



**REPUBLIC OF KENYA**  
**IN THE ENVIRONMENT AND LAND COURT OF KENYA**

**AT NYERI**

**E.L.C CASE NO. 484 OF 2014**

**(Formerly Nyeri HCCC No. 9 of 2000)**

**KONAHAUTHI LTD ..... PLAINTIFF**

**VERSUS**

**HON. WANYIRI KINYORO ..... DEFENDANT**

**JUDGMENT**

1. By a plaint dated 11<sup>th</sup> January, 2000 the plaintiff instituted this case seeking judgment against the defendant for:-

- a) Kshs.322,800/= being arrears of rent due upto 31<sup>st</sup> August 1999;
- b) Mesne profits at the rate of Kshs.14,700/= per month until possession of the premises be delivered up;
- c) A declaration that the plaintiff is entitled to vacant possession;
- d) An order for vacant possession of the premises;
- e) Costs of the suit;
- f) Interest upon (a) (b) and (c) at court rates from the date of filing of the suit to payment in full;
- g) Any other or further relief which the court may deem fit to grant.

2. It is the plaintiff's case that it leased a portion of title No. Nyeri Municipality/Block 1/69-Nyeri (hereinafter referred to as the suit property) to the defendant vide lease agreement dated 9<sup>th</sup> July, 1997 at a monthly rent of Kshs.14,700/=, for a period of 6 years.

3. The plaintiff contends that from the time the lease commenced, the defendant was persistently in rent arrears. That state of affairs forced the plaintiff through its advocate **Njeri Kariuki**, to issue the defendant with a notice of forfeiture of the lease in accordance with **Section 111 (g)** of the Transfer of Property Act.

4. It is averred that even after the defendant was issued with the notice of forfeiture of the lease, he did not pay the rent arrears which at that time stood at Kshs.322,800/=.
5. On his part, the defendant filed the statement of defence dated **2<sup>nd</sup> March, 2000** and amended on **30<sup>th</sup> July, 2008**. In his statement of defence, the defendant contends that he is owed Kshs.200,000/= by the plaintiff plus accrued interest which amount was not credited to his account to offset the rent. The defendant also explains that he tendered the balance of rent which the plaintiff refused to accept in order to force him out of the suit premises.
6. The defendant further avers that he is ready to pay any amount due, after the Kshs.200,000/= he claims and interest in respect thereof is credited to his rent account.
7. When the matter came up for hearing, the plaintiff availed one witness, Robin Muriuki Ndegwa, who is one of its directors.
8. **Mr. Robin Muriuki Ndegwa** (P.W.1), informed the court that on 1<sup>st</sup> August, 1997 the plaintiff agreed to lease the suit property to the defendant at a monthly rent of Kshs. 14,700/= for a period of six (6) years with effect from 1<sup>st</sup> August, 1997.
9. The court heard that the lease period was not completed. The plaintiff filed the suit against the defendant because from the time the lease agreement was entered into and the time he was removed from the suit premises he had only paid a total of Kshs.88, 800/=.
10. P.W.1 further informed the court that by the time the plaintiff filed this suit, the defendant was in arrears of Kshs. 770,570/=. The foregoing notwithstanding, P.W.1 informed the court that in total the defendant had paid a total of Kshs.330,000/=.
11. Before going to court, the plaintiff had issued demand notices to the defendant. P.W.1 contended that the plaintiff's list of documents, **Pexbt 1 to 16**, make it clear that the defendant was kept aware of the rent arrears.
12. The court heard that notwithstanding the fact that a decree was issued against the defendant requiring him to vacate the suit premises, he only vacated the suit property after the lease expired.
13. P.W.1, produced the plaintiff's list of documents as **Pexbt 1 to 20**.
14. The court heard that the defendant left the suit premises in 2002 and that the demand for Kshs. 770,570/= was inclusive of interest.
15. P.W.1 admitted that despite the amount claimed having included interest charged in respect thereof, the lease agreement had no clause for charging interest.
16. The foregoing notwithstanding, P.W.1 maintained that as at February, 2001 the defendant had rent arrears of Kshs. 418, 800 after factoring all the payments he had made. He also contended that clause 3b of the letter of offer provided for escalation of lease. He explained that for that reason, the rent increased to Kshs.16, 905/= from August, 2000 to the end of the lease.
17. On his part, the defendant (D.W.1) informed the court that on 31st January, 2001 he wrote a letter to his advocate informing him that he thought he did not owe any rent to the defendant (letter produced as **Dexbt 1**). He further informed the court that he was owed Kshs.200,000/= by the plaintiff and had no rent arrears.
18. He stated that he was shocked when he received a notice to show cause why he should not pay because he thought he had overpaid rent. He moved the court to set aside the notice and summary judgment that had been entered against him and succeeded in having the notice to show cause and the judgment entered against him set aside by the court of appeal. He produced the order setting the

