



REPUBLIC OF KENYA
IN THE ENVIRONMENT AND LAND COURT

AT NAIROBI

ELC CIVIL CASE NO.825 OF 2007

**THE REGISTERED TRUSTEES OF
NATIONAL COUNCIL OF CHURCHES OF KENYA.....PLAINTIFF**

=VERSUS=

1. KAIBI LIMITED

2. HON. GITOBU IMANYARA.....DEFENDANTS

J U D G M E N T

Introduction:

1. In its Complaint dated 7th October, 2002, the Plaintiff averred that it is the registered proprietor of L.R. No.209/4280 on which an office block known as Tumaini House has been erected (The suit property)
2. According to the Complaint, by a written agreement dated 9th November, 1993, the Plaintiff let to the Defendants office space in the said Tumaini House for a term of six years from 1st March, 1994; that the Lease Agreement expired by effluxion of time on 29th February, 2000 and that at the time of the expiry of the Lease Agreement, the Defendants were in rent arrears to the tune of Kshs.1,229,500 which was sum was liquidated by the 2nd Defendant on 17th April, 2001.
3. It is the Plaintiff's case that notwithstanding the expiry of the Lease Agreement, the Defendants refused to yield up possession of the suit premises; that the fair letting of the suit premises from 1st March, 2000 was Kshs.52,060 per month and that the outstanding mesne profits owed by the Defendants to the Plaintiff as at 31st August 2002 was Kshs.1,561,800.
4. The Plaintiff is claiming for vacant possession of the premises; Kshs.1,562,800 being the accrued mesne profits; further mesne profits calculated at the rate of Kshs.52,060 per month from 1st September, 2002 until possession is delivered up; Kshs.245,000 being sums paid for legal services rendered, interest on the said sum and the costs of the suit.
5. In their Defence, the Defendants averred that the Plaintiff acquiesced in the transfer of the tenancy to Gitobu Imanyara & Co. Advocates; that the fair letting value of the suit premises can only be determined in accordance with the provisions of the Landlord and Tenant (Shops, Hotels and Catering Establishments) Act and that they are not liable to the Plaintiff.

6. In its reply to Defence, the Plaintiff averred that it is the firm of Gitobu Imanyara & Co. Advocates which settled the sum of Kshs.1,229,500 for and on behalf of the 1st Defendant.

7. The Plaintiff later on amended the Plaintiff and enjoined Hon. Gitobu Imanyara as the 2nd Defendant. In the amended Plaintiff, the Plaintiff claimed for Kshs.3,942,098 being accrued mesne profits as at 23rd August, 2006.

8. This matter was partly heard by Sitati J. The matter proceeded for hearing before me from where it had stopped.

The Plaintiff's case:

9. PW1 informed the court that he is a valuer and Property Manager working with Kinyua Koech Limited; that he is the one who was managing the Plaintiff's assets known as Tumaini House since 1988 and that the 1st Defendant executed a letter of offer dated 9th November 1993.

10. According to PW1, the 1st Defendant did not honour the terms of the tenancy whereafter he instructed Whitestone Auctioneers to levy distress for rent arrears of Kshs.1,229,548.30 as at 1st February, 2000.

11. PW1 informed the court that before the said distress for rent could be effected, the 2nd Defendant paid the rent arrears of Kshs.1,229,548.30 vide his letter dated 16th February, 2000 which the witness produced in evidence. PW1 also produced in evidence a receipt that was issued by the Plaintiff's advocate in respect to the payment of Kshs.1,229,548.30 that was made by the 2nd Defendant.

12. It was the evidence of PW1 that by the time the 2nd Defendant was paying the rent arrears, the Lease Tenancy between the Plaintiff and the 1st Defendant had lapsed.

13. According to PW1, after the payment of the rent arrears, the 2nd Defendant requested for another tenancy; that the landlord instructed him to ensure that the rent of Kshs.52,060 per month from March, 2000 to June, 2001 should be settled by the Defendants first and the said instructions were contained in the letter of 19th June, 2001 which he produced in evidence.

14. According to PW1, the 2nd Defendant confirmed in writing that he would settle the rent arrears plus interest in twelve months installments vide his letters dated 26th June, 2001 and that the said installments were to form part of the new rent until the arrears were fully paid; that the amount of rent which was outstanding of Kshs.832,960 plus the costs of a previous suit of Kshs.245,000 was communicated to the 2nd Defendant and that the 2nd Defendant handed to him post dated cheques for the said amount.

15. PW1 informed the court that the 2nd Defendant gave him twelve post dated cheques for the rent arrears, accrued rent and legal fees totaling to Kshs.1,702,680 and that when the first cheque was presented to the bank, it was returned unpaid.

16. PW1 testified that when the first cheque was returned unpaid, the 2nd Defendant advised them not to encash the rest of the cheques; that the Defendants never paid the said Kshs.1,702,680 and that the rent that was due and owing as at November, 2003 was Kshs.2,233,203.

17. It was the evidence of PW1 that he continued communicating with the 2nd Defendant over the issue of the rent arrears and forwarded to him the statement showing the rent arrears as at June, 2005. PW1 produced the said statement in evidence showing that the rent owing and due was Kshs.3,257,107.

