



Mwangeka v Kenya Ports Authority & another (Environment & Land Case 91 of 2018) [2025] KEELC 617 (KLR) (19 February 2025) (Judgment)

Neutral citation: [2025] KEELC 617 (KLR)

**REPUBLIC OF KENYA
IN THE ENVIRONMENT AND LAND COURT AT MOMBASA
ENVIRONMENT & LAND CASE 91 OF 2018
SM KIBUNJA, J
FEBRUARY 19, 2025**

BETWEEN

DAVIS MWALIMO MWANGEKA PLAINTIFF

AND

KENYA PORTS AUTHORITY 1ST DEFENDANT

CEMTEC ENGINEERING LIMITED 2ND DEFENDANT

JUDGMENT

1. The plaintiff commenced this suit against the defendants through the plaint dated 26th November 2012, seeking for permanent injunction restraining the defendants from interfering with his occupation and business on plot 971/972 MN, Shimanzi Road or evicting him and costs. That vide the ruling delivered on the 4th May 2022, the court directed that the amended plaint filed on 14th August 2020 deemed as properly filed on condition the plaintiff pays each of the defendants thrown away costs of Kshs.10,000 in 30 days and in default “the amended plaint filed on 14th August 2020 will be struck out and the plaintiff will have to proceed on the basis of the original plaint.” Through the amended plaint, the plaintiff added two prayers for Kshs.257,842,524 and general damages for wrongful eviction. The plaintiff avers that he has been carrying on business on Plot No. MN/971/972, also known as Port Police Canteen, since 1989, pursuant to an agreement entered between himself and the OCPD Port Police, and he had been paying rent until November 2012. That on 21st November 2012, the 1st defendant wrote to him demanding that he vacates from the premises by 1st December 2012. That on 3rd December 2012, the defendants in violation of injunctive orders issued on 26th November 2012 threw out his goods from the premises and completed the process of evicting him on 27th February 2014. That in the process of his eviction, his goods worth millions were either stolen, damaged or simply got lost. He quantified the special damages to Kshs.257,842,524. The plaintiff seeks for judgment against the 1st and 2nd defendants jointly and severally for:



- a. “A permanent injunction to restrain the defendants, by themselves, their servants and/or agents or otherwise however howsoever from interfering with the plaintiff’s occupation of and business on the premises situated on Plot 971/972/MN Shimanzi Road or evicting the plaintiff there from.
 - b. Kshs 257,842,524.00/= special damages
 - c. General damages for wrongful eviction.
 - d. Costs of and incidental to this suit.
 - e. Any other and or further relief that this honourable court may deem fit and just to grant.”
2. The plaintiff’s claim is opposed by the 1st defendant through statement of defence dated 20th December 2012 and amended on 4th August 2022 inter alia averring that the premises occupied by the plaintiff are in Kilindini High-Level KPA Estate on Mombasa/Block 1/490 which is owned by the 1st defendant. That the same was leased to the plaintiff to provide canteen services to the employees of the 1st defendant and the police officers of Port Police station. That for administrative purposes the canteen was named Port Police canteen. The 1st defendant maintained that they have never transferred the ownership of the property to the Provincial Police Officer or the Officer commanding Port Police and that the plaintiff has been paying rent to the 1st defendant but erratically. That through the Port Public Health office issued a statutory notice for major works to be carried out in the building, which prompted the 1st defendant to issue the plaintiff with a notice to vacate for renovations to be carried out in compliance with the health requirements set by the Ministry of Health, and the plaintiff’s claim should be dismissed with costs.
 3. The 2nd defendant also opposed the plaintiff’s claim through the statement of defence dated 10th March 2023, averring inter alia that they communicated to the plaintiff that they had been awarded a contract on 2nd November 2012 to renovate and refurbish the 1st defendant’s canteen, within the 1st defendant’s premises. The plaintiff welcomed the said renovations, which started on 22nd November 2012, but on 6th December 2012 they received a court order stopping renovations which they complied with. They urged the court to dismiss the suit with costs.
 4. The plaintiff replied to the 1st defendant’s statement of defence, where he maintained that although the premises are situated at Kilindini High Level, they were leased to the plaintiff by the Port Police Station. He claimed that he always paid rent to the police, a position that was retained even after attempts were made in May 2000 to force the plaintiff to pay rent to the 1st defendant without a lease agreement. He maintained that in May of 2017 he incurred costs to renovate the suit premises to the satisfaction of health authorities and as such, the eviction by the 1st defendant was unlawful and illegal. He claimed that he was never served with a notice to vacate to give way for renovations. Instead, the 2nd defendant commenced renovations while he was still in occupation as it that was what had been agreed between them. In response to the 2nd defendant’s defence the plaintiff agreed with the 2nd defendant’s statements save that the renovations started when he was still in occupation and insisted that his eviction by the 1st defendant was unlawful, illegal and malicious.
 5. During the hearing Davis Mwalimo Mwangeka, the plaintiff, testified as PW1. He adopted his statement filed on 14th August 2020 and produced the documents on the list of documents dated 26th November 2012, and further list of documents filed on 29th October 2018 and 21st October 2020. He testified that he entered into a contract with the police in 1989 to run a canteen, and that the said contract is still ongoing as he still delivers food to the remandees, but he no longer operates the canteen



