



**REPUBLIC OF KENYA**

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

**ENVIRONMENT & LAND CASE NO. 120 OF 2016**

**SUGARLAND ESTATES LIMITED.....PLAINTIFF**

**VERSUS**

**UCHUMI SUPERMARKETS LIMITED.....DEFENDANT**

**J U D G M E N T**

Sugarland Estate limited (*hereinafter referred to as the Plaintiff*) has come to Court against Uchumi Supermarket Limited (*hereinafter referred to as the Defendant*) claiming that the Plaintiff is the sole registered proprietor of the Property known as Eldoret Municipal Block 6/241 on which it has caused to be erected a three storey building known as Sugarland Plaza. By a lease agreement dated 8th February, 2013 the Plaintiff leased to the Defendant a portion of the said premises measuring 25,629 square feet consisting of the basement floor and ground floor for a term of 10(ten) years to run a Supermarket known as Uchumi Supermarket. It was agreed that the rent payable during the said term was to be as follows:-

- (i) For the first term of 18 months from 1st January, 2013 to 30th June, 2014 the rent Kshs.706,332 (read Kenya Shillings Six Hundred and Six Thousand Six Hundred and Sixty Two) only excluding V.A.T. Payable monthly in advance.***
- (ii) For the second term of 12 months from 1st July, 2014 to 30th June, 2015 the rent of Kshs.1,240,823 (read Kenya Shillings One Million Two Hundred and Forty Thousand, Eight Hundred and Twenty Three) only excluding V.A.T. Per mont payable monthly in advance.***
- (iii) For the third term of 12 months from 1st July, 2015 to 30th June, 2016, the rent of Kshs.1,278,048/= (read Kenya Shillings One Million Two Hundred and Seventy Eight Thousand and Forty Eight Shillings) only excluding V.A.T. Per month being an escalation of three percent (3%) from the previous year payable monthly in advance.***
- (iv) For the forth term 12 months from 1st July, 2016 to 30th June, 2017 the rent of Kshs.1,316,389/= (read Kenya Shillings One Million Three Hundred and Sixteen Thousand Three Hundred and Eighty Nine Only) excluding V.A.T. Per month being escalation of three percent (3%) from the precious year payable monthly in advance.***
- (v) For the fifth term of 12 months from 1st July, 2017 to 30th June, 2018 the rent of Kshs.1,355,881/= (read Kenya Shillings One Million Three Hundred and Fifty Five Thousand Eight Hundred and Eighty One Only) excluding V.A.T. Per month being escalation of three percent (3%) from the previous year payable monthly in advance***
- (vi) For the sixth term of 12 months from 1st July, 2017 to 30th June, 2018 the rent of Kshs.1,396,558/= (read Kenya Shillings One Million Three Hundred and Ninety Six Thousand***

***Five Hundred and Fifty Eight Only) excluding V.A.T. Per month being escalation of three percent (3%) from the previous year payable monthly in advance***

***(v) For the seventh term of 12 months from 1st July, 2018 to 30th June, 2019 the rent of Kshs.1,438,545/= (read Kenya Shillings One Million Four Hundred and Thirty Eight Thousand Five Hundred and Forty Five Only) excluding V.A.T. Per month being escalation of three percent (3%) from the previous year payable monthly in advance***

***(vi) For the eighth term of 12 months from 1st July, 2019 to 30th June, 2020 the rent of Kshs.1,481,608/= (read Kenya Shillings One Million Four Hundred and Eighty One Thousand Six Hundred and Eight Only) excluding V.A.T. Per month being escalation of three percent (3%) from the previous year payable monthly in advance***

***(vii) For the Ninth term of 12 months from 1st July, 2020 to 30th June, 2021 the rent of Kshs.1,526,056/= (read Kenya Shillings One Million Five Hundred and Twenty Six Thousand and Fifty Six Only) excluding V.A.T. Per month being escalation of three percent (3%) from the previous year payable monthly in advance***