judgment aside as **Dexbt 2**. He contended that as at 3<sup>rd</sup> March, 2000 when he vacated the suit property, he had overpaid the rent. He produced his rent payment schedule as **Dexbt 3**.

19. Concerning the plaintiff's claim which includes interest, he stated that the lease agreement executed between the plaintiff and himself did not allow the plaintiff to charge interest and produced the lease agreement as **Dexbt 4**.

20. He explained that he paid Kshs. 200,000/= on behalf of Mr. Ndegwa (a former director of the plaintiff) as his contribution towards Nyeri Bursary Fund. He produced a letter allegedly written by Mr. Ndegwa confirming that he owed him money as **Dexbt 5**. He however, admitted that there is a difference between Mr. Ndegwa and the plaintiff, which is a Limited Liability Company.

21. Concerning clause 3(b) of the lease agreement which allowed for escalation of rent, he explained that rent could escalate from 1<sup>st</sup> August, 2000 but before then the rent was static.

22. Concerning his contention that he tendered the balance of rent he owed, he stated that he does not know the amount he tendered as balance. He informed the court that he paid some of the rent money owed after the tenancy was terminated. The court heard that in January 2001 he paid Kshs. 150,000/=.

23. D.W.2 **Idd Marijan Suleiman**, informed the court that he was present in the public function in which Mr. Duncan Ndegwa pledged Kshs. 200,000/= on behalf of corner house.

24. D.W.2 told the court that he was aware that corner house belongs to a company. He explained that the pledge was made to the fund and not to the defendant.

25. D.W.3 **Daniel Murage Mutwiri**, informed the court that he was present when Mr. Duncan Ndegwa made the pledge of Kshs. 200,000/= in favour of the bursary fund.

26. At the close of hearing, the parties to the suit filed submissions which I have read and considered.

27. In his submissions, the defendant contends that his evidence and that of his witness shows that the plaintiff owes him Kshs.133, 180/= on account of advance payments and rent deposit. He maintains that he paid the Kshs. 200,000/= pledged by Mr. Duncan Ndegwa to the bursary fund.

28. Concerning the testimony of P.W.1, he contends that he (P.W.1) was not a director of the plaintiff at the material time and is therefore incapable of testifying on what the former directors of the plaintiff did or did not do.

29. With regard to the plaintiff's claim for rent, he submits that the plaintiff should explain what period the pleaded amount relates to. He also submitted that the plaintiff should have indicated whether there was an interest component included and what rent payments in respect thereof are included.

30. He maintains that the plaintiff company and Mr. Duncan Ndegwa undertook to pay Kshs.200,000/= towards the bursary fund. It is contended that the said pledge was confirmed by the testimony of D.W.2 and D.W.3.

31. Concerning the defendant's counter-claim, it is submitted that the same is not defended/is unopposed.

32. The letter by Mr. Duncan Ndegwa dated 22nd June, 1999 is said to be a confirmation that he was holding cash from the fund raising.

33. The defendant explains that when the money was not paid, the said Duncan Ndegwa instructed him to pay it from the plaintiff's rent account.

34. The plaintiff is also said to have failed to disclose when the tenancy ended.

35. The defendant put his rent payment for the period of 32 months he was in occupation of the suit property at Kshs.618, 800/= inclusive of the Kshs. 200,000/= paid on behalf of the plaintiff and Duncan Ndegwa.

