



Sanghani t/a KB Sanghani & Sons v Talewa Road Contractors Limited & another (Environment & Land Case 221 of 2016) [2024] KEELC 981 (KLR) (27 February 2024) (Judgment)

Neutral citation: [2024] KEELC 981 (KLR)

**REPUBLIC OF KENYA
IN THE ENVIRONMENT AND LAND COURT AT MOMBASA
ENVIRONMENT & LAND CASE 221 OF 2016
NA MATHEKA, J
FEBRUARY 27, 2024**

BETWEEN

**NARENDRA KUMAR KARSAN SANGHANI T/A KB SANGHANI &
SONS PLAINTIFF**

AND

**TALEWA ROAD CONTRACTORS LIMITED 1ST DEFENDANT
KENYA NATIONAL HIGHWAYS AUTHORITY 2ND DEFENDANT**

JUDGMENT

1. The plaintiff is the registered proprietor of LR No. 1817/V/MN and LR No. 2043/V/MN. On 18th January 2012 he entered into a tenancy agreement with the 1st defendant for a term of 11 months from February 2012 to December 2012 and the rental payment was Kshs 300,000/= plus VAT to be paid quarterly. The tenant was required to deposit Kshs 1,392,000/= as refundable rent security within 14 days from termination of the agreement or at the expiry of the tenancy. It was a term of the tenancy agreement that the 1st defendant would vacate the suit premises on 30th December 2012 and reinstate the premises to the initial state. It was the tenant's obligation to pay for service charges which included electricity and water. Further to that, in an instance where the tenant wanted an extension of the tenancy, the same would be done in writing three months before the expiry of the tenancy and pay a revised rent of Kshs 450,000/= plus VAT.
2. The 1st defendant took possession of the suit premises and occupied it until 19th June 2013, when the same was taken over by the 2nd defendant. The 2nd defendant had a construction contract with the 1st defendant for the periodic maintenance of the Mombasa-Miritini road. The said contract was terminated by the 2nd defendant on the basis of nonperformance, which led to the 2nd defendant taking over the suit premises, on the basis of securing bitumen. The 1st defendant took the termination of the said contract by the 2nd defendant to arbitration and on 22nd March 2018 Eng. Paul Thanga Gichuhi,



the single arbitrator, made an arbitral award in favour of the 1st defendant as against the 2nd defendant. In particular, the 1st defendant was awarded Kshs 115,131,449/= exclusive of VAT. The 2nd defendant paid the entire arbitral award to the 1st defendant's advocate on 22nd July 2020, a fact that has been admitted by the 1st defendant.

3. In its Amended Statement of Claim dated 26th October 2015 the 1st defendant sought inter alia an award of the rent charges due and payable to the plaintiff for the use of the suit premises from 19th June 2013 until payment in full. It had an alternative prayer of an award of Kshs 450,000/= with VAT of 16% from the 2nd defendant for rent due from 19th June 2013 till payment in full. In the final arbitral award that was issued on 22nd March 2018 the single arbitrator found that the 2nd defendant ought to pay rent from 19th June 2013 when they took possession of the suit property. The arbitrator found that on 21st October 2014, the plaintiff had demanded Kshs 20,767,905/= from the 2nd defendant, and the said figure was not disputed by the 2nd defendant in its response dated 29th October 2014 where the, the 2nd defendant acknowledged receipt of the lease agreement. The arbitrator held that,

“I therefore find and hold that the respondent (2nd defendant) pays the rent from June 2013 to July 2015 at the rate of Kshs 450,000/= per month, a total of 26 months amounting to Kshs 11,700,000/=. To this be added the rest up to 13th September 2016 when the respondent handed over the yard and the penalties levied which should total the claimed sum of Kshs 20,767,905 which I so award to the claimant (1st defendant).”

4. The plaintiff in his plaint pleaded for interest for the rent payable and in its submissions argued that the defendants ought to pay interest on the rent amount awarded in the arbitral award since they have held the monies since 2020. The plaintiff contended that the arbitral award has been outstanding since July 2016 when the defendants vacated the suit premises. He argued that he is entitled to interest on this amount from 20th July 2016 at the contractual rate of 3% per month. The issue of interest on the rent due was never considered in the arbitration proceedings, and the arbitral award was silent on the interest on the rent due and whether it ought to be at the prevailing market rate of 3%. The tenancy agreement between the plaintiff and the 1st defendant stated that where the tenant shall be in breach of any covenant, the same shall attract a compounded interest of 3% per month. In the letter dated 21st October 2014, the plaintiff demanded from the 2nd defendant rent due together with an interest of 3% per annum and the same was not denied or disputed by the 2nd defendant. During the arbitral award, the 1st defendant as the claimant ought to have brought the issue of interest to the arbitrator for determination. The Court of Appeal in *Bawazir Glassworks Limited & another vs Asea Brown Boveri Limited* (2015) eKLR held,

“In our view, in the circumstances as explained above, the interest rate of 3% per month, which works out to 36% per annum, cannot be said to be unconscionable. The rate had been agreed upon. The proforma invoice clearly stipulated interest rate of 3% per month on any overdue account and the first appellant endorsed that rate by a letter dated 5th June, 1999. In any event, the appellants did not settle even the principal sum several years after supply and installation of the equipment. While we agree that some invoices did not specifically state that the rate of interest was chargeable monthly or annually, we are satisfied that there is ample evidence that what was initially agreed upon was interest rate of 3% per month.”