***(viii) For the Tenth term of 12 months from 1st July, 2020 to 30th June, 2021 the rent of Kshs.1,571,838/= (read Kenya Shillings One Million Five Hundred and Seventy One Thousand Eight Hundred and Thirty Eight Only) excluding V.A.T. Per month being escalation of three percent (3%) from the previous year payable monthly in advance***

The Defendant smoothly operated a supermarket business on the said premises until 20th March, 2016 when the Defendant shut down its operations and removed their goods and merchandise from the suit premises. Prior to ceasing operations and vacating the premises, the Defendant did not issue the Plaintiff with any notice of termination of tenancy. The Plaintiff avers that after shutting down its operations the Defendant removed its goods and merchandise from the suit premises within the period of 21st to 31st March, 2016 and thereafter vacated the premises. The Defendant has since then abandoned the suit premises without any formal communication to the Plaintiff on the fate of their tenancy and has not paid rent since then. Upon vacating the premises the Defendant did not restore the premises to their original condition and occasioned damage on the premises estimated to cost the sum of Kshs1,475,955/= (Kenya Shillings One Million Four Hundred and Seventy Five Nine Hundred and Fifty Five Only).

It is a term of agreement pursuant to clause 4(vi) a and b of the lease that if a Lessee was to vacate or abandon the premises for a period of 30 days consecutively or without prior written consent of the Lessor remain closed for business continuously for a period of 15 days, the Lessor on account of default by the Lessee, could re-enter the premises and repossess and enjoy occupation or terminate the lease and remove the Lessee or any other person in occupation from the premises together with their goods and chattels and enjoy the premises together with all improvements, additions, alterations, equipment and fixtures thereon and may recover from the Lessee all damages it may incur by reason of such breach by the Lessee.

Clause 13 of the lease provides that at the termination of this lease whether by expiration of time compulsory acquisition or forfeiture the Lessee was to remove all of its personal property from the premises and upon failure to do so such property was to be deemed to be abandoned and of no value to the Lessee and was to become the sole property of the Lessor for disposal as it sees fit and the Lessee further agree to pay to the Lessor the cost removal of any such property abandoned by the Lessee.”

The Plaintiff avers that the Defendant has vacated and abandoned the premises and effectively terminated its lease with the Plaintiff. Consequently, the Plaintiff has removed all its goods and merchandise from the premises. At the time of vacating the premises the Defendant was in rent arrears for the month of April, 2016 to the tune of Kshs.1,482,535/= (Kenya Shillings One Million Four Hundred and Eighty Two Thousand, Five Hundred and Thirty Five). The Defendant has further declined to pay rent of Kshs.1,482,535.60 for the month of May, 2016. The Plaintiff claims for rent arrears of Kshs.2,965,070/= from the Defendant in respect of rent arrears for the month of April, and May, 2016. The Plaintiff also

prays for three (3) month's rent in lieu of notice which was not issued by the Plaintiff prior to vacating the premises. The Plaintiff prays for an order that the Plaintiff be and is hereby granted vacant possession of the premises abandoned and vacated by the Defendant together with all improvements, additions, alterations, equipment and fixtures thereon. Demand and notice of intention to sue was duly issued by the Plaintiff and ignored by the Defendant.

Precisely, the Plaintiff prays for Judgment against the Defendant for:-

***(a) The sum of Kshs.2,965,070/= in respect of rent arrears for the month of April, and May, 2016.***

***(b) The sum of Kshs.4,447,606.80 being three (3) month's rent in lieu of notice prior to termination of the lease.***

***(c) The sum of Kshs.1,475,955/= in respect of damages occasioned by the Defendant on the premises.***

***(d) Any order of vacant possession vesting the premises to the Plaintiff together with all improvements, additions, alterations, equipment and fixtures thereon.***

The Defendant filed defence and counterclaim denying the allegations in the Plaintiff and stated that the Defendant closed the suit premises together with the operations in five other branches with a view to focus on a leaner structure in light of its financial constraints. The Defendant with the consent of the Plaintiff removed all its stock items from the suit premises with the exception of improvements, additions, alterations, equipments and fixtures which exercise was undertaken for a period of seven (7) days. The Plaintiff engaged the defendant into negotiations with a view to engage the Plaintiff as a franchise in order to continue carrying on Supermarket Business in the suit premises. The Defendant presented the Draft Franchise Agreement to the Plaintiff who upon perusal indicated that it was no longer interested in pursuing the Franchise arrangement. The Defendant wholly denies that upon vacating the premises the Defendant did not restore the premises to their original and tenantable condition and occasioned damage on the premises estimated to cost the sum of Kshs.1,475,955.

