



**Mavic Investments Company Limited v Little Sheep Investments Limited (Environment & Land Case 105 of 2019) [2024] KEELC 101 (KLR) (18 January 2024) (Judgment)**

Neutral citation: [2024] KEELC 101 (KLR)

**REPUBLIC OF KENYA**  
**IN THE ENVIRONMENT AND LAND COURT AT NAIROBI**  
**ENVIRONMENT & LAND CASE 105 OF 2019**  
**MD MWANGI, J**  
**JANUARY 18, 2024**

**BETWEEN**

**MAVIC INVESTMENTS COMPANY LIMITED ..... PLAINTIFF**

**AND**

**LITTLE SHEEP INVESTMENTS LIMITED ..... DEFENDANT**

**JUDGMENT**

**Background**

1. The Plaintiff initiated this suit by way of a plaint dated 20<sup>th</sup> March, 2019 filed in court on the same date. In the said plaint, the Plaintiff pleaded that it entered into a lease agreement with the Defendant leasing to the Defendant the property known as L.R No. 209/407/2 situated in Nairobi City County (hereinafter referred to as ‘the suit property’) for a term of eight (8) years from 1<sup>st</sup> August, 2016 to 1<sup>st</sup> August, 2024. It is the Plaintiff’s case that the Defendant defaulted in paying rent as required in the lease agreement; on the 1<sup>st</sup> day of every quarter of every year, in advance. The Plaintiff asserts that the lease agreement provided that if the rent was not paid for a period of 30 days from the time it became due, the Plaintiff was at liberty to terminate the lease and regain possession of the suit property.
2. The Plaintiff averred that it exercised the right of repossession, upon the Defendant’s default vide a notice dated 1<sup>st</sup> March, 2018, communicating the position to the Defendant. The Plaintiff however, accuses the Defendant of continuing to unlawfully deny it access into the suit property despite the termination of the lease, causing the Plaintiff to suffer loss as it is not earning any income from the property. The Plaintiff therefore prays for orders of:
  - a. Vacant possession of the suit property;
  - b. Costs of the suit;
  - c. Interest thereof; and



d. Any other relief the Hon. Court may deem fit and just to grant.

### **Defendant's Response to the Plaintiff's Case**

3. The Defendant's responded to the Plaintiff's case through its amended Statement of Defence and Counter-claim dated 1<sup>st</sup> September, 2021. The Defendant denied the Plaintiff's claim in its entirety. It averred that it leased the suit property with a view to developing stalls on it and subleasing them to third parties. It further asserted that it had always paid rent to the Plaintiff on time as and when it was due and denied being in arrears as claimed by the Plaintiff or at all.
4. The Defendant's case was that the Plaintiff's alleged notice of termination of the lease was defective for purporting to terminate the lease on fictitious and unjustifiable grounds. The Defendant therefore insists that the lease with the Plaintiff is still subsisting and it is therefore entitled to quiet possession of the suit property.
5. The Defendant alleged that it had expended a total sum of Kshs 3,200,000/= to obtain change of user of the suit property and payment of rates due to the suit property. It had further obtained all the necessary consents and approvals from the relevant bodies and had since completed construction on the suit property.
6. The Defendant affirmed that the Plaintiff as the Landlord was free to access the suit property on condition that it gives the Defendant adequate notice in accordance with the provisions of the lease agreement. The Defendant prayed for the dismissal of the Plaintiff's case against it asserting that it did not disclose any cause of action against it.
7. In its counter-claim, the Defendant while acknowledging the lease agreement with the Plaintiff asserts that it expressly informed the Plaintiff that it would construct commercial units on the suit property and lease them to third parties. It was therefore necessary to obtain a change of user from 'residential dwelling house' to 'commercial use'. The condition of change of user was indeed incorporated into the lease agreement under clause 6 which mandated the Defendant to obtain the necessary approvals and consents at its own costs prior to making any developments on the suit property.
8. The Defendant in performance of its obligations under the lease, and with the assistance of the Plaintiff, applied for and obtained the necessary consents for change of user of the suit property and also for the construction of the commercial units on the suit property. That was how the Defendant expended the sum of Kshs 3,200,000/= being payments to the County Government of Nairobi City County.
9. The Defendant enumerated in its Counter-claim the works undertaken from mid-2017 to the end of April, 2018. In that respect, the Defendant alleged that it expended a further sum of Kshs 58,735,508/=, with the full knowledge of the Plaintiff. The Defendant opened the stalls developed on the suit property on 1<sup>st</sup> May, 2018 when it started vetting potential tenants.
10. The Defendant accuses the Plaintiff of using underhand tactics in an attempt to unlawfully evict it from the suit property. The conduct of the plaintiff, according to the Defendant, amounts to breach of the terms of the lease whose particulars have been enumerated at paragraph 22 of the Counter-claim.
11. The Defendant pleads that the Plaintiff intends to unjustly benefit from the its developments on the suit property by converting them to its own commercial needs. The suit property is occupied by tenants who pay the Defendant a monthly rent of Kshs 1,600,000/=. The entire development set up by the Defendant is valued at approximately Kshs. 82,000,000/=. The Defendant pleads that it stands to lose



the monthly rental income and its investment on the suit property should the Plaintiff evict it from the suit property. The Defendant therefore counter-claims against the Plaintiff for:

- a. Costs of the approvals and consents incidental to change of user at Kshs 3,200,000/=.
- b. Current market value of the developments made by the Defendant at Kshs 82,000,000/=.
- c. Dismissal of the Plaintiff's suit with costs.
- d. Judgment against the Plaintiff for Kshs 85,200,000/=.
- e. Costs of the Counter-claim.
- f. Any other reliefs the court deems fit to grant.

#### **Plaintiff's Defence to Counter-Claim.**

12. In its reply to the Defendant's Counter-claim, the Plaintiff asserted that the lease between it and the Defendant was subject to payment of rent as and when it fell due. The Plaintiff further denied giving consent to the Defendant as expressly required under clause 6 of the lease for the construction of the alleged shops/stalls on the suit property. The Plaintiff denied knowledge of the amounts allegedly expended by the Defendant in construction.
13. The Plaintiff reiterated that it had not received rent as entitled to under the lease from the Defendant. The Defendant was in rent arrears hence in breach of the lease agreement. The Plaintiff insisted that it was therefore justified and within the law in terminating the lease with the Defendant. It was additionally entitled to re-enter the suit property and take possession of it. It prayed for the dismissal of the Defendant's Counter-claim with costs.

#### **Evidence Adduced at the Trial**

14. There were attempts to settle this matter amicably out of court. However, when the parties failed to reach a settlement, the matter was set down for hearing.
15. At the hearing, Plaintiff called its director, Mr. Victor Nzomo as its only witness. The Defendant on its part called Mr. Samuel Gicheru, its director as DW1 and Mr. Paul Matumbi, a valuer as its 2<sup>nd</sup> witness.

#### **Evidence adduced on behalf of the Plaintiff:**

16. PW1 adopted his witness statement dated 7<sup>th</sup> July, 2022 and filed on the same date as his evidence in chief. He further produced the 4 documents on the Plaintiff's list of documents as exhibits in support of the Plaintiff's case.
17. The witness statement forms part of the record of the court and I need not replicate its contents verbatim in this ruling. It affirmed the averments in the Plaintiff.
18. In response to questions by the Advocate for the Defendant in cross-examination, the Plaintiff's witness (hereinafter referred to as PW1) confirmed the lease agreement between the Plaintiff and the Defendant. PW1 confirmed that the lease allowed the Defendant to carry on developments on the suit property. The Plaintiff was aware of the developments on the suit property though PW1 stated that he had not been to the suit property since serving the termination notice at the beginning of the year 2018. At the time of issuance of the notice, the developments on the suit property looked almost complete. The suit property prior to the developments undertaken by the Defendant was a single residential house.



19. PW1 confirmed that the Plaintiff was aware the developments undertaken by the Defendant were commercial in nature. He too confirmed that they (the Plaintiff) had consented to the change of user.
20. PW 1 stated that he was not aware that the Defendant had used Kshs 3,500,000.
21. PW1 explained that the Defendant's default was in regard to the rental amounts payable and the frequency of payment of the rent. The Notice issued (PE2) was issued on a "without prejudice" basis. It was sent via email.
22. PW1 explained that, 'without prejudice', meant notwithstanding any other action that the Plaintiff was entitled to take under the lease agreement. He admitted that clause 9 of the lease agreement provided that no variation notice was to be sent by electronic mail. PW1 further stated that the lease agreement had no provision for a termination notice.
23. In re-examination, PW1 affirmed that when rent fell due for 30 days, whether demanded or not, the Plaintiff as Lessor had the right to re-enter the suit premises and repossess the same.

