



**Sagala Lodge Limited v Mwamunga & another (Suing as the executors of the Estate of Eliud Timothy Mwamunga - Deceased) (Land Case 5 of 2024) [2024] KEELC 7100 (KLR) (Environment and Land) (31 October 2024) (Judgment)**

Neutral citation: [2024] KEELC 7100 (KLR)

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

**LAND CASE 5 OF 2024**

**EK WABWOTO, J**

**OCTOBER 31, 2024**

**FORMERLY MOMBASA ELC CASE NO 242 OF 2021 AS CONSOLIDATED  
WITH MOMBASA ELC 105 OF 2022 AND MOMBASA ELCA 65 OF 2021**

**BETWEEN**

**SAGALA LODGE LIMITED ..... PLAINTIFF**

**AND**

**SAMUEL MAZERA MWAMUNGA & JOSIAH CHOLA MUNGA (SUING AS  
THE EXECUTORS OF THE ESTATE OF ELIUD TIMOTHY MWAMUNGA -  
DECEASED) ..... DEFENDANT**

**JUDGMENT**

1. The Plaintiff brought this suit through a plaint dated 7<sup>th</sup> December 2021 seeking for the following orders against the Defendant:-
  - a. A permanent injunction restraining the Defendants from:-
    - i. Disconnecting, further disconnecting water or electricity supply to the lodge and property known as lodge land measuring approximately 25 hectares on part of CR 36092 Plot No. 12176.
    - ii. Accessing, trespassing, taking/using any property, further trespassing into the property known as lodge and lodge land measuring approximately 25 hectares on part of CR 36092 Plot No. 1217 without the Plaintiff's consent or prior notice.



- iii. Permitting strangers or any unauthorized third parties into property known as lodge and lodge land measuring approximately 25 hectares on part of C.R 36092 Plot No. 12176.
  - iv. Harrassing and/or in any way interfering with the guests accessing the Plaintiff's premises on parcel of land known as lodge and lodge land measuring approximately 25 hectares on part of CR 36092 Plot No. 12176.
- b. Damages for trespass.
  - c. Costs of this suit.
  - d. Interest on (b), (c) and (d) above at court rates.
  - e. Any other or further reliefs this court may deem fit and just to grant.
2. The suit was contested by the Defendants who filed a Statement of Defence and Counterclaim dated 20<sup>th</sup> September 2022. The counterclaim sought for the following reliefs:-
- a. A declaration that the Plaintiff is in breach of the lease agreement dated 21<sup>st</sup> July 2015.
  - b. A declaration that the lease agreement dated 21<sup>st</sup> July 2015 stands terminated.
  - c. An order directing the Plaintiff to deliver vacant possession of the suit premises being the lodge leased to the Plaintiff by the Defendant and for an order of eviction directed against the Plaintiff to be evicted and permanently barred from the suit premises.
  - d. Costs of the suit.
3. The matter was fixed for hearing on 14<sup>th</sup> September 2024 after several mentions and further upon confirming compliance with the provision of Order 11 of the Civil Procedure Code.

### **The Evidence**

4. During the hearing of the suit which had been consolidated with MOMBASA ELC 105 of 2022 and MOMBASA ELCA 65 of 2021, the Plaintiff despite service and being notified of the hearing date failed to attend court and this necessitated the suit to proceed in their absence.
5. In the absence of the Plaintiff, the Plaintiff's suit was marked as closed and the matter proceeded with the hearing of the Defendant's case and counterclaim.
6. During the hearing, Samuel Mazera Mwamunga testified as the sole witness in the matter. He relied on his witness statement dated 20<sup>th</sup> September 2022 and the list and bundle of documents of the even date in his evidence in chief. It was his testimony that the late Eliud Mwamunga is the registered owner of all that property known as LR 36092 – Ndara Ranch measuring 1,905 hectares or thereabouts located within Voi in Taita Taveta County in the Republic of Kenya.
- On or about July, 2015 the Plaintiff approached Eliud Mwamunga – deceased with an intention to enter into a lease agreement over the Sagalla lodge which is a lodge located within all that property known as LR 36092 Ndara Ranch in Taita Taveta County.
7. It was also his testimony that the late Eliud Mwamunga on 21<sup>st</sup> July, 2015 entered into a lease agreement with the Defendant over the existing Sagalla lodge. On 9<sup>th</sup> June, 2018 Eliud Mwamunga passed away due to illness and succession proceedings were thereafter lodged in the High Court in Voi vide Succession Cause No. 3 of 2018.



On 17<sup>th</sup> March 2021, the Plaintiffs herein were appointed as executors of the estate of the late Eliud Timothy Mwamunga in place of the public trustee who had previously been appointed as an administrator.