5. The 1st defendant has been holding the rent due to the plaintiff since the 2nd defendant paid the arbitral award on 22nd July 2020. The 1st defendant has therefore benefited from the arbitral award since then and it only just that it remits the same at an interest at the rate of 3% per month to the plaintiff. The



interest that the court is awarding the plaintiff is to adequately compensate him for the deprivation of the use of its rental income and not a punishment to the 1st defendant. This was a similar finding in Samuel Mbuvi Mutemi t/a Samtech Building Contractors v County Government of Machakos [2020] eKLR where it was held

“In any event the interest would cover for that as was observed in the case of *Tate & Lyle Food and Distribution Ltd vs. Greater London Council and another* [1981] 3 All ER 716 where Forbes J held at page 722 that award of interest is not a punitive measure for having kept the Plaintiff out of his money but part of the attempt to achieve restitutio in integrum.”

6. The arbitral award determined the rental amounts due between 19th June 2013 and September 2016 when vacant possession was issued to the plaintiff. The issue before this court therefore is, whether the 1st defendant was responsible for the rent between 30th December 2012 and 19th June 2013. The 1st defendant argued that during this period they were tenant holding over in line as provided by Section 60 (2) of the Land Act. The 1st defendant contended that after 30th December 2012, the tenancy agreement was a periodic lease with Kshs 300,000 as rent payable monthly, and that there was no evidence that the parties agreed to renew the tenancy agreement and increase the rent to Kshs 450,000/= plus VAT. The 1st defendant maintained that during the holding over period, the plaintiff demanded and received a monthly rent of Kshs 300,000/=. The plaintiff on the other hand maintained that the tenancy agreement was renewable automatically with the new rent of Kshs 450,000 when the 1st defendant did not vacate the suit premises after 30th December 2012.

7. In such circumstances, the 1st defendant can only be referred to as a tenant holding over who continues to pay the rent payable under the expired tenancy. This was the finding of the Court of Appeal in Shirbrook (K) Limited v Nakuru Industries Ltd & another (Civil Appeal 56 of 2018) [2022] KECA 759 (KLR) (24 June 2022) (Judgment), where it was held,

“The issue that arises from the above is whether the tenancy between the parties continued after the initial period had lapsed and parties could not agree on the renewal due to the new rent demanded by the 1st respondent. As at the time of the expiry of the lease, the rent payable was Kshs. 24,000/= per month. The appellant continued to occupy the suit premises for a considerable period of time thereafter. In the circumstances the appellant could only be referred to as a tenant holding over as rightly held by the trial court. The effect of holding over and continued collection of rent by the 1st respondent from the appellant after the lease expiry was to create yet another controlled periodic tenancy of month to month between the parties in line with section 60 (2) of the Land Act, 2012 which provides, inter alia;

“A lessor who accepts rent in respect of any period after the lease has been terminated or the term of the lease has expired shall not, by reason of that fact, be deemed to have consented to the lessee remaining in possession of the land or as having given up on the rights or remedies of the lessor against the lessee for breach of a covenant or condition of the lease and if the lessor continues to accept rent from a tenant who remains in possession for two months after the termination of the lease, a periodic lease from month to month shall be deemed to have come into force.”

8. The plaintiff did not issue a notice of termination of tenancy immediately after 30th December 2012, the plaintiff allowed the 1st defendant to remain on the suit premises after the expiry of the tenancy



and is therefore estopped from denying the validity of the extension of the tenancy under the expired tenancy agreement during this period. The Court of Appeal in the above case went ahead to state,

“It follows that the appellant was obligated to pay monthly rent of the last amount that it used to pay until such a time when it could vacate or convince the 1st respondent to enter into another long term lease. We find no reason to think otherwise as the reasoning of the trial court on this aspect was sound. It cannot be said that the trial court re- wrote a new tenancy agreement for the parties and introduced new terms. The monthly rent adverted to by the trial court was directly from the lease agreement that both parties had signed and produced as exhibit before court.”