as he was evicted. He claimed to have paid rent to KPA on 29th May 2012 after he was given a three-month notice to pay or vacate. He testified that the police did not inform him that the building housing the canteen belonged to KPA, but got to be aware of it after KPA gave him notice to vacate. That he wrote to the OCPD in 2005 asking for some repairs to be done on the premises and was he was advised to write to KPA, which he did but no repairs were done. That later in 2007 he was issued with a public health notice and he ended up doing the repairs himself. He claimed that in 2012, a contractor claiming to have been contracted by KPA to do repairs called him, and they agreed that the repairs could be done as he operated the canteen. That on 20th November 2012, Mr. Cheruiyot from KPA demanded that he vacate from the canteen within 10 days, but he objected and notified the OCPD. The next day he was served with a notice to vacate in 10 days, which caused him to rush to court for an injunction, which was granted and was served upon the defendants. In defiance of the court orders, the 2nd defendant not only continued with the repairs but also disconnected the electricity. He continued operating the canteen despite the challenges until 27th July 2013, when he was evicted and his goods worth Kshs 3,634,524/= taken by KPA, and on 27th February 2014, he closed the business with a loss of 119,504,000/=. During cross-examination, he maintained that he has never been a tenant of KPA, as he had never signed any lease agreement with them, and was not aware that the canteen had been built by KPA. He admitted that KPA controls the entries and exists since the canteen is within KPA grounds. He agreed that in 1999, KPA had communicated to him that they were the owners of the canteen and that he should be paying rent to them. He also admitted that he started paying rent to KPA from 1999 until 2004, but had not paid rent to KPA from 2004 until the date of filing the suit. That the demand to pay rent to KPA was not communicated to him in writing but verbally, and that the rent was going to individuals and not KPA. On the MOU between the police and KPA he contended that the canteen was not among the facilities KPA had given the police. He acknowledged that the police had never done any renovations on the canteen from 1989 to 1999. That public health office had issued him with a closure notice to repair the canteen to their satisfaction, which he carried out, and was allowed to continue operating the canteen. He claimed that he could not comment on the extent of work done by KPA on the canteen, which totaled Kshs 11,502,000/= as seen from their bill of quantities. That the 2nd defendant continued with the repairs even after being served with the court order, and that upon his eviction by KPA, he left all his goods at the canteen.

6. Bildad Kisero, the 1st defendant's administration Manager since 2017, but had been in their service for 35 years, testified as DW1. He maintained that the canteen is within the social hall building, within the KPA housing area where both police and KPA staff reside. He maintained that the plaintiff was aware KPA owned the canteen as he was remitting rent to KPA. He denied knowing that the plaintiff was paying rent to the police. He confirmed that KPA has an MOU with the Police to operate from KPA grounds and that the canteen was not among the facilities given to the police. He claimed that the canteen was in despair and the public health issued a notice on 2nd May 2007 demanding repairs and issued a closure notice. That development prompted the 1st defendant's decision to rehabilitate the canteen and contracted the 2nd defendant to do the works at the costs of Kshs 13,343,226.12 as per the bill of quantities. The 1st defendant then wrote to the plaintiff on 21st November 2012 demanding him to give vacant possession by 1st December 2012. During cross-examination, DW1 stated that the police had not challenged the 1st defendant's ownership of the canteen. He agreed there was no lease agreement between the 1st defendant and the plaintiff, but maintained that he was not aware the plaintiff was allowed by the port police to operate the canteen since the canteen is not part of the offices or houses allocated to the police. He also stated that he was not aware that the plaintiff carried out renovations on the canteen in 2007, after the public health notice of closure was issued. He further claimed that the repair works have since been completed, but the plaintiff has not made an application



to the 1st defendant to be considered for a lease. The 2nd defendant closed their defence without calling any witness.

