



REPUBLIC OF KENYA



Catholic Diocese of Eldoret Registered Trustees v Kimutai & another (Environment & Land Case E014 of 2024) [2024] KEELC 7035 (KLR) (24 October 2024) (Judgment)

Neutral citation: [2024] KEELC 7035 (KLR)

**REPUBLIC OF KENYA
IN THE ENVIRONMENT AND LAND COURT AT KAPSABET
ENVIRONMENT & LAND CASE E014 OF 2024
MN MWANYALE, J
OCTOBER 24, 2024**

BETWEEN

CATHOLIC DIOCESE OF ELDORET REGISTERED TRUSTEES PLAINTIFF

AND

BETHWEL KIMUTAI 1ST DEFENDANT

PHYLLIS KIMUTAI 2ND DEFENDANT

JUDGMENT

1. Vide its plaint dated 10th July 2024 the Plaintiff, the Catholic Diocese of Eldoret Registered Trustees, sued the Defendants Bethwel Kimutai and Phyllis Kimutai, seeking judgment against them as follows;
 - i. An order directing the 1st and 2nd Defendants to pay the Plaintiff a sum of kshs 3,500,000/= being outstanding rent from the period from 01/01/2021 to 30/6/2024.
 - ii. An order directing the 1st and 2nd Defendants to pay the Plaintiff all accrued rents from 30/7/2024 until the date of the judgment.
 - iii. An order directing the 1st and 2nd Defendants to pay the Plaintiff the sum of kshs 1,100,000/= being loss and damage.
 - iv. An order awarding the Plaintiff interests (i) and (ii) at commercial rates from the date of default until payment in full.
 - v. An order of eviction be and is hereby directed to the 1st and 2nd Defendants in their personal capacity or through their employees, agents, or servants or assignees or anybody acting under their instruction to vacate Nandi/kamobo/2181 measuring 2.0 Ha forthwith.
 - vi. General damages for trespass
 - vii. Mesne profits



- viii. A permanent injunction do issue restraining the 1st and 2nd Defendant either by themselves or through servants, auctioneers agents or any of them or otherwise from leasing, occupying or in any way alienating or otherwise howsoever dealing with Nandi/kamobo/2181 measuring 2.0Ha.
 - ix. Costs of the suit
 - x. Any other relief that his Honourable Court may deem just and fair to grant
2. Simultaneous with filling of the suing, the Plaintiff took out a Notice of Motion under a Certificate of Urgency. At the Exparte stage directions were issued as follows by Lady Justice J. Onyango.
 - i. the application is not certified as urgent
 - ii. the application be served upon the Respondent within 5 days
 - iii. that the Respondents do file their Replying Affidavit within 14 days.
 - iv. The application fixed for interparty hearing on 23/9/2024.”
 3. In the meantime, on 29/8/2024, the request for judgment dated 27/8/2024 against the Defendants was formally endorsed and matter listed for directions before Court.
 4. The request for judgment was for a liquated demand of kshs 4,600, 000/= together with interest at commercial rates against the Defendants jointly and severally.
 5. On 29/8/2024 the Deputy Registrar fixed the matter for hearing on 16/9/2024. On 16/9/2024, the Court was made aware that the matter was for formal proof, interlocutory judgment having been entered, thus the Court certified the matter as undefended and the matter thus proceeded.
 6. On the said date, the pending application dated 10/7/2024 which had been slated for hearing on 23/9/2024, was withdrawn thus allowing the matter to proceed for hearing.

Plaintiff’s Case: -

7. It is the Plaintiff’s case that; -
 - i. It is the registered as proprietor of all that freehold interest known as Nandi/kamobo/481 measuring approximately 2.0Ha together with developments erected thereon.
 - ii. The 1st and 2nd Defendants entered into a lease agreement dated 25/01/2012 for a term of 8 years from 1/3/2012 to the 29/12/2020 with the Plaintiff over Nandi/kamobo/2181 measuring approximately 2.0 Ha with developments erected thereon for an annual rent of kshs 1,000,000/= of unpaid rent at kshs 3,500,000/=.
 - iii. The Plaintiff further pleaded breach of implied terms of the lease on the part of the 1st and 2nd Defendant and particularised nine such breaches at paragraph 5 (i) to (ii).
8. The Plaintiff further avers that they issued a demand letter dated 24/01/2024 terminating the lease effectively from 24/02/2024 under Section 65 (2) (b) (i) of the [Land Act](#).
9. The Plaintiff averred that the continued occupation of the 1st and 2nd Defendants from the date of termination of lease amounts to trespass, and that it has suffered financial loss and irreparable damage due to the trespass action hence seeks eviction orders.