9. The 1st defendant being a tenant holding over under the expired tenancy agreement of 18th January 2012 was under a legal and contractual obligation to pay the same rent for the holding-over period as the one payable under the expired tenancy. The 1st defendant's obligation was to pay Kshs 300,000/- less VAT for the year 2012, which was the amount payable between 30th December 2012 and 19th June 2013 when the 1st defendant was evicted by the 2nd defendant. The plaintiff has not adduced evidence that the 1st defendant failed to pay a monthly rent of Kshs 300,000/= less VAT for this holding over period. It is the finding of this court that the plaintiff cannot demand a rental income of Kshs 450,000/= from the 1st defendant during the holding over period.

10. The next issue for determination is whether the defendants were in trespass of the suit premises and if so, is the plaintiff is entitled to general damages for trespass as well as the mesne profit for the said period between 19th June 2013 until vacant possession was delivered. Both the defendants have denied being in trespass, the 2nd defendant argued that at all material times, the plaintiff was aware of the 2nd defendant's presence on the suit property and cannot claim trespass. The 2nd defendant submitted that they entered and remained on the suit premises with the consent of the plaintiff and even paid rent for the said period. The Court of Appeal in *Christine Nyanchama Oanda v Catholic Diocese of Homa Bay Registered Trustees* [2020] eKLR held that,

“It is settled law that where a party claims for both mesne profits and damages for trespass, the court can only grant one and not both. Mesne Profits is defined as the profit of an estate received by a tenant in wrongful possession between the dates when he entered the suit property and when he leaves (See: Black's Law Dictionary 9th edition). Mesne Profits must be pleaded and proved. In the case *Peter Mwangi Msuitia & Another v Samow Edin Osman* [2014] eKLR, this Court held as follows:

“As regards the payment of mesne profit, we think the applicant has an arguable appeal. No specific sum was claimed in the Plaint as mesne profit and it appears to us prima facie, that there was no evidence to support the actual figure awarded...”

11. Trespass was defined in *Paul Wanjigi Njoroge vs Come-Cons Africa Ltd & 2 others* (2022) eKLR as,

“A person trespasses upon land if he wrongfully sets foot on, Or rides or drives over, it, or takes possession of it, or expels the person in possession of pulls down or destroys anything permanently fixed to it, or wrongfully takes minerals from it, or places or fixes anything on it, or it seems if he erects or suffers to continue on his own land anything which invades the air space of another, or if he discharges water upon another's land, or sends filth or any injurious substance which has been collected by him on his own land to another's land.”



12. From the foregoing, the defendants have not trespassed on the suit premises. The 1st defendant's occupation of the suit premises between December 2012 and June 2013 was acknowledged by the plaintiff even demanded rental income. The 2nd defendant's occupation of the suit premises between June 2013 and July 2016 was also accepted by the plaintiff who was ready and willing to enter into a new lease and also for the 2nd defendant to pay rent for the period they occupied the suit premises. This court finds that at all material times, the plaintiff permitted the occupation and utilization of the suit premises by the 1st and 2nd defendants respectively. The complaints from the plaintiff to the defendants were more on payment of rent rather than withdrawing their consent to the occupation of the suit premises.
13. On mesne profits, the plaintiff has pleaded Kshs 450,000/= as mesne profits with effect from 11th September 2015 against the defendants and further at a rate to be determined based on comparable rents in the surrounding areas of the suit premises. Mesne profits are meant to be profits recoverable from a trespasser during the period of this unlawful occupation of another's land. A claim of trespass succeeds where there is trespass has been proved, and since it's a special damage, the same must be pleaded and proved. The plaintiff herein has pleaded Kshs 450,000/= however the same has not been proved, and the mere mentioning of a figure is not sufficient to warrant the court to exercise its discretion in favour of the plaintiff. The plaintiff's claim for mesne profit is speculative and cannot be awarded by the court, and as such the claim for mesne profits must fail. It is the finding of the court that the defendants had the authority to be on the land as tenants in holding from the plaintiff between 18th January 2012 to 20th July 2016 when vacant possession was issued to the plaintiff. The plaintiff has failed to demonstrate that the defendants were in unlawful possession of the suit premises.
14. On the issue of costs, the law is clear, costs follow the cause. I find that the plaintiff's case has succeeded, therefore he shall be entitled to the costs of the suit. My final orders are as follows. Judgement is entered for the plaintiff in the following terms;
15.
 - a. The arbitral sum of Kshs 20,767,905/= that was awarded to the 1st defendant by the single arbitrator on 22nd March 2018 as rent due on the leased property LR No. 1817/V/MN and LR No. 2043/V/MN belonging to the plaintiff to be paid to the plaintiff.
 - b. Interest at the rate of 3% per month on Kshs 20,767,905/= from 20th July 2020 when the arbitral award was made to be paid by the 1st defendant to the plaintiff, till payment in full.
 - c. Costs of the suit plus interest at court rates awarded to the plaintiff jointly and severally against the defendants.

It is so ordered.

DELIVERED, DATED AND SIGNED AT MOMBASA THIS 27TH DAY OF FEBRUARY 2024.

N.A. MATHEKA

JUDGE

