



**Fort Hotel Limited t/a Coast Park & Amusement Centre v Tourist Finance Corporation (Environment & Land Case 30 of 2015) [2024] KEELC 13685 (KLR) (10 December 2024) (Judgment)**

Neutral citation: [2024] KEELC 13685 (KLR)

**REPUBLIC OF KENYA  
IN THE ENVIRONMENT AND LAND COURT AT MOMBASA  
ENVIRONMENT & LAND CASE 30 OF 2015  
NA MATHEKA, J  
DECEMBER 10, 2024**

**BETWEEN**

**FORT HOTEL LIMITED T/A COAST PARK & AMUSEMENT CENTRE ..... PLAINTIFF**

**AND**

**TOURIST FINANCE CORPORATION ..... DEFENDANT**

**JUDGMENT**

- 1 The Plaintiff states that all times material to this suit it has been tenant of premises known as LR NO.MSA BLOCK XXV169, COAST CAR PARK & AMUSEMENT CENTRE to wit the Plaintiff has and do operate businesses from the premises known as Coast Car Park & Amusement Centre. The Plaintiff states that its occupation of the property commenced with the execution of a formal lease which lease has since expired. That the Plaintiff has during the pendency of its occupation of the property developed it at great costs and has enhanced beauty and value. The Plaintiff states that all through its occupation of the property is has paid the Defendant rent which rent was never been rejected.
- 2 The Defendant however sometime on 10<sup>th</sup> February, 2015 or thereabout did without justification purport to issue an illegalunlawful termination notice to the Plaintiff terminating its tenancy and seeking vacant possession of the premises within a limited time. The Plaintiff avers that despite having objected to the Notice and even filed and served a reference at the Tribunal in Case No. BRPTC NO. 17 of 2015 the Defendant has proceeded to advertise the suit property for sale vide Daily Nation Newspaper of 16<sup>th</sup> February, 2015 which sale was to be conducted on an as is basis.
- 3 Further the Plaintiff avers that they have sought to challenge the said notice as it was irregular and unlawful as its tenancy is protected, before the Business Premises Rent Tribunal to wit Business Rent Premises Tribunal Case No. 17 of 20115 has been filed and served. The Plaintiff avers that the Tribunal



Case is yet to be determined. The Plaintiff states that despite the fact that its tenancy is protected and the Defendant having received three (3) months' rent in advance, the Defendant has threatened and proceeded to advertise suit property for sale unless restrained by the Honourable Court to evict the Plaintiff from the suit premises. The Plaintiff avers that should the Defendant carry out the irregular and unlawful eviction it stands to suffer irreparably as it has been in occupation of the premises for twenty (20) years and uses the premises for Car Park of over two hundred (200) cars both for local and international customers. The Plaintiff prays for judgment against the Defendant for: -

