



Ismail Rahimtulla Trustees Registered & another v Joint Administrators-Spencon Kenya Limited (Under Administration) & 2 others (Environment and Land Case Civil Suit 375 of 2017) [2024] KEELC 5586 (KLR) (25 July 2024) (Judgment)

Neutral citation: [2024] KEELC 5586 (KLR)

**REPUBLIC OF KENYA
IN THE ENVIRONMENT AND LAND COURT AT NAIROBI
ENVIRONMENT AND LAND CASE CIVIL SUIT 375 OF 2017**

LN MBUGUA, J

JULY 25, 2024

BETWEEN

ISMAIL RAHIMTULLA TRUSTEES REGISTERED 1ST PLAINTIFF

SONY HOLDINGS LIMITED 2ND PLAINTIFF

AND

THE JOINT ADMINISTRATORS-SPENCON KENYA LIMITED (UNDER ADMINISTRATION) 1ST DEFENDANT

PRAGNESH JITENDRA PATEL 2ND DEFENDANT

ASHUTOSH SHARMA 3RD DEFENDANT

JUDGMENT

The pleadings

1. The Plaintiffs commenced this suit by a plaint dated 7.6. 2017. They contend that they are the registered proprietors of parcel L.R No. 209/11458 upon which they have erected a building known as “Rahimtulla Tower’ comprising of offices, shops and the usual conveniences within Nairobi city.
2. It is their case that they had leased approximately 6,000 square feet office space on the 17th floor of the said Rahimtulla Tower to the 1st Defendant through a lease agreement dated 27.7.2011 for a term of 6 years commencing on 1.11.2010 to 31.10.2016. In addition thereto, they also entered into a car parking License agreement with the 1st defendant dated 2.6.2015, which was to run upto 31.10.2015.
3. They contend that the lease terminated on 31.10.2016 by effluxion of time, but the 1st Defendant failed to comply with covenants of the lease including the obligation to pay rent, charges/fees and was in arrears of ksh.15,471,512.06 as at the time the suit was filed.



4. They aver that under the lease agreement, the 2nd and 3rd Defendants jointly and severally guaranteed the Plaintiffs the payment of rent and all sums payable under the lease by the 1st Defendant but they have since breached the terms of their guarantee.
5. It is averred that as a result of the Defendants' conduct, the Plaintiffs have suffered loss of user of the suit premises, and they pray for judgment against the Defendants for;
 - a. An order that the 2nd and 3rd Defendants are jointly and severally liable to pay special damages in the sum of ksh. 15,471,512.06.
 - b. An order that the 2nd and 3rd Defendants are jointly liable for mesne profits for every month occupied after the expiry of the lease from 31.10.2016 until the date of handing over of the premises in vacant possession;
 - c. Interests at the rate stipulated under the lease agreements;
 - d. Such other and/or further remedies as this Honourable Court deems fit.
6. The 1st and 3rd Defendants neither entered appearance nor filed defence. The 2nd Defendant entered appearance but failed to file a defence within the prescribed timelines, hence the matter proceeded as a formal proof.