#### **Evidence Adduced on Behalf of the Defendant.**

24. The first Defendant's witness (hereinafter referred to as DW1) is a director of the Defendant Company. He adopted his witness statement dated 29<sup>th</sup> June, 2022 as his evidence in chief. He further produced the documents on the Defendant's list of documents as exhibits in support of the Defendant's Defence and Counter-claim. The statement forms part of the record of this Court.
25. Under cross-examination, DW1 confirmed that the Defendant has been in continuous possession of the suit property since the signing of the lease agreement. The Defendant had only been ousted for a period of one (1) week when the Landlord had thrown them out but it regained possession. The Defendant is the one who collects the rent from the suit property.
26. The Defendant pays quarterly rent of Kshs 900,000/= to the Plaintiff. He asserted that he did not receive the alleged termination notice from the Plaintiff.
27. DW 2 was a valuer who prepared the valuation report dated 21<sup>st</sup> June, 2021. It valued the developments by the Defendant on the suit property at Kshs 82,000,000/=.
28. In cross-examination, DW2 confirmed that his instructing client was Soko Safi Ltd. In the valuation report, he had stated that the tenant was Soko Safi Ltd. At the time of the report, the rent being collected from the suit property was Kshs 1.6 million per month, which was on the lower side due to the effects of Covid-19. The goodwill per stall was Kshs 1.0 million.

#### **Court's Directions after the Hearing**

29. At the conclusion of the hearing of the case, the court directed parties to file written submissions. Both parties have complied and I have had the opportunity to read the submissions filed.

#### **Issues for Determination**

30. There is no dispute that the Plaintiff and the Defendant herein entered into a lease agreement in respect to the suit property dated 1<sup>st</sup> August, 2016 for a period of 8 years. The terms of the lease agreement are also not in contention. Each party has indeed produced a copy of the lease agreement as an exhibit in support of their respective positions.
31. The main issue for Determination is whether the Defendant defaulted in payment of rent as alleged by the Plaintiff and consequently, whether the Plaintiff lawfully terminated the lease with the Defendant.



That will then determine whether the Plaintiff is entitled to an order of vacant possession. In respect of the Defendant's Counter-claim, the issues for determination are consequent to the findings above, that is to say, if the Plaintiff is entitled to vacant possession, what would be the fate of the Defendant's Counter-claim?

## **Analysis and Determination**

### **A. Whether the Plaintiff has Established Default by the Defendant**

32. As already indicated above, the Plaintiff's claim is that the Defendant failed to pay rent in accordance with the terms and stipulations of their lease agreement dated 1<sup>st</sup> August, 2016 which rent was payable quarterly and in advance. The Plaintiff asserts that where the rent was not paid for a period of 30 days from the date it fell due, the lease agreement allowed it to terminate the lease and regain possession of the suit property. The Plaintiff purportedly exercised this right vide its notice of 1<sup>st</sup> March, 2018. The Defendant however, refused to hand over possession of the suit property necessitating the filing of this suit.
33. The Defendant denied the Plaintiff's allegations of default insisting that it had at all times paid the rent due and owing to the Plaintiff as and when it fell due.
34. At this juncture, the burden of proof was on the Plaintiff to prove the allegation of default against the Defendant. Section 107 (1) of the *Evidence Act* places the burden of proof upon the party who desires that the court gives judgment as to any legal right or liability dependent on the existence of facts which he asserts.
35. The Plaintiff's case was premised on the alleged default in payment of rent by the Defendant. The Plaintiff was therefore bound to prove the allegation of the default by the Defendant.
36. The Plaintiff in his plaint does not plead the figures nor the period of the alleged default as correctly pointed out by the Defendant in its submissions. PW1 in his testimony did not also address the figures nor the duration of the alleged default by the Defendant.
37. In its submissions, the Plaintiff solely relies on its letter of 21<sup>st</sup> February, 2018. It submits that the said letter details the breach by the Defendant together with calculations of the rent arrears due as at 21<sup>st</sup> February, 2018. The Plaintiff further asserts that the Defendant was aware of the letters detailing the breach but did not produce evidence to demonstrate payment of the rent arrears.
38. The said letter of 21<sup>st</sup> February, 2018 is addressed to the Defendant Company. It informs the Defendant that it is aware that it currently owes the Plaintiff Company a total sum of Kshs 3,048,734/= calculated as per the enclosed schedule. It informs the Defendant Company that unless the said sum of Kshs 3,048,734/= is received in full on or before the 28<sup>th</sup> February, 2018, the lease shall cease and determine.
39. The above letter was followed by the notice of 1<sup>st</sup> March, 2018 which is purportedly the notice of repossession. It is framed in the language of clause C(2) of the lease agreement which provided that;

“If the said rent or/any additional rent or any other payment due hereunder by the lessee or any part therefore is unpaid in the space of Thirty (30) days after it becomes due, whether the same shall have been legally demanded or not, or if the demised premises becomes vacant or deserted or if there shall be any breach or non-performance or non-observance by the lessee of any of the covenants agreements and conditions restrictions stipulations and provisions herein contained and on the part of the lessee to be performed and observed, then the Lessor may at any time thereafter enter upon the demised premises and the same have again



repossess and enjoy as in its former state anything herein contained to the contrary in anywise notwithstanding without prejudice to any right of action or remedy of the Lessor in respect of any antecedent breach of any covenant by the Lessee.”