1. a declaration that the Landlord/Defendant lacks capacity to determine/terminate the Plaintiff's tenancy without due process of the Law having been followed;
  2. an order of injunction does issue restraining the Defendant either by themselves, their agents, employees, and or any other person whomsoever and howsoever from offering for sale, selling and or leasing the suit premises and in any manner interfering with the Plaintiff's occupation and use of tenancy at Property known as LR NO. MSA BLOCK xxv169, COAST CAR PARK & AMUSEMENT CENTRE without following due process; or in the alternative the Defendant do compensate the Plaintiff for its investment on the property
  3. costs of and incidentals to this suit.}}
4. The Defendant filed a further further further amended defence and averred that it had issued the proper notices to the Plaintiff and that there is no existing lease agreement and further that tenancy cannot be protected when it comes to government buildings. It states that the Plaintiff's suit is misleading and is only intended to frustrate and circumvent the Defendant's legal rights. Further, it avers that the Plaintiff is unjustly using this suit to delay the finalization of the Tribunal case BPRT 17 of 2015 and that it never gave consent for the improvements on the suit property and that it has an outstanding rent arrears of Kshs. 9,940,140.64. It raised a counterclaim stating that the lease expired in June 2002 and it has never been renewed. It also claims to have issued a notice dated 10<sup>th</sup> February 2015 to the Plaintiff to make necessary arrangements to cushion their business and vacate in the interests of public. It therefore prayed for the following:
1. A Declaration that the Plaintiff and or their agents, employees and representatives and any other person claiming under the Plaintiff, without any colour of right, encroached and or trespassed on the suit property.
  2. A permanent injunction be issued compelling the Plaintiff's and or their agents, employees and representatives and any other person claiming under them to vacate land parcel Mombasa Island Block XXV169 forthwith.
  3. The Defendant further prays that this Honourable Court makes an order compelling the Plaintiff to pay the outstanding rent arrears to the Defendant herein amounting to the sum of Kshs. 9,940,140.64 as reflected in the account statement as at the 26th day of July 2019 together with all continuing rent arrears with accrued interest thereon until payment in full.
  4. The Defendant also seeks for an eviction order to issue to the Plaintiff and or their agents and representatives and any other person claiming under the Plaintiff and or their employees, from all that property known as Mombasa Island Block XXV169 located in Mombasa forthwith.
  5. The Orders of this Honourable Court be supervised and or enforced by the Officer Commanding Police Division (OCPD) Central Police Station in Mombasa County.
  6. Costs of this suit and the Counterclaim.



7. Interest on (iii & v) above.
  8. Any other relief that this Honourable Court may deem fit.
- 5 The Plaintiff put in a reply and defence and stated that it will suffer irreparable loss, goodwill and reputation if the Defendant is not enjoined and that it has been remitting rent which the Defendant has not protested against and thus has no rent arrears and reiterated all the averments of its plaint.
- 6 This court has considered the evidence and the submissions therein. One witness was called for each party and the following issues are for determination:
- a. Whether there is a valid lease between the parties?
  - b. If not, what are the consequences?
  - c. What prayers can be granted?
- 7 It is clear from the beginning that the Defendant has been in pursuit of evicting the Plaintiff from the suit property and has failed for various reasons. There exists a lease agreement produced by DW1 at page 4-13 of the list of documents which commenced on 1<sup>st</sup> July 1997 and lapsed on 30<sup>th</sup> June 2002. On 4<sup>th</sup> July 2002, the Plaintiff filed BPRT 45 & 46 of 2002 objecting to rent arrears of Kshs 2,384,076 as at the lapse date above mentioned. The court determined that whoever owes should pay or refund as the parking bays referred to as 350 in the lease agreement were actually 301 in reality and that rent should be calculated on basis of 301 parking bays. The Defendant issued a notice of termination dated 10<sup>th</sup> March 2009 seeking to terminate tenancy on the ground that the Plaintiff refused to pay agreed rent of Kshs 101,500 and was in arrears of Kshs 10,612,563 as at 28<sup>th</sup> January 2009. This effectively means that there was an implied lease with no end date and subject to the implied covenants at section 60 and 65 of the *Land Act* Cap 280. After the expiry of the lease agreement, the tenancy became a periodic lease under section 57 of the *Land Act* and the procedure for termination are provided under section 57 (4) of the same which states as follows:
- A periodic tenancy may be terminated by either party giving notice to the other, the length of which shall be not less than the period of the tenancy and shall expire on one of the days on which rent is payable.”
- 8 The period of the tenancy is defined in section 57 (1) (b) as
- the term is from week to week, month to month, year to year or any other periodic basis to which the rent is payable in relation to agricultural land the periodic lease shall be for six months”
- 9 PW1 stated that they paid the rent quarterly and their cheques were never returned. That they did not have any rent arrears. DW1 stated that they gave 3 months’ notice and produced at page 26 of the Defendant’s list of documents. Hence the Defendant is at liberty to give three months’ notice in this case.
- 10 The Defendant states that the outstanding rent arrears amount to the sum of Kshs. 9,940,140.64 as reflected in the account statement as at the 26<sup>th</sup> day of July 2019 for the period of 1<sup>st</sup> July to 16 to 25<sup>th</sup> July 2019 and they seek the same together with all continuing rent arrears, On the rent arrears, the court has noted that rent amount set is 261,600 which was not the agreed rent amount as stated in BPRT 89 OF 2009. The tribunal in its judgement held that the agreed rent was Kshs 87,200= and not Kshs.101,500=. The judgment in the above BRT case still stand as the Defendant never appealed



against it and the Plaintiff has continued to pay as per the judgement. I find that the amount requested in the counterclaim is not payable.