Litigation history

7. Litigation history of this suit presents a classic case of “how to stone wall” a case at the behest of the defendants, particularly the 2nd which led to delivery of numerous rulings in the lifespan of the suit.
8. The suit was filed contemporaneously with an application dated 7.6.2017, in which the plaintiffs sought mandatory injunctive orders for the eviction of the 1st defendant. In a ruling delivered on 29.3.2018, the prayer for Vacant possession of the suit premises was granted by this court. In minute details, the ruling captures the history of the dispute as at the time of delivery of the said ruling. In particular at paragraph 6 thereof, the court noted that service of summons had been effected, but no defences were filed even though the 2nd defendant had entered appearance and had attended the hearing of the aforementioned application. The court also marked the matter as an undefended suit.
9. More than a year down the line on 18.7.2019, the 2nd defendant filed a Preliminary Objection averring that the court had no jurisdiction to handle the case, but this was overruled vide a ruling dated 24.9.2020.
10. Again more than another year later, the 2nd defendant was back in court with an application dated 26.1.2022 whereby “the plaintiff was seeking leave to amend the defence of the 2nd defendant’s defence”. That application was dismissed by the Deputy registrar on 14.11.2022 on account of the fact that it was not possible for the plaintiff to seek to amend a defence. The ruling was delivered in the presence of counsel for the 2nd defendant.
11. Despite the dismissal of the said application, the 2nd defendant went ahead and informed this court on 16.1.2023 that they desired to orally amend their application dated 26.1.2022 to reflect that it was brought by the 2nd defendant and not the plaintiff. The court allowed this amendment (certainly the court had not seen and was not alerted about the dismissal order of 14.11.2022). In a substantive ruling delivered on 16.2.2023, the court did not allow the amendment of the defence on the basis that the 2nd defendant did not have a pleading on record capable of being amended.



12. Few months later, the 2nd defendant was back in court with an application dated 24.5.2023 praying that the orders given on 29.3.2018 and 24.9.2020 for the matter to proceed as a formal proof to be set aside. In a ruling delivered on 5.10.2023, the court declined to allow the application on the basis that the issues raised had been determined in the ruling of 16.2.2023.
13. In between these rulings, the defendants kept on applying for adjournments even though the matter was a formal proof. For instance on 18.2.2019, the case was adjourned as counsel for the 2nd defendant was in Kajiado! On the subsequent hearing date of 24.7.2019, the 2nd defendant introduced a Preliminary Objection based on jurisdiction. On the hearing date of 18.11.2021, the 2nd defendant was not ready to proceed ostensibly because he wanted to introduce a 3rd party.
14. Despite the hurdles surmounted by the defendants at every turn, the case finally proceeded to hearing on 6.12.2023.

The Evidence

15. The Plaintiff's sole witness, PW1 is Duncan Kibunyi, Chief Finance Officer of Althaus Management & Consultancy Limited engaged by the Plaintiffs to maintain their books in relation to the leases in Rahimtulla Tower. He adopted his witness statement dated 12.11.2021 as his evidence. He also produced the 7 documents contained in the Plaintiffs' list dated 7.6.2017 as P. Exhibit 1-7.
16. He avers that on 27.7.2011, the Plaintiffs entered into a lease agreement to lease approximately 6,000 ft office space on the 17th floor of Rahimtulla Tower to the 1st Defendant for a term of 6 years commencing on 1.11.2010 and expiring on 31.10.2016. That under clause 1 (a) of the lease, the 1st Defendant covenanted to pay rent by equal quarterly payments in advance and further pay and indemnify the Plaintiffs against all value added tax or similar charges or taxes imposed on the lessor on receipt of the rent or other charges.
17. That under clause (1b) of the lease, the 1st Defendant was obligated to make direct monthly payments to suppliers of all services including water, telephone and conservancy consumed, pay the Plaintiffs the cost of electricity for the premises and proportionally in the common parts and pay a service charge being a minimum of ksh. 120,000/= per month.
18. That in addition thereto, the Plaintiffs also entered into a car parking License agreement with the 1st defendant dated 2.6.2015, where the 1st Defendant acquired the rights to use parking bays nos; 203, 204, 205, 206, 207, 208, 409, 436, 437, 438, 439, 701, 702, 722, 732 and 733 for a period of 1 year 10 months.
19. That it was also an express term of the lease that the 1st Defendant would pay interest on all sums due under the lease and not paid on due dates for amounts payable in ksh at the rate of 3% above the Barclay Bank of Kenya Ltd base rate or if no such rate, at the rate which is 3% above the rate that Barclays Bank of Kenya Ltd charges its customers, and for amounts payable in USD, libor or such other index as may replace libor from time to time plus 6% from the date when the sums became due and payable until payment in full both before and after any court judgment.
20. He avers that the lease terminated on 31.10.2016 but the 1st Defendant failed to comply with covenants of the lease including the obligation to pay rent, charges /fees which were in arrears of ksh.15,471,512.06.
21. That by clause 5 of the lease agreement, the 2nd and 3rd Defendants jointly and severally guaranteed the Plaintiffs the payment of rent and all sums payable under the lease by the 1st Defendant as well as due performance and observance by the 1st Defendant of all the provisions and conditions of the lease



agreement and further jointly agreed to pay on demand the rent and all sums becoming due to the Plaintiffs from the 1st Defendant but they have since breached the terms of their guarantee.