With reference to paragraphs 11 and 12 of the Plaintiff, the Defendant avers that the Plaintiff has refused and declined to give the Defendant such removal of its improvements, additions, alterations, equipment and fixtures and commencement of restorative works in the suit premises. The Plaintiff demanded full payment of the rent arrears before allowing the defendant to undertake the removal. There was amicable exit by the Defendant from the premises and eventually failure of negotiations by the Plaintiff to purchase the goods that did not belong to third parties. According to the defendant, the plaintiff is applying the terms of clause 4 and 13 of the lease agreement selectively as it also provides that the Plaintiff should remove the Defendant from the Premises together with their goods and chattels.

The Defendant wholly denies allegations that the defendant has vacated and abandoned the premise and effectively terminated its lease with the Plaintiff and that at the time of vacating the premises the Defendant was in rent arrears for the month of April, 2016 to the tune of Kshs.1,482,535/= and further declined to pay rent of Kshs.1,482,535.60 for the month of May, 2016. He further denies the Plaintiff's claim for rent arrears of Kshs.2,965,070/= from the Defendant in respect of rent arrears for the month of April and May, 2016. Moreover, he denies that the Plaintiff is entitled to three months rent in lieu of notice issued by the Plaintiff prior to vacating the premises. Lastly the defendant objects to the plaintiff being given vacant possession of the premises abandoned and vacated by the Defendant together with all improvements, additions, alterations, equipment and fixtures thereon.

With reference to paragraphs 13, 14, 15, 16 and 17 of the Plaintiff, the Defendant avers as that the Plaintiff is only entitled to vacant possession of the premises but not to the improvements, additions, alterations, equipment and fixtures thereon. The improvements, additions, alterations, equipment and fixtures in the suit premises belong to a third party Rentco East Africa. Vesting of the third party improvements,

additions, alterations, equipment and fixtures upon plaintiff would lead to a litany of suits against the Defendant.

In the Counterclaim, the Defendant prays for an Order releasing the improvements, additions, alteration, equipment and fixtures to the Defendant for onward transmission to Rentco Limited the Owners.

When the matter came up for hearing, Brigadier (RTD) **Peter Kipchirchir Magut** testified that he is one of the Directors of Sugarland as Managing Director. Sugarland Estates Limited is the proprietor of Eldoret Municipality Block 6/241. On the property is a Commercial Building comprised of two basements, ground floor and four storeys. Uchumi Supermarket Limited was once its tenant. He produced the Lease Agreement entered into by the plaintiff and defendant for a period of 10 years from 8/2/2013. They were the main tenant having been given the ground floor and the basement. He produced the lease agreement registered on 14/4/2013. According to Brigadier Magut (Rtd) the Uchumi Supermarket vacated the Premises on 20/3/2016. They closed down their doors and their company secretary called him and informed him that they had closed. They removed their merchandise for 10 days. At the time of entering the building, Uchumi Supermarket brought in fittings, fixtures and metal alterations. The fixtures are still in the premises. He claims that they never notified him of the intention to leave and that they have never written to him but have abandoned the premises. He was called for a meeting in Nairobi. They have not paid rent for the months of April, May and June, He has a Loan from KCB and therefore seeks an order that he takes up the property. He claims for rent arrears of Kshs.2,965,070= as per the Plaintiff. He claims 3 months rent in lieu of notice being ksh 4,447,606.80 and a sum of ksh 1,475,955 in respect of damages occasioned by the defendant on the premises. He further prays for an order of vacant possession vesting the premises to the plaintiff together with all, improvements, additions alterations equipment and fixtures thereon.