7. That upon closure of the defence case on the 24th October 2024, the court gave directions on filing and exchanging submissions. The learned counsel for the plaintiff and 1st defendant filed their submissions dated 6th November 2024 and 15th November respectively, which the court has considered. The learned counsel for the 2nd defendant sought and was granted seven days on 4th December 2024 to file submissions, but none has been filed as of today the 15th February 2025.
8. The following are the issues for determinations by the court:
 - a. Whether the plaintiff had a lease agreement with the 1st defendant or the police over the canteen.
 - b. If the answer to (a) is in the affirmative, whether the defendants have breached the terms of the said lease.
 - c. Whether the plaintiff suffered loss and damages and to what extent.
 - d. Whether the defendants are liable or responsible for the said loss and damages and to what extent.
 - e. Who pays the costs?
9. The court has carefully considered the parties' pleadings, oral and documentary evidence tendered, submissions by the learned counsel, superior courts decisions cited thereon and come to the following determinations:
 - a. It is important to start by taking cognizance of the proceedings of 29th April 2019, when one Samuel Chepyot Tuwei was cross-examined pursuant to the court's direction of 3rd March 2015. He informed the court that he was the former Port Police Station commander, and that he is aware there is a MOU dated 29th March 2004 between KPA and the National Police Service, where KPA has allocated houses to the Kenya Police. That the canteen was built in 1981 and allocated to Kenya Police and has been operated by the plaintiff since 1989. He maintained that the plaintiff made rent payments to PPO Coast Province as per the agreement dated 1st September 1989 between the plaintiff and Port Police Station, but could not confirm whether the said agreement was ever forwarded to KPA. The record shows that on 31st July 2019, the court found that Mr. Tuwei had confirmed that the suit property belonged to the 1st defendant, who had allocated it to the National Police Service pursuant to a memorandum of understanding. The National Police Service had on its part put, the plaintiff into possession of the canteen. However, the court left the question as to whether the 1st defendant had any contractual relationship with the plaintiff to the full hearing, which has now taken place.
 - b. The agreement dated 1st September 1989, that the plaintiff produced is supposed to be between the plaintiff and the Government of Kenya under the Administrative Secretary to the Kenya Police. The said agreement contracted the plaintiff to provide canteen services to the staff employed at the Port Police Station, with rent payable to the officer in charge of the Port Police Station. It is however a fact that on 27th September 1999, the 1st defendant wrote to the plaintiff giving him a three-month notice to vacate from the canteen. In response, the plaintiff responded on 29th November 1999 claiming that he never signed any agreement with the 1st defendant, but rather the Kenya police to run the canteen, which contract he claimed was still in force. However, the plaintiff appear to have changed his position as he wrote to



the 1st defendant on 17th December 1999 requesting to be considered for the formalization of his tenancy agreement. The proposal was responded to by a demand for rent through the 1st defendant letter of 5th May 2000, which also informed him that he was running the canteen without a valid tenancy agreement from the 1st defendant, who is the owner. The plaintiff was directed to supply a copy of the agreement he had with the police alongside receipts of rent paid and a further demand to start paying the rent to the 1st defendant. The second vacation notice to the plaintiff was dated 11th December 2004 when the 1st defendant wrote to the plaintiff informing him that he was running a canteen without a formal agreement with them. The 1st defendant further informed the plaintiff that they intend to repossess the premises and demanded vacant possession within 14 days. The plaintiff has not demonstrated that he responded to the said notice. Instead, the plaintiff wrote a letter to the OCPD Kilindini Division dated 16th November 2005, copied to the OCS port police station and 1st defendant informing him of the urgent renovations that the premises needed. The Port Health office wrote to the plaintiff on 2nd May 2007 demanding renovations on the canteen which was said to be in an unsanitary condition. This led the plaintiff to bring the same to the attention of the 1st defendant on 10th May 2007 and 6th June 2007 asking for the repairs to be done soonest. The said repairs were never done and a closure notice was issued by the port health officer, on 5th June 2007. The plaintiff claimed in his evidence in chief that he was allowed to reopen the canteen after he repaired it at his costs in 2007, but no documentary evidence to support the claim was presented before court.