22. That as a consequence of the said default, the Plaintiffs' caused their estate agents to tabulate the outstanding rent, services charges and licenses fees due to the Plaintiffs from the 1st Defendant and the amount outstanding at the expiration of the lease was ksh.15,471,512.06 broken down as follows;

Total Rent	10,171,083.00
Interest on overdue rent	1,629,508.65
Service charge	3,167,070.00
Interest on overdue service charge	454,647.60
Electricity arrears	49,202.81
Total	15,471,512.06

23. PW1 also avers that by a letter dated 14.11.2016, the 2nd Plaintiff was notified of the appointment of joint administrators of Spencon Holdings Limited and Spencon Services Limited.
24. That further, by a letter dated 11.1.2017, the Plaintiff notified the 2nd and 3rd Defendants as guarantors of the 1st Defendant's default in paying rent, service charge and other outgoings due under the lease agreement as well as the license fees due under the car park licence agreement and demanded payment but they failed to pay.
25. In cross-examination, PW1 stated that he did not have a letter of engagement between the Plaintiff and Althaus Management and Consultancy Limited and that documents showing that the 1st Defendant defaulted in the lease and licence agreement were availed to Althaus Management Limited by Axis real estate Limited.
26. He stated that he was not a signatory to the lease agreement and the car license agreement between the Plaintiffs and the 1st Defendant. He added that for the car park licence agreement, there was no guarantee by the 2nd and 3rd Defendants to perform any obligations.

Submissions

27. The Plaintiff' submissions were filed on 23.1.2024, a day past the court given time, while those of the 2nd defendant were filed on 4.3.2024 a week late. I will consider both sets of submissions.
28. The issues raised by the plaintiff in their submissions are;
- (i) What is the effect of the failure by the Defendants to file a defence?
 - (ii) Whether the Plaintiffs are entitled to enforce the guarantee against the 2nd and 3rd Defendants?
 - (iii) What are the appropriate reliefs to grant? (d) who should bear the cost of this suit?
29. On the 1st issue, the case of Stephen Gachau Githiaga & Anor v AG (2015) eKLR is cited to submit that pleadings of a party who does not appear remain mere allegations and since the 2nd Defendant