On cross-examination by Mr. Mwinamo the learned counsel for the defendant, he states that he is in possession of the suit premises but was restricted from using the fixtures. He took possession on 20/5/2016 . He insists that they abandoned the premises as they did not inform him when they vacated. The goods in the premises belonged to the tenant and not 3rd party. The deal on the franchise was not made as their terms were so harsh.

The Defendant called **Eunice Kavera Imbeywa**, an Advocate of the High Court of Kenya and currently the Company Secretary, Uchumi Supermarket, she produced the e-mails, Master Operating Lease with Rentco and the draft Franchise Agreement. M/s imbeywa testified that the defendant closed the suit premises together with the operations in five other branches with a view to focus in a leaner structure in light of its financial constraints. The defendant with the consent of the Plaintiff removed all its stock items from the suit premises with the exception of improvements, additions, alterations, equipments and fixtures which exercise was undertaken for a period of seven (7) days. The Plaintiff thereafter engaged the Defendant into negotiations with a view to engage the Plaintiff as a franchise in order to continue carrying on supermarket business in the suit premises. The Defendant presented the draft Franchise Agreement to the Plaintiff who upon perusal indicated that it was no longer interested in pursuing the franchise agreement. According to the defendant, the Plaintiff has refused and or declined to give the Defendant such removal of its improvements, additions, alterations, equipments and fixtures and the commencement of restorative work in the suit premises. The Plaintiff has demanded full payment of the rent arrears before allowing the Defendant to undertake the removal. There was an amicable exit by the Defendant from the premises and eventually failure to negotiations by the Plaintiff to purchase the goods that did not belong to third parties.

She proceeds to state that the Lease Agreement does provide that the Plaintiff should remove the Defendant from the premises together with their goods and chattels. The Plaintiff is only entitled to vacant possession of the premises but not to the improvements, additions, alterations, equipment and fixtures. The improvements, additions, alterations equipment and fixtures in the suit premises belong to a third party Rentco East Africa. Vesting of the third party improvements, additions, alterations, equipment and fixtures upon a third party would lead to a litany of suits against the Defendant. Improvements, additions, alterations, equipments and fixtures of the Defendant were left in the suit premises with full knowledge of the Plaintiff that the same were under lease from Rantco Ltd. The Defendant thus prays for

the dismissal of the Plaintiff's suit with costs and the entry of judgment in favour of the Defendant against the Plaintiff as per the counterclaim with costs

On cross-examination by Mr Chanzu, she states that it is true that Uchumi Supermarket is in rent arrears of one month as at the time of closure. She concedes that they never issued a notice in writing. The Lease Agreement was prepared by the Defendant when Pauline Kinuthia was the Company Secretary. The lease was executed by all parties. Paragraph 4 (vi)(a) 4 (b) of the Agreement are relevant as they deal with rights and obligations. She confirmed that the Lease Agreement between Uchumi and Rentco is not signed and is not dated. She believes that the Franchise Agreement crystallized into a contract.

On re-examination, M/s Imbeywa states that the Defendant neither vacated nor abandoned the premises but closed the same and engaged Mr. Magut. He was aware that they had left the premises. The Plaintiff had no lien over the goods. At the close of the defendant's case parties chose not to submit and prayed for judgment

