



REPUBLIC OF KENYA



**Bakari v Sheikh & another (Environment & Land Case 129 of 2021)  
[2024] KEELC 6057 (KLR) (25 September 2024) (Judgment)**

Neutral citation: [2024] KEELC 6057 (KLR)

**REPUBLIC OF KENYA  
IN THE ENVIRONMENT AND LAND COURT AT MOMBASA  
ENVIRONMENT & LAND CASE 129 OF 2021  
SM KIBUNJA, J  
SEPTEMBER 25, 2024**

**BETWEEN**

**ADIJA MOHAMED BAKARI ..... PLAINTIFF**

**AND**

**ABDULWAHAB ABRAR SHEIKH ..... 1<sup>ST</sup> DEFENDANT**

**COUNTY GOVERNMENT OF MOMBASA ..... 2<sup>ND</sup> DEFENDANT**

**JUDGMENT**

1. The plaintiff commenced this suit through the plaint dated 6<sup>th</sup> July 2021 seeking for orders paraphrased as follows:
  - a. 1<sup>st</sup> defendant be compelled to subdivide the portion of land leased to the plaintiff on MN/1/144, Kongowea, Mombasa.
  - b. Order the 1<sup>st</sup> defendant to cause a lease for 99 years to be entered in favour of the plaintiff in respect of that portion on agreed terms; or
  - c. Alternatively, 1<sup>st</sup> defendant to sell the portion to the plaintiff at market value or as shall be agreed between them.
  - d. Order for 2<sup>nd</sup> defendant to stop prosecuting the plaintiff in undisclosed criminal case of 2021 pending the determination of this suit.
  - e. Costs of the suit.

The plaintiff inter alia averred that 1<sup>st</sup> defendant is the registered owner of MN/1/144, suit property, and that he orally leased un-surveyed portion of the said land to the plaintiff in 1987, at Kshs.200 per month as ground rent; that the plaintiff was to use that portion of the plot for indeterminate period, but the lease could be terminated by consent; that the plaintiff was to construct a house upon



obtaining all approvals and in compliance with the County Government's requirements; that the plaintiff's building plans were signed by the 1<sup>st</sup> defendant, and approved by the 2<sup>nd</sup> defendant; that upon completion of the construction, she asked the 1<sup>st</sup> defendant to survey her land so as to separate it from the other portion but he declined; that the 1<sup>st</sup> defendant has constructed a house that encroaches onto her portion, on top of her soak pit, and upon reporting to the 2<sup>nd</sup> defendant, it was her who was charged.

2. The 1<sup>st</sup> defendant opposed the plaintiff's claim through his statement of defence and counterclaim dated the 23<sup>rd</sup> August 2021, among others averring that Plot MN/1/144 has been subdivided severally, and the suit property is subdivision No. 22367, CR. 75191; that in 1980, he orally allowed the plaintiff to construct a residential house without land upon her paying ground rent, the amount of which was subject to review; that the lease was terminable by either party on one month's notice to the other; that the plaintiff built her house without a soak pit for waste water and has been directing her waste water to her pit latrine; that her pit latrine was discharging waste to the neighbouring houses when she was charged. In his counterclaim, the 1<sup>st</sup> defendant sought for inter alia;
  - a. Plaintiff to be ordered to vacate the suit property and demolish her house, under the supervision of OCS, Nyali Police Station.
  - b. Plaintiff be ordered him Kshs.184,800 being accrued ground rent arrears.
  - c. Plaintiff to pay him Kshs.300,000 legal fees.
  - d. Costs.
  - e. Interests.

The 1<sup>st</sup> defendant further averred that the ground rent was reviewed as follows:

- i. Kshs.600 from 1<sup>st</sup> January 2003 to 31<sup>st</sup> December 2010;
- ii. Kshs.800 from 1<sup>st</sup> January 2011 to 31<sup>st</sup> December 2015; and
- iii. Kshs.1,200 from 1<sup>st</sup> January 2016 to date.

That the plaintiff has declined to pay ground rent since 2003, and arrears of Kshs.184,800 had accumulated, and continues to accrue on a monthly basis. That the plaintiff has been served with notice to vacate, and has made him incur Kshs.300,000 in legal fees to defend this suit. The 1<sup>st</sup> defendant prayed for the plaintiff's suit to be dismissed with costs and his counterclaim be allowed.