- did not file a defence, the Plaintiffs' case is uncontested thus the balance of probability should tilt in favour of the Plaintiffs.
30. The Plaintiffs also rely on the case of Kenindia Assurance Company Limited v First National Finance Bank Limited [2008] eKLR to submit that in view of the nature of the claim against the 2nd and 3rd Defendants herein, the liability to settle the debt due pursuant to their personal guarantee requires only that the Plaintiffs show that defendants had been duly served with a demand notice.
 31. On the 2nd issue, it is submitted that the 2nd and 3rd Defendants signed the guarantee whereupon they covenanted to pay on demand the rent and all sums becoming due to the lessor from the 1st Defendant and all losses, damages, expenses and costs suffered by the Plaintiffs thus their contract cannot be re-written. The case of National Bank of Kenya Limited v Piplesic Samkolit & another [2021] KLR 112 is cited.
 32. The case of Ebony Development Co. Ltd v Standard Chartered Bank Ltd [2008] eKLR, Mwaniki Wa Ndegwa v National Bank of Kenya LTD & Another [2016] eKLR as well as the case of Karuri Civil Engineering (k) Limited v Equity Bank Limited [2019] eKLR are cited to submit that a guarantor becomes liable upon default by the principal debtor and it is not the guarantor to see to it that the borrower complies with his contractual obligation but to pay on demand the guaranteed sum.
 33. On the 3rd issue, it is reiterated that the 2nd and 3rd Defendants obligation to the Plaintiff arose as a primary debt thus it crystallized upon the demand made on 11.1.1017.
 34. On the 4th issue, plaintiffs contend that there is no dispute that following the expiry of the lease on 31.10.2016, the 1st defendant continued occupation of the suit property until the court issued the order to vacate on 5.4.2018. The plaintiffs therefore claim that they are entitled to mesne profits which are awarded in place of rent. They therefore claim monthly rent at sh.674,475 from 1.11.2016 to 5.4.2018. On this point, the plaintiffs rely on the case of Rajan Shah T/A S. Shah and Partners v. Bipin P.Shah [2016] eKLR.
 35. The 2nd Defendant's submissions are dated 1.3.2024 where they address the following issues;
 - (i) Does the court have jurisdiction to determine the Plaintiffs claim?
 - (ii) Does the absence of the 2nd Defendant's defence from the court's record amount to an admission?
 - (ii) Have the Plaintiffs discharged their burden of proof?
 - (iv) Are the Plaintiffs entitled to the orders sought?
 36. On the 1st issue, it was submitted that Plaintiffs' claim against him entirely pertains to the settlement of alleged amounts guaranteed under the lease agreement thus this court lacks jurisdiction to adjudicate on the matter. The case of Co-operative Bank of Kenya v Patrick Kange' the Njuguna & 5 others [2017] eKLR is cited.
 37. On the 2nd issue, it is argued that the Plaintiffs have not automatically discharged their burden of proof, merely because of the absence of his defense on record. To this end, the following cases have been relied upon; Josephat Muthuri Kinyua & 5 Others v Fabiano Kamanga M'etrikia [2021] eKLR, Mary Kahumbu v National Bank of Kenya ltd [2014] eKLR as well as the case of Emfil Limited v Attorney General & 423 Others [2019] eKLR.
 38. On the 3rd issue, it is submitted that PW1 failed to demonstrate his personal knowledge of the relevant facts /his connection to the case, thus his evidence should be disregarded due to its inadmissibility



under Section 35 of the *Evidence Act*. The case of *Britania Sacco v Jambo Biscuits Limited* [2018] eKLR was relied upon.

39. It is argued that even if the documents presented in court were to be considered, PW1 failed to provide contextualization of the statement of accounts and ledger accounts in relation to the corresponding invoices for the claimed amounts.
40. That further, PW1 could not provide an explanation on why the alleged outstanding arrears for the lease agreement and car park license agreements were consolidated when the car park license agreement was entered into by a different entity, Specon Holdings Limited and under which no guarantee was offered by the 2nd Defendant.
41. It is submitted that there is no clarity on the methodology used to derive the figures presented on page 134 of the Plaintiffs bundle and that the author is unknown, thus they lack probative value. The case of *Mugo Mungai & 4 Others v Official Receiver & Provisional Liquidator (Capital Finance Limited and Pioneer) & 2 others* [2019] eKLR is relied upon.
42. The court is urged to find that the Plaintiffs have failed to establish the amounts claimed since there are several discrepancies in the documents tendered as evidence.
43. In rejoinder, the Plaintiff filed supplementary submissions dated 27.3.2024 arguing that this court has jurisdiction to determine the matter as the dominant claim herein relates to land use and the claim for recovery of outstanding rent is incidental to the 'use' of land. That further, by a ruling dated 24.9.2020, this court made a determination that it has jurisdiction to hear the matter.
44. It is argued that since the claim herein is being made against the 2nd Defendant pursuant to a demand guarantee where liability is not an issue, then the balance of probability tilts in favour of the Plaintiffs. It is argued that the only proof required in this case and which has been discharged is that the 1st Defendant defaulted in its rent and it is now for the 2nd and 3rd Defendants to pay.
45. It is also argued that invoices, statements and ledgers produced by PW1 are admissible as they were produced by someone to whom the information was communicated by someone who had personal knowledge and in any case, documents relied on by the Plaintiff were produced and admitted as exhibits during trial without objection by the Defendants.