10. At paragraph 9, the Plaintiff pleaded having suffered loss and damage and particularised the loss and damages as kshs. 1,000,000/= for legal services as well as kshs. 100,000 for Court process service.
11. On the strength of the above the Plaintiff sought for the prayers listed at paragraph 1 of this judgment.

Defendant's Case: -

12. The Defendant did not enter appearance nor file a defence. Hence the case proceeded as undefended.

Plaintiff's Evidence: -

13. The Plaintiff called 1 witness PW1 Charles Mzee Langat, a catechist at St. Peter's Catholic Church who testified and adopted his witness statement dated 5th September 2024, as part of his evidence in chief. It was his further testimony that the Defendants had leased the premises for 8 years only, and after the lapse of the lease, they had not been paying rent and refused to give vacant possession to the owners. The witness produced in evidence the documents listed in the list of documents dated 5/9/2024 a total of 14 documents as P Exhibits 1 to P Exhibit 14. He prayed for vacant possession and the other prayers as prayed for in the plaint.

Defence Evidence: -

14. As noted elsewhere the Defendant did not enter appearance and filed no defence hence interlocutory judgment against them was requested and entered and the suit against them proceeded as undefended. Thus, after closure of the Plaintiffs case, the Defence case was deemed closed.
15. After closure of the Plaintiffs and Defence case, parties were directed to file their submissions.

Plaintiff's Submissions: -

16. The Plaintiff framed and submitted on 3 issues namely
 - i. whether the Defendants are in breach of the lease
 - ii. whether the Plaintiff is entitled to orders sought;
17. It is the Plaintiffs submissions that they are the registered owner of Nandi/kamobo/2181 and that they produced as P Exhibit 2 a copy of the title deed for Nandi/kamobo/2181, as well as the lease agreement dated 25/01/2012 as P Exhibit 2.
18. The Plaintiff submits on the definition of breach of contract according to Black's Law Dictionary and further places reliance on the decision in the cases of Bhankanji Dayalal Ramji vs Mombasa Calibratan Services Limited & 3 others (2018) eKLR and Katsun Limited vs Nyeri Wholesalers Limited (2014) eKLR.
19. The Plaintiff submits that he has proven material violation of the terms of the lease existing between himself and the Defendants even after expiry of the lease as per Section 60 (i) and 66 of the Land Act and the Plaintiff is entitled to vacant possession of the suit property.
20. On issue number 2, the Plaintiff placing reliance on the decision in the case of Katsuri Limited vs Nyeri Wholesalers Limited (2014) eKLR, where the Court of Appeal,

“A tenant cannot impose or force himself on a landlord. In the instant case, when the lease between the parties expired, it was incumbent upon the Appellant to give vacant possession.”



21. On the prayer of payment of outstanding rent, the Plaintiff places reliance on the decision in the case of Mepukori Pere vs Samuel Gicheru & another 2021 (eKLR) where the Court allowed for the payments of rent arrears.
22. The Plaintiff in support for the prayer of General Damages on trespass relies on the decision in the case of Kimutai Tunoi Leonard vs Samuel Cheboi (2017) eKLR.
23. The Plaintiff further relies on Section 2 of the [Civil Procedure Act](#), Order 21 Rule 13 of the Civil Procedure in support of the prayer for mesne profits.
24. On costs the Plaintiff reliance on Section 27 (1) of the [Civil Procedure Act](#) and Section 13 (7) (i) of the [Environment and Land Court Act](#) and seeks for costs together with interest.

Defendants Submission: -

25. As the matter was undefended the Defendant having not taken part on the proceedings it follows that there is no Defendant submission for the Court to consider.