- 11 On the issue of the improvements on the suit property the Plaintiff stated that they constructed a bar & restaurant area; a detached toilet block; a podium; 2 (two) office blocks; a power house; a tank tower; and general development of the property which increase the value of the same however, the Defendant vehemently denies that consent was sought. DW1 produced the lease agreement between the Plaintiff and the Defendant on page 4 to 13 and Clause g of the provides as follows;

Not to make without the previous written consent of the Lessor first had and obtained any alterations partitions or additions in or to the said premises which consent the Lessor may in his absolute discretion grant or withhold. If the Lessor shall grant its consent then the following provisions shall apply:-

- i. All drawings and specifications in respect of such alterations partitions or additions shall first be approved by the Lessor;
- ii. The Lessee shall at its own cost and expense obtain approval of all appropriate Government and Local Authorities;
- iii. All such work alterations partitions or additions shall be carried out at the sole expense of the Lessee by the contractors or mechanics approved by the Lessor and shall be done in such manner and at such time as the Lessor may from time to time designate;
- iv. Any such alterations partitions additions installations or improvements shall be removed by the Lessee and the Lessee shall reinstate the said premises to the original condition at the Lessee's own expense and costs prior to the expiration sooner determination of the lease;
- v. All expenses and charges incurred by the Lessor in connection to the removal of such alterations partitions additions or improvements shall be forthwith be repaid by the Lessee to the Lessor."

- 12 PW1 does not dispute this and has not produced any consent by the Defendant of the alleged developments. Instead they have produced a valuation report stating that should they vacate then they ought to be compensated for the same. It is a longstanding principle of law that parties to a contract are bound by the terms and conditions thereof and that it is not the business of the Courts to rewrite such contracts. In *National Bank of Kenya Ltd vs Pipe Plastic Samkolit (K) Ltd* (2002) 2 E.A. 503, (2011) eKLR the Court of Appeal at page 507 stated as follows;

A court of law cannot rewrite a contract between the parties. The parties are bound by the terms of their contract, unless coercion, fraud or undue influence are pleaded and proved."

In *Pius Kimaiyo Langat vs Co-operative Bank of Kenya Ltd* (2017) eKLR the Court of Appeal further stated that;

We are alive to the hallowed legal maxim that it is not the business of Courts to rewrite contracts between parties, they are bound by the terms of their contracts, unless coercion, fraud or undue influence are pleaded and proved."

- 13 The termination notice having been issued in 2015, the presiding law is the *Land Act* and it states in section 66 that it is an implied term of the lease that the Plaintiff is to yield the suit property as it was



before the lease started. The Plaintiff is free to remove the said improvements if they so wish and ought to be given sufficient time to do so. I find that the Plaintiff has failed to prove its case on a balance of probabilities and I dismiss it with costs. The Defendants have proved their counter claim on a balance of probabilities and I grant the following orders;

- i. A permanent injunction is issued compelling the Plaintiff's and/or their agents, employees and representatives and any other person claiming under them to vacate land parcel Mombasa Island Block XXV169 within the next 6 (six) months from the date of this order and in default of an eviction order to issue.
- ii. Costs of this suit and the counterclaim is awarded to the Defendant.

It is so ordered.

**DELIVERED, DATED AND SIGNED AT MOMBASA THIS 10<sup>TH</sup> DAY OF DECEMBER 2024.**

**N.A. MATHEKA**

**JUDGE**