- c. The communications detailed above, when taken together with the evidence of DW1 and that tendered on 29th April 2019, by Samuel Chepyot Tuwei, show that the police had assumed control of the canteen premises when they allowed the plaintiff to operate a business in it. The arrangement was informal and rent paid unaccounted for. That arrangement was without the authority of the actual owner of the premises, the 1st defendant. That when the 1st defendant came forward to assert its authority over the canteen premises and issued vacation notices, the plaintiff came around to appreciating where authority lay by paying rent to the 1st defendant for a time before finally stopping. Though the plaintiff had pleaded and testified that the 1st defendant was a stranger in the contract he had with the police over the canteen, and did not recognize it as the owner of the premises, it is a fact that he had written to them on several occasions on issues pertaining to the canteen. For instance, on 20th April 2009, the plaintiff requested to be supplied with water meters, on 12th May 2009 he asked to be allowed to carry out mpesa services and on 13th May 2009 he requested to be advised on the charges for additional services he wished to render. The letters he addressed to the police include those dated 10th May 2010 and 21st November 2012 where the plaintiff is requesting the intervention of the OCPD Kilindini division to stop the 1st defendant's interference with the running of the canteen. It is a fact that the 1st defendant issued a third notice to the plaintiff demanding his vacation from the canteen due to major renovations to be done by the 2nd defendant with effect from 1st December 2012. The plaintiff then filed this suit and obtained injunction orders stopping his eviction. His reprieve appear to have short, as on 20th February 2014 the 2nd defendant was advised by the 1st defendant to resume refurbishment of the canteen. The plaintiff then wrote to the 1st defendant on 30th May 2014 requesting to reoccupy the canteen, but from the testimony of DW1, the 1st defendant is unlikely to have the plaintiff on its premises.
- d. It has not been disputed by the plaintiff that the canteen is situated within the 1st defendant's Kilindini High Level Estate, serving the 1st defendant's employees as well as the police officers



of the port police residing within the estate. The plaintiff claimed that he was put in possession by the police pursuant to an agreement dated 1st September 1989, and denied any tenancy agreement between himself and the 1st defendant. Despite denying having a landlord-tenant relationship with the 1st defendant, the plaintiff has not challenged the title of the 1st defendant. The agreement dated 1st September 1989 that the plaintiff has been relying on, was not executed by both parties. That notwithstanding, the plaintiff took possession and retained occupation over the canteen until 27th September 1999, when the 1st defendant issued the first notice of termination. Between this first notice to vacate and the actual eviction of the plaintiff, the plaintiff admitted in evidence to have paid rent to the 1st defendant. Though he claimed in his pleadings that he was coerced into paying rent to the 1st defendant, he nevertheless admitted during cross-examination that he paid rent to the 1st defendant from 1999 till 2004. Further to that, the plaintiff has not denied that he received two other notices of termination before his eviction from the suit property. It is important to note that the police service has not challenged the 1st defendant's claim of title to the canteen and was not joined in this proceeding.

- e. The plaintiff's continued occupation of the demised premises after the first notice to vacate that was issued on 27th September 1999 was without the permission of the 1st defendant. As he admitted during cross-examination, he stopped paying rent to the 1st defendant sometime in 2004, until he was evicted in 2013. During that period, the plaintiff was a tenant in sufferance, meaning that though he entered the premises with permission of the police, that authority ended once the notice to vacate was issued, but he continued to be in possession without statutory authority or consent of the 1st defendant. Tenant at sufferance was discussed in the case of *Nyaboke & another versus Ondieki* (Environment and Land Appeal E011 of 2023) [2024] KEELC 5790 (KLR) (30 July 2024) (Judgment) where it was stated that:

“On tenancy at Sufferance, Halsbury's (supra) at paragraph 175 page 130 elaborates that;

“A person who enters on land by a lawful title, and after his title has ended continues in possession without statutory authority and without obtaining the consent of the person then entitled, is said to be a tenant at sufferance, as distinct from a tenant at will who is in possession with the landlord's consent. This is so whatever was the nature of the tenant's original estate, whether he was a tenant for years, or the sub-tenant of a tenant for years, or a tenant at will.”

