiff was not a controlled tenant since none of the conditions set out in the definition of a controlled tenancy under section 2 of the Landlord and Tenant (Shops, Hotels and Catering Establishments) Act were present in the lease agreement. The defendants relied on the case of **James Munuthi Wathingira & another vs. Stephen Muchiri Kariuki & 2 others(2009)eKLR** where the court stated that where an agreement confers a right to obtain a lease for a period exceeding 5 years, it is an uncontrolled tenancy and outside the ambit of the Landlord and Tenant (Shops, Hotels and Catering Establishments) Act. Counsel for the defendants argued that there was no dispute that the lease agreement between the parties herein was for a term of 11 years and therefore, that the plaintiff was not a protected tenant.

The defendants submitted that although the lease agreement was not registered under the Registration of Titles Act (now repealed) numerous judicial decisions to the effect that non registration does not invalidate the lease which operates as a contract between the parties existed. It was submitted that the terms of the lease operate between the parties and not in rem, and therefore did not extend to 3rd parties. The defendants cited section 38(1) of the Land Act and submitted that the sub-tenants could not be afforded any protection in law under the terms of the unregistered lease agreement entered into between the parties herein.

In further submission, the defendants averred that from the evidence on record, the plaintiff solely decided to demolish the suit premises. Counsel submitted that in clause 2(c) of the agreement, the plaintiff was allowed by the defendants to do structural adjustments to make the suit premises suitable for the intended purposes. The defendants submitted that the term 'adjustment' is defined as a "small alteration or movement made to achieve a desired fit, appearance or result" and that structural was defined as 'relating to the way something is built or organized'. It is the defendants' submission that therefore, the word structural adjustment implied minor alterations in relation to the structure of a building.

The defendants argued that they were not represented in the meetings held between PW1 and PW2 as shown in the minutes produced by the plaintiff and that the plaintiff on a frolic of his own decided to demolish the suit premises leased to him and constructed a 2 storied house and some apartments. Further, that the plaintiff went ahead to sublet the new premises and obtained a change of user without the consent of the defendants. Counsel submitted that the plaintiff's allegations that the defendant's daughter was aware of the construction and that the defendants and their families had access to one of the apartments rent free was not supported by evidence as provided under section 109 of the Evidence Act.

The defendants contended that the changes carried out by the plaintiff had the effect of altering the nature of the suit premises leased to him and the contract between the parties. It was submitted that the provisions of section 3(3) of the Law of Contract Act which provides that any dispositions affecting an interest in land must be in writing should have applied. Further, it was submitted that it is trite law that where a contract is expressed in writing, any modifications or addendums thereto must also be in writing. Counsel argued that the plaintiff exceeded his mandate as contemplated in the lease having failed to prove that the defendants authorized the changes carried out in the suit premises. The defendants contended that the activities carried out by the plaintiff were not only illegal but also contrary to the defendants' proprietary rights under Article 40 of the Constitution.

As to whether the defendants should be compelled to refund the plaintiff the sum of Kshs 40 million plus

interest accrued thereon, Counsel for the defendants argued that no documentary evidence to support the allegation that the plaintiff spent Kshs 40 million was tendered and no receipts to that effect were produced. The defendants submitted that special damages must be proved and that the only documents showing the alleged expenditure were mere quotations without any letter heads and whose authenticity was in question.

It is the defendants' submission that for PW1 to purport to recover funds allegedly dispensed towards carrying out illegal activities was not only absurd but contrary to the provisions of the law. The court was referred to the case of **Semfeb Ltd T/A Cinnamon Tree vs. Dhiren Hair Designer Ltd (2009) eKLR**, the court cited the case of **Belle Maison Ltd vs. Yaya Towers Ltd** for the proposition that a wrong doer cannot be allowed to benefit from his wrong doings especially where the wrong is blatant or contrary to the law. Counsel contended that the plaintiff's actions were not only illegal but contrary to the defendants' proprietary rights and as such that the plaintiff is not entitled to recover anything and further, that the court cannot help the plaintiff in illegality.

The defendants submitted that the plaintiff lied to the court that he could not account for the rent collected from the sub-tenants for 11 years. Counsel submitted that since the plaintiff had been in illegal occupation of the suit premises, it was only right for the defendants to be compensated for the loss of use and earnings that they had suffered as a result of the plaintiff's illegal and wrongful occupation. He contended that mesne profits were a claim for compensation by a landlord against a tenant for loss of use and occupation. The defendants averred that the plaintiff breached the terms of the agreement and illegally took subtenants in blatant disregard of their proprietary rights and therefore, that they were entitled to recover the profits illegally retained by the plaintiff as a result of the breach.