8. The executors of the estate of the late Eliud Mwamunga are at all material under a statutory duty to collect and settle all debts owed to and owed by the estate. On 3<sup>rd</sup> June 2020 Defendant herein issued a notice under Clause 17(a) of the lease agreement whereby they invoked the force majeure clause and suspended the lease agreement binding the parties herein citing the covid pandemic and the Government directive of closure of hotels and restaurants. Upon issuance of the force majeure clause, the Plaintiff is only permitted to access the lodge to take necessary steps to protect his assets during the period of suspension.
9. It was also stated that the Plaintiff has never issued a notice to the executors of the estate of their intention to resume their performance of obligations as contained in the lease but have nonetheless continued operating with impunity. The directive was thereafter lifted in August 2020 however the Plaintiff despite re-opening and continuing with business as usual, has been in breach of the lease agreement by refusing to pay the reserved rent of the leased premises.

#### PARTICULARS OF RENTAL ARREARS

2015 - 560,000/=

2016 - 1,400,000/=

2017 - 1,060,000/=

2018 - 630,000/=

2019 - 1,117,000/=

2020 - 2,375,100/=

2021 - 3,074,610/=

2022 - 3,571,467/=

2023 - 3,928,614/=

Total - 17,716,794/=

10. He urged the court to grant the reliefs sought in the Counter claim.

#### **Analysis and Determination**

11. I have I have considered the pleadings, the evidence adduced and submissions before the court. The defendants' counterclaim was not contested. The main issue for consideration is whether the Defendants have proved their case to the required standard to warrant the grant of the prayers sought.
12. In respect to the Defendant's counterclaim, a counterclaim is a suit and ought to be proven to the required standard. Although the same was not contested by the Plaintiff, the Defendant have a duty to formally prove their case on a balance of probabilities as is required by law.
13. In the case of Kirugi and Another Vs Kabiya & 3 others (1987) KLR 347 the Court of Appeal held that;  

“The burden was always on the Plaintiff to prove his case on a balance of probabilities even if the case was heard as formal proof”. Likewise, failure by the Defendant to contest the case does not absolve a plaintiff of the duty to prove the case to the required standard.”



14. It is worth noting that the Plaintiff never participated in the proceedings despite being served. The Plaintiff however its pleadings but never called any witness to prosecute their case and controvert the allegations made by the defence. Therefore, the Plaintiff's averments remain mere allegations and the Defendants testimony was not rebutted. See the case of Billsah Matiangi –Vs- Kisii Bottlers Limited & Another (2021) eKLR, where the court held that: -
- “Where a Plaintiff gives evidence in support of her case, but the Defendant fails to call any witness in support of its allegations, then the Plaintiff's evidence is uncontroverted and the statement of defence remains mere allegations”
15. However, uncontroverted evidence is not automatic evidence and the parties still have an obligation to prove their case to the required standard of probabilities.
16. In the instant suit, it is not in doubt that the Defendant is still the registered owner of the suit property.
17. It is common knowledge the Courts are bound to enforce the terms of parties in contracts, in so far as the contract is entered into legally. Furthermore, the court has considered and perused the lease agreement dated 21<sup>st</sup> July 2015 and the letters dated 17<sup>th</sup> May 2021 and Notice of termination of 3<sup>rd</sup> June 2020 and it is evident that Plaintiff is in breach of the same and has further refused and neglected to settle the rent payable to date and the property is wasting away.
18. In the absence of the defence to the Counterclaim and or controverting evidence, this court is satisfied that the Defendants have proved their case to the required standard and are entitled to the reliefs sought.
19. On the issue of costs, Section 27 of the *Civil Procedure Act* gives the court the discretion to grant costs and ordinarily costs do follow the suit. The Defendants herein have succeeded in proving their case and hence they are entitled to costs of the suit which shall be borne by the Plaintiff.

### **Final orders**

20. In view of the foregoing, the court makes the following final orders: -
- a. The Plaintiff's suit is dismissed.
  - b. The Defendants' Counterclaim is merited and judgment entered in favour of the Defendants as against the Plaintiff as follows:-
    - i. A declaration is hereby issued that the Plaintiff is in breach of the lease agreement dated 21<sup>st</sup> July 2015.
    - ii. A declaration be and is hereby issued that the lease agreement dated 21<sup>st</sup> July 2015 stands terminated.
    - iii. The Plaintiff is hereby directed to vacate the suit premises within 30 days from the date of service of the decree failure of which eviction to issue and the Officer Commanding Voi Police Station is here by directed to ensure compliance.
    - iv. The Plaintiff shall bear the costs of the suit and counterclaim.

Judgment accordingly.

**DATED, SIGNED AND DELIVERED VIRTUALLY AT VOI THIS 31<sup>ST</sup> DAY OF OCTOBER 2024.**

**E. K. WABWOTO**



## **JUDGE**

In the presence of:-

N/A for Plaintiff.

Mr. Kiwinda for Defendants.

Court Assistants: Mary Ngoira and Norah Chao.