DETERMINATION

46. Before delving into the main issue for determination, the court will put to rest the question of jurisdiction. The fact of the matter is that the said question was settled by this court vide its ruling dated 24.9.2020 where this court held that the dispute herein falls within the mandate of this court. I will therefore say no more on the issue.
47. It is common ground that the 1st defendant has since vacated the suit premises, but that was after the court gave the order for vacant possession vide its ruling of 29.3.2018. The issue therefore falling for determination is whether the prayers set out in clause b-f in the plaint are merited.
48. The Plaintiffs' case is that the 2nd and 3rd Defendants jointly and severally guaranteed to them the payment of rent and all sums arising from any non-payment or breach of a lease between the Plaintiffs and the 1st Defendant to use office space on 17th floor of Rahimtulla Tower. As earlier stated, this is an undefended claim, nevertheless the 2nd defendant was represented all along, and he even cross examined a witness; See *Emfil Limited v Attorney General & 423 Others* [2019] eKLR. The said defendant however lost any opportunity to proof facts in absence of a pleading.



49. That notwithstanding, the burden of proof still rests with the plaintiffs to prove their case in tandem with the provisions of Section 107 of the *Evidence Act*. In the case of *Gichinga Kibutha v Caroline Nduku* [2018] eKLR, the court stated as follows in relation to an undefended claim;

“It is not automatic that in instances where the evidence is not controverted, the claimant’s claim shall have his way in Court. He must discharge the burden of proof. He must prove his case however much the opponent has not made a presence in the contest”.

50. While in *Samson and Maitai and another VS African Safari Club Limited and Another* 2010 eKLR the court had this to say on proof;

“Proof refers to evidence which satisfies the court as to the truth or falsify of a fact..... the burden of proof lies on a party who asserts the truth of an issue in dispute.”

51. What were the terms of the guarantee in issue herein? Clause 5 (a) of the lease dated 27.7.2011 provides that;

“In consideration of this lease having been given to the lessee at the request of the guarantors to the Lessor the Guarantors hereby jointly and severally guarantee to the lessor the payment by the lessee of the rent hereby reserved and all sums payable by the lessee hereunder and the due performance and observance by the lessee of all the provisions and conditions hereof and in the event of any default by the lessee the guarantors hereby jointly and severally covenant and agree with the lessor to pay on demand the said rent and all sums becoming due to the lessor from the lessee hereunder and all losses damages expenses and costs suffered by the lessor as a result of non-payment or breach by the lessee or non-performance or non-observance of any of the provisions and conditions hereof”.

52. In light of the aforementioned clause, the guarantors who are captured on the 1st page of the lease as the 2nd and 3rd defendants had an obligation to pay on demand rent /sums becoming due to the lessor from the lessee. The said clause however relates to the rent on the lease and had nothing to do with the car park charges.

53. It is a known principle of law that this court cannot re-write a contract between the parties. See Court of Appeal case of *Five Forty Aviation Limited v Erwan Lanoe* [2019] eKLR. Thus the court cannot vary the terms of the aforementioned guarantor.

54. Did the lessor demand the sums due from the guarantors herein? Correspondence at page 139-144 of the Plaintiffs’ bundle indicates that the Defendants were served with a notice dated 10.1.2017 relating to claim on the arrears, but they never responded to the same. In *Ebony Development Company Ltd v Standard Chartered Bank LTD* [2008] eKLR, the court stated as follows;

“The obligation of guarantor is clear. It becomes liable upon default by principal debtorIt is not for the guarantor to see to it that the borrower complies with his contractual obligation but to pay on demand the guaranteed sum.”

It follows that the 2nd and 3rd defendants had an obligation to pay the arrears on rent upon demand.