In respect to whether a permanent injunction can issue against the defendants Counsel submitted that as at the time the defendants issued the plaintiff with a notice of intention to evict them, there was no contract between the parties since the substratum of the lease agreement had been altered.

Further, it was submitted that by the time the plaintiff instituted this suit, the term of the lease had already expired and that it was only right for the plaintiff to surrender the premises to their rightful owners. Further, the defendants' submitted that a permanent injunction cannot issue against them as the rightful owners of the suit premises and that the contrary would be in violation of their constitutional proprietary rights and would amount to the court re-writing the terms of the contract between the parties when the contract between them has already expired.

Counsel averred that an injunction being an equitable remedy, there were several sub conditions which guided the court in granting equitable remedies one of them being having clean hands and doing equity. He contended that equity follows the law and relied on the case of **Kyangaro vs. Kenya Commercial Bank Ltd & another (2004)eKLR 126** where the court stated that he who comes to court must fulfill all or substantially all his outstanding obligations before insisting on his rights.

As to whether estoppel was applicable in this case, the defendants' relied on the definition of estoppel in Black's Law Dictionary as "a defensive doctrine preventing one party from taking unfair advantage of another, when through false representation, language or conduct, the person to be estopped has induced another person to act in a certain way, with the result that the other person has been injured in some way". A similar definition was set out in the case of **Augustine Odhiambo Abiero vs. K.K Security Ltd (2014) eKLR** and explained in the case of **Central London Properties Trust Ltd vs. High Trees House Ltd (1947) KB 130**.

Counsel averred that the 5 conditions of equitable estoppel were that there was a false representation or concealment of material facts; the representation was known to be false by the party making it or the party was negligent in not knowing his falsity; it was believed to be true by the person to whom it was made; the party making the representation intended that it be acted upon or the person acting on it was justified in assuming this intent and lastly, the party asserting estoppel acted on the representation in a way that will result in substantial prejudice unless the claim for estoppel succeeds.

The defendants contended that clause 2(c) of the lease allowing the plaintiff to make structural adjustments upon which the plaintiff claimed estoppel was not ambiguous. That there was no misrepresentation or concealment in the wording of clause 2(c) to show that the defendants intended anything other than as was stated thereat. Counsel argued that the defendants' conduct demonstrated the clarity which they intended the words effected since they paid contribution of Kshs 2,010,000/- which the plaintiff acknowledged in writing as being 50% of the costs of the necessary adjustments. He averred that the plaintiff had not shown anything in writing which was indicative of any representation by the defendants' altering the legal relationship clearly expressed in the lease agreement. The defendants relied on the case of **Nuridin Bandali vs. Lombark Tanganyika Ltd (1962) EA 304** where the court stated that before estoppel can arise, one party must have made to another party a clear and unequivocal representation of a legal relationship.

Further, the defendants averred that there was nothing showing acquiescence by the defendants to the plaintiff's overstepping the prerogative extended to him under clause 2(c) of the lease. Counsel contended that it was clear that any attempts by the defendants to have the plaintiff renegotiate the agreement in line with the new developments were met with deceit and refusal by the plaintiff who cannot now claim that the defendants should be estopped and restrained from reclaiming their property upon the expiry of the lease.

The defendants submitted that the plaintiff cannot use estoppel to deny them their proprietary rights guaranteed and protected by the Constitution. Reference was made to the case of **Henry Muthee Kathurima vs. Commissioner of Lands & another (2015) eKLR** for the proposition that estoppel cannot be used to circumvent constitutional provisions and further, that estoppels cannot override express statutory provisions. Counsel further contended that estoppel cannot be used as a sword to bring a cause of action but only as a shield in defence and he relied on the case **of R vs. Kenya Railways & another Ex parte Inviolata Wacike Siboe (2014)eKLR** and **Muljijetha Ltd vs. Commissioner of Income Tax (1967)EA 50**. The **case of Titus Muiruri Doge vs. Kenya Cannors Ltd (1988) eKLR** where the court discussed situations when proprietary estoppel may be used to raise a cause of action was also cited. Lastly, it was submitted that the temporary injunctive orders issued in 2009 lapsed pursuant to the provisions of Order 40 Rule 6 of the Civil Procedure Rules and the plaintiff could therefore not seek protection under the said orders.