3. The 2<sup>nd</sup> defendant opposed the plaintiff's claim through its statement of defence dated 11<sup>th</sup> August 2021 inter alia averring that it was not aware of the oral lease referred to by the plaintiff, and was a stranger to the requirement for 1<sup>st</sup> defendant to demarcate the plaintiff's portion; that it was not aware that 1<sup>st</sup> defendant had constructed a house that encroached onto the plaintiff's portion, and no such report was brought to its attention; that no notice to sue was served and the plaintiff's claim should be dismissed with costs.
4. The plaintiff opposed the 1<sup>st</sup> defendant's counterclaim through the reply to the 1<sup>st</sup> defendant's defence, and defence to counterclaim, dated the 21<sup>st</sup> September 2021, among others averring that she never received any notice to review ground rent, and the amount claimed by 1<sup>st</sup> defendant was never agreed; that she has not received any notice to vacate the suit property, and the counterclaim should be dismissed with costs. In response to the 2<sup>nd</sup> defendant's statement of defence, the plaintiff inter alia averred that as the 1<sup>st</sup> defendant pays rates to the 2<sup>nd</sup> defendant, the latter ought to know the former was the registered owner of the suit property; that the 2<sup>nd</sup> defendant had approved her building plan that



had been consented to by the 1<sup>st</sup> defendant, that was further proof that he was the registered owner of the property.

5. During the hearing, the plaintiff testified as PW1. It is her testimony inter alia that in 1987, the 1<sup>st</sup> defendant had leased to her a plot at Kshs.200/- per month, to build a house through an oral agreement. Later, the 1<sup>st</sup> defendant then erected a house on the space she was to put up her toilet, and she reported to the 2<sup>nd</sup> defendant. That however, she was the one who was sued and fined Kshs.50,000/- over the pit effluent issue. That she then filed this suit seeking for the 1<sup>st</sup> defendant to either lease the plot to her for 99 years, or sell it to her at market rates. In cross-examination, the plaintiff agreed that she had not asked the 1<sup>st</sup> defendant to lease the plot to her for 99 years, or sell it to her before filing the suit. She confirmed that the suit property belongs to the 1<sup>st</sup> defendant, and that what she owns is the house she built on it.
6. The 1<sup>st</sup> defendant testified as DW1 stating among others that he had leased the plot to the plaintiff who erected business house thereon and that she has collected rent for 35 to 36 years. That when he asked her to increase the rent, she declined, and has not paid rent for five years. That the plaintiff had not asked him to demarcate her portion of the plot and sell it to her. He asked that she be ordered to vacate from the plot, pay the rent arrears, costs and interests.
7. The learned counsel for the plaintiff and 1<sup>st</sup> defendant filed their submissions dated 13<sup>th</sup> February 2024 and 17<sup>th</sup> April 2024 respectively, which the court has considered.
8. The following are the issues for the court's determinations:
  - a. Who between the plaintiff and 1<sup>st</sup> defendant is in breach of their 1987 oral lease agreement.
  - b. Whether the prayers sought in the plaint and counterclaim flows from the terms in the said oral lease agreement.
  - c. Who pays the costs?
9. The court has carefully considered the pleadings by the parties, oral and documentary evidence presented by PW1 and DW1, submissions by the two learned counsel, superior courts decisions cited thereon, and come to the following findings:
  - a. The ownership of the suit property, Mombasa Plot No. 144, Section 1, Mainland North, is not in dispute. It belongs to the 1<sup>st</sup> defendant. It is also not in dispute that in 1987, the 1<sup>st</sup> defendant orally leased an un-surveyed portion of the suit property to the plaintiff for Kshs.200/- per month to build a house on. From the evidence presented, the plaintiff took possession of the portion leased, erected the house structure with the approval of the 1<sup>st</sup> defendant and continued paying the monthly rent of Kshs.200/- up to 2003.
  - b. From the parties' pleadings and evidence presented, there was no term in the oral lease agreement of 1987 to suggest that the 1<sup>st</sup> defendant was to formally demarcate the plaintiff's portion of the suit plot to either sell to her at market rates or lease it for 99 years. The plaintiff conceded she had not asked the 1<sup>st</sup> defendant to sell the said portion or lease it to her for 99 years before filing this suit. Her prayer for an order compelling the 1<sup>st</sup> defendant to subdivide the plot and either lease it to her for 99 years or sell it to her at market rates does not arise from the 1987 oral lease agreement. Had the prayer been based on a term in the 1987 oral lease agreement, the court would have determined whether the 1<sup>st</sup> defendant was in breach, and whether specific performance orders could issue in the plaintiff's favour. The plaintiff therefore fails in her said prayers as the 1<sup>st</sup> Defendant cannot be forced to dispose of his land merely because the plaintiff desires it.