55. What amounts are due to the plaintiffs from the defendants? I am in agreement with the 2nd defendant that the methodology used to arrive at the figures particularly on interest are not discernible. For instance, the data at page 134 is muddled up where by, the interest on rent arrears appears to be mixed up with the interests on car park charges.



The evidence of PW1 was certainly not helpful on this point. It is also pertinent to note that the car park licence agreement was entered into between the 1st Defendant and the entity known as Spencon Holdings Limited which is not a party to this suit.

56. The fact that the figures are disorderly does not however mean that the defendants are off the hook, for the reason that the foundational fall back document is the lease agreement. At clause 3 C (a) (page 2 of the lease agreement), the figures of monthly rent are given. Such that at paragraph 3 C (d) thereof (page 3 of the said document), the monthly rent is indicated as KSH.674,475.
57. The document at page 131 headed outstanding rent and service charge arrears dated 8.10.2015, appears to be the first demand made on rent. As already stated, the court is only dealing with the rent factored in the lease agreement. The court will therefore compute the date of arrears as 8.10.2015 but will ignore the figures stated thereon on as there is no specification as to which rent is for lease and which rent is for the car park as between the 2 rent amounts.
58. That being the case, and considering that the rent was being paid on quarterly basis, I proceed to compute the rent arrears from October 2015-October 2016 as follows; October 2015 - December 2015: $674,475.00 \times 3 = \text{Kshs.}2,023,425$ January 2016 - March 2016: $674,475 \times 3 = \text{ksh.}2,023,425$ April 2016 - June 2016: $674,475 \times 3 = \text{ksh.}2,023,425$ July 2016 - September 2016: $674,475 \times 3 = \text{ksh.}2,023,425$ October 2016 - Ksh.674,475

Total Rent; Ksh. 8,768,175/=

59. The service charge due as at 8.10.2015 (document at page 131 of plaintiff's bundle) was ksh. 813,477/= . Clause (d) at page 4 of the lease document indicates that service charge was ksh.120, 000/= per month. There are 13 months from October 2015-October 2016. The total service charge is;
- $\text{Ksh.}120,000 \times 13 = 1,560,000.00 + 813,477 =$

Total service charge 2,373,477.00

60. Thus the total arrears for rent on the lease as well as service charge is sh. 8,768,175 (rent) + sh. 2,373,477 (service) giving a grand total of ksh.11,141,652.00. That amount is the one now awarded for the claim at paragraph (b) of the plaint.
61. The 1st Defendant proceeded to stay in the suit premises upto 29.3.2018 when the court delivered a ruling for vacant possession. It means that the 1st Defendant occupied the premises without paying rent and service charge for a period of 1 year and 5 months (17 months - November 2016 to March 2018). As submitted by the plaintiffs, mesne profits are calculated in place of rent. The rent changeable for 17 months is $\text{sh.}674475 \times 17 = 11,466,075$. I therefore award the said sum of Ksh.11,466,075 as mesne profits..
62. In the end, judgment is entered for the Plaintiffs against the 2nd and 3rd Defendants jointly and severally as follows;
- i. Ksh. 11,141,652 as special damages for unpaid rent on the lease and service change (prayer b in the plaint).
 - ii. Mesne profits amounting to sh.11,466,075 for the period of 17 months that 1st defendant unlawfully occupied the suit premises (prayer c in the plaint).
 - iii. Costs of the suit.
 - iv. Interest at court's rate on costs, as well as on the special damages and mesne profits but the same to be calculated from the date of delivery of this judgment.



DATED, SIGNED AND DELIVERED AT NAIROBI THIS 25TH DAY OF JULY, 2024 THROUGH MICROSOFT TEAMS.

LUCY N. MBUGUA

JUDGE

In the presence of:-

Mr. Ombegi and Mr. Ochieng for Plaintiffs

Christine Njane holding brief for Lilian Opando for 2nd Defendant

Court assistant: Eddel