18. PW1 informed the court that the 2nd Defendant eventually vacated the suit premises on 23rd August, 2006.

19. It was the evidence of PW1 that as at the time the 2nd Defendant vacated the suit premises, he owned the Plaintiff Kshs.3,942,098 being mesne profits and Kshs.245,000 being the admitted legal fees in Nairobi HCCC No. 1242 of 1997

The Defence case:

20. The Defendants neither testified nor called any witness to testify in this matter.

Submissions:

21. The Plaintiff's advocate submitted that the obligation by the Defendants to pay the rent arrears and mesne profits should not be defeated by the absence of a Lease; that the 2nd Defendant took over the tenancy after the lease lapsed; that the 2nd Defendant undertook to clear the outstanding amount of rent arrears and legal fees on behalf of the 1st Defendant and that indeed he cleared the initial rent arrears.

22. The Defendants' counsel did not file his submissions as directed by the court.

Analysis and findings:

23. The Plaintiff's claim is that the 1st Defendant continued to occupy the suit premises from 1st March 2000 together with the 2nd Defendant until 23rd August, 2006 when they vacated the suit premises leaving rent arrears of Kshs.3,942,098.

24. It is the Plaintiff's case that before 1st March, 2000, the 1st Defendant was in arrears of rent amounting to Kshs.1,229,500 and that when the Lease between the Plaintiff and the 1st Defendant expired by effluxion of time on 29th February, 2000, the Defendants continued occupying the suit premises without paying any rent.

25. PW1 produced in evidence documents showing the instructions that he gave to Whitestone Auctioneers on 1st February, 2000 to levy distress for the accumulated rent arrears of Kshs.1,229,500. PW1 also produced in evidence the letter dated 1st February, 2000 by the Plaintiff's agent in which the Plaintiff informed the 1st Defendant that the Lease will expire on 29th February, 2000 whereafter the 1st Defendant was to hand over the suit premises.

26. In the meantime, there was a pending suit between the Plaintiff and the 2nd Defendant being Nairobi HCCC No. 1242 of 1997. PW1 produced a letter authored by the 2nd Defendant dated 16th February, 2000 which shows that he settled the rent arrears that was due and owing by depositing it in court in the said matter. The money that was deposited in court was eventually released to the Plaintiff's advocate who issued a receipt on 17th April, 2001 for Kshs.1,229,548.30.

27. Even after paying the rent arrears upto and until March, 2000, the Defendants continued occupying the premises despite the expiry of the Lease.

28. When the 1st Defendant was sued in this matter for the rent arrears after the lapse of the Lease, it averred in its Defence that "the Defendant was allowed by the Plaintiff and/or the Defendant acquiesced in the transfer of the tenancy to Gitobu Imanyara & Co. Advocates". The said averment necessitated the amendment of the Plaint to enjoin the 2nd Defendant in this matter.

29. PW1 produced in evidence a letter dated 19th June, 2001 in which he informed the 2nd Defendant about the payable rent for the premises after the expiry of the first Lease. In the said letter, PW1 annexed an "extract note" showing that the payable rent was Kshs.52,060 per month with effect from March, 2000. In the said "extract note", the 2nd Defendant was also supposed to pay the costs in the previous suit and to execute a standard Lease.

30. In his letter dated 26th June, 2001, the 2nd Defendant consented to the terms set by the Plaintiff but requested to pay the rent arrears and the costs of the suit in 12 equal installments. The installments were to form part of the new rent until the said amount is liquidated.

31. PW1 produced in evidence a letter dated 29th June, 2001 which was a response to the 2nd Defendant's request to continue paying the rent for the suit premises as suggested by the Plaintiff together with the accrued rent arrears and legal fees.

32. In the said letter, PW1 Informed the 2nd Defendant that the rent arrears from 1st February, 2000 to 3rd June 2001 at Kshs.52,060 per month was Kshs.832,960 while the legal fees in the previous suit was Kshs.245,000. The total amount that was to be paid by the 2nd Defendant was Kshs.1,077,960.

33. In the said letter, PW1 agreed to the payment of the said amount in twelve installments as suggested by the 2nd Defendant together with the monthly rent of Kshs.52,060.

34. The letter requested the 2nd Defendant to forward to PW1 twelve post dated cheques of Kshs.141,890 each for the total amount of Kshs.1,077,960..

35. PW1 produced in evidence the twelve cheques for Kshs.141,890 each that the 2nd Defendant forwarded to the Plaintiff as requested in the letter of 29th June, 2001.

36. However, when the first cheque was presented to the bank, it was dishonoured. PW1 informed the court that the Defendants neither paid the rent arrears and the legal fees as promised nor the subsequent rent.

37. The evidence before this court shows that it was not until 23rd, August, 2006 that the 2nd Defendant handed over the suit premises without paying the rent of Kshs.52,060 per month after the expiry of the first Lease, together with the legal fees that they had agreed to pay.

38. Having agreed to pay the new rent of Kshs.52,060 per month with effect from March, 2000 together with the legal fees of Kshs.245,000, and having occupied the suit premises until August, 2006, the Plaintiffs are entitled to mesne profits with effect from March, 2000 and the admitted legal fees in HCCC No. 1242 of 1997 of Kshs.245,000.

39. The Defendants did not adduce any evidence in this matter to rebut the Plaintiff's evidence.

40. In the circumstances, I am satisfied that the Plaintiff has proved its case on a balance of probabilities that the Defendants owe it Kshs.3,942,098 being the accrued mesne profits as at 23rd August, 2006 together with the admitted legal fees of Kshs.245,000.

41. For those reasons, I allow the amended Plaint dated 6th December, 2007 in terms of prayer numbers (bb), (d), (e) and (f).

Dated, signed and delivered in Malindi this 14th day of **October**, 2016.

O. A. Angote

Judge