- c. Though the 2<sup>nd</sup> defendant filed their statement of defence, it failed to call any evidence in support of averments therein, or to file submissions. The pleadings in the said statement of defence are therefore mere statements without any evidence in support. The only prayer sought by the plaintiff against the 2<sup>nd</sup> defendant was for an order to stop it from prosecuting the plaintiff in undisclosed criminal case of 2021. I take note that the plaintiff confirmed through her testimony that she was found guilty in an effluent emission charge and was fined Kshs.50,000/-. If that was the criminal charge that she wanted the 2<sup>nd</sup> defendant to be stopped from prosecuting her on, then her prayer has been overtaken by events. That as there is no evidence that the plaintiff has successfully appealed the conviction, and a retrial ordered, then there is no existing prosecution upon which the order could be considered. The court of law cannot issue an order in vain.
- d. The 1<sup>st</sup> defendant has pleaded that he reviewed the Kshs.200/- monthly rent payable by the plaintiff as follows:
- i. 1<sup>st</sup> January 2003 to 31<sup>st</sup> December 2010 – Kshs.600/-;
  - ii. 1<sup>st</sup> January 2011 to 31<sup>st</sup> December 2015 – Kshs.800/-, and
  - iii. 1<sup>st</sup> January 2016 to date – Kshs.1,200/-

The plaintiff averred and testified that she had not received any notice of review of the monthly rent, and if she had, she would have referred the matter to the Rent Restriction Tribunal for assessment. The 1<sup>st</sup> defendant testified that the plaintiff declined to accept and pay the reviewed rent, and hence the claim of rent arrears in the counterclaim of Kshs.184,000/-. He relied on the letters dated the 13<sup>th</sup> March 2020 addressed to the plaintiff, and 7<sup>th</sup> October 2021 addressed to her counsel. I have however not seen any documentary evidence conveying the increment of rent payable to the plaintiff before the dates of the two letters. In his testimony, the 1<sup>st</sup> defendant did not specify how he had communicated the decision on the reviewed rent payable for the said periods to the plaintiff. In view of the absence of evidence of such communication to the plaintiff before 2020, the latter could not have been expected to pay the higher rates, that had not been brought to her attention.

- e. The plaintiff was however duty bound to pay the Kshs.200/- per month rent as per their 1987 oral lease agreement. Though the 1<sup>st</sup> defendant notified the plaintiff of the reviewed rent payable through the letters dated the 13<sup>th</sup> March 2020 and 7<sup>th</sup> October 2021, the court fails to understand how he expected the increased rent to be backdated to 2003. It could only take effect from April 2020. The court finds the 1<sup>st</sup> defendant was entitled to the arrears of the monthly rent at the rate of Kshs.200/- from January 2003 to March 2020, and thereafter monthly rent of Kshs.600/- from April 2020 to date.
- f. Through the letter dated the 13<sup>th</sup> March 2020, the 1<sup>st</sup> defendant inter alia gave the plaintiff three (3) months' notice to vacate from the leased property. It is therefore not true for the plaintiff to claim that no notice had been issued by the time the suit was filed. That period had lapsed by the time this suit was filed on 7<sup>th</sup> July 2021, but the plaintiff has not vacated to date. In view of the sour relationship between the plaintiff and 1<sup>st</sup> defendant, and the fact that the former has breached the lease agreement by failing to pay the monthly rent over the years, the 1<sup>st</sup> defendant is entitled to an order of eviction. The claim for Kshs.300,000/-, being legal fees for defending this suit, is a matter of costs whose quantum is determined during taxation.



- g. Under the provision of section 27 of the *Civil Procedure Act* chapter 21 of Laws of Kenya, costs follow the event unless where for good cause the court orders otherwise. In this suit the successful party should have the costs.
1. Flowing from the foregoing, the court finds and orders as follows in respect of the plaintiff's suit and 1<sup>st</sup> defendant counterclaim:
    - a. That the plaintiff has failed to prove her claim against both defendants to the standard required of balance of probability and the same is dismissed with costs.
    - b. The 1<sup>st</sup> defendant has proved his counterclaim against the plaintiff to the standard required under the law, and judgement is entered in his favour in the following terms:
      - i. The plaintiff to pay the 1<sup>st</sup> defendant the rent arrears at the rate of Kshs.200/- per month from January 2003 to March 2020, [207 months], and Kshs.600/- per month from April 2020 to September 2024, [54 months], totalling Kshs.74,000/- [seventy four thousand only]. That further the plaintiff to continue paying rent for any other additional period she continues remaining on the said plot at Kshs.600/= per month as order [ii] below is given effect.
      - ii. The plaintiff to remove the house and give vacant possession of the leased property to the 1<sup>st</sup> defendant within the next ninety (90) days, and in default, eviction order to issue.
      - iii. The OCS Nyali to provide security during the eviction.
      - iv. The plaintiff to meet the 1<sup>st</sup> defendant's costs.

It is so ordered.

**DATED, SIGNED AND VIRTUALLY DELIVERED ON THIS 25<sup>TH</sup> DAY OF SEPTEMBER 2024.**

**S. M. KIBUNJA, J.**

**ELC MOMBASA.**

In The Presence Of:

Plaintiff : No Appearance.

Defendants : No Appearance.

Court Assistant: Leakey

S. M. Kibunja, J.

ELC MOMBASA.