I have considered the pleadings and evidence on record and do find that on the 8/2/2013, the Plaintiff and Defendant entered into a Lease Agreement in respect of property on Title No. Eldoret/Municipality/Bock 6/241 on which was erected a building known as Sugarland Plaza comprising of Shops Office and other usual conveniences connected therewith. The term of the lease was 10 years. The rent was agreed as follows thus for the first term of 18 months from 1st January, 2013 to 30th June, 2014 the rent Kshs.706,332 (read Kenya Shillings Six Hundred and Six Thousand Six Hundred and Sixty Two) only excluding V.A.T. Payable monthly in advance. For the second term of 12 months from 1st July, 2014 to 30th June, 2015 the rent of Kshs.1,240,823 (read Kenya Shillings One Million Two Hundred and Forty Thousand, Eight Hundred and Twenty Three) only excluding V.A.T. Per month payable monthly in advance. For the third term of 12 months from 1st July, 2015 to 30th June, 2016, the rent of Kshs.1,278,048/= (read Kenya Shillings One Million Two Hundred and Seventy Eight Thousand and Forty Eight Shillings) only excluding V.A.T. Per month being an escalation of three percent (3%) from the previous year payable monthly in advance. For the fourth term 12 months from 1st ,mogi88July, 2016 to 30th June, 2017 the rent of Kshs.1,316,389/= (read Kenya Shillings One Million Three Hundred and Sixteen Thousand Three Hundred and Eighty Nine Only) excluding V.A.T. Per month being escalation of three percent (3%) from the precious year payable monthly in advance. The rest of the period is not relevant as Uchumi closed shop in March, 2016. It is not disputed that the Defendant smoothly operated a Supermarket business on the suit premises until 30/3/2016 when the Defendant shut down its operations and removed its goods and merchandise. DW.1 admitted that prior to closing shop and removing goods, it did not issue notice of termination of tenancy. It is not in dispute that the Defendant has vacated the premises without prior notice in writing.

I have carefully considered clause 4(vi) (a) (b) of the Lease Agreement which provides as follows:-

**"If the Lessee shall vacate or abandon the premises for a period of Thirty (30) days consecutively or without the prior written consent of the Lessor remain closed for business continuously for a period of fifteen (15) days (and the Lessee shall be deemed to covenant not to do suffer or permit the same) then in any such event at the Lessor's option and without limiting the Lessor in the exercise of any other right or remedy open to the Lessor on account of any default by the Lessee the Lessor may Terminate this lease and remove the Lessee or any other person or persons in occupation from the said premises together with their goods and chattels using such force as may be necessary in the judgment of the Lessor. In so doing without being liable to the Lessee who hereby relinquishes all claims thereby arising against the Lessor for forcible entry including use of excessive force if any and repossess and enjoy the premises together with all improvements, alterations, equipment and fixtures thereon and in addition to any other remedy it may have the Lessor may recover from the Lessee all damages it may incur by reason of such breach by the Lessee.** The import of this clause is that the lessor is entitled to all improvements, alterations, equipment and fixtures in the event of the lessee vacating without notice or abandoning the premises.

The import of the Defendants statement dated 10/6/2013 signed by Eunice K. Embeywa and admitted in

Court as the Defendant's evidence in Chief, is that the Defendant closed the suit premises together with the operation in five of its branches with a view to focus in leaner structures in regard to its financial condition. The Defendant engaged the Plaintiff in negotiation which did not materialize and therefore according to the defendant they are entitled to the improvements, addition, alterations, equipment and fixtures.

I have considered the emails sent on 26/3/2016 at 19.00 hours by Eliud Abasa Omoha, the Supplier Relationship Manager – Procurement to Dr. Kipngetich, indicating that they had a meeting with the Landlord at Eldoret Sugarland, Brigadier, Peter Magut and that he was seriously interested in taking over the running of the shop as a Franchise. This email is followed by another from Brigadier Peter Magut on Sunday March, 27/2016 to Julius Kipngetich where Peter Magut acknowledged the idea as excellent and therefore the Defendant had to relocate to the upper shop. However Franchise never materialize and therefore clause 4 vi (a) and (b) are still enforceable as the negotiations did not vitiate the lease agreement.

The upshot of the above is that the Plaintiff has satisfied this court that the defendant vacated and closed the suit premise on the 20/3/2016 without prior consent from the Plaintiff. The Defendant closed the business on 20/3/2016 and by the 29/4/2016 when the demand letter was written the premises remained closed. Furthermore, the premises remained closed until the 20/5/2016 when the Court granted an order that the Plaintiff takes vacant possession of the premises previously occupied by the Defendant on Sugarland Plaza situated on Land Parcel Number ELD/MUNIC./BLOCK.6/241 with all improvements, addition, alteration, equipment and fixtures thereon. The lease agreement between Rentco East Africa and Uchumi Supermarket is not signed by Rentco and therefore has no evidential value.