40. The intention of the earlier letter of 21<sup>st</sup> February, 2018 was to determine the lease between the parties upon expiry of the notice (on the termination date). This letter on its part is framed in the language of Clause C(3) of the lease agreement which on its part provides that,

“the lease is determinable by either party on giving notice and receiving acceptable of such notice in writing and the expiration of the period of such notice this agreement shall cease and determine but, without prejudice to any right of action accrued to either party during the currency of the agreement.”

41. The Plaintiff in its plaint pleads that it terminated the lease agreement through the notice dated 1<sup>st</sup> March, 2018. However, as I already pointed out, the notice of 1<sup>st</sup> March, 2018 was a notice of repossession not of termination of the lease. The letter informs the Lessee that, ‘...the Lessor has opted to enter upon the demised premises, and have again repossess and enjoy the same as in its former estate...’

42. The termination notice is indeed the letter of 21<sup>st</sup> February, 2018. In determining whether the Plaintiff lawfully terminated the lease agreement, the court will have to determine whether the said letter of 21<sup>st</sup> February, 2018 complied with Clause C (3) (cited above) of the lease agreement.

43. It is necessary to state at this point that parties are bound by the terms of their own agreement. The Court of Appeal in the case of *National Bank of Kenya Ltd -versus Pipe Plastic Samkolit (K) Ltd (2001) 2 EA 5003*, (2011) eKLR, stated that:

“A Court of Law cannot rewrite a Contract between the parties. The parties are bound by the terms of their contract, unless coercion, fraud or undue influence are pleaded and proved.”

44. That was the same position in *Pius Kimaiyo Langat -vs- Co-operative Bank of Kenya Ltd* [2017] eKLR, where the same Court stated that:

“We are alive to the hallowed legal maxim that it is not the business of courts to rewrite contracts between parties. They are bound by the terms of their contracts, unless coercion, fraud or undue influence are pleaded and proved.”

45. The Position was affirmed in the case of *Danson Muriuki Kihara -versus Johnson Kabungo* [2017] eKLR.

46. Clause C(3) of the lease agreement between the Plaintiff and the Defendant in this case provides three pre-conditions to termination;

- a. Issuance of notice;
- b. Receipt of acceptance of such notice in writing; and
- c. Expiration of the notice period.

47. The Notice of 21<sup>st</sup> February, 2018 was clear on the termination date. It, in compliance with the provisions of clause C(3), required the Defendant to indicate acceptance of the notice. However, no evidence was provided by the Plaintiff confirming receipt of acceptance in writing of the notice by the Defendant.



48. In the absence of such evidence of receipt, the said notice was non-compliant with Clause C(3) of the lease agreement and therefore inconsequential and invalid. It did not terminate the lease agreement between the Plaintiff and the Defendant, if that was the intention.
49. The Plaintiff's case was that the Defendant has continued to deny it access even after termination of the lease. Having found that the lease agreement has not been validly and lawfully terminated, the Plaintiff's case fails. The lease between the Plaintiff and the Defendant is therefore lawfully subsisting and the Defendant is entitled to continue its possession of the suit property until the end of the term of the lease or until the lease is validly and lawfully terminated.
50. The conclusion is that the Plaintiff has not proved its case. It is therefore not entitled to an order of vacant possession. Its case is hereby dismissed.
51. As I stated at the point of framing the issues for determination, the Defendant's Counter-claim is dependent on the finding as to whether or not the Plaintiff is entitled to an order of vacant possession. Having found that the lease agreement between the parties has not been lawfully terminated and is still subsisting and binding between the parties, the Defendant's Counter-claim lacks basis. The above finding pre-empts the Defendant's Counter-claim. I therefore proceed to dismiss it as well. In any event, the Defendant has not proved any breach of the lease against the Plaintiff.
52. Having arrived at the above decision, it is only appropriate that each party bears its own costs.
53. Consequently, the final order is that the Plaintiff's suit is dismissed. The Defendant's Counter-claim too is dismissed. Each party shall bear its own costs.
54. The Court wishes the parties peaceful co-existence for the remainder of the term of the lease.  
It is so ordered.

**JUDGMENT DATED, SIGNED AND DELIVERED VIRTUALLY AT NAIROBI THIS 18<sup>TH</sup> DAY OF JANUARY, 2024.**

**M.D MWANGI**

**JUDGE**

In the virtual presence of:

Mr. Adolo for the Plaintiff

No appearance for the Defendant

Court Assistant: Yvette