Issues for Determination

It is not in dispute that the registered proprietors of the suit premises are the Defendants and the relationship between the Defendants and the Plaintiff is one of Landlord and Tenant. The gist of this suit is in analyzing the nature of the Tenancy relationship subsisting between the Defendants as the Landlords and the Plaintiff as the Tenant of the suit premises. The issues that I have settled upon which fall for determination in this suit therefore focus on the Tenancy relationship between the Defendants and the Plaintiff and are the following:

1. Did the parties enter into a lease agreement and if so which one(s)?
2. What was the term of the lease(s), if any?
3. Is the Plaintiff a protected tenant? If so, what are the implications? If not, what are the implications?
4. Was the Plaintiff authorized to demolish the house and other structures on the suit premises and to put up a two storey building on the suit premises?
5. Did the Plaintiff spend Kshs. 40 million for the construction of a two storey building on the suit premises and is he entitled to a refund of that sum plus interest from the Defendants?
6. Was the Plaintiff authorized to sub-let the suit premises to sub-tenants?

7. Should the court issue an order evicting the Plaintiff and his sub-tenants out of the suit premises?

8. Who shall bear the costs of this suit?

Determination

1. Did the parties enter into a lease agreement and if so which one(s)?

Both the Defendants and the Plaintiff agree that they entered into a Lease Agreement dated 1st January 2003 for the suit premises (hereinafter referred to as the “Lease Agreement”), copies of which they both produced. The Lease Agreement contained the terms and conditions under which the Defendants as the Landlords agreed to lease the suit premises to the Plaintiff as the Tenant.

2. What was the term of the lease(s), if any?

Though the Parties herein entered into the Lease Agreement, during the hearing, there was a lack of agreement between the Defendants and the Plaintiff on the agreed term of the Lease Agreement. The Plaintiff held the position that the Lease Agreement was for a term of 11 years from 1st January 2003 while the Defendants held the view that the Lease Agreement was supposed to be for a term of 5 years and 6 months which was renewable.

Clause 1 of the Lease Agreement was to the following effect:

“The Landlord agrees to let and the Tenant agrees to take on Lease the ALL THAT Building erected and being on that parcel of land known as Land Reference Number 1870/IX/98 Nairobi (hereinafter called “the Premises”) for a term of Eleven (11) years from the First day of January Two Thousand and Three (hereinafter called “the Term”). A formal Lease will be drawn by the Tenant’s Advocates for an initial term of 5 Years and Six Months renewable.”

While the first sentence of this clause is clear on the term of the Lease Agreement, confusion on this is brought in by the second sentence which I have underlined above. It is not stated by either of the parties as to whether the “formal lease” referred to in that clause was ever drawn by the Tenant’s Advocates. None was produced in evidence by the parties. That leaves us with just the clear statement in the first sentence in that clause that the term of the Lease Agreement was agreed to be 11 years from 1st January 2003. I hold that the agreed term of the Lease Agreement between the Defendants and the Plaintiff was agreed to be 11 years from 1st January 2003. The term of the Lease Agreement therefore expired on 31st December 2013.

3. Is the Plaintiff a protected tenant? If so, what are the implications? If not, what are the implications?

The Plaintiff’s case is that he is a controlled tenant within the meaning of the Landlord and Tenant (Shops, Hotels and Catering Establishments) Act and therefore entitled to the protection afforded to controlled tenants under that statute. In section 2 of the Landlord and Tenant (Shops, Hotels and Catering Establishments) Act, a controlled tenancy is defined as follows:

“means a tenancy of a shop, hotel or catering establishment-

(a) Which has not been reduced into writing; or

(b) Which has been reduced into writing and which –

i. Is for a period not exceeding five years; or

ii. contains provision for termination, otherwise than for breach of covenant, within five

years from the commencement thereof; or

iii. relates to premises of a class specified under subsection (2) of this section

Provided that no tenancy to which the Government, the Community or a local authority is a party, whether as a landlord or as a tenant shall be a controlled tenancy.

The same section defines the word “shop” as follows:

“means premises occupied wholly or mainly for the purposes of a retail or wholesale trade or business or for the purpose of rendering services for money or money’s worth.”

Going by the given definition of the term “shop”, it is quite clear to me that the Plaintiff, who runs a Dental practice at the suit premises, does qualify to be termed as a shop within the meaning of that statute. However, the Plaintiff himself admitted that he entered into the Lease Agreement with the Defendants under which he leased the suit premises for a term of 11 years. This clearly takes him outside the scope of the definition of a controlled tenant for the reason that his tenancy was reduced in writing and was for a term exceeding 5 years. As I found earlier, his tenancy in the suit premises was for a term of 11 years. The Plaintiff is therefore not a controlled tenant and is not entitled to any of the protection extended to controlled tenants under the Landlord and Tenant (Shops, Hotels and Catering Establishments) Act.

4. Was the Plaintiff authorized to demolish the house and other structures on the suit premises and to put up a two storey building thereon?

