



REPUBLIC OF KENYA
IN THE ENVIRONMENT AND LAND COURT
AT MOMBASA
ELC CASE NO.86 OF 2016
SHEIKHA MOHAMED ALI

(ALIAS SHUKHA MOHAMED ALI).....1ST PLAINTIFF

Suing as the lawful attorney of: -

AHMED MOHAMED ALI.....2ND PLAINTIFF

ABDULATIF MOHAMED ALI.....3RD PLAINTIFF

ALI MOHAMED ALI.....4TH PLAINTIFF

ZAINAB MOHAMED ALI.....5TH PLAINTIFF

VERSUS

HAMID MOHAMED ABDULKADIRDEFENDANT

JUDGEMENT

1. In a plaint dated 4th June, 2015 and filed on 5th June, 2015, the plaintiffs sued the defendant for vacant possession of the property known as Subdivision No.619/Section 1/Mainland North (Original Number 50/2) (the suit premises). The plaintiffs also sought rent arrears from October 1997 until May 2015 and mesne profits from 1st June 2015 until vacant possession of the suit property is obtained, costs of the suit and interest as well as any other relief that the court may deem fit to grant.

2. The plaintiffs state at all material times they have been and are the registered proprietors of the suit property which measures 12.92 acres or thereabouts. The plaintiffs further state that in 1996, they entered into a lease agreement with the defendant whereby the defendant leased the suit property from 1st October 1995 to 30th September 2025 at a monthly rent as follows:

a. 1st October 1995 to 31st December 1995, no rent was payable.

b. 1st January 1996 to 30th September 2000, Kshs.5,000 per month.

c. 1st October 2000 to 30th September 2005, Kshs.5,500 per month.

d. 1st October 2005 to 30th September 2010, Kshs.6,500 per month.

e. 1st October 2010 to 30th September 2020, Kshs.8,900 per month.

f. 1st October 2020 to 30th September 2025, Kshs.10,000 per month.

3. According to the plaintiffs, the defendant failed to pay the rent due to the plaintiffs from October 1997 to the date of the filing of suit and the rent arrears had accumulated to Kshs.1,209,500 as at the time of filing suit. The plaintiffs further state that despite numerous demands made to the defendant, the defendant neglected, refused and/or failed to pay the rent and rent arrears. The plaintiffs aver that on 22nd April 2015, they issued the defendant with a notice of termination effective from 1st May 2015 and which was to take effect on 31st May 2015, but the defendant continues to illegally occupy the suit property without paying rent an act that is detrimental to the plaintiffs who have been denied the right to receive rent for the suit premises.

4. In his defence dated 20th July 2015 and filed on 22nd July 2015, the defendant, while admitting that the plaintiffs were the registered proprietors of the suit property, avers that upon the sub-division of the original plot Number 619 Section 1, Mainland North since October 2005 the original Plot Number 619 Section 1 Mainland North ceased to exist. The defendant admitted that he entered into a lease agreement with the plaintiffs in 1996 but avers that the lease of the original plot Number 619 section 1 Mainland North was to commence on 1st January 1997. The defendant also denied the manner and particulars of payment of rent as set out in the plaint and as outlined hereinabove. The defendant stated that he has paid rent to the plaintiffs, their agents or representatives totaling kshs.500,307.00 and denied being in rent arrears. The defendant further states that he answered all the plaintiffs' demand letters, notifying the plaintiffs that he had paid all rents due and was not in arrears. The defendant further denied that he was occupying the suit property illegally and put the plaintiffs to strict proof thereof.

5. The case was fixed for hearing on 20th February 2017 when only the plaintiff attended. The court, being satisfied that notice of hearing was duly served on the defendant, ordered the case to proceed ex-parte.

6. PW1, Shiekha Mohamed Ali (alias Shukha Mohamed Ali), who is the 1st plaintiff, testified that the plaintiffs are the proprietors of the suit property and produced a certificate of Title to support their case. PW1 in her evidence stated that in 1996 they entered into a lease agreement whereby the defendant leased the suit property from 1st October 1995 and the lease was to run up to 30th September 2025. She stated that there was no rent payable from 1st October 1995 to 31st December 1995, but thereafter the rent payable would increase gradually from Kshs.5,000 per month for the period from 1st January 1996 to 30th September 2000 up to a maximum of Kshs.10,000.00 per month for the period of 1st October 2020 to 30th September 2025. The lease agreement was produced as the plaintiffs' exhibit number 3. According to PW1, the defendant did not pay the rent due from 1997 to date. The witness produced various demand letters issued by the plaintiffs' advocates to the defendant demanding for payment of rent arrears, but the defendant still never paid.