In the case of *Janendra Raichand Shah & 2 others versus Mistry Walji Naran Mulji* [2014] eKLR the court held that:

“Occupation of a Tenant at Sufferance is without statutory authority or authority of the person entitled. Although a Tenant in Sufferance may not be the typical trespasser, nevertheless his occupation of the premises is without the authority of statute, Common Law, equity or contract. In that sense the wrongful occupation of a Tenant in Sufferance is akin to the wrongful occupation of a trespasser. In fact the definition of mesne profits accepted by the Court of Appeal in *Kenya Hotel Properties Ltd* (supra) is suggestive that a wrongful possession by a tenant could amount to trespass. It is for this reason that I am willing to hold that a wrongful occupation of a Tenant in sufferance is a Tort.”

The plaintiff has not disputed that on 11th December 2004, the 1st defendant demanded that he vacate the demised premises in 14 days, as he had been operating canteen without a



formal agreement with them. However, the plaintiff did not vacate, but instead continued in operation until 2007 when the Public health officer issued a notice of closure of the demised premises for failing to meet the sanitary conditions. From this point onwards, it is clear to the court that the plaintiff was dealing with the 1st defendant as a tenant would with their landlord. It was in recognition of the 1st defendant as the landlord that the plaintiff wrote the letters dated 20th April 2009, 12th May 2010 and 13th May 2010 requesting to be supplied with a water meter number, to be allowed to operate a mpesa shop and for approval to offer additional services at the canteen respectively. The demised premises remained the property of the 1st defendant, who retained the right towards its usage and ownership, and as such the plaintiff cannot insist on continuing with tenancy without the 1st defendant concurrence, even when the landlord wanted to do some repairs/renovations in compliance with the public health notices.

- f. In the case of *Kasturi Limited versus Nyeri Wholesalers Limited* (2014) eKLR the court stated that:

“It is the duty of the courts to ensure that no individual is prevented from taking possession and or enjoying their property. A tenant cannot impose or force him/herself/itself on a Landlord.”

I am in agreement with that position, and from the evidence availed before this court, I find the plaintiff continued to occupy the demised premises without the consent of the 1st defendant or entering into a lease agreement. Further, he has not demonstrated to the court that he paid any rent to the 1st defendant for his tenancy to be deemed as an implied contract. From 11th December 2004, when the landlord issued the plaintiff with a notice to vacate he should have sought the execution of a lease agreement with the 1st defendant, as a way of regularizing his occupation of the premises. Consequently, the court finds that the 1st defendant was within his rights as a land owner to evict the plaintiff from their demised premises, since the plaintiff continued to stay in the premises after termination of the implied tenancy, and even after he was asked to vacate. In my view, the plaintiff was in wrongful possession of the premises and the 1st defendant was justified to evict him.

- g. Therefore, the plaintiff's case as pleaded in the original plaint is without merit. I have referred to the original plaint because there is no evidence before the court to confirm that the plaintiff had complied with the condition in the ruling delivered on the 4th May 2022, where the court directed that the amended plaint filed on 14th August 2020 would be deemed as properly filed on condition the plaintiff pays each of the defendants thrown away costs of Kshs.10,000 in 30 days and in default “the amended plaint filed on 14th August 2020 will be struck out and the plaintiff will have to proceed on the basis of the original plaint.” That as the defendants, especially the 1st defendant, has denied having been paid, and plaintiff did not avail documentary evidence to prove compliance with the condition, the court makes a finding that the amended plaint was struck out by operation of the said order.
- h. That the plaintiff having lost in his claim, then pursuant to section 27 of *Civil Procedure Act* chapter 21 of Laws of Kenya that provides that costs follow the event unless where the court directs otherwise for good cause, he will pay the defendants costs.

10. In view of the above conclusions, the court finds that the plaintiff has failed to establish his case on a balance of probability and his claim is dismissed with costs.

It is so ordered.



DATED, SIGNED AND VIRTUALLY DELIVERED ON THIS 19TH DAY OF FEBRUARY 2025.

S. M. Kibunja, J.

ELC MOMBASA.

In the Presence of:

Plaintiff : Mr Mwawasi.

Defendants : Mr Ndambuki for Wafula for 1st Defendant and Kivuva for 2nd Defendant

Court Assistant– Shitemi.

S. M. Kibunja, J.

ELC MOMBASA.