Issues for Determination: -

26. Before framing issues for determination, the Courts notes the following undisputed facts, in this case. The Plaintiff having exhibited a copy of title over the suit property it is indeed the registered proprietor of Nandi/kamobo/2181 and holds an indefeasible title under Section 26 of the [Land Registration Act](#). In that capacity, the Plaintiff leased the suit property to the Defendants, making the relationship between them as landlord and tenant.
27. Having found the relationship between the Plaintiff and the Defendants as one of Landlord and Tenant, the Court has first to determine. Its jurisdiction in view of the existence of the Business Premises Rent Tribunal, which exercises jurisdiction in some matters involving such relationship of landlord and tenants under Cap 302 Laws of Kenya.
28. Having analysed the pleadings, the evidence and the submissions on record, and considered the applicable law, the Court frames the following as issues for determination.
 - i. Whether or not the Court has jurisdiction to hear and determine this matter?
 - ii. Whether the Plaintiff has proved its case?
 - iii. If so, what reliefs are available to the Plaintiff?
 - iv. Who bears the costs of the suit?

Analysis and Determination: -

29. It is trite law that a Court must determine jurisdiction before it deals with a matter. The Plaintiff submits that the Court has jurisdiction under Section 162 (2) (b) of [the Constitution](#) of Kenya.
30. As noted at paragraph 27, the relationship between landlord and tenant may in so far as the provisions of Section 2 of Cap 302 be a matter for the Business Premises Rent Tribunal that is established to hear and determine such matters.
31. The question arising is whether the lease that governed the tenancy herein was a controlled tenancy so as to be able to oust the Courts jurisdiction.



32. In answer to that the Court shall examine the provisions of Section 2 as they relate the controlled tenancy as well as the clause of the Lease Agreement (P Exhibit 3) and shall be further guided by the decision in the of Khalif Jele Mohamed & Another vs Republic and Another (2019) eKLR. Where the Court of Appeal dealt extensively with the issue of what constitutes a controlled tenancy, and interpreted Section 2 (i) (b) (ii) of Cap 302; The Court held interalia,

“ 16. We have considered the appeal and the submissions BY Learned Counsel; as we have already stated, the critical issue on which the appeal turns and which we need to determine is whether the Judge correctly interpreted Section 2 (i) (b) (ii) of the Act.....

17. .. there is no dispute ...

18. according to the Tenants

19. Section 2 (i) of the Act.....

20.for our purposes, the relevant.....

21. As produced above Section 2 (i) (b) (ii) of the stipulates that if a tenancy agreement has provision for termination otherwise than for breach of covenant, within 5 years from the commencement of the term, it is controlled tenancy. In other words, if such a tenancy has provision for termination, which can be invoked at any time during the term it is in our view a controlled tenancy.”

33. I have examined the lease agreement and the same was for a period of 8 years and the termination provided therein was upon any breach of the terms therein at clause 3 (h) and there were no other provisions for termination.

34. At clause 5 (b) there is an arbitration clause that applies only to the said clause to be invoked in relation to damage on the property or part thereof by fire or other normal comprehensive risk.

35. From the breaches pleaded at paragraph 5 of the Lease Agreement, the breach envisaged under clause 5 (b) was not pleaded and does not form the foundation of this suit, hence the arbitration clause is not applicable.

36. Having found at paragraph 33, that the lease was for 8 years with no termination clause other than for breach, it follows that the tenancy between the Plaintiff and Defendant was not a controlled tenancy and as the suit was not founded on a breach as a result of comprehensive insurable risk, the arbitration clause does not apply and I find that this Court has the requisite jurisdiction thus to hear and determine this matter.

37. On issue number 2, as to whether the Plaintiff has proven his case. The Court notes that interlocutory judgment was entered and the matter proceeded as undefended essentially as formal proof, but the Plaintiff was nonetheless required to prove its case on the required standard of proof; as was stated by the Court of Appeal in Karugi and others vs Kabiya and 3 others (1983) eKLR, where the Court held interalia,

“ the burden on a Plaintiff to prove his case, remains the same throughout the case even though the burden may become easier to discharge where the matter is not validity defended. The burden of proof is not way lessened because this is heard by way of formal proof.”