This court further finds that even if the same was signed by Rentco East Africa the agreement was between the defendant and Rentco and that there was no privity of contract between the plaintiff and Rentco.

Privity of contract is a long-established part of the law of contract. In the earlier part of the last century, it was identified by Viscount Haldane LC as one of the fundamental principles of the English Contract Law. See **Dunlop Pneumonic Tyre v. Selfridge and Co. Ltd.** The essence of the privity rule is that only the people who actually negotiated a contract (who are privity to it) are entitled to enforce its terms. Even if a third party is mentioned in the contract, he cannot enforce any of its terms nor have any burdens from that contract enforced against him.

In our jurisdiction that proposition has been accepted in a line of decisions of the Court of Appeal, among them AGRICULTURAL FINANCE CORPORATION V LENGETIA LTD [1985] KLR 765, KENYA NATIONAL CAPITAL CORPORATION LTD V ALBERT MARIO CORDEIRO & ANOTHER, CA NO 274 OF 2003 and WILLIAM MUTHEE MUTHAMI V BANK OF BARODA, CA NO 91 OF 2004,

Thus in AGRICULTURAL FINANCE CORPORATION V LENGETIA LTD, quoting with approval from *Halsbury's Laws of England, 3rd Edition, Volume 8, paragraph 110, Hancox, JA*, as he then was, reiterated:

*“As a general rule a contract affects only the parties to it, it cannot be enforced by or against a person who is not a party, even if the contract is made for his benefit and purports to give him the right to sue or to make him liable upon it. The fact that a person who is a stranger to the consideration of a contract stands in such near relationship to the party from whom the consideration proceeds that he may be considered a party to the consideration does not entitle him to sue upon the contract.”*

The Franchise agreement prepared by Eunice K. Embeywa is also not signed and also of no evidential value.

The plaintiff commissioned highland valuers ltd to inspect the property and advise on the cost of repairs to be done which they did and submitted the report which was produced as an exhibit in this court.

According to the report the repairs to be undertaken upon the premises include painting, screeding of the damaged floor and replacement of broken glazing in respect of the lower basement. In respect of the upper basement the plaintiff is expected to do painting, replacement of broken and cracked ceramic floor tiles and plumbing works to the washrooms. The evidence available to court is that they inspected the premises and are of the opinion that the cost of the repairs to be undertaken on the premises occupied by uchumi supermarket on Eldoret Municipality Block 6/241 Eldoret town is Ksh 1,475,955.00. The report is signed by E.K. Metto a registered valuer. The defendant did not avail an alternative report and therefore this report is not challenged. I do find that the plaintiff has proved on a balance of probabilities that he is entitled to the damages occasioned by the defendants on the premises necessitating the repairs.

The plaintiff has also demonstrated that neither notice to vacate, was issued by the defendant nor consent in writing to vacate the premises was obtained from the plaintiff as envisaged in the lease agreement. The court notes that rent was payable in advance and therefore the plaintiff is entitled to rent in the month of April and May as the plaintiff took possession on the 20/5/2016.

Having evaluated the evidence on record and the law I do find that the Plaintiff is entitled to compensation in the following terms:-

- |  |                          |
|--|--------------------------|
| (1) Costs of restoration of the premises to the original situation ..... | Kshs.1,475,955/=         |
| (2) Three month's rent in lieu of Notice .....                           | Kshs <b>4,447,606.80</b> |
| (3) Rent Areas for the month of April & May .....                        | Kshs.2,965,070/=         |
| TOTAL.....   | <b><u>8,888,631</u></b>  |

***(4)An order of vacant possession vesting the premises to the Plaintiff together with all improvements, additions, alterations, equipment and fixtures thereon is hereby granted.***  
**DATED AND DELIVERED AT ELDORET THIS 12TH DAY OF AUGUST, 2016.**

**ANTONY OMBWAYO**

**JUDGE**