In asserting that he was authorized to demolish the house on the suit premises and build a two storey building thereon, the Plaintiff sought to rely on clause 2(c) of the Lease Agreement which stated as follows:

“The Tenant will carry out at his own cost and with the consent of the Landlord which is hereby given certain structural adjustments and repairs to the Premises and in consideration therefore the Landlord has agreed to grant the tenant Eleven (11) years term to be formalized by way of a renewal lease.”

In his testimony, the Plaintiff stated that his agreement with the Defendants was that he would lease the suit premises to build a dental surgery and carry on the business of a dentist there. He admitted that the house standing on the suit premises needed some necessary renovations to convert it into a dental surgery. It was his further testimony that upon embarking on those “necessary renovations”, the experts he had hired to do the job concluded that the house standing on the suit premises could not sustain a dental surgery, pointing out that the floor and the roof were not in a good state. I will quote his testimony when he said as follows:

“We decided to demolish and re-build”

My understanding is that by “we”, he meant himself and the experts that he had hired.

On their part, the Defendants contended that they did not in any way authorize the demolition of the house and structures that they leased to the Plaintiff further stating that what the Plaintiff did was to step out of his mandate under the Lease Agreement which only authorized him to make “structural adjustments and repairs” on the house that was standing on the suit premises but definitely not pulling it down as the Plaintiff did. They denied having been involved in that process and expressed shock when they saw the changes that the Plaintiff carried out at the suit premises.

My finding is that the Plaintiff had no authority from the Defendants to demolish the house that was standing on the suit premises and to build a two storey building thereon.

5. Did the Plaintiff spend Kshs. 40 million for the construction of a two storey building on the suit

premises and is he entitled to a refund of that sum plus interest from the Defendants?

The Plaintiff claimed that he spent the sum of Kshs. 40 million to build the two-storey building now standing on the suit premises. However, he did not produce any evidence to support this assertion. Pressed to prove this expenditure, the Plaintiff admitted that he did not produce any receipts or other documents to demonstrate this expenditure. Further, even if he were to prove that he did indeed spend Kshs. 40 million to demolish the house standing on the suit premises and to build the new two-storey building, the court has already arrived at the finding that the expenditure was unauthorized. This further finds support from clause 2(c) of the Lease Agreement which I cited earlier which stated that the authorized structural adjustments and repairs to the Premises were to be carried out by the Tenant "at his own cost". It is obvious that the Plaintiff clearly went on a frolic of his own when he spent Kshs 40 million on the suit premises. This expenditure was unauthorized and therefore not refundable from the Defendants.

6. Was the Plaintiff authorized to sub-let the suit premises to sub-tenants?

A perusal of the Lease Agreement shows that there was no mention of the issue of sub-letting the suit premises. This could be because at the time the parties entered into the Lease Agreement, there was only one house and several ancillary structures standing on the suit property. The issue of sub-letting would, in those circumstances, not have arisen as there was really no extra facilities to sub-let. This, of course, all changed when the house standing on the suit premises was demolished and a new two-storey building was erected by the Plaintiff. There was now a lot of extra space available for sub-letting. My finding on the issue of sub-letting is that the Defendants are not claiming to be paid any of the rental proceeds received by the Plaintiff from them. Their continued occupation of the suit premises is solely dependent on the continued occupation by the Plaintiff. If the Plaintiff leaves, they leave with him.

7. Should the court issue an order evicting the Plaintiff and his sub-tenants out of the suit premises as sought in the Defendants' Counterclaim?

I did note earlier that the Plaintiff acknowledges that the Defendants are the registered proprietors of the suit premises and he is their tenant. I also made the finding that the term of the Lease Agreement expired on 31st December 2013. The Plaintiff has not obtained any renewal of the Lease Agreement. He is also not a protected tenant. This leads to my finding that he is under obligation to deliver up vacant possession of the suit premises to the Defendants. The rights of a registered proprietor are well enunciated in the law. One of the main rights enjoyed by a registered proprietor of a parcel of land is to have possession thereof to the exclusion of all others. The Plaintiff cannot hold on to the suit premises any longer and this applies to all his sub-tenants. The Plaintiff is therefore ordered to grant the Defendants vacant possession of the suit premises within 30 days from the delivery of this Judgment.

8. Who shall bear the costs of this suit?

The upshot of the above is that this suit is hereby dismissed. The Counterclaim is allowed. Each party shall bear their own costs of this suit.

DELIVERED, DATED AND SIGNED AT NAIROBI THIS 7TH DAY OF APRIL 2017.

MARY M. GITUMBI

JUDGE