38. The Plaintiff called 1 witness who produced the lease agreement as P Exhibit 3. The Court notes that the said lease was not registered as required under the law, however various dicta quoted in the decision of *Chon Jeuk Suk Kim & another vs E.J Austin & 2 others* (2013) eKLR, including the decision in the case of *Bachelors Bakery Limited vs Wetland Securities Limited* held such an agreement is valid between the parties even in absence of registration. There is no doubt that the said lease expired and a notice of non-renewal was issued and has been exhibited before Court, at conclusion of the lease, the Defendants have not given vacant possession hence are now in arrears of kshs. 3,500,000/= as at June 2024, noting that the lease had expired on 29/12/2020. And the yearly rent was kshs 1,000,000/= in accordance with the lease.
39. At the conclusion of the lease, the Defendants remained in possession of the suit land and hence the provisions of Section 60 (i) of the *Land Act* came into play, meaning the Defendants are required to pay the annual rent that they had agreed till they give vacant possession. Hence the Plaintiff has proved the claim for the rent arrears of kshs 3,500,000/= as pleaded as at 30/6/2024 which arrears continues to accrue till vacant possession is granted to the Plaintiff.
40. The Plaintiff has also proven that the Defendant was in breach of both the express terms and the implied terms, a report exhibit number 12 shows the damages to the premises a breach for failure to maintain the premises.
41. Special damages of kshs 1,100,000 were pleaded and proof by way of receipt for kshs 1,000,000/= legal fees was produced as P Exhibit 11. The kshs 100,000/= was said to be Court Process Server fees, in respect of the summons herein as well as precious demand letters; and same is allowed. On a balance of probabilities, the Court finds that the Plaintiff has discharged its burden of proof as required under Section 107 of the *Evidence Act* and has thus proven its case and is entitled to the reliefs sought.
42. Accordingly, judgment is entered for the Plaintiff as prayed in the plaint, as here follows; -
- i. As the Plaintiff was desirous of terminating the continued occupation by the Defendants and issued a termination Notice (P Exhibit 7), the Defendants become trespassers after expiry of the termination notice and the Plaintiff are entitled to General Damages for trespass. In this regard I find guidance in the decision in the case of *Kimutai Tunoi Leonard vs Samuel Cheboi* 2017 eKLR cited by the Plaintiff and award kshs 500,000 as general damages for trespass.
 - ii. On mesne profit, the same was pleaded as a relief, but no specific sum was claimed and this relief is thus not granted; (*Peter Mwangi Msuitia vs Samow Edin Osman*) 2014 eKLR where the Court held inter alia

“As regard the payment of mesne profit, we think the Applicant has an arguable appeal. No specific sum was claimed as mesne profits and it appears to us prima facie, that there was no evidence to support the actual figure awarded.”
 - iii. Therefore, Judgement is for the Plaintiff against the Defendant jointly and severally for; -
 - a. Rent arrears of kshs 3,500,000/= as at 30/6/2024
 - b. The Defendants to pay the accrued rent from 01/07/2024 until they give vacant possession.
 - c. Special damages of kshs 1,100,000/=
 - d. Interest on (a) and (b) at Court rates from the date default till payment in full.



- e. General damages for trespass at kshs 500,000/=
- f. The 1st and 2nd Defendants to give vacant possession of the property Nandi/kamobo/2181 within 30 days from date of judgment, in default the Plaintiff be at liberty to evict them, their agents and/or servants.
- g. After their eviction the Defendants are restrained permanently from interfering with the Plaintiffs ownership of the suit property in terms of prayer (viii)of the plaint.
- h. The Plaintiff are awarded costs of the suit on the lower scale, the suit having not been defended.
- i. Interests on (c) (d) and (f) at Court rates from date of this judgment till payment in full.
- j. Judgment accordingly.

JUDGMENT DELIVERED AND DATED AT KAPSABET THIS 24TH DAY OF OCTOBER 2024.

HON. M. N. MWANYALE,

JUDGE

In the present of

1. Ms. Sang holding brief for Ms. Chesoo for the Plaintiff
2. Ms. Oduor for the Defendant