36. Based on his calculations, he submits that he is owed Kshs.148, 400/= on account of overpaid rent.

37. As at the time of writing this ruling no submissions had been filed by the plaintiff.

### **Analysis and Determination**

38. It is not in dispute that there existed a lease agreement between the plaintiff and the defendant. The terms of that lease agreement are as contained in the letter of offer dated 9<sup>th</sup> July, 1997. The lease was to subsist for a period of six months at a monthly rent of Kshs. 14,700/- per month unless reviewed as contemplated in clause 3(b) of the said letter of offer. That clause allowed for variation of the agreed rent as from 1<sup>st</sup> August, 2000. The rent payable under that clause would be determined by an independent valuer to be nominated by the parties failing which the chairman of the Chartered Institute of Arbitrators (Kenya branch) on application of the lessor.

39. From the evidence adduced in this suit, it appears there is no evidence that the rent payable was ever increased in accordance with the said clause.

40. Clause 11 of the lease/letter of offer provided for what would happen if the rent agreed on remained unpaid for seven days after becoming payable (whether lawfully demanded or not). the clause, inter alia, provided as follows:-

**“...if at any time hereafter you are in breach of any of the covenants or conditions referred to herein or in the lease, it will be lawful for the lessor to re-enter the premises or any part thereof and thereupon this agreement shall be terminated absolutely.”**

41. The evidence on record shows that as at 29<sup>th</sup> April,1999 the defendant was already in breach of his obligations to the plaintiff. Consequently the plaintiff issued him with the notice of an even date requiring him to pay the amount claimed in that notice (Kshs. 234,600/=). The notice warned the defendant that if he would not have met the terms of the notice as at 12<sup>th</sup> May, 1999 the plaintiff would exercise its right to re-enter the suit premises and to determine the lease.

42. That demand notwithstanding, there is evidence that the defendant continued to occupy the suit premises. Whereas the plaintiff claims that the defendant continued occupying the suit property for the entire term, the defendant claims that he was ejected out of the suit premises on 3<sup>rd</sup> March, 2000.

43. Although the lease agreement did not provide for payment of interest on account of breach of its terms, P.W.1 admitted that the plaintiff's demand for rent arrears was inclusive of interest.

44. Since the defendant has since vacated the suit property prayers (c) and (d) of the plaint to have been rendered nugatory.

45. With regard to prayers (a) and (b), I agree with the defendant's submissions that the plaintiff ought to have specified the period of time in respect of which they relate or whether they include the interest allegedly charged on the unpaid rent. Most importantly, the plaintiff ought to have adduced evidence capable of proving when the defendant vacated the suit property. Without that evidence, it is not possible for the court to rightly determine what the rights and obligations of the parties are. Be that as it may, from the evidence adduced in court and the submissions made in respect thereof, the court can nevertheless determine the rights of the parties based on the undisputed or uncontroverted facts of the case.

46. According to the testimony of the defendant and the submissions he made in respect thereof, he was in the suit premises for 32 months. Rent payable for that period at the agreed rate of Kshs.14,700/= is

Kshs.470,400/=. In his testimony, P.W.1 stated that the plaintiff had received a total of Kshs.330,000/= on account of rent from the defendant. That amount does not tally with the rent schedule issued to the defendant which shows that as at July 2002 the defendant had paid Kshs.418,800/=. That would at least leave a balance of Kshs.51,600/= being unpaid rent.

47. It is noteworthy that the defendant claims that he is entitled to set off any balance found to be due from him from the Kshs. 200,000/= allegedly paid on behalf of the plaintiff and Duncan Ndegwa. With regard to that claim, I hold the view that the said Duncan Ndegwa and the plaintiff are in law, separate legal entities. Without any evidence that the plaintiff passed a resolution authorizing the said pledge, the same cannot be said to have been sanctioned by it. The defendant cannot rely on the said pledge to prove his claim against the plaintiff.

48. The upshot of the foregoing is that I enter judgment for the plaintiff against the defendant for Kshs.51,600/= plus interest thereof at the court's rate from the date the suit was filed until payment in full. The plaintiff shall also have the costs of the suit.

**Dated, signed and delivered at Nyeri this 7<sup>th</sup> day of July, 2015.**

**L N Waithaka**

**JUDGE**

**In the presence of:**

Mr. Muhoho h/b for Mr. Ng'ang'a for the plaintiff

Mr. Wanyiri Kigo for defendant

Court assistant - Lydia