7. PW1 stated that on 19th August 2014, they wrote a letter to the defendant giving him the option to purchase the suit property for Kshs.2,000,000. The defendant, through Kituo cha Sheria responded on 15th September 2014 expressing his willingness to purchase the property but pointed out that the sale was not legally possible before the expiry of the lease in October 2026 and also questioned the plaintiffs' capacity to sell. The plaintiffs responded to the defendant's said letter on 14th October 2014 informing the defendant of their legal capacity to sell and the price of Kshs.2,000,000 being final offer. The plaintiffs also demanded the immediate payment of rent arrears of kshs.1,209,500.00 . Thereafter on 22nd April 2015 the plaintiffs gave the defendants a one month's notice of termination effective from 1st May 2015 and which was to expire on 31st May, 2015. According to PW1, to date the defendant has not vacated from the suit property and is not paying any rent.

8. The plaintiffs' therefore want the court to order the defendant to give vacant possession of the suit property and to pay the rent arrears as from October 1997 until May 2015 as well as mesne profits from 1st June, 2015 until vacant possession is obtained.

9. Counsel for the plaintiffs submitted by reiterating the contents of the evidence of the plaintiffs' witness. They submitted that upon expiry of the period provided for in the termination notice, the lease was effectively terminated and the plaintiffs are therefore entitled to vacant possession. Counsel submitted that rent is one of the crucial elements of a lease agreement and the defendant's breach of the condition to pay rent entitled the plaintiffs to treat the agreement as repudiated. Counsel further submitted that the plaintiffs are entitled to be paid the rent arrears of Kshs.1,209,500.00 being arrears accumulated up until the termination of the lease, and that once the lease was terminated and the defendant failed to hand over vacant possession, the suit property started to attract mesne profit as per the tabulation in the lease agreement.

10. As earlier stated, the defendant and his advocate did not attend court during the hearing despite being duly served with a hearing notice. The defendant's case was therefore closed without any evidence being adduced on his behalf.

11. The plaintiffs' claim is that the defendant continued to occupy the suit property from 1st June 2015 when the lease had been terminated and therefore ought to be ordered to give vacant possession. The plaintiffs' also claim for the sum of Kshs.1,209,500 being accumulated rent arrears until the termination of the lease on 31st May 2015 as well as mesne profits from 1st June, 2015 until vacant possession of the suit property is obtained by the plaintiffs.

12. PW1 in her evidence produced the lease agreement showing how rent was to be paid. Various letters written to the defendant demanding for payment of outstanding rent arrears were also produced. Similarly, the notice of termination of lease was produced as an exhibit. The defendant in his defence admits having entered into the said lease agreement with the plaintiffs.

Although in his defence the defendant states that he has paid all the rent to the plaintiffs, there was no evidence given to support that allegation. The defendant was served with notice of termination of the lease. He has not given possession and is still in occupation and there is no evidence that he is paying rent.

13. The defendant did not adduce any evidence in this matter to rebut the plaintiffs' evidence.

14. I am satisfied on the evidence placed before me that the defendant is in rent arrears and has continued to wrongfully occupy the suit property from 1st June 2015. The plaintiffs are entitled to mesne profits for the period that the defendant has continued to trespass and wrongfully use the property.

15. In the circumstances and considering the evidence on record, I am satisfied that the plaintiffs have proved their case on a balance of probabilities. For those reasons, I enter judgment for the plaintiffs against the defendant in the following terms: -

a. The defendants to give vacant possession or be evicted from parcel of land sub-division Number 619 Section 1 Mainland North(optional Number 50/2).

b. Rent arrears of Kshs.1,209,500.00.

c. Mesne profits at the rate of kshs.6,500 per months form 1st June 2015 until vacant possession is given.

d. The defendant is ordered to pay costs of this suit.

DATED. SIGNED AND DELIVERED IN MOMBASA THIS 11TH DAY OF MAY 2017

C. YANO

JUDGE